HCA 1887/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
HIGH COURT ACTION NO. 1887 OF 2011

BETWEEN

E-GLOBAL LIMITED Plaintiff

and

TRENDA LIMITED Defendant

Before: Deputy High Court Judge Burrell in Chambers
Date of Hearing: 22 January 2013
Date of Judgment: 31 January 2013

D E C I S I O N

---

1. On 11 March 2011 the plaintiff and defendant entered into a provisional agreement whereby the plaintiff would purchase and the defendant would sell a commercial unit in the Peninsula Centre, Kowloon for $18,000,000. On 18 March the plaintiff paid an initial deposit of $500,000. A second deposit of $1,300,000 was due to be paid on 7 April 2011 upon the signing of a formal agreement. The balance was agreed to be paid on completion on 13 October 2011.

2. On 7 April the formal agreement was not signed. The full reasons for the purchaser not signing are not clear. However, they included concerns about certain directions which had been issued by the Fire Services Department against the Incorporated Owners of the Building (the "I.O.") in December 2006. These directions had yet to be complied with but there had been no difficulty, since 2007, in the I.O. being granted extensions of time to comply.

3. Ultimately, it was issues surrounding the Fire Services Directions which caused the sale and purchase to fall through. Between May 2011 and October 2011 the purchaser's solicitors made requisitions, including one concerning the Fire Directions, which, they submit, were not adequately answered. Thus on the day of completion it is their case that the defendant had not shown good title, the requisition in relation to the Fire Directions had remained unanswered and they were entitled to neither sign a formal agreement nor complete the transaction.

4. Although no formal agreement had been signed on 7 April, the purchaser's solicitors had written to the defendant's solicitors enclosing a cheque for $1,300,000. The letter stated:

> 'As the terms of the formal Agreement for Sale and Purchase have not yet been fully agreed between our respective clients, the same cannot be signed yet and therefore the payment of the further deposit is not yet due. Please refer to the case of Yiu Yau Ping v Fong Yee-Lan (Civil Appeal No.128 of 1991) and Health Link Investment Limited v Pacific Hawk Investment Limited (Civil Appeal No.147/1994).
>
> In order to show our client's sincerity to purchase the Property, we are instructed to send you herewith our cheque drawn in your favour for the sum of HK$1,300,000.00 in payment of the further deposit payable upon signing of the formal agreement for Sale and Purchase. Kindly note that the said cheque is sent to you subject to your firm's strict undertaking only to hold the same

> and release (where applicable) the same to your client pursuant to said Provisional Agreement."

5. By Order 14 and Order 14A Rules of High Court summonses the plaintiff seeks to recover the sums of $500,000 and $1,300,000. By Order 86, rule 8 Rules of High Court the defendant seeks declarations and order entitling it to forfeit those sums. These being cross summons it follows that both parties take the view that their case is suitable for summary disposition.

Issues

6. There are two issues, the answers to which will resolve both summons.

7. Firstly, did the Fire Service Directions constitute an encumbrance or a blot on the title?

8. Secondly, even if it did not had the defendant's solicitors dealt with the requisition relating thereto sufficiently so that any consequent failure by the purchaser to complete would constitute a repudiation of the contract.

"The 3 Directions"

9. In December 2006 three directions had been issued under Cap 502, the Fire Safety (Commercial Premises) Ordinance, an Ordinance designed to provide for "fire safely improvements …" (preamble to the Ordinance).

10. The Directions required a significant number of alterations to be done. However by mid 2011 none of the work had been done, although there was some evidence that it was a matter 'in progress' rather than one that had been simply ignored. It is common ground that extensions of time had been readily granted on a regular basis. No reason was given for the delay in compliance and none, in writing, had been asked for. This situation has continued throughout 2012 although, the affidavit evidence suggests, progress continues to be made.

11. It must also be remembered that the Peninsula Centre is a substantial building. The plaintiff's proposed purchase was for 75/32,426 parts. Thus if all units were of a similar size there would be over 400 units in the building.

12. Put in context therefore common sense dictates that these directions were not urgent and did not impact on the existing safety of the building from a Fire Services perspective. Neither could they have compromised the safety of the public. In the 3-4 years since they had been issued there was no evidence that any attempt had been made to register them as encumbrances in a conveyance transaction. Given the size of the building and the time frame in question common sense again dictates that numerous sale and purchase transactions must have taken place over the same period. Moreover, the Fire Service Ordinance, Cap 502 makes no provision for registering such directions against the property (unlike the Building Ordinance, Cap 123).

Events leading up to non completion on 13 October 2011

13. On 4 April 2011 the plaintiff's solicitors were informed by letter from the building's Management Company of the existence of the Fire Directions.

14. On 5 May 2011 they wrote to the defendant's solicitors as follows:

> "Please let us have as soon as possible the Fire Safety (Commercial Premises) Improvements Directions mentioned in paragraph 5 of the said letter for our perusal. Please also confirm whether your client has received or has notice of any directions relating to the Property or Peninsula Centre other than the said Directions and if there is such other directions, please provide us with certified copy of the same forthwith. Meanwhile, please let us know what step your client will take to comply with the said Directions and other directions (if any)."

15. This request was repeated on 23 June and 5 September 2011. There is no doubt that by 7 September 2011 the plaintiff's solicitors were in possession of copies of the Fire Services Directions.

16. Regrettably, the defendant's solicitor's first reply to the request was not until 3 October 2011. Their answer was:

> "It is not a proper title requisition. On an entirely without prejudice basis, we are instructed that our client is not aware of any of the matters being raised. However, you should write to the relevant Government authority to seek their confirmation on the matters directly."

17. Mr Paul Leung, counsel for the defendant, submitted that at this stage the plaintiff "probably knew more about these Directions than we did." In any event, the difference in positions between the two solicitors was now clear. The defendant's solicitors did not regard it as a

potential blot on the title and that there was no real risk of enforcement proceedings being taken against them for non compliance. The plaintiff's solicitors however regarded it more seriously and rely on what Mr George Hui, counsel for the plaintiff, describes on 'the cardinal principle' as follows:

> "The burden is on the vendor to prove a good title to the very high standard of proof beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of an incumbrance … the vendor discharges his obligation if he shows to the standard that he is in a position to convey the estate or interest contracted to be sold 'without any blot, or possibility of litigation to the purchaser' …"

18. In the following days, without prejudice to their primary position that there was no encumbrance, the defendant did recognize an obligation on it to provide financial comfort to the plaintiff should it be required in due course to pay for its share of the works to be carried out in compliance with the directions. The making of such provisions, which had to be reasonable, would also demonstrate that it was a "willing purchaser" in the context of the words of Litton PJ in *Mexon Holdings Ltd v Silver Bay International Ltd* (2000) 3 HKCFAR 109:

> "A good title does not mean a perfect title, free from every possible blemish. Whenever a question like this arises, it must be approached from the stand-point of a willing purchaser and a willing vendor, both possessed of reasonably robust commonsense, both intending to see the transaction through to completion in terms of their own bargain."

19. On 10 October 2011 the defendant's solicitors wrote, in a long letter, as follows:

> "We wish to place on record that the matter raised by you is not a requisition but an enquiry. Our client as vendor is not obliged to answer any speculative requisition of pure fishing exercise (Goldmex Limited v Edward Wong Finance Limited, HCA

No.4788/2001). We stress that our reply under our letter dated 3rd October 2011 on this regard was made is given on an entirely without prejudice basis."

20. On 11 October 2011 they wrote:

"We maintain our stance in our letter dated 10 October 2011. Without prejudice to the aforesaid, our client agrees to deposit HK$50,000.00 with us as stakeholder's money in compliance with the notices.

and on 12 October 2011:

"With reference to your letter of the 11th October 2011, we are instructed that the proposed stakeholder's money in the sum of HK$50,000.00 pending the potential contribution (if any) is reasonable, taking into account that our client's share in the lot where the Property situates is only 75/32,476, that is to say, if the costs for repairs to the fire installation or equipment in the Building is HK$10,000,000.00, ours is only required to pay, approximately, HK$23,094.00. Anyway, our client agrees to undertake to be responsible for the contribution of the requisite works after the completion if the stakeholder money shall not be sufficient.

Furthermore, we would like to refer you to the Notices of repair which enumerated the items of the intended works. It is blatantly obvious that the replacement of doors and installation of signs on the building are trivial matters. It is therefore impractical to require our client to engage a surveyor or other professionals to prepare an estimate of the costs to be incurred, bearing in mind that each surveyor's estimates can be varied.

Lastly, the intended works have been discussed among the owners for almost 5 years and yet cannot be finalized, and the Management Office, upon our enquiry, cannot give any estimate of the costs to be involved. It is therefore not sensible to require our client to deposit a greater sum arbitrarily imposed by you, which is disproportionate to the required works.

Our client has devoted a considerable effort striving to reach a compromise with yours. Our client's suggestion to stakehold a sum of HK$50,000.00 and to give an undertaking as aforesaid is sufficient and reasonable in the circumstances."

21. The plaintiff's solicitors rejected these answers and failed to complete.

22. Also on 12 October 2011 the defendant's solicitors had sent a completion statement to the plaintiff's solicitors which showed that had completion taken place the equity due to the defendant would have been almost $9 million.

Law

23. Mr Hui for the plaintiff submitted that the Fire Directions could constitute an encumbrance on individual units in the building either because of the risk of enforcement action being taken or because the individual owner may be liable to pay for compliance costs which would constitute a defect in title if those costs were "extraordinary …" and "… wholly outside the contemplation of a reasonable purchaser."

24. In support, considerable reliance was placed on *All Ports Holdings Ltd v Grandfix Ltd* [2001] 2 HKLRD 630. It was submitted that *All Ports* was 'on all fours' with the present case. Extracts from the judgment of Le Pichon JA were cited such as:

> "Contributions resulting from having to comply with orders served under s.26 of the Buildings Ordinance where a building has become dangerous can hardly be categorized as 'ordinary running expenses'. Nor could they properly constitute costs for 'renewal' required from time to time. So the possibility of the liability to pay a contribution required by the Incorporated Owners to comply with the s.26 order constituting a blot on title cannot be ruled out altogether."

and

> "The vendor's response dated 14 September 1999 [in which the vendor said that it had no knowledge of the relevant building orders but that it was willing to deposit a certain sum as security], contained no explanation whatsoever. In fact, the vendor said it did not know that such orders had been issued. It was submitted that that was no answer to the requisition nor, indeed, was the offer to provide security either in the sum of HK$50,000 (the basis of computation not having been disclosed) or in the sum as may be certified by an architect as the fair share of the estimated cost. The problem was precisely that there was no evidence available at that point as to the exposure or potential liability of the property under the order …"

25. In fairness to Mr Hui, in his oral submission, he said that he did not rely on *All Ports* in support of his submission that the Fire Services Directions constituted an encumbrance; rather he relied on the second limb of the case namely whether or not the possible costs of the works had been reasonably provided for.

26. *All Ports* is not authority for the proposition that the Fire Services Directions constitute an encumbrance. *All Ports* was concerned with an section 26 *Order* not a Fire Services *Direction*. In *All Ports* the Order had been registered against the building and had been issued because of the dangerous state of the building. Whereas, the works required under the Fire Services Direction (which was not registered and, by the Ordinance, could not be) were more in the nature of an ongoing need to upgrade fire safety measures.

27. Given the entirely different nature of the works required to be done in the present case and given that the risk of enforcement measures being taken against the I.O. (because of the history of the matter and the nature of the works themselves) was minimal it seems to me that the duty on the vendor was limited to offering reasonable and adequate provision to

meet the financial consequences of the eventual compliance with the Directions by the I.O.

28. In support of the defendant's submission that the risk of enforcement measures was minimal, it is fair to note the following. No warning letters had ever been sent, no Orders had ever been issued or contemplated and no reasons for extensions of time applications had ever been asked for.

29. By the same reasoning, the plaintiff's attempt to elevate the cost of complying with these Directions as being "extraordinary" or "outside the contemplation of a reasonable purchaser" and thereby become a defect in title, does not succeed.

The defendant's offer

30. In an attempt to ensure completion an offer, without prejudice, of $50,000 to be stakeheld was made. It is fair to note that the method by which the figure of $50,000 was reached was somewhat random. The method was as follows; the unit was 75/32,426 parts of the whole building, if the works costs $10 million their share would be about $24,000. Therefore $50,000 should be more than enough.

31. $10 million was entirely speculative and so the plaintiff's solicitors were entitled to reject it. However, the vendor immediately replied with an unconditional undertaking to pay the excess should it exceed $50,000. Given that no-one knew what the cost would be, one asks rhetorically, what more could they have done? Nonetheless, it was

rejected on the basis that when the time came the vendor might be penniless.

32. However, taking a robust view of the matter I conclude that, at this point, the vendor had made a reasonable offer which had been unreasonably rejected. The plaintiff, on the same day, learnt that the defendant would receive an equity of about $9 million from the sale. It is true to say that there *may* have been a queue of unknown creditors waiting for that money but in my judgment such cautious speculation was unreasonable in the circumstances. It caused the completion of a $18 million property transaction to collapse. $50,000 cash plus a promise made in writing through solicitors should have been accepted as reasonable.

33. Mr Hui finally complains that the undertaking was not fortified or secured. Thus, he submits, it was reasonable to reject it. I do not agree simply because no fortification or further security was asked for. It was just rejected. In similar circumstances To DHCJ in *Hu Mei Yu Anastaria v King Best Enterprise Ltd* HCA 9317/1998 said:

> "Approaching the undertaking offered by the plaintiff from the standpoint of a purchaser with robust common sense and willing and intending to see the transaction through to completion, the purchaser must come to the conclusion that with the undertaking he gets what he bargained for. However, the defendant's solicitors simply dismissed the offer of undertaking. They never requested for any security or any amount to be set aside or to be held as stake money. A willing purchaser intending to complete would, if he thought the undertaking insecure, request for some form of security. They did not. I reject the defendant's objection that a mere undertaking was insufficient. In my view, the plaintiff's offer of undertaking is reasonable and sufficient to discharge the encumbrance."

Decision

34. In answer to the questions posed in the Order 14A summons taken out by the plaintiff, the defendant, Trenda Ltd, did not wrongfully repudiate the Provisional Agreement for Sale and Purchase of the property. Accordingly, the defendant is entitled to the declaration it seeks under Order 86, rule 8 to the effect that it validly rescinded the same agreement upon the plaintiff's failure to complete.

Consequences

35. The plaintiff paid over two sums of money, $500,000 on 18 March 2011 and $1,300,000 on 7 April 2011.

36. No issue arises in relation to the $500,000. It was validly forfeited by the defendant.

37. The position with regard to the $1,300,000 is not so straightforward.

38. The Provisional Agreement required the second "deposit" to be paid "upon the signing of the Formal Agreement", "on 7 April 2011".

39. No such agreement was signed on 7 April or at all. The purchaser's solicitors letter described the payment as a form of "sincerity" as the deposit was "not yet due" but that it should be stakeheld until the formal agreement was signed.

40. This approach did two things. First, it showed a desire to keep the agreement open and secondly it made clear that the $1.3 million

was not, at that moment, a deposit, simply because it did not coincide with the signing of a Formal Agreement.

41. I agree with Mr Hui that the defendant is not entitled to forfeit this sum as it was not paid as part of the contractual arrangement between the parties.

42. I order that $1,300,000 paid into court by the defendant's solicitors be paid out to the plaintiff together with interest from 7 April 2011 at prime rate.

Costs

43. The defendant has succeeded in its legal argument but has not recovered the full amount it sought. It has only validly forfeited $500,000 out of $1,800,000. However, I consider it is entitled to the bulk of its costs. I make a costs order *nisi* that the plaintiff pay 80% of the defendant's costs to be taxed if not agreed.

(M P Burrell)
Deputy High Court Judge

Mr George Hui, instructed by Siao, Wen and Leung, for the Plaintiff

Mr Paul H M Leung, instructed by Alvan Liu & Partners,
for the Defendant