

HONG KONG / JUDGMENT

METRO WORLD ENGINEERING LTD v. CHAN YUK SING

COURT

Court of First Instance

DECIDED

14 May 2007

CASE / FILE NUMBER

HCA1205/2005

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bjbj Hon Chung J in Court Dates of Hearing: 26 to 29 March and 19 April 2007 Date of Handing Down Judgment: 14 May 2007

J U D G M E N T

Introduction

The plaintiff commenced this action in June 2005 claiming the repayment of \$650,000 from the defendant. It is said that the said sum was a loan advanced to the defendant by way of 3 cheques during the period from November 1999 to May 2000. The defendant admits the receipt of the cheques and the said sum, but denies that it was a loan. He asserts in essence that the said sum was partial payment by a Mr Wong Kwok Fai Davis (Wong) for participating in a village-house development.

Background

Some of the background facts are undisputed and are as follows. Wong was the person-in-charge of the plaintiff's office. The evidence adduced at trial is not entirely clear, but he also appears to be in charge of the plaintiff's financial affairs. What is clear from the evidence is that he was able to transfer funds between the plaintiff's bank account and his personal accounts. The plaintiff carried on the business of construction and engineering. Kingland Concrete Drilling Co. Ltd. (Kingland) was one of the plaintiff's sub-contractors. The defendant was Kingland's proprietor. Wong became acquainted with the defendant as a result. Apart from Kingland's business, the defendant was also involved in the development of, and/or trading in, small village houses in the New Territories. The defendant collected the following cheques from Wong:-

- (a) a cheque of \$100,000 dated 22 November 1999 drawn on Wong's bank account;

- (b) a cheque of \$450,000 dated 12 January 2000 drawn on Wong's bank account;
- (c) a cheque of \$100,000 dated 8 May 2000 drawn on Wong's bank account. Before the defendant received the first cheque from Wong, in around mid-November 1999, Wong and the defendant went to the office of Tsang Ka Kau (Tsang), a registered surveyor who handled the village house development project for the defendant. The purpose of Wong's visit there is disputed; the defendant claims that Wong went there to find out the details of the project whereas the plaintiff claims that Wong merely accompanied the defendant to go there. Wong was decreed bankrupt by the court on 23 July 2003. Witnesses Testimony The plaintiff's only witness was Wong. The defence called the following witnesses to testify:-
- (a) the defendant;
- (b) Tsang;
- (c) Ng Wing Kong (), who took part in the village house development project but later reached an agreement with the defendant to withdraw from it;
- (d) Siu Kai Ming (), who took over the defendant's share in the village house development project. In assessing credibility for the purpose of making a finding of fact, the tests adopted for such assessment are as those stated in the judgment of *Star Glory Investment Ltd. v. Kai Tuo (H.K.) Technology Co. Ltd. and Others*, HCA 3523/2002:- The assessment of a witness's credibility and/or reliability is a task frequently undertaken by the court in litigation (in fact, very often an essential task). I consider the following to be the appropriate test to adopt:- There are two objective tests for assessing a witness's credibility regarding a matter to which he has testified:-
- (a) whether that part of his testimony is inherently plausible or implausible;
- (b) whether that part of his testimony is, in a material way, contradicted by other evidence which is undisputed or indisputable (an example often given of such evidence is contemporaneous documents). Further, where it is shown that a witness has been discredited over one or more matters to which he has testified (using the above tests), this fact is relevant to the assessment of his overall credibility. Likewise, regard may be had to a witness's motive for deliberately not giving truthful testimony. For example, telling the truth may prejudice his interest, or a just determination of the litigation may affect his interest . (See, for example, the decisions in *Chiu Chi Tong v. Lau Chong Sai & Another*, HCA 765/2002 (para. 28) and *Yu Ming Investment Ltd. v. Pang Ru Chuan*, Richard HCA 814/2002 (para. 13)) . On the other hand, the reliability of the witness is concerned with his ability to accurately observe, recall and recount the relevant events. Finally, for the avoidance of doubt, even though the testimony of individual witnesses is considered below under separate sub-headings, I have also considered their testimony in the light of the totality of evidence.
- (1) Tsang and Siu The significance placed by the defendant on the testimony of Tsang and Siu is the inference to be drawn from their meetings with Wong. Tsang testified to the effect that, in mid-November 1999, Wong arrived at his office with the defendant and Ng. Tsang

understood the meeting was to enable Wong to examine the documents relating to the village house development project. Consequently, he gathered the relevant files and explained the contents of some of the documents therein to Wong. Wong was mainly interested in the progress of the development project and the time taken for it to complete. Siu's testimony is in effect that he met Wong on 3 occasions in 2003. By this time, the 3 sums the subject-matter of this action have already been paid to the defendant. According to Siu, during those meetings, Wong raised the following matters:-

- (1) both he and the defendant were both involved in the development project;
- (2) he asked Siu when the proceeds from the development project would be available for distribution;
- (3) he mentioned he had invested a sum of \$700,000 into the development project. Siu also testified that initially he was unwilling to meet Wong because he could not find any document showing Wong's involvement in the development project. He only did so because the defendant also said Wong had an interest in it. It was unclear from the plaintiff's written closing submissions whether the plaintiff contends Tsang and Siu should be regarded as untruthful witnesses. However, the plaintiff clarified during the hearing on 19 April 2007 that it would not ask the court to treat Tsang or Siu as dishonest witnesses. The plaintiff asks the court not to rely on their testimony essentially for the following reasons. It is likely Tsang's professional duties would require him to meet many people regularly. Tsang's recollection of his meeting with Wong could therefore have been faulty. In this connection, the plaintiff places emphasis on matters over which the testimony of the defendant, Ng and Tsang differ from each other. In relation to Siu, the plaintiff points out he admitted in testimony he was unclear about the precise dealings between Wong and the defendant. I disagree with the plaintiff. In relation to Tsang, there is no evidence of his memory having been affected by the need for him to have regular meetings with others (including his clients). In fact, this aspect has not been gone into when he testified. The plaintiff should not be permitted to raise this in its closing submission without giving the witness (or the defence) a fair opportunity to respond: Phipson on Evidence (2005) 16th Ed., para. 12-12. In any event, Tsang has given clear and definite testimony regarding his meeting with Wong. He expressed no hesitation with regard to the identity of the people he met on that occasion. Further, there is no evidence the meeting with someone who was not a client (such as Wong) was a common experience for Tsang. The discrepancies in the testimony of Tsang, Ng and the defendant relied upon by the plaintiff include the following:-
 - (a) according to Tsang, the so-called inspection by Wong was in fact Tsang explaining to Wong some of the documents kept by Tsang. On the other hand, the defendant said Wong inspected some of the documents and asked Tsang questions. Ng said Wong was looking at the documents all the time while Tsang explained the documents to Wong;

- (b) Tsang and the defendant said the inspection lasted for about half an hour whereas Ng said it lasted for about 20 minutes. I do not find the discrepancies to be material. They are relatively trivial differences which should not affect the witnesses credibility or reliability. The plaintiff also points out that Tsang testified to the effect after his meeting with Wong, the defendant spent another half hour or so with Wong inside the conference room after which:- the Defendant said to Tsang that he and Wong had reached an agreement to work together (para. 90, plaintiff's written submissions). The plaintiff says this part of Tsang's testimony is inconsistent with the alleged contribution agreement, especially with regard to when the agreement was reached. But as the plaintiff fairly accepts, the said meeting between the defendant and Wong was not one where Tsang has paid any attention. His testimony does not positively assert the defendant and Wong had reached an agreement there and then. Properly understood, Tsang only testified to the effect that they told him they had sorted out the matters among themselves; this is not inconsistent with the defendant's pleaded case. In relation to Siu, his admission that he was unclear of the precise dealings between Wong and the defendant is in short irrelevant. What is relevant is his testimony that Wong made claims to Siu about Wong's involvement in the village-house development project. Siu's testimony over this is also clear and definite. I therefore find both Tsang and Siu to be honest and reliable witnesses.
- (2) The Defendant and Ng I also accept the defendant and Ng to be truthful and reliable. The plaintiff's criticisms of their credibility appear to fall within various headings in its closing submissions, such as Different versions of the basis of the Defendant's Case The Defendant's and Ng's joint efforts to mislead and The mystery of the 2 Supplementary Agreements (and others). The criticisms will be discussed below. But before discussing the individual criticisms, I pause to note that it is quite obvious neither Wong, the defendant nor Ng were people of much sophistication; nor do they keep accurate and/or detailed records of their business dealings. Take the example of the plaintiff's case, which is that the cheque payments were a loan. The plaintiff did not ask the defendant to sign any document to evidence the loan. I now turn to the individual criticisms. First, the defendant's pleaded case is that the oral contribution agreement was made in early November 1999 at Wong's office in Kowloon Bay. The defendant changed the location to another address in Kowloon Bay in his second witness statement. I accept the defendant's explanation that the mis-stated location was due to his earlier faulty memory about this. Second, in the parties pre-action correspondence, the defendant's solicitors alleged (in April 2004 and May 2005) that the oral agreement was reached between the plaintiff and the defendant, and not between Wong and the defendant. Wong admitted in his testimony he was in effect the boss in the plaintiff's office. The practice of businessmen carrying on their businesses through private companies (which they control) is common. In these circumstances, the stance taken by the defendant in the pre-action correspondence is not necessarily inconsistent with his pleaded case. Third, the defendant's testimony was that the oral agreement was discussed at the end of October 1999 and the beginning of November 1999. An agreement was reached by 1 November 1999. On the other hand, Ng's testimony was that the agreement was reached

between the defendant and Wong mid-October 1999, prior to the date of the first cheque (22 November 1999). Ng also testified the agreement was made in a tea house. I do not consider the above difference in the witnesses testimony to be material; it could well be caused by differences in recollection and/or narration. Fourth, the defendant's document which allegedly recorded the agreement already reached with Wong referred to a company called Sing King Investment Co. Ltd. (Sing King) rather than the defendant. The defendant's testimony was in short that Sing King was a company which he controlled. Whether the contractual document named the defendant or Sing King therefore has little practical significance to the transaction between Wong and the defendant. Fifth, there is evidence that the defendant and Ng have signed contractual documents which contain terms which are said to be inaccurate. One of the defendant's documents is headed Agreement for the Termination of the Joint Development Rights (undated) (the termination agreement). The reason given therein for Ng's withdrawal from the development project was Sing King's failure to fulfil its contractual obligations. However, both the defendant and Ng testified that the real reason for Ng's withdrawal was Ng's financial problems. The termination agreement provided for Ng's withdrawal to be effective immediately; Ng also has to be compensated immediately. But the defendant's testimony is that Ng's withdrawal (and Ng's entitlement to the repayment of his share) would have to depend on a new partner taking over Ng's share. I accept the explanation given by the defendant and Ng that the termination agreement was so worded because there were other investors behind Ng. The language used by the termination agreement would not expose Ng's then financial problems to those investors. Sixth, Ng's testimony regarding where the termination agreement was signed differs: at one time he said it was in a restaurant in Tseung Kwan O but he also said it was in the carpark in Hang Hou Village. I find this to result from Ng's faulty memory about this aspect. Seventh, the defendant and Ng have signed two documents both called supplementary agreement and dated 9 December 1997. In short, the documents stipulated that Ng's share in the development project totalled \$7.22 million. A time-table for Ng to pay his share by instalments was set out. There were, however, differences in the wordings of the documents. The more important differences are:-

- (1) difference in timing of one of the instalments;
- (2) a 2-month difference in the time period for construction of the village houses. The response of the defendant and Ng to the above was that their business relationship was based more on trust than written documents. Therefore, they were not very attentive to the details in the records. Taking into account things like the witnesses background, the type of transaction in question and the nature and extent of the differences set out above, I do not find the criticism to be a valid basis for doubting their credibility or reliability. Eighth, the amount Ng was originally required to pay for his share in the development project was \$7.2 million. But, according to the defence, the amount Wong promised to pay was merely \$4.6 million. This makes the defence case inherently implausible. I disagree. Because Ng wanted to withdraw, he was not entitled to the full repayment of his earlier payments. Indeed, the evidence was he was only repaid part of his contribution. Also, the property market was

suffering a decline at the time. Hence, when Wong agreed to take over Ng's share, there is nothing extraordinary he was only asked to pay a lesser sum than what Ng was asked to pay in the beginning. The plaintiff also points out the defendant and Ng have been long time friends, implying that Ng could have given untrue testimony to help the defendant. I have borne this in mind when assessing their credibility. There are still other criticisms which I will not set out in full, for example, the originals of many of the contractual documents (which the defendant disclosed during discovery) have been lost. Suffice it to say I have considered them and do not find the credibility or reliability of the defendant or Ng is affected by them.

- (3) Wong On the other hand, I do not accept Wong to be an honest witness. His testimony that the cheques were given to the defendant by way of a loan is inconsistent with the testimony of Tsang and Siu (see para. 15 and 16 above). I also agree with the defence that the cash book, which Wong claims was part of the plaintiff's accounts regarding the plaintiff's own transactions, is in fact a record of payments by, or to, Wong himself. Wong initially asserted he was never involved in village house development projects. Upon further cross-examination, he admitted he was once involved but claimed that the houses were only workers accommodation. I consider that to be contrived. The defence points out Wong's motive for commencing this action on the basis that the loan was granted by the plaintiff and not Wong is because Wong has since July 2003 been adjudged bankrupt. Because of the conclusions reached above, I do not find it necessary to make a finding about this. Findings of Fact Based on the above, and the documentary evidence adduced at trial, I find that the sum of \$650,000 was part of Wong's payment for participating in the development project. Wong has breached the agreement by failing to make further payment(s).

Conclusion

The plaintiff's claim is dismissed. The plaintiff accepts in its closing submissions that the outcome of this action turns entirely on whether the plaintiff's case, or the defendant's case, is accepted by the Court: see para. 1 and 95 thereof. In the paragraphs above, I conclude that I should accept the defendant's case and reject the plaintiff

- s. There is therefore strictly no need to discuss the matter further. I shall do so for completeness. The defence case is that the agreement was reached between the defendant and Wong, not between the defendant and the plaintiff. For this reason alone, the plaintiff's claim should be dismissed. Further, although there is no counterclaim, the plaintiff never argues that, even on the defendant's own case, the plaintiff (or Wong) should still be entitled to repayment of the sum claimed. At least implicitly, this must have been because the plaintiff does not challenge the defendant's right to forfeit Wong's payments by virtue of Wong's breach of the contribution agreement (and/or to set it off against the defendant's loss (if any)). Costs Order The parties accept that costs should follow the event. There will accordingly be a costs order that the costs of this action (including any reserved costs) be paid by the plaintiff to the defendant to be taxed if not agreed. Despite the defendant's

argument based on Wong s credibility, I do not consider a taxation on indemnity basis to be justified. (Andrew Chung) Judge of the Court of First Instance High Court Mr Alfred Liang, instructed by Messrs David Wong & Co., for the Plaintiff Mrs Dora Chan, instructed by Messrs Hau, Lau, Li & Yeung, for the Defendant PAGE 1udk 1udk F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A(\$0N i\$&B(hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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