

HONG KONG / JUDGMENT

RE LSK

COURT

Court of First Instance

DECIDED

21 March 2007

CASE / FILE NUMBER

HCMP4683/2003

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bjbj HCMP 4683/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 4683 OF 2003

BETWEEN IN THE MATTER OF the estate of LSK, a patient in Shatin Hospital and IN THE
MATTER OF THE MENTAL HEALTH ORDINANCE, CAP. 136

Before: Hon. Lam J in Chambers (Not open to public) Date of Hearing: 21 March 2007 Date of
Judgment: 21 March 2007

J U D G M E N T

1. On 12 November 2004, upon inquiry, this court made an Order under section 24 of the Mental Health Ordinance directing the applicant, who is the wife of the patient, and also Lam Sau-fong, the sister of the patient, be authorised to receive periodic payment, to be paid out of money held in court for the patient in HCPI230 of 2001. The periodic payment was to be for the maintenance, care and support of the patient and the patient's family and the education of the children. I was told this morning the periodic payment is at the rate of \$38,000 per month.
2. The money in court has a balance of about \$8 million to \$9 million. Since the making of the order, the Applicant belatedly disclosed that the patient had actually purchased a property in Mainland China and the position was that there appears to be some problems with regard to the development of the property at the time of the application. It was a property purchased over 10 years ago and the purchase price had already been paid a long time ago. The developer had failed to proceed diligently with the project.

3. At the time of the application, the Applicant has written off the property as an asset and did not make any disclosure to this court about that matter. However, it transpired that the development has since been completed and the patient had completed the transaction in early 2005. At the moment, the property is registered in the name of the patient.
4. Given the circumstances of the patient and that of the family, the Applicant and family members of the patient are of the view that the property should be sold and the proceeds could then be used for maintenance of the family. All the family members agree to the idea. The Applicant then took it upon herself to list the property for sale in Mainland China. She did so in March 2006.
5. At first, the property was listed for sale at the price of RMB140,000. Eventually, in December 2006, there was an interested purchaser who offered to purchase the property at the price of RMB120,000. The Applicant again took it upon herself to sign that agreement on behalf of the patient. Completion under that agreement was to take place on 15 March 2007.
6. Given the state of the patient, he was not in a position to sign any document for the purpose of completing the transaction. The Applicant therefore comes to this court to ask for authorisation to enable her, together with the sister of the patient, to dispose of that property on behalf of the patient.
7. Without any intention to criticise the Applicant, I think I must point out that it is important for family members of a mentally incapacitated person to appreciate that once an inquiry has been held and a person has been found by the court to be mentally incapacitated, all dealings with regard to his estate, including assets and finance, have to be sanctioned by the court. In the present case, the Applicant had not been appointed as the committee. Therefore she had no authority to act on behalf of the patient in dealing with the property. It is her duty to disclose to the court as soon as it comes to her notice that there are properties belonging to the mentally incapacitated person that have to be handled one way or another.
8. She has explained why she failed to disclose it at the time when she made the first application in this case. Even if that were so, she should have come to this court as soon as it was found out that the property had been built and there was a completion in early 2005. At that stage she should have come to this court to ask for directions about what is to be done to the property. Further, she should not have entered into the sale and purchase agreement in December 2006 without seeking the court's approval in the first place.
9. To avoid this sort of things happening again in the future, I require the Applicant to file a further affidavit within 21 days confirming to this court that she appreciates her duty to give information to this court as soon as possible whenever it comes to her knowledge about any properties or assets of the patient which she has not disclosed to the court so far and that, as far as she now knows, the patient did not have any other assets or properties, apart from those that she has already disclosed to the court. This is to ensure that she understands the extent of her duty and the limit of her authority.

10. I should point out that I do not mean to criticise anyone, in particular Mr Wong in this regard because I was told that the Applicant has not informed him about this property in the first application. Yet this case does highlight the importance of ensuring instructions from a client regarding the affairs of a patient are comprehensive and adequate.
11. This court is faced with a situation where the sale and purchase agreement has been made. I have to decide whether the court should allow the transaction to go ahead. There are two problems: first, as I have canvassed with Mr Wong in the course of today's hearing, there is no evidence before me about the extent to which the Chinese authority will regard an order from this court as sufficient authorisation to allow the Applicant to complete the transaction on behalf of the patient.
12. Under the laws in Hong Kong with regard to disposal of real properties or landed properties, it would have to be done by an order made by the court of the jurisdiction in which the property is situated. Be that as it may, bearing in mind the situation and the value of the property, I see no harm in trying because I know that in Probate cases the Chinese authority has acted upon orders made by a court in Hong Kong in the past. I think it is necessary to make it clear that whatever order made by this court is to be subject to the law of the Mainland. In other words, if the law of the Mainland requires certain acts to be done or authorisation to be obtained from the court in Mainland China, then the order of this court is not meant to be a substitution of such acts or authorization. This proviso is necessary to ensure the observance of judicial comity between different jurisdictions.
13. The second problem relates to the purchase price. I do not have any surveyor's report before me or valuation report before me with regard to the purchase price of RMB120,000. On the other hand, I was told that the Applicant listed the property since March 2006 and it was in the same range as other units for the same building, starting from the figure of RMB140,000. The only figure achieved is RMB120,000 some nine months afterwards.
14. Bearing in mind the overall financial position of the estate and the relatively insignificant value of this property, it may be a little bit disproportionate if I were to insist that a valuation report is to be obtained because the cost of the valuation report might represent a not insignificant proportion of the sale proceeds. Further, there is a time constraint because completion of the sale and purchase has been extended only up to 15 April.
15. In the special circumstances of this case, I am prepared to accept the figure of RMB120,000 in the agreement as a realistic figure that can be obtained in the market. I come to this conclusion bearing in mind the efforts that the Applicant has made in terms of the sale of the property and also I see no reason why the Applicant and the family members would agree to a sale which they believe not to be representative of the market value of the property.

16. For these reasons, I am prepared to make an order but subject to the proviso that I have mentioned, authorising the Applicant, Liu Yuk-yi j(g- rt held on behalf of the patient. I understand the Applicant has no objection to that. (Submissions by counsel)
17. The Applicant s costs of this application are fixed at \$8,000 pursuant to Order 62, Rule 9(4)(b) and are to be paid out of the estate.
18. I propose to have the judgment I have just delivered typed out and circulated for the benefit of the profession. I understand from Mr Wong that the Applicant has no objection to that. (M H Lam) Judge of the Court of First Instance High Court Mr Paul Wong, instructed by Messrs Maurice Lee, Tsang, Ng-Quinn & Tang, for the Applicant Official Solicitor, absent
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