

HONG KONG / JUDGMENT

HKSAR v. YIP SAI MING

COURT

Court of Appeal

DECIDED

31 March 2006

CASE / FILE NUMBER

CACC6/2005

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj nt

Before : Hon Stuart-Moore VP, Stock JA and McMahon J in Court Date of Hearing : 1 March 2006
Date of Judgment : 31 March 2006

J U D G M E N T

Hon McMahon J (giving the judgment of the Court) : AUTONUMOUT The applicant was convicted after trial before Judge Chua in the District Court on 19 charges of obtaining a pecuniary advantage by deception contrary to section 18(1) of the Theft Ordinance, Cap.

210. He seeks leave to appeal those convictions. AUTONUMOUT The evidence before the judge was that the applicant had purchased a flat in Tsuen Wan (the flat) in the names of himself and his wife in mid-2000 with a mortgage from the Hang Seng Bank (). To assist in the mortgage re-payments the applicant, a police inspector, had applied for and received from the Hong Kong Government a grant under the Home Financing Allowance () scheme. The payments under the HFA scheme were paid directly from the Treasury into the applicant s personal HSBC bank account. The applicant then paid his monthly mortgage instalments to the HSB. AUTONUMOUT Those arrangements continued for 16 months from their commencement in June 2000 through to September 2001 when the applicant completely ceased payments of his mortgage instalments. As a result HSB eventually obtained a court order for vacant possession of the Flat in June
2002. Possession of the flat was delivered to the HSB in July 2002. AUTONUMOUT Subsequently the applicant divorced his wife, a decree being granted on 12 December 2002. On 21 December, the applicant paid a lump sum of \$170,000 to the HSB as part payment of the then outstanding amount of \$763,218.67 due under the terms of the court order. AUTONUMOUT In May 2003 the Treasury and therefore the Director of Accounting

Services (the Director) had learnt from the Commissioner of Police details of the applicant s divorce and the HFA payments to his HSBC account were subsequently halted. AUTONUMOUT Prior to that communication the Director, who was the officer responsible for the administration of the HFA scheme, had been unaware that the applicant had ceased his mortgage payments and had lost possession of the flat, and so had continued to make monthly payments to the applicant in accordance with the scheme. The applicant had at no time informed either the Director or any other relevant government official or Department of his loss of possession of the flat or of his failure to pay his monthly mortgage instalments. In that period of 21 months the applicant had continued to receive the HFA benefits each month and had applied them to his own use. AUTONUMOUT Each of the 19 offences of which the applicant was convicted related to a monthly HFA instalment paid into his HSBC account during that period (no charges being laid in respect of payments made in March 2002 and March 2003 for reasons unconnected with this appeal). Each charge at trial was identical (save for the date of the offence and changes in the applicant s income) and we set out below the 1st charge as a template for the rest 1st Charge Statement of Offence Obtaining a pecuniary advantage by deception, contrary to section 18(1) of the Theft Ordinance, Cap. 210. Particulars of offence YIP Sai-ming, on or about the 28th day of September 2001, in Hong Kong, dishonestly obtained for himself a pecuniary advantage, namely, credits of \$15,020.00 Hong Kong currency to his bank account with The Hong Kong and Shanghai Banking Corporation Limited, account number 004-006-8702679, which was part of the credit of \$67,173.00 Hong Kong currency entered in the said account, by a deception, namely, by falsely representing to the Director of Accounting Services of Hong Kong Special Administrative Region that he was entitled to the full payment of \$67,173.00 Hong Kong currency which included the monthly Home Finance Allowance of \$15,020.00 Hong Kong currency for the period of the day of September 2001 to the 30th day of September 2001. AUTONUMOUT The judge in convicting the applicant on each of the 19 charges found that the applicant was aware he had an obligation to inform the Director that he had ceased making payments of his mortgage instalments and had failed to do so in order to deceive the Director into continuing the HFA scheme payments to his HSBC account. AUTONUMOUT The grounds of appeal relied upon by the applicant can be conveniently summarized under two headings :

- (1) that the judge misunderstood the meaning and effect of the relevant Civil Service Regulations and consequently the obligations of the applicant under those regulations (the meaning of the Regulations); and
- (2) that the judge failed to properly consider the applicant s case at trial (the defence case). AUTONUMOUT The applicant by his amended perfected grounds of appeal had originally sought to argue two other grounds relating respectively to whether the applicant s omission to inform the Director of his failure to pay his mortgage instalments and consequent loss of his premises was capable of being a deception, and as to the judge s interventions in the course of evidence resulting in unfairness to the applicant. Mr Mitchell-Heggs for the applicant abandoned those grounds and in our view he was right to do so. AUTONUMOUT

Before we turn to the grounds of appeal, we should commence by saying that at an early stage Mr Robert Lee for the respondent made it plain that he was not seeking to sustain the convictions arising from charges 1 to 10. That is because he conceded that during the time period the subject of those charges (i.e. September 2001 to 30 July 2002) the applicant, though he had failed to devote any part of the HFA monies paid to him towards payment of his mortgage instalments, still held his interest in and possession of the flat. Mr Lee conceded that for the applicant's failure to apply HFA monies to his monthly mortgage instalments as they fell due to have been dishonest required proof that the applicant was familiar with and in breach of specific provisions of the relevant regulations relating to the HFA scheme. Mr Lee accepted that it was uncertain whether the evidence at trial could have established that the applicant was aware of these specific provisions and the obligations they placed upon him. We will abide by Mr Lee's concession and in due course the applicant's convictions on charges 1 to 10 will be quashed. AUTONUMOUT's position on the applicant's convictions on charges 11 to 19 is quite different. The events the subject of those charges took place after the applicant's flat was physically possessed by the HSB at the end of July 2002 due to the applicant's non-payment of his mortgage instalments. An order of the High Court on 24 June 2002 directed that the applicant and his wife were to deliver possession of the Flat to the HSB within 42 days. AUTONUMOUT Lee says that when the applicant received his HFA scheme payment on 30 August 2002 (the subject of the 11th charge), he would necessarily have been aware then and from that time onwards that a fundamental condition of him having received that payment and following payments was that they be utilized for repayment of an existing mortgage on a flat owned and occupied by him, and that was a condition which no longer existed. Mr Lee says that regardless of the uncertainties in the evidence which led to his concession regarding the other offences, that the offences which follow chronologically after the passing of possession of the applicant's flat to the HSB in July 2002 (i.e. those the subject of charges

- 19) are properly founded and that even though the failure of the applicant to report the loss of his flat was not the expressed grounding for the judge's convictions on those charges, it follows from her reasoning that she would necessarily have convicted the applicant of those offences on that basis. Mr Lee says we should therefore apply the proviso to the convictions under charges 11 to 19. AUTONUMOUT We turn now to the grounds of appeal : The meaning of the regulations AUTONUMOUT The complaint of the applicant is that the judge misunderstood the obligations of the applicant under the relevant Civil Service Regulations. Those regulations are as follows :

- (1) Regulation 1630(a), (b) and (c)
- (a) The Home Financing Allowance comprises an accountable part and a non-accountable part.
- (b) 50 per cent of the allowance received by an officer is accountable. The other 50 per cent of the allowance is non-accountable.
- (c) The accountable part of the allowance shall be used either for :

- (i) repaying the mortgage loan on a residential property in Hong Kong; or (ii) renting accommodation in Hong Kong
- (2) Regulation 1636(b) The allowance payable to an officer shall be credited monthly in arrears to his salary account. The officer shall be personally responsible for actual mortgage repayment on his property to his lending institution.
- (3) Regulation 1637(b) In the event that an officer's entitlement to the allowance is decreased for whatever reasons, for example a decrease in repaying the mortgage loan on a property, he shall, within 14 days, report and refund any overpayment of the allowance to the Director of Accounting Services
- (4) Regulation 809(4)(a) An officer (whether single, married, separated, divorced or widowed) who is in receipt of Civil Service Housing Benefits is required to report, within 30 days, to (ii) the Director of Accounting Services or his head of department in the case of Home Financing Scheme, Home Purchasing Scheme, Housing Loan Scheme any change in the information provided in the statement on housing and housing related benefits received by an officer/his spouse (GF551) or in circumstances which affect his entitlement to such benefits.
- (5) Regulation 1696(a) : An officer who is receiving a Home Financing Allowance for acquiring a property shall be required personally to live in that property. AUTONUMOUT Lee, as we have said, has accepted that there was no sufficient proof that the applicant was familiar with these regulations so as to impute to him knowledge of his obligations under the HFA scheme to report to the Director (or the Treasury) his non-payment of his mortgage instalments. For that reason we no longer need to consider Mr Mitchell-Heggs particular argument as advanced in his written submissions that the applicant was entitled under regulations 1630 and 1636 to delay applying the accountable portion of the HFA payments to his mortgage repayments until the payment by him of the lump sum of \$170,000 on 21 December 2002 to the HSB. AUTONUMOUT However, following on from his concession, Mr Lee, as we have said, further argues that the fundamental purpose of the HFA scheme is to repay mortgage loans owed by civil servants on residential premises purchased and occupied by them. He says that if the beneficiary under the HFA scheme loses possession of the premises he has an obligation to report that fact to the Director, and regardless of whether the applicant had read the regulations or not, that must have been something known to him. For that reason we firstly consider whether the applicant was under an obligation to report the loss of possession of his flat to the Director. AUTONUMOUT We agree with Mr Lee that a fundamental requirement of the HFA scheme in the circumstances of this case is that the applicant as the recipient of benefits under that scheme is required to apply the accountable part of the allowance received by him to repaying his mortgage on residential property purchased and occupied by him : see regulations 1630(c)(i) and 1696(a) above. That is the plain meaning of those regulations. AUTONUMOUT It is obvious that to comply with those requirements an applicant must possess such a property. If his possession ceases for any reason (including in this case delivery of possession to a

mortgagee bank as a result of non-payment of instalments of a mortgage loan) then the fundamental condition on which the HFA benefits are predicated disappears, and the Director is entitled to cease further payments under the scheme. Regulation 809(4)(a) requires the applicant to report such a dramatic change in his circumstances to the Director. Accordingly the applicant was under a duty to report to the Director the loss of possession of his flat. AUTONUMOUT But more importantly in our view a breach of the actual obligations of the applicant under the provisions of the regulations governing the HFA scheme does not, by itself, determine criminal liability and relevantly to this case, whether the applicant intended to deceive the Director by his omission to inform him of the loss of possession of the flat. AUTONUMOUT The question as to whether a deception has been practised by a defendant's omission to do or say something is a question of fact, as is the question of a defendant's intention to deceive. Those questions are not answered solely by reference to any contractual or other obligation a defendant may be found to have to disclose information to the person alleged to have been deceived. Any such obligation may be one of the circumstances to be taken into account in determining whether there was in fact a deception and if so, whether a defendant's knowledge of that obligation goes to establish that he intended to deceive when he omitted to disclose the relevant information. AUTONUMOUT As the judge rightly said in the present case. Although the subject of whether the defendant was or was not in breach of Regulations 809(7) and 1696, the requirement to personally live in the premises by moving out before the bank repossessed the flat, arose in the trial, it seems to me this breach and the question of whether the defendant did or did not read the Civil Service Regulations relevant to the Home Financing Scheme are not decisive factors on the issue in this case. and later What I have to decide is whether the defendant honestly believed he was under no duty to report in time his failure to make the monthly mortgage repayments and that he honestly believed this would not affect his entitlement to the monthly housing allowance. AUTONUMOUT In our view that was the correct approach. AUTONUMOUT Subsequently in her reasons for verdict the judge accepted that while the applicant may not have made himself familiar with the relevant regulations, he did, as he admitted in his evidence, read the contents of Exhibit P1, a memorandum notifying him of his being granted approval under the HFA scheme and stating inter alia Change of Rate of Allowance

3. Please note that in accordance with CSR 1630(b), 50% of your allowance must be used for receiving your bank mortgage loan (repayments to Government for downpayment loan excluded). If the amount of your monthly mortgage instalment falls below 50% of the amount of HFA received by you for whatever reasons, under CSR 1637 you have to report the change to this office within 14 days and refund any overpayment immediately. Documentary Proof of Ownership and Mortgage Arrangements
5. To prove your purchase and ownership of the property, you should submit to this office a self certified copy of the Record of Owners from the Land Registry by NOV

2000. The Record of Owners should incorporate up to date information in respect of the Assignment Deed, the first legal charge and, where appropriate, the second legal charge, after registration at the Land Registry. Change of Information/Property
6. This approval is given on the condition that the information contained in your Formal Application for the HFA together with the supporting document(s) submitted by you is correct, and may be withdrawn if there is any change to the information which affects your eligibility for the HFA. Please inform this office and your Head of Department in writing within 14 days of any change to the information given in the document(s). Live in Requirement & Prevention of Double Housing Benefits (CSR 809)
8. To protect your interest, please take note of the provisions in CSR 809 of the live requirement for an officer in receipt of the allowance and the other relevant Civil Service Bureau Circular and Circular Memorandum for the prevention of double housing benefit rules.
- AUTONUMOUT The judge s finding that the applicant was substantially aware of his obligation to apply the HFA benefits he received towards his mortgage repayments and to report to the Director (whether directly or through the Treasury) any material change in his mortgage circumstances as a result of him having read Exhibit P1 was a finding that cannot be criticised. AUTONUMOUT Accordingly it is plain that this first complaint of the applicant cannot succeed for the simple reason that not only did the judge not misunderstand the meaning of the relevant regulations, she appreciated correctly that those regulations were in themselves not determinative of the fundamental issue before her as to the applicant s state of mind, and she based her conclusions in that regard not on any interpretation of the regulations but on the applicant having received and read Exhibit P1. There is no merit in this first complaint of the applicant. The defence case AUTONUMOUT The complaint of the applicant in this regard is that the judge failed properly to consider his case as presented at trial. It is fair to say this was the primary ground relied upon by Mr Mitchell-Heggs. AUTONUMOUT The defence case was that the applicant prior to September 2001 (when he stopped paying his mortgage instalments) had a falling out with his wife which, later, in December 2002 resulted in their divorce. The applicant claimed that he stopped making repayments on their mortgage as he did not wish his wife to get the benefit of those payments. He allowed the flat to be surrendered to the HSB because he had a plan to the effect that following the surrender of the flat it would not form part of any property order in his subsequent divorce and that he could then pay the arrears owing on the flat to the mortgagee (i.e. HSB) and regain possession of the flat without his wife being aware of that fact. AUTONUMOUT As Mr Mitchell-Heggs says in his written submissions all those concealments and duplicities were dishonest in that other parties were being deliberately misled by the applicant , but he asserts that the intention of the applicant was simply to deceive his wife for the purposes of his divorce. AUTONUMOUT With respect, the defence case as advanced by the applicant in his evidence was on its face less than credible and the judge was entitled to regard it as so. It is far from surprising that the judge dismissed it out of hand. The scheme of the applicant, as asserted by him, required the flat to remain unsold by the HSB until after his divorce which occurred in December

2002. That was quite a lot to take for granted in September 2001 when the applicant ceased his mortgage repayments. Further it required the HSB to accept the applicant's offer to return to the previous status quo in the face of a court order granting the bank possession of the flat and after the applicant had paid only a fraction of the sum the bank had obtained under that order. In dealing with this defence the judge said He made it clear in cross examination if he had known in December 2002 he would not get repossession, he would stop repayments. It is odd therefore after the court granted the bank possession in July 2002, he did not notify the Treasury. Also, to a question asked of him, he said his then wife had not made a claim for the flat. This seems to be the case, as in the decree nisi order there is no order as to the flat. I therefore reject as untrue the reason he gave for not paying the mortgage repayments from September 01 to December 02. AUTONUMOUT It may be that in arriving at her decision to reject the defence case the judge did not analyse it in great depth. She was, in our view, not required to do so. The case advanced by the applicant, even if true, did not exclude an intention by him to deceive the Director along with various other individuals, including his wife. Mr Mitchell-Heggs accepts the applicant set out to deceive. For that reason the real issue was whether the applicant, regardless of his claimed motive or his intentions towards his wife and perhaps others, intended to deceive the Director. AUTONUMOUT In this regard the judge said What I have to decide is whether the defendant honestly believed he was under no duty to report in time his failure to make the monthly mortgage repayments and that he honestly believed this would not affect his entitlement to the monthly housing allowance. and later I am satisfied on all the evidence before me the defendant knew he had to report his non mortgage repayments in good time and he knew full well his allowance would come to a halt as soon as the Treasury Department learnt of it. That was why he omitted to inform the person from the department of this when enquiries were being made regarding his divorce. I am in no doubt that what the defendant did for 19 consecutive months was dishonest by the ordinary standards of reasonable and honest people, and the defendant himself realised that what he did was, by those standards, dishonest. AUTONUMOUT The question before the judge during the trial was whether the applicant had been proven to be dishonest in not reporting to the Director his failure to make payments under the mortgage. That was the real issue before the judge, not the motive the applicant may or may not have had in doing so, and the judge gave sufficient reasons for finding the applicant to have been dishonest. AUTONUMOUT We should say also that we do not think the applicant's payment of \$170,000 to the HSB on 21 December 2002 was crucial to the determination of the case. As we have said the real issue, apart from whether the applicant wished to deceive his wife and others, was whether he intended to deceive the Director. Even if the payment of the \$170,000 lent some support to the applicant's version of deceiving his wife, though we note that following that payment no further mortgage instalments were paid by him, it offered little factual assistance to the judge in determining the issues before her. AUTONUMOUT In our view, the judge was not required to consider in any greater detail than she did the reasons the applicant gave for omitting to report his failure to pay his mortgage instalments, resulting in the loss of the flat. This ground must fail also. The proviso

AUTONUMOUT The final matter we have to consider is the application of the proviso. In our view it is fair to describe Mr s assertion that the convictions pursuant to charges 11 to 19 are sustainable on the basis of the applicant s failure to report the loss of possession of the flat as an alternative basis to the judge s actual reasons for convicting, as it is apparent from the reasons for verdict that the judge s conclusions were arrived at on the basis of the applicant s dishonesty in failing to report his non-payment of mortgage instalments rather than his failure to report the loss of the flat. Nevertheless we accept Mr s reasoning in this regard that the judge, if she had found the failure to report the former to be dishonest and as the result of an intention to deceive the Director, most certainly and necessarily would have found the latter to be dishonest and to have resulted from the same intent. Had the judge considered the matter from that perspective, then on the basis of her reasoning there is no doubt she would have convicted the applicant of charges 11 to 19.

AUTONUMOUT We do not accept Mr Mitchell-Heggs argument in this regard that the alternative basis for sustaining the convictions on charges 11 to 19 is inconsistent with either the prosecution s case at trial or the reasoning of the judge. The applicant s non-payment of his mortgage intalments led inevitably to the loss of his flat and formed part of the same chain of events. The issues before the judge at trial as to the applicant s intentions and state of mind are the identical issues which apply to the alternative basis advanced by Mr Lee for sustaining the applicant s convictions on charges 11 to 19. AUTONUMOUT Accordingly, accepting Mr s concession, we allow the application for leave to appeal, treat the hearing of the application as the appeal and quash the convictions under charges 1 to 10. As this in our opinion is an appropriate case in which to apply the proviso we dismiss the appeal so far as the remaining convictions pursuant to charges 11 to 19 are concerned. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance Mr Robert S.K. Lee, SADPP, of the Department of Justice, for the Respondent Mr Antony B. Mitchell-Heggs, instructed by Messrs Sanny Kwong & Henry Lo, assigned by DLA, for the Applicant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V r p# &`#\$ ~fpC 6hQf v?s^0Fp u)4q& u)4q v?s^ ~fpC & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=52081

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-yip-sai-ming-2006>

Prepared on 26 October 2026 · Esheria