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DCCJ 4463/2008

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 4463 OF 2008**

BETWEEN

CHIONG STANLEY

Plaintiff

and

LAM YIP HING

1st Defendant

LUI KIT CHUN

2nd Defendant

Coram: H.H. Judge Chow

Hearing dates: 8th May, 2009

Date of handing down Decision : 29th May, 2009

Decision

1. There are 2 summonses for this Court to dealt with: (1) the Plaintiff's summons for summary judgment against the Defendants under Order 14 r. 1 and Order 86 r. 1 of the Rules of the District Court ("RDC") for the sum of \$360,000 and damages to be assessed, and for an order that the Defendants' counter-claim to be struck out and dismissed, and (2) the Defendants' summons for:-

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B (a) summary judgment on their Counterclaim as per the draft
C Minutes of Order;
D (b) alternatively, a summary determination of the questions of
E law set out in the summons under RDC Order 14A and/or
Order 33 of the RDC as a preliminary issue:-

Facts of case

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G 2. The Property known as Apartment E, 18/F, Kimberly 26, No.
H 26 Kimberly Road, Kowloon was assigned by Dragon Fair Industries
I Limited to the Defendants on 15th July, 2005. By a sale and purchase
J agreement dated 20 August 2008 the Defendants agreed to sell the
K Property for \$3.6 million. The Plaintiff paid a total sum of \$360,000 as
L deposit. Completion was scheduled to take place on or before 29
M September 2008. By a letter dated 5 September 2008, the Plaintiff's
solicitors raised the following requisition on title in respect of the Property
concerning the assignment ("the Bushell Assignment") of the Property
from Bushell Ltd. to Dragon Fair Industries Limited: -

N "We note that the (Bushell) Assignment was executed by Tam
O Kraven Kin Man and Tan Lim Heng on behalf of (Bushell). We
P also note that by a Board Resolution dated the 14th October 2004
the said Tam Kraven Kin Man was not an authorized person in
execution of any document. Please let us have the documentary
evidence to prove due execution of the (Bushell) Assignment."

Q (Underlines added) Q

R 3. By a letter dated 20 September 2008, the Defendant's former
S solicitors provided the following answer to the above requisition:-

T "The (Bushell Assignment) has been duly executed by the two
U directors, Section 20 of the Conveyancing and Property shall

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apply. We are of the view that due execution of the said Assignment by the Vendor, Bushell Limited was presumed under section 23 of the Conveyancing and Property Ordinance.”

4. By a letter dated 25 September 2008, the Plaintiff’s solicitors made the following reply: -

“We regret that we do not share the same view as yours in answering our requisition 1. Please note that section 20 is only a deeming provision and not an irrebuttable presumption, it may be inferred that, where a person dealing with the company actually knows the execution by a different mode (where the Board Resolution dated 14th October 2004 required a special manner of execution actually adopted), the deeming provision will be inapplicable since the person dealing with the corporation will not be ‘dealing in good faith’ and section 23 is inapplicable since there is no appearance of due execution. The Vendor cannot rely upon the section 23 presumption in the absence of confirmation by our client the Purchaser from his perusal of the said Board Resolution that the mode of execution by the Vendor in the [Bushell Assignment] will suffice. In the light of what was required in the said Board Resolution, due execution of the Assignment had not been shown. We iterate our requisition.”

5. By a letter dated 20 October 2008, the Defendants’ former solicitors notified the Plaintiff that the paid deposit of \$360,000 was forfeited because of his failure to complete the purchase of the Property on the scheduled date. A Memorandum of Rescission of the Agreement was registered in the Land Registry on the following day.

The law

6. Section 23 of the Conveyancing and Property Ordinance (“the Ordinance”) provides:-

“An instrument appearing to be duly executed shall be presumed,

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until the contrary is proved, to have been duly executed.”

Does section 23 apply to the Bushell Assignment? The execution page of the Bushell Assignment reads:-

“SEALED with the Common Seal of the Vendor and SIGNED by Tam Kraven Kin Man and Tan Ling Heng, directors who is/are duly authorized by the Board of Directors of the Vendor and whose signatures is/are verified by :-

HENRY M.H. KU
Solicitors, Hong Kong SAR”

(Underlines added)

7. Section 20(1) of the Ordinance stipulates:-

“In favour of a person dealing with a corporation aggregate in good faith, his successors in title and persons deriving title under or through him or them, a deed shall be deemed to have been duly executed by the corporation if the deed purports to bear the seal of the corporation affixed in the presence of and attested by its secretary or other permanent officer of the corporation and a member of the corporation’s board of directors or other governing body or by 2 members of that board or body.”

(Underlines added)

8. In the Bushell Assignment, the vendor is Bushell Ltd. It was not disputed that on the execution page it was stated that the common seal of Bushell Ltd. was stamped by the authority of Bushell’s directors authorized in that behalf. Bushell Ltd’s common seal was stamped on the execution page, and 2 directors duly authorized by the Board of Directors of Bushell Ltd. signed that page and their signatures were verified by a solicitor. The requirements under s. 20(1) were met. So on the face of it the Bushell Assignment was a duly executed document, and section 23

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applies to the Bushell Assignment.

9. The Plaintiff argues that the board minutes of Bushell Ltd. dated 14 October 2004 (“the Minutes”) showed that Tam Kraven Kin Man was not an “A” director authorized by Bushell Ltd. to execute the Bushell Assignment. Thus the presumption under section 23 of CPO was rebutted. The minutes of the Board of Directors of Bushell Ltd. reads:-

“PRESENT : Mr. Lau Shu Yan, Julius (“A” Director)
Mr. Tse Kin Lun (“A” Director)
Mr. Tan Lim Heng (“B” Director)
Mr. Tsang Choi Tai (“B” Director)

1. CHAIRMAN

.....
The chairman reported to the Meeting that a quorum was present and that the Meeting could proceed to business accordingly.

3. Kimberley 26

- (A)
- (B) Sale of Kimberley 26

IT WAS RESOLVED that any one “A” Director and any one “B” Director of the Company be authorized to sign under hand or execute under the common seal of the Company for and on behalf of the Company all the relevant agreements, supplemental agreements, confirmatory agreements, cancellation agreements, deeds of undertaking assignments, confirmatory assignments, deed of mutual covenant and management agreement, sub-deed(s) of mutual covenant, management agreements and/or other deeds and documents in relation to the sale of Kimberley 26.”

(Underlines added)

10. The Plaintiff’s Counsel submits that the requisition in this case is whether Tam Kraven Kin Man is an “A” director and that the

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Defendants have never supplied a direct answer except to repeatedly make reference to sections 20 and 23 of the Ordinance. He further submits:-

‘29. But the Minute records a specific mode of execution as determined by resolution 3(B) for the sale of the subject premises. Although described as a duly authorized director, there is no indication in the Assignment as to how its execution has conformed with the resolution of the Board.

30. And it is submitted that absent other evidence it is only reasonable for the Plaintiff to construe resolution 3(B) to have conferred authority just to those directors named in the first page of the minute.

31. Even if the Plaintiff was wrong to take that construction, it cannot be said that his requisition is improper.

32. Quite simply because Tam Kraven Kin Man could have been a “B” director.

33. It does not follow that just because Tam Lin Heng is a “B” director that Tam Kraven Kin Man must have been an “A” director. There is no evidence to make that assumption.’

11. Clause 3(B) of the Minutes imposes no requirement that the Assignment must show expressly on its face that the Bushell Assignment was signed by one “A” director and by one “B” director. As long as the assignment was in fact signed by any one “A” director and any one “B” director of the company authorized by the Board of Directors to execute the Assignment under the common seal of the Company, the requirement under Clause 3(B) was satisfied. The submission under Paragraph 29 of the Plaintiff’s submission is that Clause 3(B) was not satisfied. This is wrong.

12. The directors on P.1 of the Minutes were those present in the meeting. They were there to form a quorum, so that the meeting could be

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held. It is simply wrong to construe Clause 3(B) to have conferred authority merely to those directors named on p. 1 of the Minutes. Clause 3(B) refers to any one “A” Director and any one “B” Director of the Company. So Clause 3(B) applies to any “A” or “B” director, whether she/he attended the meeting or not. Clause 3(B) does not say that only those directors present in the meeting are authorized to execute documents of the Company. So the submission under Paragraph 30 cannot stand.

13. It is unnecessary for the Bushell Assignment to show on its face whether Tam Kraven Kin Man is an “A” director or a “B” director. The Bushell Assignment (P.30 of Bundle B) expressly stated that Tam Kraven Kin Man and Tan Lim Heng (directors) are “duly authorized” by the Board of Directors to sign the Bushell Assignment. This implies that the Board of Directors acted in accordance with the Clause 3(B) of the Minutes when it appointed these two directors to execute the Assignment. Hence the submissions under paragraph 31 to 33 must fail.

14. It is not disputed that Tam Kraven Kin Man is a director of the Company. This purpose of the board meeting on 14.10.2004 is not to classify the directors as “A” directors or “B” directors. On this Minutes, against the word “Present” the directors present were listed out, either as “A” director or “B” director. This is evident that the identities of Tam Kraven Kin Man and Tan Lin Heng whether as an “A” director or as a “B” director have already been known to the management level of Bushell Ltd. before this meeting was held. By virtue of the Minutes, it can be seen that Tan Lin Heng is a “B” director. When the Bushell Assignment says that Tam Kraven Kin Man and Tan Lin Heng were duly authorized by the company to execute the Assignment, it must mean what it says. So Tam

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Kraven Kin Man must be an “A” Director. There is no evidence to show that Tam is not an “A” director. By letter dated 5 September 2008, the Plaintiff solicitors stated that by the Board Resolution dated 14 October 2004 Tam Kraven Kin Man was not an authorized person in execution of any document. This is wrong, because that meeting did not decide who was or who was not an authorized person to execute the documents of Bushell Ltd. That Board Resolution does not show that Tam Kraven Kin Man was not an authorized person to execute any document. The requisition started off on a wrong assumption of fact.

15. I note the submissions made under paragraph 32 and 33 of the Plaintiff’s submission. The Plaintiff’s Counsel simply ignored the phrase “duly authorized” by the Board of Directors in the Bushell Assignment. It means that the authorization has duly complied with Clause 3(B) of the Board Resolution. When the Bushell Assignment was signed by two directors duly authorized by the Company, due execution of the Bushell Assignment has been shown. Therefore the arguments contained in the Plaintiff’s letter dated 25 September 2008 are wrong. There is no evidence to rebut the presumption under section 23.

16. As a result the Defendant by letter dated 20 September 2008, answered the Plaintiff’s requisition satisfactorily.

17. For the reasons stated above the Plaintiff’s summons must be dismissed and I dismiss it. The Defendant succeeds in their summons. I enter judgment in favour of the Defendant as per paragraphs (1) to (4), (8) and (12) of the draft minutes of Order set out on P.49 to 50 of Bundle A; in respect of paragraphs (5) and (6), I enter judgment thereof, but the actual

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monetary figures are to be assessed by this Court. Para. (7) be replaced by “damages to be assessed by this Court” and (10) is replaced by the following order: an order for costs nisi is hereby made (to be made absolute within 14 days’ time) that the Plaintiff do pay the Defendants costs of and occasioned by this action (including the costs relating to the Plaintiff’s summons and the Defendant’s summons) to be taxed, if not agreed, with certificate for Counsel.

18. I make no order under Paragraphs (2) (3) and (4) of the Defendants’ summons, but I make an order in terms of Paragraph (5).

(S. Chow)
District Judge

The Plaintiff: represented by Mr. Jason Wong instructed by Messrs. Chan, Wong & Lam, Solicitors.

The Defendants: represented by Mr. Jonathan Chang, instructed by Messrs. Alvan Liu & Partners, Solicitors.