

HONG KONG / JUDGMENT

MANDECLY LTD AND ANOTHER v. HAO WEI AND OTHERS

COURT

Court of Appeal

DECIDED

13 November 2007

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Before: Hon macrobutton nomacro Tang VP , Cheung JA and Yuen JA in macrobutton nomacro
Court Date macrobutton nomacro s of Hearing: 8 - 10 October 2007 Date of macrobutton nomacro
Judgment : 13 November 2007

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macrobutton nomacro Hon Tang VP : This is the appeal from the judgment of Yam J given after a trial which lasted 38 days. The main protagonists, Mr Chan, the 2nd plaintiff, and Mr Hao, the 1st defendant, gave their evidence in Putonghua, which was then interpreted into Cantonese. Almost all the important documents were in Chinese. There was no official English translation, although a small number of the documents have been translated into English. The judgment was in English. The appeal was conducted in English. Hence this judgment is also in English. For that purpose, I have freely translated some of the documents and the evidence. I must stress, however, that in the event of discrepancies between my translation and the Chinese original (whether documentary or transcript) the original must prevail. I depend on the original for my understanding of the proceedings.

Introduction

The plaintiffs were the only shareholders in the 3rd defendant. The 3rd defendant owned 52% of the Beijing Mandas Real Estate Development Company Limited (Beijing Mandas). The 1st plaintiff was the corporate vehicle in which most of the shares in the 3rd defendant were held on behalf of Mr Chan. Beijing Mandas was formed as a joint venture between the 3rd defendant and the Chaoyang Park Development and Operation Company (Beijing Chaoyang) to develop the real

estate project known as Greenlake Garden. The present proceedings arose out of the sale by Mr Chan and the 1st plaintiff of the shares in the 3rd defendant to Mr Hao. The 2nd defendant was the corporate vehicle for Mr Hao. In this judgment I refer to the 1st and 2nd defendants as the defendants. It is common ground that the use of the land on which Greenlake Garden was to be built

- d. That is so notwithstanding that some of the 68,600m² to be built would be underground. It is unnecessary to consider the logic behind this approach. It was the approach adopted by the parties as well as by the relevant authorities in Beijing. There is a dispute between the parties, however, whether in respect of unenclosed dants case was that they had paid the full rate in respect of Phase 1 and as a matter of contract the plaintiffs were liable to reimburse them. I will deal with this below. The Land Grant was revised on the 25 April 1994 to permit a construction area of 117,200m² comprising 95,550m² of residential flats and underground car parks and public facilities of 21,650m². It is also common ground that Greenlake Garden was to be developed in two phases. The actual area built in Phase 1 was 46,800m², which was approximately 40% of the total permitted built up area of 117,200m². However, only 36,143m² of the 46,800m² was above ground. The transaction Mr Hao wanted to purchase the 3rd defendant's interest in Phase 2 only. However, without the cooperation of Beijing Chaoyang and, more importantly, approval by the authorities, that was not feasible. So it was agreed that Mr Hao should purchase the entire share capital of the 3rd defendant. In Mr Chan's 1st witness statement (his witness statements stood as his examination-in-chief), he said that prior to the agreement: the 1st Defendant also had separate negotiations with the people of Beijing Chaoyang at the time. Mr Chan said Mr Hao wanted to buy the plaintiffs 52% stake in the land for Phase 2 and deal separately with Beijing Chaoyang in respect of the remaining 48%. Mr Chan went on to say in paragraph 32 of his 1st witness statement: 32. At around the time when I and the 1st Defendant had our negotiations, I also made some enquires with the then responsible officer of Beijing Chaoyang, Mr. Ma Ai Guo, Assistant General Manager of Beijing Chaoyang, about what they wanted to do with their interest in Beijing Mandas. He provisionally indicated that Beijing Chaoyang may withdraw from the Development but they should have some RMB 100 million profits from the Development, including both Phase 1 and 2. And he also indicated that the RMB 100 million should be exclusive of the profits which Beijing Chaoyang had received directly (as distribution of profits from Beijing Mandas) or indirectly (as advance payments made by the Plaintiffs for Beijing Chaoyang). Those profits were in the sum of about RMB 26 million. He also indicated that part of the profits to be given to Beijing Chaoyang may be paid in kind by transferring some of the units in the Development to Beijing Chaoyang. I told him that the figure he was looking for was too high, and the more reasonable figure should be about RMB 100 million.
33. On the other hand, in the course of my negotiation with the 1st Defendant, the 1st Defendant told me that he had negotiated with Beijing Chaoyang, and it would agree to the 1st Defendant's purchase of the shares in the 3rd Defendant and to sell its interest in Beijing Mandas to the 1st Defendant if Beijing Chaoyang would be paid some thing like RMB 100 million as its share of profit in the Development, including both Phase 1 and Phase 2.

Indeed, the Plaintiffs had paid Beijing Chaoyang RMB 26 million profit in respect of Phase 1 already, and thus the 1st Defendant would have to pay Beijing Chaoyang the balance of some thing like RMB 74 million.

34. If the 1st Defendant were to buy up the 3rd Defendant's shares and were also to pay Beijing Chaoyang RMB 74 million or RMB 100 million, the 1st Defendant would effectively be acquiring the whole of Beijing Mandas. He would effectively be buying up all of the assets as well as liabilities of Beijing Mandas. At the time, whilst Beijing Mandas did have various liabilities, it also had very substantial assets represented by the unsold residential units and other parts of Phase 1, as well as the land for Phase 2 and its foundation works.
35. However, as said above, the 1st Defendant did not want to have anything to do with Phase 1 of the Development. Further, the 1st Defendant at the time told me that he did not have sufficient cash to pay the Plaintiffs for the shares in the 3rd Defendant and also to pay Beijing Chaoyang. There was then the arrangement whereby some of the property developed but unsold in Phase 1 would be left in Beijing Mandas to offset the liabilities of Beijing Mandas, and the rest of the property developed but unsold in Phase 1 and also some other assets of Beijing Mandas would be transferred to the Plaintiffs or our nominees as part of the price which the 1st Defendant would have to pay for the shares in the 3rd Defendant. As will be seen, it was agreed that 13,200m² of the property developed but unsold in Phase 1 would be left in Beijing Mandas. The 13,200m² were unsold apartments. They were all above ground but included unenclosed balconies. The balance of the unsold properties became known as the Schedule 1 properties. Schedule 1 is a schedule to the Statement of Claim and the properties comprised in it formed part of the plaintiffs claim. These properties were described as unsold because some of them were the subject of false sales which were entered into for the purpose of obtaining bank finance. It appeared that false sales were known to banks and tolerated by the authorities. The parties created a total of 15 documents. The first such document is dated 12 April 2001 and the last 27 September 2001. In Appendix 1 of Yam J's judgment, there is a list of such documents. For convenience sake, an abbreviated list can be found in Appendix 1 to this judgment. It is unnecessary to refer to all 15 documents. I will only refer to those documents which are necessary, that Party A (the vendor) was stated to be the 1st plaintiff only. Party B, was Mr Hao. The 3rd defendant was described as Party C although it was not a party and Beijing Mandas was described as Party D, it was also not a party. TA1 stated that the parties had reached agreement on certain matters of principle after the effective date of the Share Transfer Contract, and the balance within 150 days after the effective date of the Share Transfer Contract. On the other hand, the 1st plaintiff, confirmed, inter alia, that the construction fee payable to China Xin Xing Construction Development Main Co. S;`lQ s?b) 13,200 sq. m. of residential units left to the 1st Defendant, the share transfer fee should correspondingly be reduced at the rate of RMB 8,000 per sq. m.. 5.2 If the Liabilities of Beijing Mandas were in excess of RMB 87 million, the share transfer fee payable should be reduced accordingly. 5.3 In clause 2.5 (erroneously typed as clause 3.5), if Party A's tax liabilities, payable but unpaid, exceeds zhyi nterest in Beijing Mandas. In cross-examination Mr Chan said that Mr Hao gave 10,000m² of unsold

apartments to Beijing Chaoyang, presumably as profits in return for relinquishing their 42% interest. [See Day 5 page 61-62; Day 5 page 30P, page 27N.] It may be helpful at this juncture to mention some of the major issues in this appeal:

- (1) the liability to pay land premium in respect of the 13,200m² of completed apartments transaction did not proceed, the 1st plaintiff would be liable to repay twice the deposit. Clause 5 provided that, in principle, the verification work by Mr Hao should be completed within 10 days of DA1. At trial, an important dispute between the parties related to whether or not verification work began shortly after 16 April 2001. According to the plaintiffs, substantial verification work took place on 21 and 22 April 2001 involving not just Mr Chan and Mr Hao, but one Ms Yang Li Hua (Ms Yang) for the plaintiffs and a Ms Qin Jian Ping (Ms Qin) for the defendants. That was flatly denied by Ms Qin and Mr Hao. In relation to the events of 21 and 22 April 2001, the learned judge preferred the plaintiffs version. Although Mr Jat, counsel for the appellant, devoted a substantial part of his written submission to the event of that particular weekend, realistic as ever, Mr Jat made no oral submission on the matter. I will deal with this aspect of the case later in the judgment. Share Transfer Contract (repeated the provisions of TA1, including, for example, the mistaken reference to Clause 3.5 in Clause 5.3. Clause 5.3 is identical in effect to Clause 5.3 in TA1. Other new provisions included Clause 6 dealing with the handover of the documents of Beijing Mandas. A time table for payment of the cash consideration was agreed to in Clause 4, under which EQOS joint management of Mr Chan and Mr Hao, and that the handover of the fixed assets of Beijing Mandas should take place in accordance with the accounts and relevant materials of Beijing Mandas provided by the plaintiffs. According to Mr Chan, a list of fixed assets to be handed over had been prepared and was supposed to be annexed to the SA1. However, eventually, it was not annexed but it had been handed over to Mr Hao. It was also agreed that the cut off date for the accounts and financial matters of Beijing EQOS true and complete and made part of SA2. On the other hand, clause 1.7 was obviously premised on the basis that the disclosed tax liabilities might have been inadequate. Clause 1.13 provided that Mr Hao would be responsible for the land premium and default paym EQOS ,g 0e EQOS 0~{r g N ,g 0e EQOS 0~{r xVnE\ @b g xVnE\ [Kmb z-N gsQ" :PCg:P EQOS 0KND R>ky Y g'Y v:PCg:P RUSMO 1u2u liability not disclosed in Appendix 1 to SA3. Mr Jat relied heavily on this provision in connection with the counterclaim on unpaid tax liabilities. His submission, put simply, is that Clause 1(9) of SA3, where the cap on tax liability was removed, was made on the basis that Appendix 1 of SA3 contained a complete and true statement of Beijing Mandas tax liabilities. Since the tax liabilities disclosed in Appendix 1 was incomplete, the plaintiffs could not rely on clause 1(9) of SA3. This will be discusse -N gsQ1 es|?bK\ Q?bK\ ?b0W S gP xVnE\ ^?b0W@\ gsQ R1u2u xVnE\ ks^s| N OpOCQ he Schedule 1 properties. Essentially, they succeeded. This is the defendants appeal. The defendants challenged each and every finding of the learned judge, which they acknowledged were findings of fact. Mr Jat submitted that this is one of those exceptional cases where the appellate court is entitled to interfere, citing the well-known words of Bokhary PJ in Ting Kwok-keung v Tam Dick-yuen & Ors [2002] 5 HKCFAR 336 at paras. 32 to 46. Mr Patrick Fung, SC, who appeared for the plaintiffs, referred

us to the decision of this court in *Tin Kwong International Enterprise Co Ltd & Ors v San Tung & Anor* [2006] 2 HKLRD 185, namely that we are not entitled to disturb a finding of primary fact, unless we are satisfied the learned judge's conclusion is plainly wrong. Mr Fung also referred us to the celebrated words of Kirby J in *State Rail Authority of New South Wales v Earthline Construction Pty Ltd (in liq) and Ors* [1998] 160 ALR 588, at paras. 90 to 92. Oral agreement regarding 13,200m² Essentially, Mr Chan's case is that the premium which had been paid in respect of Phase 1 already exceeded the amount of the premium payable in respect of the properties actually sold to genuine purchasers as well as the Schedule 1 properties. In order to understand this oral agreement, it is necessary to consider how it came about that it was agreed that the plaintiffs should have the benefit of 13,200m² of apartments. It seems uncontroversial that at the material time, the unsold area of Phase 1 included about 143 residential V }Mb 0 0P 01\vf1u 1\vf(ub Mzf} Mzf}-N 0 0 P/ft vTSp viQ N POUL 0 0D orally did not appear to have been seriously challenged. Mr Jat confirmed that Mr Chan's evidence that the defendant appeared to have given 10,000m² to Beijing Mandas was neither challenged in cross-examination, nor refuted by Mr Hao in his evidence. It should be noted however that, for example, Clause 1.5 in SA2 (12 July 2001) recorded that the as their profits for their relinquishment of their 42%. This is possibly an example that the written provisions did not represent the reality. Mr Jat made 3 points:

- 1) that the alleged oral agreement was not mentioned in any of the contractual documents, 12 of which directly related to the transaction or the financial side.
- 2) in 3 of the agreements, the plaintiffs agreed to bear outstanding premium for Phase 1. It was therefore incredible that no mention should be made about the land premium regarding the 13,200m².
- 3) that the terms of the agreements are contrary to the oral agreements. In relation to the 3rd point, Mr Jat relied basically on clause 1.13 in SA2, clause 1.6.4.3 in SA3 and Clause 9 in the 4PA. Clause 1.13 of SA2 recorded the fact that in r b g 1u2u 0 0 er, Mr Hao would also have been aware that there would definitely have been land premium unpaid at the time of SA2, so the use of the reservation if any was unnecessary. It was thus an important issue of fact before the learned judge, when Mr Hao or Ms Qin became aware of the actual footage built in Phase 1 and the amount of land premium paid in respect of Phase 1. It was the plaintiffs case that long before SA2, which was signed on 12 July 2001, Mr Hao was aware, not only that the amount of land premium l 2001, Ms Qin requested that it be stated in writing, and that was done by a document marked as YLH-2 dated 27 April 2001. That, however, has been denied by Ms Qin. Another important document bearing on this issue is the letter from the Beijing Real Estate Authority]?bK\ t@\ t of the above ground construction (leaving aside for the moment whether the balcony should be charged at the full rate or half rate). According to Mr Chan, Exhibit P64 was supplied to Mr Hao in April. Certainly, long before SA2 or SA3. Exhibit P64 is not an easy document to understand. Nor would I attempt a translation. It was written in response to a letter dated 18 March 1999 from Beijing Mandas, requesting the issuance of individual title documents Cg^\ ?b0W S gP xVnE\lQ \:SF g`S0Wb ^Q{b vQ-N0W

N3 W0Wb R0W Nb 0W N ^Q{b y:N3 g0W N ^Q{b N>k2 N>k7 NCgb ^Q{b c6R(W yrdk W0W@\ 5,659,500)/1100, title documents for 22,950m2 of apartments could be provided. Whether there was the oral agreement regarding the liability for land premium in respect of the 13,200m2 turned on credibility. Credibility, of course, was a matter for the learned judge. The plaintiff was under cross-examination for 10 days, and Mr Hao was cross-examined for about 4 days. I am satisfied this is a case where the trial judge enjoyed a tremendous advantage. The oral evidence took over 30 days. The witnesses are not natives of Hong Kong (although Mr Chan is a Hong Kong resident). As the learned judge said everything happened in Beijing . Given the unfamiliarity with the legal and business environment in Beijing, the advantages of observing the witnesses at length and in close quarters are particularly important. The learned judge was keenly aware of the attack on the credibility of Mr Chan. He said: 3.7 They queried why no such term of agreement was ever set out in any of the 15 agreements or declarations between 12-4-01 and 27-9-01. They submitted that for the span of nearly five months, if there were such an agreement, they would have spelt out in one of those agreements which was meant to set out all the agreements between the parties in writing. para. 3.7 of the judgment. The learned judge accepted Ms Yang s evidence that the document of 27 April 2001 namely Exhibit YLH-2 was given to Ms Qin on or about 27 April 2001, notwithstanding Ms Qin s denial. Also, as the learned judge said, it would make sense for Mr Hao to want to know how much by way of land grant fees had been paid, because the amount paid in respect of Phase 1 would affect Phase 2. I would add that it is inconceivable that Mr Hao would not wish to know how much of the permissible built up area in relation to Greenlake Garden, had been utilised in Phase 1, because that would affect what square footage could be built in Phase 2. Mr Hao s denial of such knowledge has to be seen in the light of Mr Jat s acceptance that it was inexplicable why he should have agreed to Clause 1.6.4.3 in SA3, if the understanding was that the plaintiffs were liable to pay the land premium on the 13,200m2. Mr Jat also relied on TA1 Clause 5.1 which provided that if the plaintiffs were unable to provide 13,200m2 JX/f v>\xebT bf}`O!| U0W N~vs^ N]NASs^ JTbT N~vs^ _ N/f NASs^ v?bP[1\I{ NASs^ NASs^ v?bP[ASs^ es|?bP[#jMb- 1\fmB- Mbs^ had already been paid, so that it would make sense if less than 13,200m2 were left behind. Be that as it may, Mr Chan s explanation was not straightforward or clear. Unfortunately, not everything in this case was straightforward. As Mr Jat submitted the parties operated in an environment where regulations or laws were administered flexibly and everything seemed negotiable. Despite the length of the trial, I am not satisfied that the court has been told the full picture. As I have said the learned judge s conclusion that there was the oral agreement regarding the land premium on 13,200m2 was essentially a finding of fact based on credibility. Mr Jat argued most forcefully that some of the learned judge s reasoning was not correct. I have taken such criticism into account. With respect, the learned judge s reasoning varied in quality. But, after careful consideration of Mr Jat s submission and the evidence, I am satisfied that the learned judge s overall conclusion is right. On the evidence I would have come to the same conclusion. YLH-23, the weekend of 21 April 2001 One of Mr Jat s complaints is that the learned judge was overly influenced by his adverse view on Mr Hao and Ms Qin s credibility in relation to exhibit YLH-23 and the events of the weekend of

21 April 2001. I turn to the serious factual dispute between the parties over the event of the weekend of 21 April 2001. Undoubtedly, the learned judge's conclusion on the credibility of the witnesses on this issue exerted an important influence over his overall assessment of the credibility of the witnesses. Understandably so, in my view. The discrepancies between the evidence of the plaintiffs and the defendants over the events of the weekend of 21 April 2001 could not have been the result of mistaken recollection. After careful consideration of the evidence I shared the view of the learned judge that the credibility of Mr Hao and Ms Qin had been severely damaged. According to the plaintiffs, Mr Chan and Ms Yang met Mr Hao and Ms Qin, and others from Mr Hao's side at the office of Beijing Mandas for verification work on 21 and 22 April 2001. In preparation for that meeting, Ms Yang instructed the accountants of Beijing Mandas to prepare the ledger balances from the computer accounts. That was in turn done by a Ms Ying (Ms Ren). This is the Exhibit YLH-23 which was in the handwriting of Ms Ren. It may be confusing but the reference to YLH-23 was sometimes a reference to the actual exhibit produced at trial and other times to the documents created (according to Ms Yang) for the weekend of 21 April 2001 and provided to Ms Qin, of which the exhibit YLH-23 was the copy retained by the plaintiffs. In this judgment I will refer to the former as YLH-23 (exhibit) and the latter as YLH-23 (document). Ms Yang said she provided a copy of YLH-23 (document) to Ms Qin over that weekend. Also she said she switched on the computer to show Ms Qin the ledger balances as recorded on the computer and gave her various explanations on the various items shown in YLH-23 (document). Some primary documents were also shown to Ms Qin for checking as she requested. Ms Qin jotted down notes of such explanations on YLH-23 (document). However, Ms Qin said that the YLH-23 document was only given to her after 28 May 2001 and that her handwriting which appeared on the first page of YLH-23 (exhibit) were written by her after 28 May 2001. Ms Qin was emphatic that she was not at the office of Beijing Mandas over the weekend on 21 and 22 April 2001. She said, however, she went to the office of Beijing Mandas on 28 April 2001. However, she only stayed for a very short time, and no verification work was done. On the plaintiffs side, it was alleged that verification work took place not only on the weekend on 21 April 2001, but also the weekend of 28 April 2001. YLH-23 (exhibit) consisted of 2 sheets of paper, they were produced by Ms Yang on behalf of the plaintiffs. They are both photocopies. There are original handwriting written with a blue ball pen on the first page of YLH-2 the verification exercise on 21 April 2001. Ms Qin said that although she had written on the 1st page on YLH-23 (exhibit) and that she had been given a 2-page document, the 2nd page she was supplied with, albeit after 28 May 2001, did not have the words position as at 20 April 2001 on it. The question whether there was verification work done over the weekend of 21 April 2001, and if so, whether YLH-23 was prepared for the occasion and supplied to Ms Qin, occupied much time at trial but eventually it was the handwriting of Ms Qin, but there was some original handwriting of Ms Yang. The learned judge held in para. 2.24 of his judgment that he accepted Ms Yang's explanation why the 2nd page of YLH-23 did not bear Ms Qin's handwriting. I agree. With respect to the learned judge, he then demonstrated convincingly in paras. 2.9 to 2.19 of his judgment why the evidence of Ms Yang and Mr Chan should be preferred over the evidence of Mr Hao and Ms Qin in relation to YLH-23. Then he

turned to consider Exhibit P55, which according to Ms Yang, was created by Ms Qin on 22 April 2001 as a summary of the result of the investigation into the financial affairs of Beijing Mandas. Ms Qin denied that. According to her, it was made very late in July 2001, the learned judge dealt with this in paras. 2.20 to 2.32 of his judgment. And he concluded in para. 2.33: 2.33 Accordingly, I find that Ms s evidence that [P55] was only prepared after mid-7-2000 [which should be mid-7-2001] was not truthful. The learned judge then dea nUS2 & edible. Instead, Mr Chan and his staff, and in particular, Ms Yang, had frankly disclosed the financial position of Beijing Mandas to Mr Hao and his staff, in particular, Ms Qin . The importance of YLH-23 and the events of the weekend of 21 April 2001, of course, was the plaintiffs evidence that Exhibit P55 was produced as a result. If that version of events were accepted by the court, that would seriously weaken a substantial part of the defendants counterclaim based on non-disclosure. As I have said, Mr Jat made no oral submission in relation to undisclosed liabilities. So far as Exhibit P55 is concerned, Mr Jat submitted that paras. 2.26 to 2.32 of the judgment is wrong, because the judge failed to appreciate that the entries he relied on only showed that Exhibit P55 was prepared after YLH-23, but they did not prove that Exhibit P55 was produced on 21 to 22 April 2001. But the significance of YLH-23 is that the learned judge concluded and was entitled to conclude that Ms Qin and Mr Hao were unreliable. The learned judge could not be criticised for accepting Ms Yang s evidence that Exhibit P55 was created by Ms Qin on 22-4-01 2.20. Ms Qin s evidence which was rightly rejected by the learned judge affected not just her credibility, it also went to the credibility of Mr Hao, because it also his evidence that no verification exercise took place on 21 and 22 April 2001. Mr Jat made the valid point that even if Mr Hao and Ms Qin were not credible witness, the learned judge ought nevertheless to have scrutinised the evidence of Mr Chan to see whether there was indeed the oral agreement regarding the land premium for the 13,200m2. But that was what the learned judge has done, and with respect, I agree with his conclusion. Moreover, I agree with Mr Fung that as a matter of inherent probability, it was inconceivable that no verification work was done until well into May 2001. It will be recalled that under DA1 (16 April 2001), the defendants agreed to pay a deposit of RI{ tended the office of Beijing Mandas, but no verification was done. She was introduced to Mr Chan and stayed half an hour or so and left. The judge in para. 2.6 of the judgment recounted Ms Qin s evidence that probably on 21 April 2001, Ms Qin was asked to wait outside Greenlake Garden by Mr Hao, and then she accompanied Mr Hao to see Mr Chan at Greenlake Garden, but that was only a short introduction. She left after about half an hour to an hour, she did not do any verification work. However, it seems clear that according to Ms Qin, that event took place not on 21 April 2001, but on 28 April 2001, but this error does not affect the correctness of the learned judge s conclusion. Moreover, YLH-23 was prepared so as to show Beijing Mandas position as at 20 April 2001. That supports the plaintiffs case that it was prepared for the purpose of the verification exercise which commenced on 21 April 2001. Default Payment and Penalties (Default Payment) They can be dealt with relatively briefly. Under SA2, it was ,ge EQOS]?bK\ W0W@\ S gsQ FU=mv^ xVnE\ default. Even so, it was the defendants case that the final amount was reduced after negotiation. Mr Jat has correctly pointed out the Land Grant made no mention of Greenlake Garden being developed in 2

phases. However, Exhibit P64 recognized the fact that Greenlake Garden was being developed in 2 Phases. It referred in terms to the fact that: Phase 1 has been completed. and in fact it was. However, as a matter of contract between the plaintiffs and the defendants, the parties had agreed that the defendants should be responsible for the default payment in relation to Phase 2, see in particular, Clause 1.13 in SA2. They had not agreed that the defendants should be responsible only for default payment in respect of Phase 2 accruing after 28 April 2001. I believe the only reasonable interpretation to put on the parties agreement is that such part of default payment in respect of Phase 2 claim depended on the plaintiffs liability to pay land premium in respect of 13,200m². Since I agreed with the judge's conclusion on this issue it would have been unnecessary for me to deal with the question whether the land premium for balconies should be at full or half rate. However, since this matter might go further, I would deal briefly with this question. It is common ground that under the relevant regulations, land premium for unenclosed balconies was payable at half rate only. However, the defendants have applied for leave to adduce the Supplemental Agreement made between the Beijing Real Estate Authority and Beijing Mandas dated 12 September 2006, under which it appeared that land premium for balconies had been paid at the full rate. I agree with Cheung JA that we should refuse leave to produce the Supplemental Agreement. In any event Mr Jat's submission depended on Clause 9 of the 4PA. He submitted that it was agreed under Clause 9 that the land premium payable in respect of Phase 2 was satisfied that the supplemental agreement satisfies the second and third Ladd v Marshall conditions. The Supplemental Agreement was a consensual document and was entered into to vary the contractual obligations of Beijing Mandas. Tax liabilities It is helpful to note that this part of the counterclaim was made under the rubric of Plaintiffs liability in respect of tax in excess of RMB5,000,000. It was part of the defendants counterclaim that there were undisclosed tax liability for which the plaintiffs the business tax at 5% was payable on sales regardless whether they resulted in profit or loss. In para. 71K of the Re-amended Defence and Counterclaim, it was alleged that according to the records of Beijing Mandas, prior to 28 April 2001, Beijing Mandas had sold 231 apartments in Phase 1 for the total consideration of of Business Tax and on the basis that a sum of RMB3,974,491.27 has been paid by Beijing Mandas as Business Tax for the sale of properties in Phase I, the additional amount in excess of RMB5 million is RMB11,496,221.09 (RMB20,470,712.36 - RMB3,974,491.27 - RMB5,000,000). There was also a claim for counterclaim, it was alleged that sometime between the signing of SA2 12 July 2001 and the signing of the SA3 on 6 August 2001, the plaintiffs: had produced certain accounting records of Beijing Mandas to the 1st Defendant. In the said accounting records, there was an item showing that the Income Tax of 1st Defendant. This was an important indication that Appendix 1 of SA3 was not intended to contain a complete statement of Beijing Mandas tax liabilities. The specific inclusion of Property Tax of 150,000 was necessary because of the agreement on splitting up the liability between the parties. It was further alleged: 71F. In the premises, the Plaintiffs have represented to the Defendants:

- (1) that the only outstanding tax which might be payable by Beijing Mandas consisted of: (a) Income Tax in the sum of RMB2,015,371.70 which was within the RMB5 million limit which the 1st Defendant agreed to bear; and (b) Property Tax in the sum of RMB150,000, of which the 1st Defendant would only be responsible for RMB 100,000;
- (2) that, in any event, the outstanding unpaid tax liability which the 1st Defendant has assumed would not exceed RMB 5 million. (the Representation Mr Chan in his evidence denied any misrepresentation, and in his 1st Supplemental Witness Agreement he explained why e sales that was expressly made known to the lender. It seemed that the creation of false sales to raise finance was at the time a tolerated practice and that the business tax paid would be refunded. The learned judge was also satisfied that there was no misrepresentation. He was satisfied that Mr Hao was aware of the potential business tax payable. It is unnecessary to consider in detail why the learned judge thought Mr Hao would agree to Clause 1(9) of SA3. The learned judge was skeptical about the defendants counterclaim on tax liabilities which was not raised until: 4.39 12-2004, just two weeks before the commencement of this trial in 1-2005. Further that: 4.41 By the end of the trial which is nearly one and a half years later, the defence did not inform the court nor lead any evidence as to what explanation they have given to the tax authority and what was the result of the investigation by the tax authority. Although it was the evidence of Mr Hao that: 4.40 he was repeatedly demanded by the tax authority in 9 and 10-2004 Then: 4.41 it is reasonable to accept the plaintiffs submission that the allegations of the defence about the tax problems were unreal. He concluded that: 4.46 In conclusion, given the elaborate system of the investigations into the tax position of enterprises by the tax authority of the government, if the tax problems of Beijing Mandas were real or as substantial as alleged by the defence, it is quite impossible that the problems would not have been discovered by the tax authority over the years. However, in the past five years, Beijing Mandas had not been demanded by the tax authority to make any outstanding payment for tax, otherwise Mr Hao would have produced the same. Further SA3 must have superseded the previous old provisions in relation to tax since those provisions provided that the payment of such tax liability is subject to tax payment receipt (zhy:N y contingent tax liabilities. The thrust of the pleadings was that Clause 1(9) was the result of misrepresentation. That was rejected by the learned judge. I am not satisfied that the obligation of the defendants to pay the additional tax liability depended on the correctness of Appendix 1. I am of the view that Clause 1(9) of S ble, I share the learned judge s skepticism that such liability would ever have to be paid. Or that the liability, if any, could not be kept within reasonable bounds. I will not deal with Ms Yang s evidence on this aspect save to say that on her evidence, such liability, if any, was likely, to be minimal. Water charges iciently proved their case. This might appear to be a surprising conclusion. However, having regard to the material considered by the learned judge, and referred to specifically in his judgment, I have come to the conclusion that this is a finding which should not be disturbed. The documents produced on behalf of the defendants showed that the inspectors on behalf of the Inspectorate of Beijing Sale of Tap Water Supply Group eg4l O4l% 4 and 2006. However, as recorded by the learned judge, Ms Yang s evidence was that

water charges had been paid and that it was impossible that they had not paid water charges since 1994. According to the plaintiffs evidence, Beijing Mandas in about 1995, contracted with a You Lian Company led. See judgment at para. 9.2. At para. 9.28 of the judgment, the judge recorded that: 9.28 According to Mr Chan, You Lian was a subsidiary company of the water company and a quasi-designated contractor of the water company for water connection works. The learned judge then set out in paras. 9.29 and 9.30 of his judgment, the various contracts and documents in connection with water supply, which had been supplied to Mr Hao's side by Mr Chan, including, for example, a water connection works contract with You Lian, dated December 1995. These documents also included, amongst others, a letter to the Water Company on registration and instalment in office, dated 20 October 1997, and water supply facilities hygiene permits. None of these documents had been produced by the defence. The judge then concluded: 9.32 I must say I agree with the plaintiffs submissions that it is inconceivable with all these documents that the plaintiffs had not paid water charges by illegally and improperly connecting water pipe to the main water supply in all these years and thereby avoided paying the same. This could not be done unless there is a conspiracy among Beijing Mandas, You Lian, Chaoyang Park and Wan Guo Property. Why should a state enterprise participate in such a conspiracy basically for Xin Xing? 9.33 On the other hand then why there was a report by water company in February 2002? There is no definite answer in this respect. The only thing which had so glaringly happened is that by November 2001 Mr Hao had already in the two parties since 9-2001 to 2-2002 had been quite acrimonious. Mr Jat submitted that the learned judge should not have speculated about the possibility of a conspiracy. No conspiracy had been alleged. The defendants allegation was that there had been an illegal connection to the mains. There is force in this submission. However, in the end, I have decided that I cannot interfere with the learned judge's conclusion. This is a case where the learned judge was entitled to look at the larger picture the position between Beijing Mandas and the Real Estate Authority as evidenced by Exhibit P64 or otherwise, between the plaintiffs and the defendants the position was governed by Clause 9 of 4PA which clearly recorded that the land premium of Phase 1 paid transfer of Blocks 3, 4 and 5. Mr Jat submitted that the learned judge was wrong to order that Blocks 3, 4 and 5 as well as the 4 vehicles be transferred to the plaintiffs. Essentially, Mr Jat's submission is that on the evidence the learned judge ought not to have been satisfied that the defendants had been in breach. In relation to Blocks 4 and 5, there was an application for leave to adduce evidence to show that they have been demolished and that there is an order for the demolition of Block 3. The application had not been actively pursued. In any event, I agree with Cheung JA that leave should be refused. Mr Jat also submitted that the plaintiffs had failed to show lack of co-operation on the defendants part. I think it would be naive to think that there would have been co-operation. As the learned judge said, though in the context of water charges, The relationship between the two parties since 9-2001 to 2-2002 had been quite acrimonious. If the defendants are no longer able to transfer Blocks 3, 4 and 5 no doubt the matter can be resolved in the enforcement of the order. The question of damages in lieu, if any, may then have to be resolved. As for the 4 vehicles, on the evidence referred to us by Mr Jat, it does seem that the defendants had offered to assist in the transfer

of these vehicles. However, looking at the matter in the round, I am not prepared to interfere with the order made by the learned judge. I also ignore for the purpose of this judgment the correspondence from the parties relating to actions or in actions regarding the 4 vehicles subsequent to the judgment below.

Conclusion

For the above reasons, I would dismiss the appeal with costs. Hon Cheung JA: I agree. Application to adduce new evidence The defendants applied for leave to adduce the following evidence for the purpose of the appeal:

- (1) The Administrative Judgment of the People's Court of the Beijing Chao Yang District dated 22 August 2006 (n@\ ng Mandas dated 12 September 2006 (the Supplemental Agreement). The relevance The first two documents were sought to be adduced in relation to the order of Yam J requiring the defendants to transfer the Schedule 1 properties to the plaintiff. Among the Schedule 1 properties are three blocks of buildings, namely, Blocks 3, 4 and 5. It was argued that the two judgments show that the defendants would not be able to comply with the order. The 22 August 2006 Judgment empowered the Demolition Notice dated 3 y the Beijing Planning Committee. Accordingly, Beijing Millennium's claim was not a civil dispute within the jurisdiction of the Beijing Court. The Beijing Court dismissed the claim by Beijing Millennium. The purpose relied upon by the defendants in respect of n@\ 3.13 of the judgment) is erroneous. Ladd v. Marshall The principle on the admission of new evidence is governed by Ladd v. Marshall [1954] 1 WLR 1489 Leave to adduce further evidence on appeal will only be granted
- (1) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- (2) if the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and
- (3) if the evidence is such as is presumably to be believed. The two judgments In respect of the 22 August 2006 Judgment although it was delivered after the judgment of Yam J, the subject matter was concerned with the Demolition Notice of 3 April 2006 which was already in existence before the judgment of Yam J. The 3 August 2006 Judgment was delivered after close of submissions and shortly before the judgment of Yam J. But again the relevant subject matter dealt with in that judgment was already in existence at the trial. The position is that at the hearing before Yam the defendants were aware that Block 3 was subject to the Demolition Notice. They were further aware that Blocks 4 and 5 were already demolished by Beijing Mandas since Mr. Hao by then had already controlled Beijing Mandas. Furthermore the defendants must be aware of the plaintiff's claim in respect of these three blocks. Irrespective of the dates of these two judgments the issue could have been raised before Yam J by the defendants if they were concerned with any order requiring them to transfer the three blocks to the plaintiff. We are not satisfied that the second limb of the Ladd v. Marshall

requirement is satisfied in this case namely, if the two judgments were adduced as evidence they would probably have an important influence on the result of the case although they need not be decisive because at the trial the defendants already had evidence which had a significant bearing on this issue. Insofar as these two judgments are relevant for the purpose of the enforcement of the judgment, Yam J had already provided the parties with liberty to apply. In our view the parties should return to Yam J if this issue arises in the future. Further these two judgments will not be able to assist this Court on the issue now raised by the defendant, namely, the Order of transfer exceeded what was required of the defendants under Supplemental Agreement No. 3 dated 6 August 2001. The defendants case is that they were only required to cooperate with Beijing Millennium in respect of Beijing Millennium s application for ownership permit of Blocks 4 and 5 and that in respect of Block 3 they were to coordinate with Beijing Millennium s application for approval of this block and also to coordinate with Beijing Millennium s application for the ownership permit. The two judgments have no bearing on this particular issue. Accordingly we will not admit the two judgments as new evidence. The Supplemental Agreement In relation to the Supplemental Agreement, clearly whether the land premium was to be charged on full balcony or half balcony basis cannot be resolved even with this new evidence. If this document was to be admitted then clearly the plaintiff must be given an opportunity to cross-examine Mr Hao on the circumstances in which this Supplemental Agreement came into existence and also to call further evidence in relation to be correct n@\ . er nisi that the plaintiffs are to have the costs of the appeal including the costs of the application for leave to adduce evidence on appeal; such costs to be taxed if not agreed. (macrobutton nomacro Robert Tang) Vice-President (Peter Cheung) Justice of Appeal (Maria Yuen) Justice of Appeal Mr Jat Sew Tong, SC and Mr Anthony Chan, instructed by Messrs Fred Kan & Co., for the macrobutton nomacro Defendant s Mr Patrick Fung, SC and Mr Lee Tung Ming, instructed by Messrs Anthony Siu & Co., for the P>kOS P>kR NCQ P>kOS P>kR NCQ EQOS EQOS ~KNe EQOS EQOS z-N gsQ" -N gsQ1 es|?bK\ Q?bK\ N gsQpS a gP SKNOS Party Agreement) 27.09.2001
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