

HONG KONG / JUDGMENT

RE CHAU KAM FUNG

COURT

Court of First Instance

DECIDED

21 September 2007

CASE / FILE NUMBER

HCB3065/2006

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Before : Hon Chu J in Court Date of Hearing : 12 September 2007 Date of Judgment : 21 September 2007

J U D G M E N T

By Petition filed on 24 April 2006 and amended on 22 August 2006, Madam Tam Kin Ying (the petitioner) applies for a bankruptcy order be made against Madam Chau Kam Fung (the debtor). The debt in question represents the deposit paid by the petitioner to the debtor under a sale and purchase agreement and the petitioner s legal costs for the preparation of the sale. The debtor denies incurring the debt.

Facts

The facts leading to these proceedings are not in dispute. By a sale and purchase agreement dated 18 December 2003, the petitioner agreed to buy and the debtor agreed to sell a property situated at Hennessy Road, Wanchai at the price of \$680,000. Completion was to take place on 13 January 2004. Pursuant to the agreement, the petitioner had paid to the debtor \$68,000 by way of deposit. The parties were represented by separate firms of solicitors in the sale. Messrs Ford Kwan & Co () acted for the petitioner and Messrs William Sin & So () acted for the debtor. Under Clause 4(a) of the sale and purchase agreement, the debtor was required to show and give a good title to the property. Clause 5 contained the usual provision on requisitions of title. Clause 11 provided that if the petitioner failed to complete the purchase, the debtor shall be entitled to, inter alia, forfeit the deposits paid. Clause 12 further provided that if the debtor failed to complete the sale, she shall return to the petitioner all the deposits and other money paid and the petitioner shall be entitled to recover from the debtor damages she had sustained. Under cover of a letter dated 20 December 2003, WSS sent to FK the title deeds and documents against the latter s

undertaking to return them immediately upon demand. Attached to the letter is a schedule setting out the 28 items of title documents that were delivered to FK. Item 21 is an assignment with memorial no.7323837. It was an assignment dated 20 October 1997 under which the property in question was assigned by a Magdalen Investments Limited to Linkpeak Company Limited. Item 22 of the schedule is described as a certified copy of a memorandum dated 4 July 1997 given by a Callumberg Limited as the sole director of Magdalen Investments Limited. By letter dated 31 December 2003, FK raised a number of requisitions, of which only requisition No. 5 is relevant to these proceedings. The requisition is worded as follows: Assignment memorial no. 732387 In Assignment Memorial No. 732387, the Common seal of Magdalen Investments Limited was affixed unto the instrument with only one signatory signing thereon. Due execution cannot be presumed. We require formal production of a certified copy of the relevant Board Minutes to prove the execution of the said Assignment by the said Magdalen Investments Limited. Mr Wong who appears for the petitioner fairly accepts that the certified copy of board minutes required by FK is in fact item 22 of the schedule of title documents delivered by WSS to FK on 20 December 2003. In other words, FK already had the document it asked for under the requisition. WSS answered the requisitions by letter dated 9 January 2004. Point 5 of the reply is relevant. It states: In requisitions 5 and 6, we send you herewith copy Articles of Association of Magdalen Investments Limited and Linkpeak Company Limited for your perusal. By letter dated 12 January 2004, FK followed up on the matter and raised the following requisition: in the sealing provision of Magdalen Investments Limited, it is stated that the common seal when affixed to any instrument except as provided in Regulation 3 shall be witnessed by a director or any other person so authorized from time to time by the directors. Please let us have the said Regulation 3 before 12:45pm tomorrow. Again, Mr Wong fairly accepts that the so-called Regulation 3 is in fact a reference to Article 3 of the Articles and Association of Magdalen Investments Limited, a copy of which had already been sent to FK by WSS on 9 January 2004. Further, the provision in Article 3 is dealing with the issue of share certificates and is completely irrelevant to the requisition pursued by FK. By that as it is, WSS replied to FK s further requisition by letter dated 13 January 2004. The relevant part stated: We have noted that certified copy of Memorandum of Magdalen Investments Limited has been sent to you under cover of our letter dated 20th December 2003 (item 22 of the Schedule of the list). You have not returned copy of the said Memorandum of Magdalen Investments Limited despite repeatedly request by our Mr K.S. Chan to your Ms. Lee. However, we consider that due execution of Assignment in question can be presumed under Section 23A of Conveyancing and Property Ordinance, Cap.219. We consider that our client has shown good title of the Property in accordance with the Agreement for Sale and Purchase made between our respective clients. In the letter, WSS further offered to postpone the completion to 31 January 2004 to enable FK to consider the point, but in the meantime to deliver the keys and let the petitioner had possession on 13 January 2004. On the same day, FK wrote to WSS as follows: Kindly note that up to the moment of writing this letter, we have not received from your firm satisfactory reply to our letter dated 12th January 2004. In the circumstances, your client has failed to prove good title of the property in accordance with Clause 4(a) of the S & P. Pursuant to Clause 12 of the S & P, as your client fails to complete the said sale in accordance with the terms of the S & P, we are instructed to demand from your client to return to us on our client s behalf all

the deposits under the S & P, i.e. HK\$68,000 forthwith. In addition, we are instructed that our client will claim against yours for your client's failure to complete the sale in accordance with the terms of the S & P. WSS replied immediately by enclosing its earlier letter of 13 January 2004. FK wrote back, stating: We refer to your letter dated 13th January 2004 and do not agree with your view that due execution of the Assignment in question can be presumed under Section 23A of the Conveyancing and Property Ordinance as according to the sealing provision of Magdalen Investments Limited (as having been spelt out in our letter dated 12th January 2004) the common seal when affixed to any instrument except as provided in Regulation 3 shall be witnessed by a director or any person so authorized from time to time by the directors: the use of common seal per se is subject to exception as stated in Regulation 3. In addition, may we remind you that we need reasonable time to consider your reply to our requisition and we failed to receive your answer by 12:45pm today. We reiterate the contents of our previous letter dated 13th January 2004. In the meantime, all our client's rights are hereby reserved. WSS replied by letter dated 14 January 2004, the material part read: In response to your allegation, we point out that your requisitions on title had been satisfactorily answered by our letters dated 9th and 13th January 2004. Further, on 12th January 2004 our Mr K.S. Chan had by telephone orally demanded your Miss Lee (presumably your handling solicitors) to return the documents in item 22 of our schedule of title documents [sic] (presumably the certified Memorandum & Articles of Magdalen Investments Limited) for our perusal, but you had failed to return the same, we had put that matter on record in our letter dated 13th January 2004. Therefore, we consider that you had acted in breach of your personal undertaking to return the said document on demand, and such act had rendered us unable to consider the matter of execution of the Assignment by the said company any further. On the reasons aforesaid, your allegations are totally denied. We consider that your letter was a rescission of the Agreement for Sale and Purchase. On a purely without prejudice basis and without any liability whatsoever, we are instructed to accept your rescission and return the deposits on condition that your client agrees that the parties shall have no further claim against each other and enter into a Cancellation Agreement at their own costs. Despite the offer in this letter of WSS, there was no agreement. On 11 December 2004, the petitioner issued a statutory demand against the debtor. This was followed by the Petition herein. The test Where the debtor disputes the existence of the debt, the test is whether there is a bona fide dispute of the debt on substantial grounds and the burden is on the debtor to adduce sufficiently precise factual evidence to satisfy the test: *Re ICS Computer Distribution Ltd* [1996] 3 HKC 440, 444B-C. It is however not the function of the Bankruptcy Court to resolve the dispute in question. If a substantial dispute is raised, the petition will have to be dismissed: see *Re Lympne Investments* [1972] All E R 385; *Re Bylamson & Associates (Enterprises) Ltd* [1983] 1 HKC 510. The dispute The petitioner's case is that the debtor has failed to prove a good title and is therefore in breach of the sale and purchase agreement. On this basis, the debtor is obliged to return the deposit and pay her legal costs by way of damages. The debtor, on other hand, says that the petitioner has repudiated the sale and purchase agreement by failing to complete the purchase such that she is entitled to forfeit and keep the deposit. The dispute between the parties evolves around two issues. The first is whether the requisitions raised by the petitioner are proper requisitions. The second is whether the requisitions had been satisfactorily answered. Due execution of the

assignment by Magdalen Investments Limited It should be mentioned that Mr Wong had at the outset of his submissions accepted that as a matter of fact, Assignment memorial no. 7323837 was duly executed by Magdalen Investments Limited and the debtor did have a good title. The position can be briefly stated as follows. The Assignment was affixed with the common seal of Magdalen Investments Limited and signed by one Mrs Pauline Wing Fong McMahon as its authorized person. Article 69 of the Articles of Association of Magdalen Investments Limited provided that: If the Company shall have only one director, such sole director shall have full power to represent and act for the Company in all matters and in lieu of minutes of a meeting shall record in writing and sign a note of memorandum of all matters requiring a resolution of the directors. Such note or memorandum shall constitute sufficient evidence of such resolution for all purposes. Article 78 of the Articles and Association further provided that: The common seal when affixed to any instrument except as provided in Regulation 3, shall be witnessed by a director or any other person so authorised from time to time by the directors. The memorandum that forms item 22 of the schedule of documents delivered from WSS to FK under letter dated 20 December 2003 stated in its heading that it was signed by the sole director pursuant to Article 69 of the Articles of Association of Magdalen Investments Limited. The memorandum recorded that Mrs Pauline Wing Fong McMahon was authorized to sign for and on behalf of the company the Assignment and to complete the sale and to affix the common seal of the company. Bona fide dispute on substantial ground? Mr Wong's argument in support of the petition is that although the debtor does have a good title, she had failed to answer the requisitions satisfactorily and therefore failed to show a good title. Before analysing the answers to the requisitions given by WSS, it is necessary to first look at the requisitions raised by FK. Mr Wong does not dispute that it has to be shown that the requisitions were properly raised. It is apparent from FK's letter dated 31 December 2003 raising the requisition that the petitioner's concern on the assignment by Magdalen Investments Limited is that there was only one signatory. The request for the certified copy of the board minutes of Magdalen Investments Limited to prove due execution is, however, quite unnecessary given that FK already had the Memorandum dated 4 July 1997. A reading of the memorandum will show that it was given by the sole director of Magdalen Investments Limited, recording a resolution that authorized Mrs McMahon to sign and affix the common seal on the assignment. The memorandum stated that it was made pursuant to Article 69 of the Articles of Association of the company. If FK wished to investigate into the question of due execution of the assignment, the proper document to ask for should be the Articles of Association of the company. Perhaps because of this, in answer to the requisition, WSS supplied to FK a copy of the Articles of Association of Magdalen Investments Limited. It may well be that WSS should have drawn FK's specific attention to Article 69 of the Articles of Association. The omission to do so, however, should not have been critical given that the memorandum stated clearly that it was signed pursuant to Article 69. Yet it does not appear from FK's next letter dated 12 January 2004 that it had addressed its mind to Article 69. Instead it appears that FK's mind was focused on the sealing provision in Article 78 of the Articles of Association. Under Article 78, the affixing of the common seal, except as provided in Regulation 3, shall be witnessed by a director or any person so authorised from time to time. On the basis of this, FK then asked for the said Regulation 3. Again, this request is quite unnecessary because it was in fact a cross-reference to Article 3 of the same

document. A reading of Article 3 will readily show that it is entirely irrelevant. And that would have put an end to the requisition. Unfortunately, FK seemed to think that Regulation 3 was a separate document and requested for a copy of it. This mistake was not picked up by WSS. Instead, WSS responded by asking FK for sight of the memorandum on the mistaken belief that it was the Memorandum and Articles of Association of Magdalen Investments Limited: see WSS's letter dated 14 January 2004. Curiously, FK did not accede to the request. It is not known why FK took that stance. At the same time, WSS sought to address the concern as to due execution of the assignment by saying that due execution of the assignment can be presumed under section 23A of Conveyancing and Property Ordinance. Section 23A(1) provided that: A deed purporting to be-

- (a) executed prior to the commencement of section 9 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003 (14 of 2003) by or on behalf of a corporation aggregate; and
- (b) attested by a signatory or more than one signatory, where the signatory or each of the signatories, if more than one, is a person who could have been authorized under the articles of association or other instruments of the corporation, shall, until the contrary is proved, be presumed for the purposes of proof of title to any land to have been duly executed by the purported signatory or signatories, as the case may be, with the authority conferred by the articles of association or other instruments of the corporation, whether or not the source of the authority or the means by which such authority was purportedly conferred is apparent from the deed. The assignment by Magdalen Investments Limited was executed in October 1997 before the commencement of section 9 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003 on 9 May 2003. The requirement in section 23A(1)(a) is therefore fulfilled. Further, having regard to Articles 69 and 78 of the Articles of Association of Magdalen Investments Limited, the other requirement in section 23A(1)(b) will also appear to have been met. It would therefore seem that WSS is on strong ground when it replied that due execution can be presumed under section 23A of Conveyancing and Property Ordinance. Indeed, the petitioner has not sought to argue that section 23A does not apply. The thrust of Mr Wong's submission is that it was insufficient for WSS to merely refer to section 23A and say that due execution can be presumed. In support of the submission, he referred to the case of *Lam Chung Yan v Wu Yuk Ying & Wu Yuk Ling* (unreported) HCMP 1011/2005, 9 September 2005 at paras.10, 11 and 32. In that case, the purchaser raised requisition on the capacity of the signatories of the re-assignor and requested for a certified copy of the relevant board minutes and the Articles of Association of the re-assignor. The vendor answered by simply saying Please refer to section 23A of CPO. Deputy Judge L Chan held that this was insufficient because the vendor had not indicated the capacity of the signatories and one could not know whether section 23A would be applicable or not. It is not my function and I do not propose to give a concluded view on the point. It is sufficient to observe that the present case can arguably be said to be different from the case of *Lam Chung Yan* in that the petitioner had been provided with the memorandum dated 4 July 1997 and the Articles of Association of Magdalen Investments Limited. By reading them, the petitioner would be in a position to judge whether the presumption in section 23A applied.

In light of the above analyses, it is obvious that the debtor has substantial grounds to dispute the debt. Mr Wong argued that the debtor's dispute was not bona fide in that in all her four affirmations filed herein, she never properly set out her defence. The debtor was acting in person when she filed her first two affirmations. She denied being indebted to the petitioner and stated that the transaction was handled by lawyers. She further exhibited the sale and purchase agreement and the correspondences between FK and WSS. In her 3rd affirmation filed after she became legally represented, she further exhibited the memorandum dated 4 July 1997 and the Articles of Association of Magdalen Investments Limited. Then in her 4th affirmation filed shortly before the trial, she also exhibited the assignment in question. It is correct to say that the debtor has not set out in her affirmations what her defence is.

However, she had indicated at the outset that she was not indebted to the petitioner and that the matter arose out of a conveyancing transaction. She had also provided the court and the petitioner with all the documentation. The conveyancing dispute as well as the dispute in these proceedings can be readily discerned from the correspondence exchanged between FK and WSS. I cannot agree that the conduct of the debtor in dealing with the petition shows that her dispute to the debt is not bona fide. The debtor's ability to pay Mr Lam who appeared for the debtor further informed the court that the debtor is able to pay the debt and will do so in the event the court rejects her defence to the petition. As I have concluded that the debtor has raised a bona fide dispute on substantial grounds, it is not necessary to deal with this matter. Suffice it to observe that the better and prudent course is for the debtor to raise the issue of her ability to pay in her affirmation instead of by way of counsel's submission.

Conclusion

The debtor having shown that there is a bona fide dispute of the debt on substantial ground, the Petition is dismissed. Applying the normal rule of costs follow event, there is an order nisi that the petitioner pays the costs of the debtor and the Official Receiver, to be taxed if not agreed. (C Chu) Judge of Court of First Instance High Court Mr Paul C Y Wong instructed by Messrs Christine M Koo & Ip for the petitioner. Mr Joseph S W Lam instructed by Messrs T L Ip & Co for the debtor. The Official Receiver not appearing. PAGE - 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 H I J K L M N O P Q R S T U V &`#\$ (#p# (#p# r p# (#p# r p# Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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