

HONG KONG / JUDGMENT

MICRO POWER LTD v. MASTER PROFIT CORPORATION LTD

COURT

Court of First Instance

DECIDED

20 April 2007

CASE / FILE NUMBER

HCA1764/2006

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bjbj HCA1764/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 1764 OF 2006

BETWEEN MICRO POWER LIMITED Plaintiff and MASTER PROFIT CORPORATION LIMITED
Defendant

Before : Hon Saw J in Chambers Date of Hearing : 28 March 2007 Date of Judgment : 20 April 2007

J U D G M E N T

Background

AUTONUMOUT This is an application for summary judgment under Order 14, rule 3 of the Rules of the High Court. AUTONUMOUT The plaintiff is the current registered owner of the property known as 2/Floor, King s Tower, 480 King s Road and 15-23A Tsat Tsz Mui Road, Hong Kong (the Property). By a lease dated 12 August 2003 (the lease), the Property was let by the predecessor-in-title of the plaintiff to the defendant for a term of three years commencing from 12 August 2003. AUTONUMOUT Clause 8(a) of the lease provides as follows: If the Tenant shall be desirous of taking a tenancy of the said premises for a further term of three (3) years from the expiration of the said term of tenancy, the Tenant shall not less than three (3) months before the expiration of the term granted give to the Landlord notice in writing of such desire AUTONUMOUT Clause 5(11) of the lease provides as follows All notices under this Lease shall be in writing. Any notice to the Tenant shall be sufficiently served if left addressed to the Tenant at the said premises or sent to the Tenant by registered post or left at the Tenant s last known address or place of

business in Hong Kong and any notice to the Landlord shall be sufficiently served if delivered to the Landlord by registered post or left at his last known address or its registered office in Hong Kong. The last date upon which a notice to exercise the option for a further term of three years could be served was 11 May 2006. The dispute AUTONUMOUT It is the plaintiff's case that the tenant did not give any notice to the plaintiff to exercise the option on or before 11 May 2006, and in such circumstances, the plaintiff is entitled to possession of the premises. The defendant remains in possession of the Property and the plaintiff claims vacant possession together with mesne profits, fees, rates interest on the above amounts and costs. AUTONUMOUT The defendant says that on 1 May 2006, it sent to the plaintiff by ordinary post a document purporting to exercise its option under the lease for a further three-year term. The credibility issue AUTONUMOUT There have been a number of affirmations/affidavits filed on behalf of the plaintiff and the defendant and the following can be discerned from these. AUTONUMOUT Ming Louis, a manager of the plaintiff company, deposed that the date for exercising the option having passed, the solicitors for the plaintiff wrote to the defendant in the following terms We are instructed by our client to remind you that the tenancy of the above premises shall expire on 11th August 2006 and you are requested to vacate and deliver vacant possession of the above premises to our client at the expiration of the term of the tenancy i.e. 11th August 2006. AUTONUMOUT He says that as a direct consequence of the solicitors letter, on 30 May 2006, a Ms Liza Wong telephoned him on behalf of the defendant. It was the essence of his evidence that Ms Wong acknowledged that there had been a failure to serve the notice to exercise the option in time but nevertheless she wished to discuss this and endeavour to remedy the situation. He says that he advised Ms Wong that the matter was in the hands of the plaintiff's solicitors and there was nothing that he could do. AUTONUMOUT On 2 June 2006, he received another telephone call from a Ms Wong and that on the same afternoon, a document which purported to be a notice to exercise the defendant's option under the lease was received by the plaintiff by facsimile. AUTONUMOUT It was at the heart of Mr's evidence that this document had been created retrospectively in an attempt to remedy what must have been an oversight on the part of the defendant. AUTONUMOUT On the other hand, Ms Wong Mui, Liza, affirmed that she was a shareholder and director of the defendant company which operated the premises as a mahjong and snooker club. She said that Mr Chong Ping, who was also a shareholder and director, had advised her that he had sent a letter to the plaintiff to exercise the option to renew the tenancy on or about 1 or 2 May 2006 and that a copy of that letter was kept in the premises. Having located the letter bearing the date of 1 May 2006, she called the plaintiff's solicitors to advise them that the defendant had exercised its option on 2 May 2006 and that she would fax a copy of that letter to the solicitors. She said that the solicitors said they had no instructions in that regard and referred her to the plaintiff. As a consequence, she called Mr Tse on 1 June 2006 in the afternoon and told him that the plaintiff had renewed the tenancy on 2 May 2006. Mr Tse told her that they had never received such a letter. As a result, she made a photocopy of the letter and, having endorsed in manuscript the following Please take the trouble to discuss with (your company) on the matter relating to the renewal of tenancy, waiting for reply, thank you! This she said she then faxed to Mr Tse. AUTONUMOUT In addition to Ms Wong, an affirmation was filed on behalf of the defendant by Chong Ping. He said it was his responsibility after the defendant had entered into

the lease of the premises to ensure the payment of their obligations on time and to this effect he had endorsed on the file kept in the premises the respective renewal dates and other relevant matters. He says that on about 30 April 2006 he arranged for the preparation of a notice in Chinese to the plaintiff to exercise the option to renew. He says further that in the evening of 1 May 2006, he signed that document, put it into an envelope and posted it to the plaintiff. He says that he sent the notice by ordinary post because this was the method previously adopted when sending cheques to the plaintiff for the payment of rent, management fees and the like and that there had never been any problem in the past. AUTONUMOUT With respect to all of the affirmations that have been placed before me, counsel have referred to a number of documents which are said to evidence and support the respective positions. On behalf of the plaintiff it is said that the fact that the plaintiff had arranged for the property to be advertised for sale or further lease is clearly indicative of its assertion that there had been no proper renewal exercise of the option to the lease. It is said that the letters written on its behalf by its solicitors to the defendant are likewise entirely consistent with this. For the defendant it is said that its response has been at all times consistent with its assertion that it had renewed the lease. AUTONUMOUT As can be seen from the above, there is a critical issue of credibility between the assertions made on behalf of the plaintiff and the assertions made on behalf of the defendant. The plaintiff's position is that, for whatever reason, the notice of renewal of the lease was neither sent to nor received by the plaintiff. For the defendant, it is said not only was the renewal sent to the plaintiff but that it was received by the plaintiff and either ignored or overlooked. The resolution of the above conflict is integral to the determination of the plaintiff's claims. I am in no position nor am I entitled, save in exceptional circumstances, to attempt to resolve that conflict. Whether one of the respective positions is inherently improbable is a matter for the trial judge. A point of law AUTONUMOUT It is asserted by the plaintiff that pursuant to the terms of the lease service by ordinary post is not permissible and that as a fundamental principle an option such as that granted to the defendant must be exercised in strict compliance with the provisions of the lease. It is immediately apparent that Clause 8(a) of the lease is itself silent on the manner in which notice to exercise the option is to be served on the plaintiff. However, Clause 5(11) provides that notices :

- (1) to the tenant shall be sufficiently served if left addressed to the Tenant at the said premises or sent to the Tenant by registered post or left at the Tenant's last known address or place of business in Hong Kong ; (2) to the Landlord shall be sufficiently served if delivered to the Landlord by registered post or left at his last known address or its registered office in Hong Kong . AUTONUMOUT The plaintiff points out that Clause 5(11) does not provide that service by ordinary post will be regarded as sufficient for the purposes of the contract. Likewise it is said that the specified method of service are mandatory and must be strictly complied with for a notice to be valid. AUTONUMOUT The defendant for its part for the purposes of this application, but not otherwise accepts, that for it to succeed it must show that the plaintiff actually received the notice. But assuming for the purposes of this application that it could do that, its position is that the plaintiff's assertion as to the invalidity of such a notice is not supported by authority or is at the very least a live issue. AUTONUMOUT A number of

authorities were referred to by counsel. To my mind, for the purposes of this application, the most critical is the unreported judgment of the Court of Appeal in CACV77/2004, a judgment delivered in the Chinese language, the translation of which has been agreed by both counsel. In that case, it was a ground of appeal (albeit that it transpired unnecessary to determine given the court's findings on other matters), that according to the tenancy agreement, in that case, the landlord had to serve a notice of termination of a tenancy agreement by registered post and that because the defendants had served the notice of termination by ordinary post therefore the notice had been improperly served and was invalid. AUTONUMOUT In giving judgment of the court Cheung JA said this

25. Nonetheless, this court does not agree that the notice of termination of tenancy agreement can only have legal effect if it is served by registered post.
26. Clause 4(k) of the tenancy agreement reads as follows Any notice required to be served hereunder shall be sufficiently served on the Tenant if delivered to them by prepaid mail at their registered office or last known address in Hong Kong or left on the Premises and shall be sufficiently served on the Landlord if delivered to it by registered post at its registered office or last known address in Hong Kong. A notice sent by registered post shall be deemed to be given at the time when in due course of post it would be delivered at the address to which it sent.
27. The principle for exercising the tenant's rights made the tenancy agreement is that the tenant must strictly observe and comply with the terms and conditions for exercising such rights. See : Interpretation of Contracts by Lewison, 2004 edition, pages 501 to 502.
28. This court does not disagree with the legal principle. But this court does not agree that the notice would be invalid if the defendants adopted another mode of service. Although under Clause 4(k), modes of service of notice by mail by the landlord and by the tenant differ, both modes are regarded as sufficient service. If the relevant words are sufficiently served, this court is of the view that the modes of service only involves the question of how the Defendants are able to prove that the notice has been effectively served, an issue of proof. If the Defendants served the notice by registered post, this proved that the notice had been sufficiently served. Clause 4(k) was intended to avoid the dispute between the parties on whether the Defendants had served the notice. If, on the other hand, the Defendants only served the notice by ordinary post, they would have difficulty in adducing evidence to prove whether the Plaintiff has received the notice or not. The purposes of requiring the tenant to serve the notice by way of registered post under Clause 4(k) were only to avoid this type of dispute, and at the same time protect the landlord. Nonetheless, if the Plaintiff had actually received the notice, the modes of service of notice do not affect the legal effect of the notice received. Therefore, this court does not agree with the submission that registered post is necessary for the notice to terminate the tenancy to have legal effect. AUTONUMOUT These observations are particularly relevant in the instant proceedings. AUTONUMOUT Pao, counsel for the plaintiff, urges upon me that and the observations by the Court of Appeal are obiter and that I am free to depart from them. Whilst this may be so, it nevertheless is in my

opinion clear beyond peradventure that the same issues are joined in these proceedings. In this regard it is useful to observe that in the decision of the English Court of Appeal in the *Yates Building Company Ltd v. RJ Pulleyn & Sons (York) Ltd* (1975) 237 EG 183, Lord Denning (in a case where it was acknowledged that a letter had been received within time to exercise an option under a sale and purchase agreement, but that it had been sent by ordinary post as opposed to registered post) considered that the means by which the other party receives the option (registered post or otherwise) is not the critical issue. He said as follows Orr LJ [sitting with Lord Denning and Lord Scarman] gave this instance in the course of the argument. Suppose there were a postal strike during the last week, and the buyer, to make sure it was in time, sent the letter by special messenger, would this not be sufficient? Looking at the object of this provision, it seems to be this. It is inserted for the benefit of the buyer so that he can be sure of his position. So long as he sends the letter by registered or recorded delivery post, he has clear proof of postage and of the time of posting. But if the buyer sends it by ordinary post, he will have no sufficient proof of posting, or of the time of posting. In that case, if the seller proves that he never received it, or received it too late, the buyer fails. None of those reasons apply, however, when the seller does receive it in time. AUTONUMOUT To my mind, if it is established that the plaintiff received the defendant's letter purporting to exercise its option, then in the light of these authorities, there is clearly a dispute of some moment as to the validity of the exercise of the option. Order 14 AUTONUMOUT In *Ng Shou Chun v. Hung Chun San* [1994] 1 HKC 155, the headnote reads in part Per curiam (Per Godfrey JA) In an application under O 14 or O 86 RSC it is not a proper course for the court to embark on a mini-trial of the action on affidavit evidence. In future, it is sufficient for the court to ask itself whether the defendant's assertions are believable, not whether they are to be believed. *National Westminster Bank v. Daniel* [1993] 1 WLR 1453 applied. *Murjani BK v. Bank of India* [1990] 1 HKLR 586 considered. AUTONUMOUT In *Sin Hua Bank Ltd v. Sung Foo Kee Ltd* [1993] 1 HKC 65 at 67, Litton JA, as he then was, said Where there are real disputes of fact, or where the factual matrix is unclear, it would be a strong remedy for a court to give summary judgment to the plaintiff. By giving unconditional leave to defend, the court is, in effect, postponing judgment for the plaintiff if the plaintiff turns out eventually to be right. Any delay can be compensated for in interest. He then went on cite with approval the dictum of Sir John Donaldson MR in *Lloyds Bank v. Ellis Fewster* [1983] 1 WLR 559, 562B In a case where the triability of the issue depends upon evidence as opposed to law, I would think it a very surprising situation if the Court of Appeal was prepared to disturb the judge's view. If one judge thinks there is a triable issue, it would be surprising if two or three judges think there is not. AUTONUMOUT Finally, in this regard, *Man Earn Ltd v. Wing Ting Fong* [1996] 1 HKC 225 at 228, Godfrey JA said Unless it is obvious that the defence put forward by the defendant is frivolous and practically moonshine, O 14 ought not to be applied : see *Codd v. Delap* (1905) 92 LT 510, per Lord Lindley AUTONUMOUT Applying these observations as I must to the instant application, I am satisfied that it is not appropriate to grant to the plaintiff summary judgment. AUTONUMOUT The defendant's proposition that the plaintiff did receive the notice to exercise the option under Clause 5(11) of the lease is to my mind believable. Whether or not this occurred is in the final analysis a

matter of the credibility of the witnesses and what proper inferences could and should be drawn from their evidence. AUTONUMOUT The plaintiff s application is therefore dismissed, and I order that the costs be costs in the cause. It has been urged upon me by Mr Chan, SC for the defendant that the proper order for costs should be that the defendant s costs be paid by the plaintiff on the basis that the plaintiff was at all times aware of the defendant s defence in these matters. I am afraid I do not agree and I accept that it is appropriate to make the order that I do. (Darryl Saw) Judge of the Court of First Instance, High Court Mr Jin Pao, instructed by Messrs Baker & McKenzie, for the Plaintiff Mr Chan Chi Hung, SC, instructed by Messrs W.K. To 1udk 1udk & `#\$ & 6" ABC-j.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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