

HONG KONG / JUDGMENT

LEONG WING SUM v. NG KAI MAN**[2018] HKCFI 114****COURT**

Court of First Instance

DECIDED

19 January 2018

CASE / FILE NUMBER

HCA51/2018

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bjbj 51/2018

[2018] HKCFI 114 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE HIGH COURT ACTION NO 51 OF 2018

BETWEEN LEONG WING SUM Plaintiff and NG KAI MAN Defendant

Before: Hon Chow J in Chambers (Open to public) Date of Hearing: 19 January 2018 Date of
Decision: 19 January 2018 Date of Handing Down of Reasons for Decision: 19 January 2018

REASONS FOR DECISION

I have before me an inter partes summons issued by the Plaintiff on 10 January 2018 (the Summons) seeking an interlocutory injunction pending the trial of this action in the following terms, namely, that:- the Defendant whether by himself, his agents or servants or otherwise whosoever be restrained from interfering [with] the Plaintiff s performance of an agreement dated 19th March 2011 entered [into] between the Plaintiff and the Defendant, including the construction of the house on Lot No 812 in Demarcation District 242, Tseung Kwan O Village, New Territories. The parties are agreed that the court should give directions on the filing of evidence, and adjourn the hearing of the Summons to another date to be fixed for substantive argument. The question for decision is whether the court should grant an interim injunction pending the substantive hearing of the Summons. At the conclusion of the hearing on 19 January 2018, I informed the parties that I would accept the Defendant s offer of an undertaking in lieu of injunction (more particularly described below), with reasons to be given later. This I now do. The Plaintiff s claim against the Defendant can briefly be summarized as follows. The Defendant is

the registered owner of Lot No 812 in Demarcation District No 242, Tseung Kwan O (the Lot) under a New Grant No 21068 dated 4 November 2010 (the New Grant), and is entitled to build a small house on the Lot pursuant to the Government's Small House Policy. By a written agreement dated 19 March 2011 entered into between the Plaintiff and Defendant, the Plaintiff agreed to build the house on the Lot for the Defendant and be responsible for all costs associated with the building of the house in return for, in substance, ownership of the 1/F, 2/F and Flat Roof of the house to be erected. There were other related documents executed by the parties, including a will and a power of attorney, which I do not consider it necessary to set out in this decision. For the present purpose, Mr Benjamin Lam on behalf of the Defendant has expressly confirmed that he would not be relying on any illegality, or possible illegality, in relation to this agreement between the Plaintiff and the Defendant. I shall leave the issue of illegality for further consideration at the substantive hearing of the Summons. Under the New Grant, the Defendant is required to complete the construction of the house before the expiration of 36 calendar months from the date thereof (see Special Condition No 3). On the other hand, it is also expressly provided in the New Grant that the grantee shall not commence any operations for building on the lot until the Director shall have set out the lot on the ground (see General Condition No 5(a)). As a matter of fact, the Director set out the lot on the ground on or about 23 September 2015. Construction works by the Plaintiff's contractor commenced in about September 2015. By April 2016, most of the superstructure of the house had been built, except the roof hut and roof fences. However, further construction works could not be carried out, apparently because of some triad interference which it is not necessary to set out in detail in this decision. According to the Plaintiff, he and the Defendant's father (whom the Plaintiff says was at all material times the Defendant's agent in relation to the construction of the house) jointly decided to temporarily suspend the construction works pending the police's investigation into the matter. In early 2017, the Defendant's father told the Plaintiff that the price of landed properties had shot up a lot in the past few years and the Defendant could get a better deal than the one that he had entered into with the Plaintiff. By then, the Plaintiff had already incurred about HK\$1.38 million pursuant to the Agreement, and was not willing to pay any extra consideration to the Defendant. On 23 October 2017, the Defendant suddenly contacted the Plaintiff for the first time (by Whatsapp). Prior to that date, the Plaintiff had all along been dealing exclusively with the Defendant's father on behalf of the Defendant, save on the occasion of the signing of the Agreement at the office of Messrs C P Cheung & Co. Some discussion between the Plaintiff and the Defendant ensued on the question of resumption of construction works, but no firm agreement was reached. On 16 November 2017, the Defendant, through his solicitors, sent a letter to the Plaintiff complaining about the Plaintiff's delay in the construction of the house and imposed a deadline of 1 January 2018 on the Plaintiff to complete the same. Unknown to the Plaintiff, on the same date (ie, 16 November 2017), the Defendant also signed an authorization letter authorizing one Mr Pang to deal with the District Lands Office, Sai Kung, in relation to the construction of the small house on the Lot. The Plaintiff considered the deadline as imposed by the Defendant to be unreasonable. Nevertheless, the Plaintiff found a new contractor () to carry out the outstanding construction works, and informed the Defendant on 26 December 2017 that his new contractor would commence works on the next day. However, when Wo turned up at the site on 27 December 2017,

he was told that the Defendant had already authorized another company to carry out the works. It is not necessary to set out in detail the events that occurred on 27 December 2017 and on the next couple of days, save to mention that ultimately Wo was not allowed to enter the site or continue works on the site. As a matter of fact, the Defendant has engaged another contractor who has erected some scaffolds and started works on the site. The Plaintiff complains that the Defendant has unlawfully prevented him from carrying out the Agreement, and has deprived or is seeking to deprive him of his rights and interests under the Agreement (in particular in respect of the 1/F, 2/F and Flat Roof of the house being constructed on the Lot). The Defendant has not yet filed any evidence in opposition to the Summons. Nevertheless, Mr Lam submits that on the basis of the existing evidence, the Plaintiff has not shown any serious issue to be tried. In particular, Mr Lam argues that the Plaintiff has substantially delayed in building the small house, taking into account the fact that the Agreement was entered into in March 2011, and the New Grant expressly requires the construction of the house to be completed before the expiration of 36 calendar months from the date thereof (ie, on or before 4 November 2013). In this regard, Mr Lam also refers the court to clause (3) of the Agreement, which according to him requires the Plaintiff to comply with the terms and conditions of the New Grant. Hence, the Defendant was justified to impose the deadline of 1 January 2018 on the Plaintiff to complete the building works, and to carry out the works himself when the Plaintiff failed to do. Mr Lam also disputes, I understand, the Plaintiff's allegation that the Defendant's father was the Defendant's agent, and submits that the alleged joint decision by the Plaintiff and the Defendant's father to temporarily suspend construction works (referred to in sub-paragraph 4(4) above) would not be binding on the Defendant. I consider, on the basis of the limited evidence before the court at this stage, that there are serious issues to be tried on:- whether the building covenant in the New Grant requiring the grantee to complete the construction of the house before the expiration of 36 calendar months from the date thereof had been extended or waived by the Director, having regard to (inter alia) the fact that the Director only set out the lot on the ground in September 2015; whether the Defendant's father was the Defendant's agent in relation to the construction of the house on the Lot; whether the Defendant's father and the Plaintiff jointly agreed that construction works should be temporarily suspended due to triad interference pending police investigation; whether the Plaintiff has been guilty of unreasonable delay in completing the construction of the house; and whether the deadline of 1 January 2018 imposed by the Defendant on the Plaintiff to complete the construction of the house is unreasonable. On the issue of balance of convenience, I consider that granting an interim injunction in the terms sought by the Plaintiff (ie, permitting the Plaintiff to carry out or continue works on the Defendant's land) may lead to wasted works being carried out or even irreversible results. In any event, there seems to me to be no great urgency to allow the Plaintiff to carry out the works between now and the substantive hearing of the Summons (which I have directed should be heard on 23 February 2018 before the Summons Judge). On the other hand, as I informed Mr Lam at the hearing, I consider that the status quo ought to be maintained pending the substantive hearing of the Summons by imposing an interim, prohibitory, injunction to restrain the Defendant from carrying out any further works on the site. Mr Lam fairly accepted that the balance of convenience lied in favour of maintaining the status quo. Mr Lam also informed the court that should the court be minded

to grant such injunction, the Defendant would be willing to offer an undertaking to the same effect in lieu of an injunction being imposed by the court, although his primary position was that no interim injunction should be granted. In all the circumstances, I consider that the parties respective positions are best protected by an interim injunction restraining the Defendant from carrying out any further works on the site pending the substantive hearing of the Summons. Taking into account the offer of undertaking by the Defendant, I order that upon (i) the Plaintiff undertaking to comply with any order the court may make if the court should later find that the order herein has caused loss to the Defendant or any other party and decides that the Defendant or that other party should be compensated for that loss, and (ii) the Defendant undertaking whether by himself, his servants or agents or otherwise howsoever, not to carry out or continue any construction works on the Lot pending the substantive hearing of the Summons:- leave be granted to the Defendant to file evidence in opposition on or before 9 February 2018 ; leave be granted to the Plaintiff to file evidence in reply (if any) on or before 15 February 2018; no further evidence be filed without leave of the court; and the Summons be adjourned for substantive argument before the Summons Judge at 10:00 am on 23 February 2018, with 2 hours reserved. Lastly, I order that the costs of the hearing on 19 January 2018 be costs in the cause of the Summons. (Anderson Chow) Judge of the Court of First Instance High Court Ms Dora Chan, instructed by Tsang, Chan & Woo, for the Plaintiff Mr Benjamin Lam, instructed by Cheung Fung & Hui, for the Defendant At the hearing, the Court stated that the Defendant was given leave to file evidence in opposition within 14 days of the date of the hearing (which would expire on 2 February 2018) and also on or before 9 February 2018. The above discrepancy was a slip, and the intention was that the Defendant should have up to 9 February 2018 to file evidence in opposition (as requested by Mr Lam on behalf of the Defendant, namely, 21 days).

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