

HONG KONG / JUDGMENT

CHIU SIU LAN v. BONFIELD DEVELOPMENT LTD

COURT

District Court

DECIDED

8 August 2007

CASE / FILE NUMBER

DCCJ784/2007

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bjbj DCCJ 784/2007 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 784 OF 2007

BETWEEN CHIU SIU LAN Plaintiff and BONFIELD DEVELOPMENT LTD. Defendant

Coram : Deputy District Judge A. Yuen in Chambers Date of Hearing : 16th July 2007 & 26th July 2007 Date of handing down Decision : 8th August 2007 DECISION The Plaintiff applies for a summary judgment pursuant to O.14 of RDC.

Background

On 7th August 1997, the Plaintiff entered into an agreement with the Defendant for the sales and purchase of the 1/F of a 3-storey house to be erected on a piece of land in D.D.23, Lot No. 1069 of Po Sam Pei, Tai Po (The Property) at a price of HK\$1,930,000 (The Agreement). Pursuant to the Agreement, the Plaintiff paid the Defendant a deposit of \$386,000. No house has ever been built on the land. The Plaintiff seeks to recover the deposit paid pursuant to Clause 4 of the Agreement. Cl. 4 provides: if the Defendant was in breach of the Agreement and failed to sell the Property to the Plaintiff .. the Defendant shall return to the Plaintiff double of the deposits which the Defendant had received. There is no dispute that there is no stipulated time for the completion of the Property in this Agreement. Cl. 5 provides: Upon signing of this Agreement, parties understand that it requires time for the Government to approve the application to erect this Property. Therefore parties cannot repudiate the agreement unilaterally or ask for the refund of the deposit or for compensation for any reason. The Plaintiff, however, argued that although there was no stipulated time for completion of the Property, there should be implied in the Agreement a reasonable time for the completion and that the Defendant should exercise its due diligence to procure the construction of the village house in the said piece of land. (The Implied Terms) The Plaintiff argued that there was a delay of almost 10 years, which was an undue delay,

and the Defendant had virtually done nothing to procure the construction of the Property. The Defendant was therefore clearly in breach of the Agreement and it had not shown any arguable defence at all. The Defendant, on the other hand, argued that there shouldn't have such Implied Terms in the Agreement. Even if there were such Implied Terms, the Defendant had done everything it could to procure the construction of the Property. Therefore, the Defendant committed no breach at all. The Defendant further argued that the Agreement in question was an agreement involving the sales and purchase of property, therefore it should be stamped pursuant to the Stamp Duty Ordinance. Otherwise, it's inadmissible and the Court was estopped from relying on the terms and conditions of the Agreement. Furthermore, since this Agreement was a sales and purchase of a Property, Order 14 of RDC has no application. Application of O.14 RDC O.14 r.1(3) provides: This Order shall not apply to an action to which O.86 or O.88 applies. O.86 r.1 provides: 1(1) In any action begun by writ indorsed with a claim for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or for rescission of such agreement, or for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment. I agreed with the Plaintiff's submission that the Agreement in question was not a sales and purchase of property agreement, rather, it's an agreement where the Defendant agrees to procure the construction of a village house on a piece of land. It's clear that the Defendant isn't the owner of the piece of land. It's only a developer. In fact, it's up to the owner, a Mr. Lee Sze Hing, to apply to the Government for approval to erect a village house on the said piece of land. In short, the Defendant has no property to sell. This Agreement is also different from ordinary sales and purchase agreement in that it allows the Plaintiff to exchange the Property for a similar unit in the same or any other district in the event that the Government rejects the land owner's application to erect a house on his land. (Clause 9) Furthermore, the Plaintiff can transfer his right to subscribe the Property to other person. (Clause 11) Therefore, I found that O.86 not applicable and there is no need for this Agreement to be stamped before it's admissible. Any Triable Issue or Arguable Defence? In an O.14 application, it is for the Defendant to show that there is a triable issue or an arguable defence. In this case, there are disputes as to:

- (i) Whether or not there are such Implied Terms in This Agreement? (ii) If there are such Implied Terms in this Agreement, whether or not the Defendant has breached these Implied Terms? (iii) It's specified in the Agreement that the Property was in Lot No. 1069. There is no dispute that this Lot No. 1069 doesn't exist at all. The Plaintiff argued that the Defendant simply couldn't perform pursuant to the Agreement because of the non-existence of subject matter. The Defendant, however, argued that the Property was to be constructed on a piece of land shown in a plan which was given to the Plaintiff. This piece of land, be it Lot No. 1069 or not, does exist. Therefore the Lot No. per se was never a material consideration in this Agreement. It's therefore clear that there are quite a number of identifiable issues which need to be resolved at trial. I do not find that this is a suitable case for an O.14 application. Leave to Defend with or without condition? The Plaintiff urged this Court to impose a

condition even if this Court is minded to grant the Defendant leave to defend. The Plaintiff argued that there was an undue delay of 10 years in this case and the Defendant had virtually done nothing in order to procure for the construction of the Property. It is clear that the owner of the land, Mr. Lee Sze Hing, has to obtain an approval from the Government before the Defendant could start building on this piece of land. Mr. Lee Sze Hing did submit a written application to the Tai Po District Lands Office. In a letter dated 6th March 1997, the District Lands Office informed Mr. Lee that there were a large number of prior applications received by the office and were being processed according to their dates of application, and that prompt action could not be taken to process Mr. Lee's application. Furthermore, Mr. Lee was asked not to make any enquiries because priority of all applications were determined by the dates on which they were received by the office. Then, in a letter dated 7th September 2000, the District Lands Office wrote and requested Mr. Lee to attend an interview on 26th October 2000 apparently for the processing of his application. Mr. Lee was required to produce a no. of documents including a proposed small house plan in support of his application. Mr. Lee was also warned that if he failed to attend this interview, his application would be dismissed. Whether or not Mr. Lee had attended the interview on 26th October 2000 is unclear. It is however clear that he only submitted a proposed small house plan to the District Lands Office at a later stage. In a letter to the District Lands Office, Mr. Lee submitted the proposed plan and requested the Office to process his application as soon as possible. The Office received this letter on 14th November 2000. There is no evidence that the office has made any reply so far. As far as the Defendant is concerned, it is apparent that it had done nothing at all. However, it is unclear whether or not the Defendant's inaction was because of the failing to obtain approval from the Government by this Mr. Lee Sze Hing or was it because of the Defendant's own fault. Therefore I am not prepared to impose any condition when granting the Defendant leave to defend.

Conclusion

- [illegible]

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