

HONG KONG / JUDGMENT

MARBLE HOLDING LTD v. YATIN DEVELOPMENT LTD

COURT

Court of First Instance

DECIDED

2 February 2007

CASE / FILE NUMBER

HCA1127/2004

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bjbj HCA1127/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 1127 OF 2004

BETWEEN MARBLE HOLDING LIMITED Plaintiff and YATIN DEVELOPMENT LIMITED
Defendant

Before : Hon Burrell J in Court Dates of Hearing : 22-25 January 2007 Date of Judgment : 2
February 2007

J U D G M E N T

AUTONUMOUT By a provisional sale and purchase agreement dated 21 February 2004 (the agreement), the plaintiff agreed to buy and the defendant agreed to sell a commercial property in Macau for \$19 million. A deposit of 10% was paid over on 15 March 2004 in accordance with the terms of agreement. AUTONUMOUT Completion was due to take place on 30 April 2004 but it did not do so. The defendant refused to return the deposit of \$1.9 million. In these proceedings, the plaintiff claims the return of the deposit and damages and/or an account for profits made by the defendant following the non completion. AUTONUMOUT The plaintiff's primary claim is that completion did not occur because the defendant was in breach of an express term of the contract. AUTONUMOUT The relevant clauses in the agreement on this issue are : Clause Upon completion, the purchaser agrees to purchase the said premises subject to the existing tenancy. Clause 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. AUTONUMOUT Clause 17 is a specific addition to a standard provisional agreement. It was included for a purpose. The defendant submits that it was no more than information which created no rights or obligations binding the parties. AUTONUMOUT The plaintiff, with whom I agree, submits it was a clear and unambiguous statement of and reflection of the parties intention and understanding at the time of signing. AUTONUMOUT The facts, as I find them to be, are straightforward. The existing tenancy (Fantastic) was due to expire on 31 March 2004. Notice to quit had been served. An offer by Fantastic to renew the tenancy had been refused. A cheque for new rent for April 2004 had been returned. A new tenancy with Angel had been signed. A higher rent had been agreed. Angel had paid the proper deposit. AUTONUMOUT Thus the old tenant (described in evidence as troublesome) was going and a new lease for three years of \$120,000 was ready to commence on 1 April 2004. AUTONUMOUT On the basis of all of the above and on the basis that clause 17 was incorporated into the contract, the plaintiff offered \$19 million. The offer was accepted and the agreement was signed. AUTONUMOUT Towards the end of March 2004, it became apparent that Fantastic was not going to vacate the premises. Fantastic remained throughout April and were still in possession on the day of completion. The plaintiff refused to complete. The defendant insisted on completion and refused to defer it. The defendant s position was that it had tried its best to evict Fantastic and therefore they refused to return the deposit. AUTONUMOUT In May 2004, the defendant entered a new provisional sale and purchase agreement with a new purchaser for \$20 million which completed successfully soon afterwards. AUTONUMOUT The defence is twofold :

- (a) that clause 17 is not to be construed as a condition requiring the defendant to deliver up the premises with the new tenancy in place, or
- (b) that the plaintiff had waived this requirement by having orally agreed through the respective solicitors in Macau that the plaintiff would take over the problem of evicting Fantastic if they remained in possession on 30 April 2004. Issue (a) is purely a matter of law, issue (b) is purely a matter of fact. In my judgment, both must be resolved in the plaintiff s favour. Clause 17 (read in conjunction with clause AUTONUMOUT 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. AUTONUMOUT 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. Waiver? AUTONUMOUT If clause 17 is construed as a clear unambiguous express

condition, which it is, the defendant submits that the plaintiff, by an oral agreement, waived it. AUTONUMOUT The evidence on this issue came from the two solicitors in Macau, Dr Carlos Simoes, for the plaintiff and Dr Antonio Baguinho, for the defendant. AUTONUMOUT Simoes agreed that in late March, it became apparent that a problem may be looming in that Fantastic were refusing to vacate the premises. Dr Simoes agreed that he and Dr Baguinho had discussions about how to solve the problem. Various ideas were mooted. The high watermark of the defence case was that Dr Baguinho believed that an understanding had been reached that, provided the defendant used its best endeavours to evict Fantastic in time, the plaintiff would still complete the purchase on time even if Fantastic were continuing to be troublesome. In short, they would take over the task of evicting Fantastic after 30 April 2004. AUTONUMOUT In my judgment, Dr Baguinho has, in his own mind, upgraded a proposal into an understanding and further upgraded the understanding into a binding oral agreement, when, in fact, it never was more than a proposal. Indeed, I further accept Dr Simoes evidence that it was a proposal made by the defence side. AUTONUMOUT It is unnecessary to consider the legal principles relating to waiver and promissory estoppel save to say that a party relying on an oral agreement to waive the consequences of a clear, written, important condition of a purchase agreement carries a heavy burden and must adduce clear cogent and persuasive evidence. AUTONUMOUT In my judgment, the persuasive evidence in this case all goes in the plaintiff's favour. I have in mind the following matters :

- (i) I find it unimaginable that Dr Simoes would agree, on his client's behalf, to inherit a lawsuit by completing. Both sides agreed that it would take about a year to evict Fantastic through legal proceedings. There would be no benefit whatever for the plaintiff to consent to a self-inflicted headache. (ii) I accept that the plaintiff did propose a different solution, namely that completion be deferred to see if Fantastic would be evicted and Angel installed within a reasonable time. This proposal was rejected by the defendant. (iii) There was no evidence that Dr Simoes ever had any instructions from his client to agree to waive clause
- 17. I accept that Mr Johnson Lam, on behalf of the plaintiff, gave no such instructions and further that, a careful and competent solicitor such as Dr Simoes would not and did not advise his client to make such an offer or proposal. (iv) Proceedings to evict Fantastic were commenced by the defendant in mid April, well before completion. If there had been an agreement that the plaintiff would do this after 30 April, there was no need for the defendant to commence an action, in mid April, in which it would have no interest two to three weeks later.
- (v) I found Dr Simoes to be an impressive witness whose recollection of events and conversations could be safely relied on. (vi) In fairness to Dr Baguinho, he conceded certain difficulties regarding his evidence. I accept that he held a belief that there was an understanding but I find that in fact there was none. He, fairly, accepted that his recollection of the conversations did not amount to a binding oral agreement but merely an understanding . He also accepted an important weakness in his written evidence. He had

made two witness statements. The first relied on hearsay evidence in that he stated that it had been his partner, Alexandre Victorino, who had had the discussions about the problem with Dr Simoes. Mr Victorino did not make a statement or give evidence. In his second statement, Dr Baguinho corrected the first statement and said that it had been he who had spoken to Dr Simoes and not his partner. When asked, in evidence, to explain the change, he said that my partner told me that he had never spoken to Dr Simoes so it must have been me. These matters significantly diminish the value of the evidence advanced on the defendant's behalf. (vii) The correspondence and documentary evidence is consistent with the plaintiff's version of events. Documentary evidence in support of the contention that there was an oral collateral agreement is limited to a single email between the defendant's Macau solicitor (from Mr Victorino's email address) and the defendant's Hong Kong solicitor. (viii) The defendant's representative at trial was one of its directors Mr Chan Hin Wang. It became apparent that his first hand knowledge of the events was virtually nil. The basis of his knowledge was from attending company meetings after the event and by reading correspondence, none of which he had signed. The director who had been involved had neither made a statement nor gave evidence. Mr Chan's witness statement was littered with inadmissible hearsay. It carried very little weight. AUTONUMOUT The second matter upon which Mr Lee, for the defendant, relies in support of the waiver issue is the fact that, on 15 March 2004, the plaintiff consented to the balance of the deposit, a sum of \$1.4 million, be released to the defendant. AUTONUMOUT Clause 2(b) of the agreement states

- (b) ...Upon or prior to the signing of the Formal Agreement for Sales and Purchase, which means on or before 15/3/2004 further deposit shall be paid in the sum of HK\$1,400,000.00. Clause 16 states The Vendor and the Purchaser agreed that the initial deposit and further deposit shall be deposited with ... by the Vendor's solicitors until the Vendor's solicitor has proved that the purchase price of the said premises is sufficient to payoff the bank's mortgage and has a good title, then the same could be paid over to the Vendor. AUTONUMOUT The defendant's submission seems to be that the effect of clauses 2(b) and 16 is that the release of the deposit constitutes an acceptance of the vendor's title which the plaintiff cannot later dispute. The submission is without merit. As explained by Dr Simoes, in Macau, given the facts as they stood on 16 March 2004, the purchaser would have been in breach of the agreement if it had not released the money. Its right to insist on clause 17 remained wholly unaffected. AUTONUMOUT For all the above reasons, the plaintiff's claim for the return of the deposit of \$1.9 million must succeed. Plaintiff's claim for an account AUTONUMOUT In addition to the claim for the return of the deposit, the plaintiff also seeks further damages and/or an account arising out of the fact that the property was soon sold to another purchaser for \$20 million. The claim is for \$1 million less agreed expenses of \$250,524.80. AUTONUMOUT The basis of the claim is that having wrongfully repudiated the contract, the defendant holds the property on trust for the plaintiff. In breach of trust, it then re sold the property at a profit. That profit is the plaintiff's. AUTONUMOUT I think this claim is flawed for two reasons. AUTONUMOUT Firstly, because of the remarks of Lord Nicholls of Birkenhead in A.G. v. Blake [2001] AC at page 285 where he said ...An account of

profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. AUTONUMOUT Secondly, as a result of the failure to complete, the plaintiff still had \$17.1 million which it could have invested in other property and made a profit. Moreover, Mr Lam informed the court that the purpose of the purchase was a long term investment, not a quick profit. In all the circumstances, I think that a further award of approximately \$750,000 would be a windfall which the plaintiff cannot reasonably expect and to which it is not legally entitled. AUTONUMOUT To conclude, there will be judgment for the plaintiff in the sum of \$1.9 million with interest at prime plus 1% from 3 May 2004. AUTONUMOUT As to costs, the plaintiff, in its written submission seeks indemnity costs. I have considered but reject the request for indemnity costs. I do, however, think that the plaintiff should get all its costs even though the second limb of its claim has been unsuccessful. The real issue in this case has always been the deposit. The defendant has wrongfully retained it throughout and I think that costs should follow that event. AUTONUMOUT There will be a costs order nisi in the plaintiff's favour. (M.P. Burrell) Judge of the Court of First Instance High Court Mr Barrie Barlow, instructed by Messrs Susan Liang & Co., 1udk 1udk K L M N O P Q R S T U V &`#\$ & 6" ABC-j.dot setup Microsoft Word 9.0 #`=D Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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