

HONG KONG / JUDGMENT

LEE CHUET MAN v. KWOK WAI

COURT

District Court

DECIDED

20 November 2007

CASE / FILE NUMBER

DCCJ5268/2006

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bjbj DCCJ 5268/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 5268 OF 2006

BETWEEN LEE CHUET MAN Plaintiff and KWOK WAI 1st Defendant THE OCCUPIERS of the land and premises known as Factory C on 11th Floor, Fou Wah Industrial Building, Nos. 10-16 Pun Shan Street, Tsuen Wan, New Territories, Hong Kong erected on Section B of Tsuen Wan New Territories Lot No. 338 in Demarcation District No. 355 2nd Defendant

Coram: His Hon. Judge Leung in Chambers (open to public) Date of hearing: 10 October 2007
Date of handing down decision: 20 November 2007
DECISION Lee (the Plaintiff) commenced this action in October 2006. Kwok (the 1st Defendant) acknowledged service of the proceedings and indicated his intention to defend. In default of defence, the interlocutory judgment was entered against Kwok and the 2nd Defendant in May this year. Kwok now applies to set aside the judgment.

Background

Lee and Chu Shing Cho are the registered owners of the factory unit in question in Tsuen Wan, New Territories. They were at the material time, and still are, tenants-in-common each holding 50% interest in the property. Lee claims that Kwok has been occupying the property as a trespasser since no later November 2005. Lee claims vacant possession of the property and mesne profit to be assessed. Kwok denies trespass. He claims he has been authorised by Chu to occupy the property. He seems to suggest that Lee has at some stage also permitted him to remain in the property. Kwok seems to be putting both the regularity of the judgment and the merits of the defence in issue. Regular judgment There are the affirmations of service filed on behalf of Lee. I also heard Kwok's explanation of why the mail and documents delivered might not have reached him. Some of his explanation was impromptu in court, not to be found in his affirmation and should be inadmissible. Kwok also asserted discussion between him and Lau

Wing Keung, representative of Lee, after the commencement of this action. Lau allegedly misled him to believe that he could just wait and would be notified whether this action would continue or not. Lau in his affirmation denied the allegation. However, irrespective of the dispute, the fact is that Lee's solicitors did serve the requisite notice to Kwok in February this year prior to entering judgment. I have no doubt about proper service in this case. This is a regular judgment.

Merits The principles for setting aside a regular default judgment are well established. The defendant needs to show that his defence has a real prospect of success. It is his burden to adduce evidence to demonstrate that his defence carries some degree of conviction: *Hong Kong Civil Procedure 2007* at paras. 13/9/12-13/9/14 and 13/9/21. A tenant-in-common is entitled to enforce his interest in land, including maintaining an action for trespass, on his own without joining the other co-owner: *Incorporated Owners of Chungking Mansion v Shamdasani* [1991] 2 HKC 342, 352I-353B. This is what Lee is doing. Likewise, a tenant-in-common is entitled to deal, in whatever way he desires, with his own undivided share, including granting a licence to a third party without the concurrence of the other co-owner: *Chin Lan Hong & Ors v Cheung Poh Choo & Ors* [2005] 3 HKLRD 811, 822D-823H. This is the effect of Kwok's assertion, if accepted. Licence by Chu Kwok asserts that Chu has permitted him to occupy the property without condition. Assuming that he means some sort of oral licence by Chu, I see no evidence of how such oral licence came to exist. Kwok asserts that upon receipt of the writ, he had contact with Chu who allegedly told him to apply for legal aid and to contact Chu's daughter. But there is nothing from Chu which could at least lend weight to his assertion. Upon receipt of Kwok's affirmation, Lee's solicitors wrote to Kwok and requested for contact details Chu or his daughter with a view to verifying his assertion. Kwok did not pay heed to such request. Kwok has produced what appears to be a letter of authorisation by Chu dated 2 January 2003. The authorisation was written under the letterhead of International Dyeing & Bleaching Fty. Ltd. (International). The address of International printed there consists of 3 consecutive units in the factory in question. The property in question is one of them. The letter of authorisation describes the property as being vacant for years and its being used then to store abandoned materials from the mi;N e,girmi N mi kKNmi;NNg That means in case any person other than the owners of the property or Kwok adds lock to the property, Chu together with the other 50% owner would hold such person liable. Lastly the authorisation is stated to last until further notice. Properly construed, the letter of authorisation entrusted Kwok with the duty to manage but did not, expressly or impliedly, confer a licence or right to Kwok to occupy the property himself. Therefore whether the authorisation is relied on as the instrument creating a written licence or as evidence of an oral licence, it does not support Kwok's case. Licence by Lee Kwok suggested that Lee has at some stage either expressly or impliedly consented to his occupation of the property. Such assertion about an express or implied licence is too vague. Even assuming what he said is true, there is no suggestion that this could be anything more than a bare licence which would have been revocable at will by notice: *Hill & Redman's Landlord and Tenant* (2007), Vol.1 at para.683. The demand for possession and, at the latest, the initiation of legal proceedings by Lee against Kwok would have effectively revoked any such licence. I therefore see no realistic prospect in Kwok's resisting the claim on this basis since Lee demanded possession. Other arguments Kwok challenged the authority of Lau and Lee's solicitors in this action. Such challenge lacks any conceivable basis. Kwok referred

to the discussion between Kwok and Lau prior to the entering of the judgment. The discussion was about his request for payment if he was to move out of the property. That, even if happened, was admittedly short of any settlement and has no bearing on whether Kwok has a meritorious case of licence. The claim for outstanding wages or charges allegedly owed to Kwok by some company or companies, with which Lee was allegedly associated, is irrelevant either.

Conclusion

It is incumbent on Kwok to adduce evidence to show some conviction in his defence. He has failed to do so. His lack of legal representation cannot be a complete answer. The other application Before this hearing, on 27 September 2007, Kwok took out another application. The Master heard and disposed of part of it and adjourned the rest to this hearing. The part so adjourned consists of Kwok s request for (1) extension of time for filing the defence and (2) an order for his telephone service provider to produce records of calls to and from his own mobile phone. During the hearing, nothing much was said about this other application. In view of my above conclusion on the merits of his defence, such application has to be refused. Order In the circumstances, I dismiss Kwok s both applications with costs, including any costs reserved, to be taxed if not agreed. Counsel for Lee might have been involved in this case prior to this hearing. However, with no disrespect, I am not prepared to certify the engagement of counsel in the circumstances of this case. This costs order is nisi and shall become absolute in the absence of argument in 14 days. Simon Leung District Judge Representation: Mr Shuni Yoneya instructed by Messr S Y Chu & Co for the Plaintiff The Defendant appearing in person, present PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk >*6D :i#z *\mT zo/< xC&1 ({m8 =J+> P0} W~7gb W~7g xC&1 ({m8 =J+> KZ1H 8%FH n*\U & 6" Normal.dot setup Microsoft Word 9.0 x R3+ Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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