

HONG KONG / JUDGMENT

OTIS ELEVATOR CO (HK) LTD v. CHEUNG YIP CHUEN DAVID

COURT
District Court

DECIDED
21 July 2007

CASE / FILE NUMBER
DCCJ5316/2005

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bjbj DCCJ5316/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 5316 OF 2005 BETWEEN OTIS ELEVATOR COMPANY (HK) LIMITED Plaintiff and CHEUNG YIP CHUEN DAVID Defendant Coram: H H Judge H C Wong in Chambers Date of Hearing: 21 July 2006 Date of Delivery of Decision: 21 July 2006 D E C I S I O N The plaintiff applies for summary judgment against the defendant for the purchase and installation of two lifts in the building known as Tak Cheung Commercial Building (hereinafter referred to as the said building) under a contract evidenced in writing by a quotation agreed to and signed by the defendant on 10 August 2004. The defendant filed a defence and counterclaim on 23 December 2005. The plaintiff amended the statement of claim with leave on 24 March 2006. On 4 April 2006, the plaintiff filed an inter parte summons for summary judgement against the defendant. The defendant, in opposition, filed an affirmation on 22 April 2006, setting out his full defence and they are as follows:

- (a) The defendant, Mr Cheung, was not the contracting party. He was merely an agent for the company, Four Seas Industrial Company Limited (hereinafter referred to as The Four Seas). He pointed out, all of the plaintiff s correspondences, including the quotations, the invoice and other letters were all addressed to Four Seas Industrial Company Limited with Four Seas address.
- (b) The work under the contract was not duly completed and performed. Mr Cheung referred in his affirmation to the plaintiff s failure to install the CCTV system and the announcement system inside the lifts and the poor working conditions of the two lifts.
- (c) The plaintiff failed to arrange payment terms by a leasing agreement. This was in breach of a promise made to Mr Cheung. Thereafter, when the plaintiff s invoice for the charges were delivered, the plaintiff refused to accept four post-dated cheques from the defendant, in breach of the plaintiff s agreement previously. Addressing the first defence raised by the defendant: party to the contract It is apparent from the documents exhibited, the quotation was returned and signed by the defendant, Mr Cheung. Mr Cheung had first signed the

faxed quotation, putting down his name and his phone numbers and the date of signing. Subsequently, he signed on the original quotation again when it was delivered to him by hand. Mr Chan, counsel for the defendant, argued that since the plaintiff's correspondences referred to the defendant's name as S O, ed the quotation, contrary to this claim, there is evidence that Mr Cheung paid the first instalment of \$170,000 by his personal cheque on 12 October 2004 and subsequently the four instalment cheques were issued by another company of which Mr Cheung is a 50 per cent shareholder. Even if what Mr Cheung claimed is true, that he was merely acting and contracting on behalf of Four Seas; in law, Four Seas may only be a disclosed principal and Mr Cheung is still liable as its agent. Furthermore, the record shows Four Seas is not a tenant in the said building. Mr Cheung, on the other hand, is a tenant of a number of units of the said building. The fact that the quotation and other correspondences from the plaintiff referred to your company or putting the name and address of Four Seas below Mr Cheung's name may be construed as merely Mr Cheung's address. In any event, as I referred to earlier, even if Mr Cheung had contracted as an agent of Four Seas he is still liable and he can still turn to Four Seas to be reimbursed if he is minded to do so. Mr Cheung criticised the plaintiff's work to be sloppy and produced a document from the EMSD conferring two permits for the two lifts to be operated at the end of December 2004, the plaintiff had sent it to one Fortune Capital Development Limited. When checking against the land search record it is found that Fortune Capital Development Limited was, in fact, the landlord to Mr Cheung, it having obtained an 11-year lease from the owner of the building. The second defence, (b) the plaintiff's work had not completed. The defendant claimed that he is entitled to set-off the damages suffered because of the plaintiff's failure to install certain items, and the work was defective for which the defendant has counterclaimed for damages. Unfortunately, Mr Cheung failed to quantify his loss in the counterclaim or in his affidavit. Therefore, it is not possible to assess what amount should be set off against the plaintiff's claim without particulars being disclosed. The plaintiff, of course, denied the defendant's allegation of defects. This can be seen from Mr Wong's second affirmation of 6 May 2006. These are, of course, matters that can be explored when and if the defendant particularised his loss and damages in his counterclaim. The third defence, (c) the plaintiff failed to arrange leasing terms and further, refused to accept payment by instalments. There was nothing in the 10 August 2004 quotation signed by the defendant that referred to payment by leasing terms. The payment terms clearly stipulated in the quotation accepted by Mr Cheung that 20% was to be paid upon acceptance and signing of the quotation, a further 50% upon delivery and installation work commencing, and the balance of 30% to be paid upon completion and the issue of the relevant permit. It is clear from the documents that the plaintiff had obtained permits from the EMSD to operate those two lifts and therefore the balance of payment should be paid immediately. Under the contract, therefore, there was no machinery leasing terms agreed. Furthermore, this was not acted on by Mr Cheung either, because he could have arranged leasing terms with his own banker himself if he so wished. In any event, he did attempt to pay the \$680,000 balance by four post dated cheques. The first was dated 25 July 2005, the fourth and last one was 30 June 2006. This indicated that he had accepted that the payment was due and owing when

these cheques were issued. If the plaintiff had not rejected these payments, the plaintiff would have been fully paid by now. From the evidence and the exhibits produced, I am not persuaded that the defendant has any merits in his defence. Any loss and damage he may have suffered he should pursue them under the counterclaim. For the reasons set out above, I grant summary judgment in the sum of \$680,000 to the plaintiff, with interest at half judgment rate from the date of writ to date of judgment and thereafter at full judgment rate with costs to the plaintiff on the claim. These proceedings will be continued on the counterclaim only. (Discussion on costs) Costs to the plaintiff, to be taxed if not agreed, with certificate for counsel. (Discussion on costs) The costs are assessed at \$50,257. (Discussion re stay of payment) The application is refused. The plaintiff should not be deprived of the fruits of his success, particularly when the defendant's counterclaim lacks particulars and the amount is uncertain. It is impossible to know which amount to be set aside and the \$680,000 should not be kept from the plaintiff. (H C Wong) District Judge Representation: Mr Lawrence Hui, instructed by Messrs Huen & Partners, for the Plaintiff Mr Vod K S Chan, instructed by Messrs Pang, Kung & Co, for the Defendant PAGE - PAGE CRT8/21.7.2006/GTT DCCJ5316/2005/Decision A B C D E 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 B C D E F G H I J K L M N O P Q R S T U V & `#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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