

HONG KONG / JUDGMENT

CHEUNG HUNG v. LAU KWOK MONG

COURT

Court of Appeal

DECIDED

6 February 2007

CASE / FILE NUMBER

CACV320/2006

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bjbj CACV 320/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 320 OF 2006 (ON APPEAL FROM DCCJ 5403 OF 2005) BETWEEN Cheung Hung Plaintiff and Lau Kwok Mong Defendant Before : Hon Cheung JA and Hon A. Cheung J in Court Date of Hearing : 31 January 2007 Date of Judgment : 31 January 2007 Date of Reasons for Judgment : 6 February 2007 Reasons for Judgment Hon Cheung JA AUTONUMOUT These are the reasons of our judgment given on 31 January 2007. The appeal AUTONUMOUT The plaintiff claimed against the defendant the sum of \$350,000 and applied for summary judgment of this sum. H H Judge Yuen of the District Court granted the defendant leave to defend conditional upon him paying the sum of \$350,000 into court. The defendant appealed against the order in respect of the condition. The plaintiff s claim AUTONUMOUT The plaintiff s case on the claim is as follows. On 26 November 2004 the defendant asked her for a loan of \$1,000,000. The plaintiff told him that she could only lend him less than \$500,000. Then on 29 November 2004 the defendant asked the plaintiff to lend him \$370,000 in order to purchase a property in Yuet Wah Street. The plaintiff duly lent him the sum of \$370,000. AUTONUMOUT The plaintiff s claim was initially for the sum of \$370,000. The application for summary judgment was also based on this sum. After the defendant filed his affirmation the plaintiff reduced the amount to \$350,000 by acknowledging that the defendant had made part payment of \$20,000 on 8 February 2005. The plaintiff s case is that around the Lunar New Year of 2005 the plaintiff asked the defendant to repay \$370,000. The defendant only managed to repay her \$20,000. The defence AUTONUMOUT The defendant denied that the sum of \$370,000 was lent to him as a loan. The defendant was previously engaged in the business of an estate agent and the plaintiff was one of his former employees. In 2001 because of the downturn of the defendant s business the plaintiff joined another estate agency. The plaintiff and the defendant had participated in a property investment in the past. In 1994 the defendant set up a company by the name of Wing Joy Industrial Limited (Wing Joy). The shareholders were the plaintiff, the defendant s wife and a friend of the defendant. Wing Joy was used to acquire a property. AUTONUMOUT In November 2004 the plaintiff introduced the defendant to buy properties in the Chung King Mansion. The defendant entered into five provisional agreements for the purchase of five shop units. The purchase was made through a company by the name of Add Success Development Limited (Add Success). After signing the provisional agreement the defendant was not prepared to go through

the transaction because of the problems with the floor size of the shop units and the amount of mortgage he could obtain from the bank. The defendant said the plaintiff persuaded him to continue with the transaction and she offered to take up 25% of the investment. On 24 November 2004 he signed five formal agreements for the purchase and paid a 15% deposit of the purchase price. The deposit was in the sum of \$1,466,646.05. On 29 November 2004 the plaintiff paid him \$370,000 which was the round up figure of 25% of \$1,466,646.05 at \$366,661.60. Later on the plaintiff told the defendant that she had cash flow problems and the defendant lent her the sum of \$20,000 on 8 February 2005. AUTONUMOUT After inspecting the shop units the defendant discovered that their actual size were much smaller than the size as described in the sale and purchase agreements. On 1 March 2005 the defendant's solicitors wrote to the vendor's solicitors disputing the size of the shop units. The response from the vendor came on 3 May 2005 when it rescinded the sale of the properties and forfeited the deposits paid by Add Success. The plaintiff was dissatisfied with the loss of her investment and brought this action against the defendant. The plaintiff maintained her case AUTONUMOUT The plaintiff maintained that the sum of \$370,000 was a loan and not an investment. She also refuted the defendant's contention that the payment of \$20,000 was a loan from the defendant to her. The reasons AUTONUMOUT The judge's reason for granting conditional leave to defend can be seen from the following paragraph

11. The possibility of the making of a loan of a significant sum (HK\$370,000) by the plaintiff to the defendant without hesitation and without the demand for a written confirmation of the nature of the payment may need to be assessed with reference to the parties previous dealings, their personal relationship and their credibility. The issue of credibility can only be determined in the context of a witness verbal testimony. The fact that the plaintiff had a share in the sale/purchase commission in the sale of the 5 Chung King Mansion units bought by the defendant, though the plaintiff was adamant that she was not involved in the sale of those 5 units, does not sit comfortably with the rest of her factual contentions. On the other hand the fact that the defendant admitted he never consulted the defendant when he decided to withdraw from the deal, though according to the defendant, the plaintiff was meant to have interest in the 5 units makes the defendant's defence shadowy. Triable issue AUTONUMOUT Whether the sum of \$370,000 given by the plaintiff to defendant was a loan or whether it was an investment by the plaintiff is clearly an issue that has to be tried. The nature of the money advanced to the defendant cannot be resolved by affidavit evidence. The plaintiff's case of a loan was not supported by any written agreement. Clearly the matter can only be resolved by hearing oral evidence of the parties. AUTONUMOUT The judge was, of course, correct to grant leave to defend but the issue is whether she should have imposed conditions on the defendant. The principles AUTONUMOUT A condition of paying some or all of the money or damages into court, or giving security, is imposed where there is a good ground in the evidence for believing that the defence set up is a sham defence or the master is prepared very nearly to give judgment for the plaintiff. Conditional leave may be granted where there is something suspicious in the defendant's mode of presenting his case or the court is left with a real doubt about the defendant's good faith. Leave to defend conditional on the full amount claimed being paid to court may be ordered where the defence is

shadowy : see paragraph 14/4/16 of the Hong Kong Civil Procedure 2007 (HKCP AUTONUMOUT Where conditional leave to defend is given, however, the Court of Appeal will not interfere with the discretion of the judge unless there has been some error of principle or misapprehension of facts or unless undue weight has been given to a particular aspect of the fact. Where there is no basis upon which the judge could have concluded that the defence was suspicious or a sham, the Court of Appeal can set aside conditional leave to defend and grant leave to defend unconditionally : see paragraph 14/4/44 of HKCP 2007. Defence shadowy? AUTONUMOUT In my view the judge had erred when she described the defence as shadowy because on the plaintiff s own case the nature of the money advanced cannot be resolved by way of affidavit evidence. This being the situation the defence raised by the defendant cannot be in the nature of a sham or shadowy defence. AUTONUMOUT The only reason relied upon by the judge in imposing condition is the fact that the defendant did not consult the plaintiff when he decided not to continue with the purchase. In my view the judge had attached undue weight to this aspect of the case. Whether the defendant was justified in not informing the plaintiff about not continuing with the transaction must be one of the matters to be resolved at the trial as well. He had explained that he was the majority shareholder in Add Success. The other shareholders were nominal shareholders only. He explained that after discovering that the five shop units were much smaller than as described in the sale and purchase agreements his trust and confidence in the plaintiff was completely shattered. He said I see no reason why I should inform her about my decision, not to mention that I have the majority stake and thus the final stake in our joint investment . He maintained that the vendor had wrongfully breached the agreement. AUTONUMOUT Mr. Leung, counsel for the plaintiff, submitted that there were other unsatisfactory aspects of the defendant s case such as why he decided to countermand the cheques after the provisional agreements and the actual figures of the deposit paid. AUTONUMOUT In respect of the first point, the defendant s case was that he was persuaded by the plaintiff to carry on with the transaction after he had countermanded the cheques. As to the second point the defendant had explained that initially he was interested in eight shop units but eventually five were purchased because two of them were already sold and the third one was not capable of being sold. The mistake in the figures was due to clerical errors by including the amount of the deposits of some shop units which he had not bought. AUTONUMOUT These two matters obviously are matters that can be used to test the credibility of the defence but they cannot be described as being so unsatisfactory as to turn what otherwise is a credible defence into a sham or shadowy defence.

Conclusion

AUTONUMOUT For this reason we allowed the appeal and set aside the judge s order on the condition. The defendant is entitled to the costs of the appeal while the order of costs below remains. Hon A. Cheung J : AUTONUMOUT I agree. (Peter Cheung) (A. Cheung) Justice of Appeal Judge of the Court of First Instance Mr. Michael Leung, instructed by Messrs Joseph C. T. Lee & Co., for the Plaintiff Ms Wing Kay Po, instructed by Messrs Chan, Wong & Lam, for the Defendant

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