

HONG KONG / JUDGMENT

FONG KAI PO AND ANOTHER v. YAN YEE WAN

COURT
District CourtDECIDED
15 February 2007CASE / FILE NUMBER
DCMP3150/2006

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bjbj W^{va})

1. The 1st and 2nd Plaintiffs applied for an Order for Sale in respect of the subject property under the Partition Ordinance, Cap. 352. The subject property consists of a residential flat and a car parking space and is referred to in the Order that I have made herein as "the Property". The 1st Plaintiff, the 2nd Plaintiff and the Defendant are co-owners of the subject property. They are tenants-in-common holding equal shares. The Defendant also desired a sale and she did not oppose the application in substance although it cannot be said that she has positively consented to the application. Her real concern is that the minimum price of sale should be set at a higher figure. She is also reluctant to pay the costs of the proceedings.
2. From my reading of Wong Chun Kei Johnny & Others v. Poon Vai Ching, Executrix of the Estate of Poon Kam Chuen, deceased & Others, HCMP 4322/2002, 6 January 2005, I accept the following to be the applicable principles in dealing with an application of this nature:
 - (1) A co-owner has a basic right to rid himself of the shackles of co-ownership and ask for an order for partition or sale if he has no other remedy.
 - (2) When it is impracticable to make an order for partition, the court should make an order for sale unless it is persuaded (the burden being on the opposing co-owner) that such an order will not be beneficial to all the co-owners, or that it will result in very great hardship to one co-owner.
 - (3) Whether an order for sale is beneficial to all the co-owners is not determined by the dissent of the opposing co-owners or the assertion by them that it is not beneficial. It has to be determined by the court objectively.

3. The rateable value of the residential flat is \$87,600.00 and the rateable value of the car parking space is \$10,200.00. Pursuant to Section 9 of the Partition Ordinance, this matter is within the jurisdiction of the District Court.
4. I am satisfied that partitioning the subject property is not a practicable option. I am satisfied that an order for sale is beneficial to all the three co-owners, bearing in mind in particular that the subject property has been left vacant for a long time and that the management fees for the subject property is very much on the high side. There are also other expenses accruing in relation to the subject property. The parties are on common ground that the mortgage loan on the subject property has been repaid in full although the Legal Charge affecting the subject property has not yet been discharged. The title deeds of the subject property are still kept with the mortgagee bank DBS Bank (Hong Kong) Limited who for several years has been charging an annual title document custody fee.
5. The 1st and 2nd Plaintiffs have been paying the management fees, electricity charges, telephone charges, government rent, rates, title document custody fee payable in respect of the subject property for some time. The Defendant has been paying the cleaning costs of the subject property for some time. There was previous litigation between the parties in this connection. The 1st and 2nd Plaintiff have instituted a District Court Action against the Defendant in respect of such payments that related to the period from January 1998 up to and inclusive of February 2006, and which the 1st and 2nd Plaintiffs claimed to have made. The action was subsequently settled. Details of the claim in that District Court Action and the settlement thereof are not before me.
6. Before me, the parties were content to have the application disposed of by Affidavit evidence alone. Although the Defendant is unrepresented and she alleges that she does not understand English (the 1st and 2nd Plaintiffs claim that the Defendant do understand English), she has been provided with the service of a Court Interpreter. The contents of the documents in English have been explained to her where required.
7. I have considered all the circumstances and would make the Order as set out below. This decision will be handed down. At the time of handing down, an interpreter will be provided for the Defendant to explain the contents of this Decision to her. Order
1. ALL THOSE 20 equal undivided 1,930th parts or shares of and in ALL THAT piece and parcel of ground registered in the Land Registry as TUEN MUN TOWN LOT NO.330 and of and in the building thereon now known as Spring Seaview Terrace (Twmof ng (collectively, the Property) be sold by private treaty or failing which, by public auction pursuant to Section 6 of the Partition Ordinance (Chapter 352, Laws of Hong Kong) in the following manner and in accordance with the following time limits: -
 - (1) The Property be sold by private treaty at a price of not less than HK\$3 million. The Formal Sale and Purchase Agreement of the Property shall be executed within 3 months from the date of this Order and the date of completion of such sale shall be within 2 months of the execution of the Formal Sale & Purchase Agreement, provided that the 1st Plaintiff, the 2nd

Plaintiff and the Defendant shall be at liberty to extend the above time limit or time limits with unanimous consent in writing and provided that the 1st Plaintiff, the 2nd Plaintiff and the Defendant shall also be at liberty to lower the price of sale to not less than HK\$2.85 million with unanimous consent in writing.

- (2) Failing execution of a Formal Sale and Purchase Agreement of the Property within the original or extended time limit as provided for in paragraph (1) above, the Property shall be sold by public auction with a reserve price of HK\$2.5 million. The 1st public auction shall be held within 2 months from the expiry of the abovementioned time limit.
2. The proceeds of sale of the Property shall be paid to Messrs. Tai, Tang & Chong, solicitors for the 1st and 2nd Plaintiffs who shall apply the same in the following manner and priority:
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 - (1) To discharge any cleaning costs, management fees, electricity charges, telephone charges, government rent, rates, title document custody fee payable in relation to the Property and which remains outstanding and unpaid immediately before the completion of sale;
 - (2) In case the Property is subject to any incumbrance which may be discharged by payment, to discharge that prior incumbrance by payment immediately before the completion of sale;
 - (3) To pay all reasonable costs of and incidental to the discharge of the Legal Charge dated 13th May 1991 registered in the Land Registry by Memorial No. TM491010;
 - (4) To pay all reasonable estate agent's commission, legal costs and disbursements, auctioneer's remuneration and all other reasonable expenses payable or incurred for the purpose of or in connection with the sale provided that such estate agent's commission and auctioneer's remuneration shall not exceed 1% of the sale price of the Property and that such legal costs and disbursements shall not exceed HK\$15,000.00;
 - (5) Subject to paragraph (6) below, the remaining proceeds shall be divided into 3 equal shares for distribution among the parties. 1 of the said 3 equal shares shall be paid to the 1st Plaintiff (the 1st Plaintiff s Share); 1 of the said 3 equal shares shall be paid to the 2nd Plaintiff (the 2nd Plaintiff s Share), and the remaining 1 equal share shall be paid to the Defendant (the Defendant s Share);
 - (6) Before the Defendant s Share shall be paid to the Defendant, Messrs. Tai, Tang & Chong shall deduct the following from the Defendant s Share and apply the same in the manner provided hereunder: -
 - (a) 1/3 of the management fees, electricity charges, telephone charges, government rent, rates, title document custody fee payable in relation to the subject property in relation to the period from 1 March 2006 up to the date of completion of sale and which the 1st and 2nd Plaintiffs have already paid before the completion of sale. The total sum thereby deducted shall be paid to the 1st and 2nd Plaintiffs in equal shares; and

- (b) HK\$50,000.00 to be withheld as security for the 1st and 2nd Plaintiffs costs of these proceedings pending ascertainment of the precise amount through agreement or taxation. When the amount of such legal costs is thus ascertained, the entire or a portion of the amount so withheld, as the case may be, shall be paid over to the 1st and 2nd Plaintiffs towards satisfaction or diminution of the Defendant's liability for such costs, as the case may be, and the balance thereof, if any, shall be paid to the Defendant.
- (7) Before the 1st Plaintiff's Share and the 2nd Plaintiff's Share shall be paid to the 1st and 2nd Plaintiffs respectively, Messrs. Tai, Tang & Chong shall deduct the following and apply the same in the manner provided hereunder: -
 - (a) Before the 1st Plaintiff's Share shall be paid to the 1st Plaintiff, there shall be deducted from the 1st Plaintiff's Share 1/3 of the cleaning costs of the Property which the Defendant has already paid before the completion of sale. The sum thereby deducted shall be paid to the Defendant.
 - (b) Before the 2nd Plaintiff's Share shall be paid to the 2nd Plaintiff, there shall be deducted from the 2nd Plaintiff's Share 1/3 of the cleaning costs of the Property which the Defendant has already paid before the completion of sale. The sum thereby deducted shall be paid to the Defendant.
- 3. The conduct of the sale shall be committed to Messrs. Tai, Tang & Chong, solicitors for the 1st and 2nd Plaintiffs, subject to the terms and directions of this Order.
- 4. Should the sale be conducted by public auction, C S Surveyor Limited be appointed as the auctioneer for the purpose of carrying out the sale subject to the terms and directions of this Order. C S Surveyor Limited shall have the authority to sign a memorandum of sale binding on the parties hereto in favour of the successful bidder in the public auction.
- 5. For the purpose of carrying out the sale of the Property ordered herein, the Defendant shall:-
 - (1) Do all such acts and/or things reasonably necessary to vest the title of the Property and/or the Defendant's interests therein to the purchaser or purchasers thereof, including but not limited to executing such conveyance, contract or other document in respect of the Property as may be reasonably required, with due expedition when required to do so;
 - (2) Do all such acts and/or things reasonably necessary to discharge the Legal Charge dated 13th May 1991 registered in the Land Registry by Memorial No. TM491010, including but not limited to executing such conveyance, contract or other document in respect of the Property as may be reasonably required, with due expedition when required to do so; and
 - (3) Do all such other acts and/or things as may be reasonably necessary to transfer to the said purchaser or purchasers vacant possession of the Property and the Defendant's interest therein, with due expedition when required to do so.

6. Should the Defendant neglect and/or fail and/or refuse to execute such conveyance, contract or other document in respect of the Property reasonably necessary for the purpose of carrying out into effect the sale of the Property ordered herein, within 3 clear working days after written notice requiring her to do so has been served on her by the solicitors for the 1st and 2nd Plaintiffs, or should the Defendant cannot after reasonable inquiry be found, Mr. Tai Wai Yin Howard, a partner of Messrs. Tai, Tang & Chong, the solicitors for the 1st and 2nd Plaintiffs, shall be nominated, appointed and authorized to execute all such conveyance, contract or other document to convey the Property to the purchaser or purchasers thereof in place of the Defendant, pursuant to Section 25A(1) of the High Court Ordinance (Chapter 4, Laws of Hong Kong) and Section 48 of the District Court Ordinance (Chapter 336, Laws of Hong Kong).
7. Any party having an interest in the Property may purchase the Property in the sale ordered herein and bid in the public auction thereof.
8. That there be liberty to apply to a District Judge for further directions.
9. The Defendant do pay the 1st and 2nd Plaintiffs the costs of these proceedings forthwith, to be taxed if not agreed. There be Certificate for Counsel. (R. Cheung) Deputy FORMTEXT District Judge Representation: Mr. Kenneth K.Y. Lam, instructed by Messrs. Tai, Tang & Chong, for the Plaintiffs The Defendant: appearing in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V & `#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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