

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NO. 1747 OF 2002

BETWEEN

INCORPORATED OWNERS OF
FU NING GARDEN 1st Plaintiff

FUNING PROPERTY
MANAGEMENT LIMITED 2nd Plaintiff

and

GRANTWIN DEVELOPMENT LIMITED 1st Defendant

CHAN WAI HING 2nd Defendant

Coram: Deputy High Court Judge A Cheung in Chambers

Date of Hearing: 28 June 2002

Date of Judgment: 28 June 2002

J U D G M E N T

1. This is an application for the entry of default judgment by the Plaintiffs against the two Defendants who have failed to file any defence to the Statement of Claim in this action. I shall not repeat the background of this piece of litigation. It has already been set out in an earlier judgment

given by me when the Plaintiffs applied for interlocutory injunction against the two Defendants on 17 May 2002.

2. On that occasion, an interlocutory injunction was granted by me against the 2nd Defendant and no injunction was granted against the 1st Defendant because the 1st Defendant gave an undertaking which was found to be satisfactory to me. It is not in dispute that the two Defendants have not filed any defence to the Plaintiffs' claim. In those circumstances, my task is to look at the Statement of Claim and see what relief the Plaintiffs are entitled to obtain based on their pleading.

3. Having done that, I am fully satisfied that the Plaintiffs are entitled to the relief sought by them which is in fact reflected in the interlocutory injunction that the two Plaintiffs have already successfully obtained against the 2nd Defendant.

4. At today's hearing, those representing the Defendants put forward no real argument against the grant of permanent relief by the Court in favour of the Plaintiffs. So in those circumstances, I make an order in terms of paragraph 1 of the Summons in relation to the injunctive relief; I also make an order in terms of paragraph 2 of the Summons in relation to the payment of damages to be assessed.

5. Finally, as regards the payment of costs, Mr Lin, counsel for the Plaintiffs, asks for payment of costs on a solicitor and own client basis, relying on clause 12(d) and (g) in the Deed of Mutual Covenant, which is binding on both the 1st Defendant as the registered owner as well as the 2nd Defendant as the tenant, pursuant to the provisions in section 41 of the Conveyancing and Property Ordinance (Cap. 219).

6. In this regard, although the provisions in the DMC refer to payment of costs on a solicitor and own client basis, I am persuaded by Mr Lin's argument that this does not make it a positive covenant within the meaning of section 41(6) of the Ordinance. The promise to pay costs on a solicitor and own client basis is in relation to the manager's taking of court action to enforce the covenants in the Deed of Mutual Covenant. It is ancillary in nature; and whether it amounts to a "positive" covenant should, in my judgment, depend on whether the manager is seeking to enforce a "positive" covenant substantively in the action or not.

7. Since in the present action, the covenants involved are negative in nature, in my judgment, that also determines the nature of the contractual right to demand for solicitor and own client costs in the present case. So for that reason, I am of the view that not only is the covenant in question binding on the 1st Defendant as owner, it is also binding on the 2nd Defendant as tenant, notwithstanding the provisions in section 41(5) of the Ordinance relating to the limited binding effect of a positive covenant.

8. Turning to the basis of taxation, there being no possible dispute as to the Plaintiffs' entitlement to costs, I agree with Mr Lin's submission that in a case where there is expressly provided for a contractual entitlement to costs on a particular basis, whilst the Court does nonetheless retain an unfettered discretion in relation to costs, the Court would normally exercise its discretion in accordance with the contractual provisions save in exceptional circumstances: *Chekiang First Bank v Fong Siu Kin* [1997] 2 HKC 302; *Yeung Kwok Fan v Standard Chartered Bank* [2001] 4 HKC 486. Having heard the parties, I can find no exceptional circumstances in the present case.

9. I am minded to make an order in relation to costs that would reflect the contractual entitlement of the Plaintiffs in the present case. The Deed of Mutual Covenant refers to payment of costs on a solicitor and own client basis. On the face of it, that may be more appropriate as a basis of taxation in a non-contentious matter: *c. f.* O. 62 r. 29(1). (I say no more than that as I have not heard much argument on this point.) However, the Court, as I say, has an unfettered discretion in the matter; and all I need to do is to make an order that reflects the contractual entitlement of the Plaintiffs relating to costs. In this regard, I note that O. 62 r. 28(4)(a) provides for the payment of indemnity costs, the definition of which is similar to the definition of costs payable on a solicitor and own client basis.

10. In the circumstances, in the exercise of my discretion, I make an order that the Defendants pay to the Plaintiffs their costs of the action to be taxed on an indemnity basis if not agreed. This would apply in relation to taxation of the costs of the Plaintiffs' application for interlocutory injunction mentioned by me above as well.

(A Cheung)
Deputy Judge of the Court of First Instance
High Court

Mr Kenny Lin, instructed by Messrs Alvan Liu & Partners, for the
Plaintiffs

Mr Samuel L C Yang, of Messrs Samuel L C Yang & Co., for the 1st
Defendant

Mr Kenny Chan, instructed by Messrs Philip Ng & Wong, for the 2nd
Defendant