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CACV 33/2009 & HCMP 2674/2009

CACV 33/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 33 OF 2009
(ON APPEAL FROM LDBM NO. 83 OF 2007)

HCMP 2674/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCEEDINGS NO. 2674 OF 2009
(ON AN INTENDED APPEAL FROM LDBM NO. 83 OF 2007)

BETWEEN

WONG WING ON WILLIAM RONALD (黃永安) Applicant

and

YAU PAK MAN (邱柏民)	1 st Respondent
LEUNG KWOK WAI (梁國威)	2 nd Respondent
LI KAI LING (李啟玲)	3 rd Respondent
CHAN KAM HUNG (陳錦雄)	4 th Respondent
CHAN SHIU WING (陳樹榮)	5 th Respondent
LEUNG PO HING (梁保興)	6 th Respondent
LEUNG CHUN KWONG (梁振光)	7 th Respondent
LAM CHING LUN (林精倫)	8 th Respondent

LEUNG YING (梁嫻)

9th Respondent

LU YUN CHI (陸潤琪)

10th RespondentTHE INCORPORATED OWNERS OF
UPTOWN PLAZA (新達廣場業主立案法團)11th Respondent

Before: Hon Tang VP, Cheung JA and Kwan JA in Court

Date of Hearing: 29 January 2010

Date of Judgment: 29 January 2010

Date of Reasons for Judgment: 4 February 2010

REASONS FOR JUDGMENT

Hon Tang VP (giving the reasons for judgment of the Court):

Introduction

1. These proceedings in the Lands Tribunal were brought by the applicant, an owner of a unit in Uptown Plaza, a development in Tai Po which has a commercial complex and 6 residential blocks. The 11th respondent is the incorporated owners of Uptown Plaza (“the estate”). The 1st and 2nd respondents were respectively the former chairman and secretary of the 11th respondent, and the 3rd to 10th respondents were other members of the executive committee of the 11th respondent, at the time when the application was made at the Lands Tribunal. It appeared that at one time the applicant was also a committee member of the 11th respondent.

2. After a 19-day hearing, the applicant's claim was dismissed by District Judge Yung on 2 February 2009 with costs against the applicant at the High Court scale and on an indemnity basis with certificate for counsel.

3. The applicant's appeal is CACV 33/2009. He appealed on the merits as well as against the costs order.

4. The learned judge also ordered that the 1st and 2nd respondents to pay the costs of the other respondents jointly and severally with the applicant and on the same basis. HCMP 2674/2009 is the application by the 1st and 2nd respondents for leave to appeal out of time against such costs order.

5. By summons dated 29 June 2009, the 11th respondent applied to strike out the applicant's Notice of Appeal on the ground that it is frivolous, vexatious and an abuse of the process of the court, or alternatively, for security for costs in the sum of HK\$379,300.

6. The 11th respondent's costs have been taxed in the total sum of HK\$2,365,800.01. The costs of the 3rd to 10th respondents have not been taxed but are said to exceed HK\$1,600,000. The applicant's unit at the estate has a market value of HK\$2.8 million. So the cost orders are potentially ruinous.

Background

7. In order to understand the proceedings, it is necessary to go briefly into the background, which I have gratefully taken from the skeleton submissions of Mr. Paul Wu, counsel for the 11th respondent.

8. In 2002, a Mr Siu, made a complaint with the Equal Opportunities Commission (“the EOC”) about the lack of access for persons with disability or wheelchair users in Block 3 of the estate. After an Extraordinary General Meeting, a resolution was passed by a majority of the owners’ present to provide a movable ramp for Siu’s access. In May 2006, the EOC informed the 11th respondent that Siu had made a further complaint about discrimination in access, disposal or management of premises as defined by the Disability Discrimination Ordinance, Cap. 487 (“the DDO”). The EOC granted legal assistance to Siu to commence legal proceedings. Mr Siu became the plaintiff in District Court Equal Opportunities Action No. 6 of 2006 (“the EOC proceedings”).

9. The applicant, the 1st and 2nd respondents were of the view that the 11th respondent should defend Siu’s action. The 3rd to 10th respondents were of the view that the action could not be successfully defended. Initially, the 11th respondent was represented by Messrs Kong & Chang (“KC”) in defending Siu’s action. However, some committee members were dissatisfied with KC’s conduct and on 16 December 2006, the committee members resolved to terminate the appointment of KC and decided to instruct Messrs Chung & Kwan Solicitors (“CK”) to give legal advice on Siu’s action. The applicant was opposed to the appointment of CK. He took the view that CK who were also the solicitors for Hong Yip (the Manager of the Estate) had a conflict of interest.

10. By a Notice of Application dated 16 March 2007, the applicant applied to the Lands Tribunal for:

- “(1) a declaration that the 1st to 11th Respondents have been in breach of the DMC and/or New Grant and/or have committed anticipatory breaches of the DMC and/or the New Grant;

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- (2) a declaration that the co-owners of the Estate are not liable to pay or contribute to the building cost of providing the disability access ramp which are in breach of the DMC and/or the New Grant notwithstanding a majority resolution from the owners;
- (3) an order restraining the 1st to 11th Respondents from continuing to engage CK on the grounds of conflict of interest;
- (4) an order restraining the 1st to 11th Respondents from convening an owners meeting for the purpose of passing any resolution to provide for the disabled access ramp;
- (5) an order restraining the 1st to 11th Respondents from applying to the Sinking Fund and/or Management Fund for making such provisions inconsistent with the terms of the DMC and/or the New Grant; ...”

11. In the meantime, on 24 March 2007, CK wrote to the EOC to explore the possibility of settlement by proposing a tentative plan for the construction of permanent disabled access ramps for the estate. In the same letter, CK inquired whether Siu would be willing to accept other options such as powered lifting platforms in lieu of a permanent ramp. By letter dated 29 March 2007, the EOC wrote to CK welcoming the possibility of settlement but Siu was unwilling to consider any alternative to a permanent ramp.

12. On 18 June 2007, Futton Ella Architects Ltd (‘Futton’), on the instructions of the 11th respondent, submitted an application to the Buildings Department for the approval of the construction of permanent ramps for all of the 6 residential blocks of the estate.

13. In early August 2007, 132 owners of the estate (more than 5% of the total owners) requested the 1st respondent (presumably, as chairman of the Management Committee of the 11th respondent), to convene an owners' meeting on 15 September 2007 to, inter alia, discuss and resolve on:

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(1) whether to contest Siu's claim or to negotiate for a settlement;
and

(2) upon obtaining the approval from the Building Authority on the submitted plan, to invite tender for building the permanent access ramps.

14. By a letter dated 15 August 2007, Futton was notified that its proposal was accepted by the Buildings Department.

15. On 30 August 2007, the Management Committee resolved to:

- “(1) remove the 1st and 2nd Respondent from the Management Committee on the ground that they had failed to attend three Committee meetings in a row; and
- (2) to adopt the agenda put forward by the 132 owners for the owner's meeting on 15 September 2007.”

16. By a Summons dated 7 September 2007, the Applicant applied, inter alia, for:

- “(1) a declaration that the co-owners of the Estate should not be liable to pay or contribute to any building costs in relation to the disabled access ramps which are in breach or inconsistent with the DMC and the Grant;
- (2) an order restraining the 1st to 11th Respondents from holding the owners meeting on 15 September 2007 or at any time for the purpose of passing any resolution to provide for the disabled access ramps;
- (3) an order restraining the 1st to 11th Respondents from applying from the Sinking Fund and/or Management Fund for providing the disabled access ramp in breach or inconsistent with the DMC and the Grant; and
- (4) an order that the 3rd to 11th Respondents indemnify the Applicant against any claim or demand which the

Applicant may be liable for in connection with and in respect of the disabled access ramps.”

17. On 14 September 2007, District Judge Wong ordered that the 11th respondent be restrained from either on 15 September or at any time before the final determination of the trial of the applicant's application from “passing any resolution to provide any improvement or additional building facilities or alteration building works, for providing any disability access ramp or lifts or otherwise.” Judge Wong also ordered an early hearing of the proceedings. The matter was eventually heard by Judge Yung on 16 October 2007. Judgment was handed down on 2 February 2009 as stated in para. 2 如上.

Appeal on merits

18. Mr. K.M. Chong, who appeared for the applicant, put the case of the applicant succinctly. It appears that under the New Grant, on which the estate was held, the construction of the ramp required the approval of the Director of Land (“the Director”), special condition 5(b), and that under the Deed of Mutual Covenant governing the estate no work which contravenes the New Grant was permitted. Mr Chong submitted that had the intended meeting taken place on 15 September and the resolution passed, the building of the ramp would have contravened the New Grant because the proposed resolution did not say in term that the prior approval by the Director would be sought. We have not seen a copy of the proposed resolution, but presumed that the proposed resolution did not in term mention the obtaining of approval from the Director. But the evidence showed that the 11th respondent had had the services of authorized persons who would have been aware of the need for approval under the New Grant.

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Indeed, in the Buildings Department’s letter of 15 August 2007 referred to in para. 15 如上, there was a standard paragraph (para. 5) stating that:

“This approval should not be deemed to confer any title to land or to act as a waiver of any term in any lease or license ...”

19. Further, para. 6 of the same letter stated that the Buildings Authority had received a letter dated 9 July 2007 from the legal representative of the secretary of the incorporated owners of the estate, presumably the 2nd respondent:

“... informing that the proposed works are inconsistent with or contrary to the provisions of the original deed of mutual covenant. In this connection, you are required to inform your client accordingly. ...”

20. In the circumstances, it is inconceivable that the construction would have gone ahead without the approval of the Director. Nor is it conceivable that given the clear objective of the Equal Opportunities Ordinance, permission would not have been obtained. Indeed, subsequently, approval was indeed granted by the Director.

21. Mr Chong submitted that had the resolution been passed, his client would have been required to contribute to the cost of construction. That is so. We also agree that an owner has an interest to see that only proper resolutions are passed. But, that was not the situation here. If the applicant was concerned that the proposed resolution did not mention the requirement of approval by the Director all he had to do was to remind his fellow owners at the meeting that approval was required. It was inconceivable that the 11th respondent would have ignored the need for such approval.

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22. We were satisfied that the appeal was so unarguable as to amount to an abuse of process, accordingly, we have struck out the substantive appeal of the applicant. We should add that Mr Chong had not adopted any of the other arguments advanced on behalf of the applicant at first instance. With respect, that is the correct decision since none of those arguments had any merit.

The costs appeal

23. Mr. Paul Wu, who appeared on behalf of the 11th respondent, pointed out that, with the substantive appeal struck out, leave to appeal from the costs order is required. But, rightly, he did not seek to take the procedural point that no leave had been applied for. We have given the applicant leave to appeal from the costs order. So far as the 1st and 2nd respondents' application for leave to appeal against the costs order is concerned, Mr Wu has drawn our attention to the fact that they were very much out of time and that there was no satisfactory explanation for the delay. Even so, in the very unusual circumstances of this case, we felt that leave should be granted to the 1st and 2nd respondents to appeal against the costs order out of time. We will not refer to the reasons given by the learned judge, save to say, with the greatest respect, that they have caused us concern. Of course, the granting of leave does not mean that the appeal will succeed. But, in fairness, the parties should have a proper adjudication.

24. Lastly, there was an application for a stay of execution in respect of the costs order against the applicant. Since we have granted leave to the applicant to appeal against the costs order, it is only right that

there should be a stay of execution. In the meantime, the 11th respondent is protected by a charging order against the applicant's unit.

(Robert Tang)
Vice-President

(Peter Cheung)
Justice of Appeal

(Susan Kwan)
Justice of Appeal

Mr. K.M. Chong & Mr. Lester Lee, instructed by Messrs Chiu, Szeto & Cheng, for the Applicant.

Mr. Kevin C.W. Wong & Mr. Roland Lau, instructed by Messrs Cheung & Yip, for the 1st and 2nd Respondents.

Ms. Koo Yeuk Lan, instructed by Messrs Chan & Chan, for the 3rd to 10th Respondents.

Mr. Paul K.N. Wu, instructed by Messrs Alvan Liu & Partners, for the 11th Respondent.

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