

HONG KONG / JUDGMENT

MARBLE HOLDING LTD v. YATIN DEVELOPMENT LTD

COURT

Court of Appeal

DECIDED

6 June 2007

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bjbj cacv 67/2007 in the high court of the hong kong special administrative region court of appeal civil appeal no. 67 of 2007 (on appeal from hca 1127/2004) BETWEEN MARBLE HOLDING LIMITED Plaintiff YATIN DEVELOPMENT LIMITED Defendant Before: Hon Rogers VP, Le Pichon JA and Suffiad J in Court Date of Hearing: 29 May 2007 Date of Handing Down Judgment: 6 June 2007 J U D G M E N T Hon Rogers VP: This was an appeal from a judgment of Burrell J given on 2 February 2007. The matter before the judge was a claim for the return of a deposit of \$1.9 million which had been paid in respect of the purchase of shop premises in Macau. The judge gave judgment for the plaintiff in the sum of \$1.9 million together with interest. At the conclusion of the hearing of this appeal judgment was reserved which we now give.

Background

The parties entered a provisional agreement for the sale and purchase of the shop premises on 21 February 2004 (the agreement). The agreement was in what would appear to have been a standard form estate agent s agreement with blanks to be filled in. The printed form of the agreement was in both Chinese and English. Parts of both the English and the Chinese versions were deleted in the executed form and there were additional handwritten clauses in Chinese. A certified translation of the agreement was before the court and nothing appears to turn on the translation. The purchase price for the premises was to be HK\$19 million. Clause 2 of the agreement provided that there should be an initial deposit to be paid on the signing of the agreement in the sum of HK\$500,000. There was to be a further deposit to be paid on 15 March 2004 in the sum of HK\$1.4 million. The balance of the purchase price was to be paid upon completion on or before 30 April 2004. The dispute between the parties arose because the plaintiff refused to complete the contract because the tenant which had been in the property at the time of the execution of the agreement had held over and remained on the property on 30 April 2004 and the tenant whose lease had commenced on 1 April 2004 was not in possession of the property. The plaintiff s case was based on clauses 4 and 17 of the agreement. Those clauses read as follows: Clause 4 : Upon completion, the purchaser agrees to purchase the said premises subject to the existing tenancy. Clause 17 : Main contents of the tenancy : Tenant - Fantastic

Natural Cosmetics (Macau) Ltd., Terms : 1/4/2001 - 31/3/2004, monthly rental HK\$100,000.00
Tenant - Angel Cosmetics International Ltd., Terms : 1/4/2004 - 31/3/2007, monthly rental HK\$120,000.00, the tenant has a further option to renew the tenancy for 3 years, monthly rental fixed at HK\$144,000.00. The judge held that clause 17 when read in conjunction with clause 4 constituted a condition of the contract which required that the new tenant should be in place in the premises at the time of completion. He said at paragraphs 13 and 14 of the judgment:

13. No other interpretation can be put on the evidence other than that the plaintiff would only buy if there was to be a new tenant on a three-year lease at a higher rent. When the defendant accepted that, an agreement was reached.
14. One of Mr Lee Tung Ming s (counsel for the defendant) arguments that clause 17 does not create any binding obligation was that the defendant could never guarantee or ensure that Fantastic would leave. It was no more, he submitted, than a reasonable expectation, not a guarantee. The submission is misconceived. Clause 17 was not intended to be a guarantee; it was a simple and straightforward express conditional term. The defendant found itself unable to comply with the condition (in spite of its best endeavours to evict Fantastic). It was a condition without which the plaintiff would not have signed the contract. It was a condition which was reasonable and sensible to include in a contract for the purchase of a shop. The plaintiff wanted a certain and good tenant for a reasonable term of years and at a higher rent. This, the defendant, did not provide. This appeal On this appeal Mr Campbell, who appeared on behalf of the defendant in this court but not in the court below, argued that clause 17 did not constitute a condition which could only be satisfied if the new tenant was in place. Whereas clause 17 had to be read in the light of clause 4, in that clause 4 of the agreement provided that the plaintiff agreed to purchase the premises subject to an existing tenancy and hence would not obtain vacant possession on completion, clause 17 merely provided details of the main contents of the tenancy agreements. It was said that although it was permissible to have regard to the factual matrix, in so far as it was said that the plaintiff would not have entered the agreement except on the condition that a new tenant was in place paying the higher rent, the judge would have gone beyond considering the factual matrix but was considering the subjective intention of the parties, specifically of the plaintiff, and that was impermissible. There is no dispute that copies of the two tenancy agreements were not provided to the plaintiff until 10 March 2004. Nevertheless, the existence of those tenancy agreements was patently disclosed to the plaintiff and recited in the agreement itself. Clause 24 of the tenancy agreement with Angel Cosmetics International Ltd (Angel Cosmetics) read as follows: The Tenant hereby expressly declare and acknowledge that the Tenant are fully aware that the said Premises have been let by the Landlord to efuse or fail to vacate the said Premises or the Landlord shall fail to recover possession of the said Premises by 30th June 2004, either the Tenant or the Landlord may give a written notice to the other terminating this Tenancy Agreement whereupon this Tenancy Agreement shall cease to have any legal effect and force. In such event, the Landlord shall within 30 days upon the rescission of this Tenancy Agreement, refund the security deposit and advance payment of HKD\$480,000.00 paid under this Tenancy

Agreement to the Tenant without any interest or compensation. Upon refund of the said security deposit and advance payment of HKD\$480,000.00 to the Tenant in the manner aforesaid, the Tenant shall have no further claim against the Landlord as a result of the termination of this Tenancy Agreement. The Landlord shall be entitled to relet or sell or otherwise deal with the said Premises in such manner as the Landlord may think fit. Save as herein before expressly provided, this special clause shall in no way affect or alter the other terms and conditions of this Tenancy Agreement. This court's attention was drawn to what was said by Brennan J (as he then was) in the decision of the High Court of Australia in *Bahr & Anor v Nicolay & Ors* (No

- 2) (1988) 164 604 at 650-1: It is clear that the parties to the Thompsons contract intended that the title to lot 340 which the Thompsons acquired pursuant to their contract should be subject to the Bahrs interest under cl. 6 of the Bahrs contract. In other words, their intention was not only that the Thompsons should have notice of the Bahrs interest, but that the Thompsons, upon acquiring lot 340, should be bound by cl. 6 of the Bahrs contract. Robertson would not have signed the contract of sale on Nicolay's behalf if the Thompsons had not agreed to be so bound. In *Munro v. Stuart* (1924) S.R. (N.S.W.) 203, a contract of sale contained a provision that the property was sold subject to existing tenancies or occupancies. Harvey J at page 204(48) construed that provision simply as a condition that the purchaser is to take the property over subject to any existing tenancies for what they may be worth and cannot repudiate the contract because of their existence. However, his Honour thought that such a provision might have to be given a wider construction than this had there been during negotiations for the contract any agreement between the parties ... that the purchaser would recognize those leases, and that this clause had by mutual agreement been put into the contract for the purpose of giving effect to such an agreement. Though his Honour's tentative approach would lead to the conclusion that cl. 4 should be construed to accord with the parties' actual intention, that approach seems to me to involve an impermissible reference to evidence of intention as an aid to interpretation. Although it is permissible to refer to the factual matrix in which the parties were at the time of the contract in order to construe the terms of a contract (see *Codelfa Construction Pty. Ltd. v. State Rail Authority of N.S.W* (1982) 149 C.L.R. 337, at p. 401., it is not permissible to expand the meaning of the terms of the contract so construed so as to accord with the actual intention of the parties. I am unable therefore to embrace the tentative approach suggested by Harvey J. However, the extrinsic evidence is admissible to show that there is an independent and collateral unwritten contract which, together with the written contract, constitute the arrangements made by the parties: *De Lassalle v. Guildford* [1901] 2 K.B. 215., and see *J. J. Savage & Sons Pty. Ltd. v. Blakney* (1970) 119 C.L.R. 435, at pp. 441-442. In my view, the approach to the construction of the contract in the present case must be on similar lines. Clause 4 did, indeed, provide that the assignment of the premises would be subject to an existing tenancy. It was therefore implicit that vacant possession would not be given. Clause 17 did not purport to set out all the terms of the tenancy agreements. It is quite clear from the terms of clause 24 of the tenancy agreement made with Angel Cosmetics that, as of

30 April 2004, that agreement remained in force. It was indeed envisaged in that agreement that Angel Cosmetics might not obtain possession until the end of June. It was only then that the tenancy agreement would cease to exist if vacant possession could not be given. When the solicitors on behalf of the plaintiff purported to accept what they considered was the wrongful repudiation of the contract in their second letter of 30 April 2004 they did so without proper basis. That letter referred to the first letter of the same date the material parts of which read: We stress that our client is able and willing to complete the purchase of the Property on the terms of the Provisional Agreement. However, in view that Fantastic Natural Cosmetics (Macau) Limited is still occupying the Property, it becomes highly unlikely that your client will be entitled to call for completion of the sale and purchase of the Property on the 30th April 2004. Undoubtedly, the failure of your client to fulfill its obligations under the Provisional Agreement, the deliberate non-disclosure and/or the delay in the disclosure of material information render your client be the party at fault. In the circumstances, the failure to hand over the Property to Angel Cosmetics International Limited pursuant to the new lease on the 30th April 2004 shall amount to a wrongful repudiation of the Provisional Agreement by your client. In such an event, your client is obliged to return all the deposits paid by our client to yours under the Provisional Agreement in the total sum of HK\$1,900,000.00 on demand and to fully compensate our client for its damages arising from the default of your client. In the second letter, which purported to accept the repudiation, it was stated: Dear Sirs, Re: Rua de Sao Domingos No.16, Macau (the Property) We refer to our letter of even date. We put on record that the Property has not been handed over to Angel Cosmetics International Limited pursuant to the new lease on or before 5 p.m. today. In the circumstances, your client has failed to fulfill its obligation under the Provisional Agreement and undoubtedly this failure amounts to a wrongful repudiation of the Provisional Agreement on the part of your client which is hereby duly accepted by our client. We are therefore instructed to demand your client, which we hereby do, to return all the deposits paid by our client to yours under the Provisional Agreement in the total sum of HK\$1,900,000.00 at or before 1:00 p.m. of the 3rd May 2004 to our client or us receiving on behalf of our client and to fully compensate our client for its damages arising or due to the wrongful repudiation of the Provisional Agreement on the part of your client. Failing which, we have standing instruction to institution legal proceedings against your client for the recovery of the same without further notice. We hereby reserve all the rights and remedies of our client in this matter. Barlow SC, who appeared on behalf of the plaintiff, said in answer to a question from the court that both parties had proceeded on the basis that time was of the essence of the agreement and that indeed the defendant had refused to extend time for completion. On further analysis, however, whether or not time was of the essence under the agreement appears not to be of consequence to the outcome. In answer to queries raised by the court as to whether any request for extension of the time for completion had been made, reference was made to a letter of 20 April 2004 from the plaintiff's Macanese lawyers which referred to the fact that should the defendant not be able to obtain the vacation of the premises by Fantastic Cosmetics (Macau) Limited and hand over possession to Angel Cosmetics on or before 30

April the defendant would be considered to have failed to fulfil its obligations under the agreement. That letter continued: At the same time, we wish to put on record that our client is willing and able to complete the purchase on the terms of the Provisional Agreement. Furthermore, as a gesture of goodwill and on the basis totally without prejudice to any of the rights of our client and subject to the entry into a written supplemental agreement, our client will have no objection to postpone the completion of the sale and purchase of the property for a reasonable period of time for your client to vacate Fantastic Cosmetics (Macau) Limited and to render the new tenancy with Angel Cosmetics International Limited to become effective. The offer, therefore, was subject to the parties entering into some unspecified written supplemental agreement. Apart from that letter there was apparently, in the intervening time a brief without prejudice meeting at which no settlement or agreement was achieved. In my view the terms of the letters of 30 April 2004 are clear. The plaintiff chose to treat the defendant as having repudiated the contract and to accept that repudiation. It was not entitled to do so for two reasons. In the first place clause 17 did not warrant that Angel Cosmetics would be in possession of the premises. In the second place, in so far as clause 17 of the agreement provided for the existence of a tenancy with that company, there was nothing inaccurate in what was stated and the defendant was not a breach of any of its obligations under the agreement. I would therefore allow this appeal and make an order dismissing the action with an order nisi that the costs here and below be to the defendant. Hon Le Pichon JA: I agree. Hon Suffiad J: I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (A.R. Suffiad) Judge of the Court of First Instance Mr Barrie Barlow SC, instructed by Messrs Susan Liang & Co., for the Plaintiff/ Respondent Mr James W Campbell, instructed by Messrs Charles Yeung Clement Lam Liu & Yip, for the Defendant/Appellant 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 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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