

HONG KONG / JUDGMENT

WISE WAVE INVESTMENTS LTD v. TKF SERVICES LTD

COURT

Court of First Instance

DECIDED

22 August 2007

CASE / FILE NUMBER

HCA389/2005

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HCA 389/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO 389 OF 2005

BETWEEN

WISE WAVE INVESTMENTS LIMITED Plaintiff

and

TKF SERVICES LIMITED Defendant

Before: Hon A Cheung J in Court

Dates of Hearing: 9-10 & 12-13 July 2007

Date of Judgment: 22 August 2007

J U D G M E N T

Facts and disputes

This is a conveyancing dispute. The plaintiff is the purchaser, and the defendant the vendor of a property known as Unit 1, Ground Floor, Yuen Yee Mansion, Nos. 18A, 20 and 20A Belcher

s Street, Hong Kong (

the property

).

Yuen Yee Mansion (

the building

), a multi-storey building, was built in the 1960s. Its management is governed by a deed of mutual covenant dated 23 February 1963.

In December 1991, the ground floor of the building was renovated into a shopping arcade known as Charmview Shopping Arcade, comprising over 20 shop units.

A sub-deed of mutual covenant (

Sub-DMC

) dated 3

December 1991 was entered into by the original owner who used to own the entire ground floor premises, the first purchaser of a shop unit in the shopping arcade and a management company tasked to manage the shopping arcade, to govern the mutual rights and obligations of the respective owners of the shop units in the shopping arcade and its management.

For all practical purposes, management of the shop units in the shopping arcade is entirely governed by the Sub-DMC and the manager appointed under the Sub-DMC was and is, for all management purposes, the manager of the shopping arcade.

The defendant became the registered owner of the property, a shopping unit in the shopping arcade, in 1994. The defendant has two directors, namely Mr Adam To and Mr Ted Lai, who are both solicitors and partners in Messrs K B Chau & Co, a firm of solicitors. They are also the beneficial owners of the issued shares in the defendant.

The defendant has let the shop unit to a tenant for rent. Indeed there is an unauthorized cockloft erected inside the property, which has been let to a separate tenant from the shop unit itself.

To cut a long story short, disagreements between the defendant and the then manager of the shopping arcade arose in the latter part of the 1990s concerning allegedly poor management of the shopping arcade, the supply or the disconnection of supply of air-conditioning to the property and contributions for electricity deposit and repair/maintenance expenses. These have been described as

long running disputes

. The net result is that the defendant has stopped paying management fees to the manager for a substantial period of time, so much so that by November 2004, when the defendant sought to sell the property, the total outstanding amount of management fees, electricity deposit and repair/maintenance contributions was almost HK\$500,000. The defendant

s stance was and is that it is not liable to pay the amount to the manager (New City (HK) Management Limited

the then manager), by reason of the disputes and by reason of its claim of set-off.

In any event, through two estate agents working for Centaline Property Agency Limited, the defendant entered into a preliminary sale and purchase agreement dated 25 November 2004 for the sale of the property to a Mr Lawrence Lau or his nominees. The price was HK\$4,600,000 and the sale was subject to the two tenancies relating to the shop unit and the cockloft. The preliminary sale and purchase agreement, which was a standard form Centaline agreement, contained four additional terms; the first three were drafted by one of the estate agents (Mr Raymond Ip) and the fourth one by Mr Adam To himself. The first two terms dealt with the two tenancies of the property. The third term dealt with the fact that the cockloft was a

self-constructed

structure and specifically provided that the purchaser could not use that as a ground for refusing to complete.

The fourth term, added specifically by Mr To, reads as follows:

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s on behalf of the defendant, that both of them had told the agents that there were long running disputes with the manager of the shopping arcade on the matters described above and that a substantial amount of management fees and other contributions was outstanding. Indeed both said in evidence that there was a meeting held at the office of Mr To on 16 November 2004 in which Mr To told the two agents in some detail about the disputes with the manager and the outstanding management fees etc.

According to Mr To, he told the two agents that the manager would likely learn about the intending sale of the property to the agents

client (ie Mr Lau) and if the manager should seize upon the opportunity to register a charge against the property for the outstanding money before completion, the defendant would be responsible for paying off the charge so as to clear the encumbrance and convey a good title to the purchaser. The defendant would in that event continue its arguments with the manager. However, if no such charge was to be registered before completion, the defendant would not pay the disputed money but would carry on its arguments with the manager. But the defendant would still be responsible for any liability to pay, if established after completion. Mr To said in evidence that both agents understood what he said and agreed to take instructions from their client. Mr To also said that he told the two agents the amount that was (allegedly) outstanding and even gave them a copy of the current debit note from the manager.

Mr To also said in evidence that he told the two agents that the purchaser had to accept what he had suggested or else there would be no sale. He also told the agents that upon completion the purchaser could not request for an apportionment account in respect of the management fees and relevant charges because by the nature of things that could not be done pending the resolution of the disputes with the manager.

Mr To said that two days later, Mr Ip rang him up and said that his client was agreeable to Mr To

s terms. He said he had prepared a draft preliminary agreement incorporating what Mr To had said in the meeting (ie the first three additional terms). But the agent said he did not know how to draft the clause regarding the disputed outstanding management fees and contributions. He asked Mr To to draft the appropriate term.

As described, Mr To did draft an additional term which became the fourth additional term, which has been reproduced above.

According to Mr To

s evidence, he drafted the term in that particular manner because he felt that there was no need to refer to the situation where a charge was registered by the manager prior to completion. For in that case, it was a title problem and the vendor would be bound to clear off the charge. On the other hand, the additional term that he drafted would cater for the situation where no charge was registered before completion, in which event there would be no apportionment account relating to the disputed management fees and contributions.

Both estate agents, ie Mr Raymond Ip and a Ms Alice Pang, gave evidence for the plaintiff. Essentially, they said that Mr Lau was Ms

Pang

s client and Mr Ip was the person in Centaline who successfully contacted the defendant for the sale of the property. Both agents worked together to bring about the sale. There was no dispute that they were the agents of the purchaser, rather than the vendor.

Both of them denied in evidence that they ever met Mr Adam To on 16 November 2004. Rather they said they met Mr To at his office on 25

November 2004 when the preliminary agreement was signed.

More importantly, Mr Ip said that whilst Mr To mentioned about the disputes the defendant had been having with the manager, he never mentioned the exact amount involved. Nor did he mention that the defendant would only pay off the outstanding amount in case there was a charge registered prior to completion. In his witness statement, Mr Ip said that Mr

To actually told him that the defendant would discharge the outstanding management fees and contributions prior to completion. In the box, Mr Ip accepted that that was never said, but what was said was that the defendant would be responsible for the management fees and contributions. But Mr Ip added that his understanding of what Mr To meant was that the defendant would discharge the outstanding management fees and contributions before completion. Mr Ip also denied that he had ever been told by Ms Lee earlier on that there were substantial management fees and contributions allegedly outstanding.

Ms Pang also said in evidence that she only met Mr To once at his office on 25 November. She said she only heard that there were outstanding management fees and contributions. She said she did not hear about the disputes between the defendant and the manager. She could not remember whether Mr

To said that the defendant would discharge the unpaid management fees and contributions prior to completion, although that was what she said in her witness statement. She was certain that Mr To did not tell her the exact amount of outstanding management fees and contributions. She thought the outstanding amount was small. She emphasized that there was no reason for her to withhold the relevant information from her client, who was an established one, if she had been

told about it. For after all, she said, this was not a particularly big transaction and there was no reason for her to risk

offending

her client by misleading him.

Mr Lawrence Lau also gave evidence at trial. He said he had never heard about the exact amount of management fees and contributions outstanding from Ms Pang, his only contact. He thought that the outstanding amount was not substantial. In any event, according to his reading

which was also shared by Mr Ip and Ms Pang, additional term (4) inserted by Mr

To meant the defendant would be responsible for discharging the outstanding amount whatever it might be

before completion. He was quite agreeable to that arrangement as understood by him and his agents.

To complete the story, Mr Lau duly nominated his company, the plaintiff, to be the purchaser in the transaction. After some brief solicitors

correspondence, a formal agreement for sale and purchase dated 9 December 2004 was signed by the parties. Additional terms (3) and (4) in the preliminary sale and purchase agreement were reproduced verbatim as clauses 31 and 32 of the formal agreement for sale and purchase. There was no mention whatsoever of the problem of the disputed management fees and contributions or the arguments with the manager in the solicitors

correspondence pertaining to the drafting or execution of the formal agreement for sale and purchase.

However, the purchaser

s solicitors (Kenneth CC Man & Co) found out from the manager the amount of outstanding management fees and contributions in mid January 2005. By letter dated 19 January 2005, they sent a copy of the latest debit note from the manager to the defendant

s solicitors in the conveyancing transaction, namely K B Chau & Co for the latter

s attention. The solicitors

letter said that the contents of the manager

s debit note were

self-explanatory

.

As the completion date (28 February 2005) was approaching, Kenneth CC Man & Co wrote to K B Chau & Co on 23 February 2005 asking for evidence of payment of the outstanding management fees and contributions before completion, pointing out that the property was to be assigned to the purchaser free from encumbrances.

By letter dated 24 February 2004, K B Chau & Co replied as follows:

It is said in Clause 3 of the Agreement that the property will be sold free from all encumbrances subject only as thereafter appears.

Clause 32 provides that the management fee and the maintenance fee will be the responsibility of our client up to the date of completion and no apportionment account in respect of the management fee and maintenance fee will be dealt with between our respective clients. The reason for adding this clause in the Agreement is that there is a dispute between the management company and our client as to the true amount of outstanding management and maintenance fees payable by our client prior to completion after taking into our client

s right to damages. Further, there is no air-conditioning supplied to the above property for many years and thus our client is not liable to the air-conditioning charges. Your client and the estate agent know full well about these facts and clause 32 was therefore agreed. As there is no air-conditioning supplied to the above property, we trust that your client will not pay for the management fees as presently claimed by the management company even after completion.

Kenneth C C Man & Co were not satisfied with the answer. By letter dated 25 February 2005, the firm pointed out that the outstanding amount was substantial and proposed that the vendor provide a

substantial security

to settle the same once the claim was established. The letter suggested that a stakeholder arrangement or alternatively an undertaking from K B Chau & Co be arranged.

In the meantime, the manager confirmed by letter dated 25

February 2005 that the total amount (then) outstanding was HK\$510,840.30, including outstanding management fees in the sum of HK\$416,195.

K B Chau & Co did not accept the suggestion of Kenneth CC Man & Co. By letter dated 26 February 2005, they wrote:

We refer to your letter of 25th February 2005 and are instructed that they will not agree to the stakeholder money arrangement nor undertaking from our firm.

Our attention is drawn by you to the alleged substantial outstanding management fee and maintenance fee. We are instructed to send you herewith some of the correspondence exchanged between the solicitors acting for the management company and our client. The contents of which are self-explanatory. As can be seen from those correspondences, our client

s claim against the management company is a genuine one. This is supported by the fact that the management company is legally represented all along and they have not taken any legal proceedings against our client so far, not even registered a charge against the above property for the alleged outstanding management fees.

As to the alleged outstanding repair costs, our client has paid their share for the repairs necessary for the property but not for those charges for the settlement of the property. The latter is not required by law and they have got no right to demand the same against our client.

Kenneth C C Man & Co were not satisfied with the reply and insisted on a security arrangement.

K B Chau & Co wrote further on 28 February 2005 as follows:

In our letter sent to Cosmos Property Agency and Management Limited [a former manager] on our client

s behalf on 6th August 1998, we have informed the latter that our client suffered substantial loss due to their failure to maintain the air-conditioning system. Thereafter, they had not taken steps to repair the air-conditioning system and eventually completely cut-off the system from the above property. The damages suffered by our client should be able to set off all the alleged outstanding management fees. What

s more, there was and is never any proper management provided by the management company. Most of the shop owners have not paid any management fees for a long time.

As to the alleged outstanding repair charges, our client had paid the part which were necessary for the repair as defined in the Deed of Mutual Covenant. Our client is not liable under the Deed of Mutual Covenant to pay for the part of the renovation charges which had the effect of bettering the shopping arcade.

Despite what

s said in the above paragraphs, the same have been taken care of at the time of your client buying the above property and your client knows full well the state and condition of the shopping arcade and the above property. The alleged outstanding payments have treated as monetary claims to be dealt with by our client and the management company and was reflected in the price already. For your information, the rental payments per month is in the total sum of \$28,500.00.

We are of the view that all requisitions concerning the title of the above property have been properly answered and the alleged outstanding management fees and repairing fees are not, till the writing of this letter, made as a charge against the property by the management company against the property by the management company even though they have had full notice of the sale and informed your client the alleged outstanding. But even if there were a memorandum of charge registered against the property, the provisional sale and purchase agreement and the formal agreement have provided for the same

Kenneth C C Man & Co did not agree and insisted that there was an encumbrance created by the claim for outstanding management fees and contributions. The firm maintained that they should either be paid off or there should be a satisfactory security arrangement put in place to secure the purchaser

s position after completion.

K B Chau & Co did not agree and after the lapse of the completion time, the firm, on behalf of the defendant, sought to determine the formal agreement for sale and purchase and forfeit the deposits paid (\$460,000).

There was a last attempt by Kenneth C C Man & Co on the same day (28 February 2005) to salvage the deal. Amongst other things, they proposed the stakeholding of HK\$510,000 for a period of 12 months. The proposal was not accepted by K B Chau & Co.

The parties

positions having thus crystallised, the plaintiff commenced the present proceedings on 6 April 2005, asking for specific performance together with damages, or damages in lieu of specific performance.

Title problem: a real risk that a charge had already arisen?

Did the presence of a disputed claim for the outstanding management fees and contributions of over HK\$500,000 at the contractual time of completion render title to the property defective so that the purchaser was justified in not completing the sale and purchase, in the absence of a satisfactory arrangement to cater for the disputed claim?

The question may be approached from two perspectives. First, whether non-payment of outstanding management fees and contributions by itself gave rise to a charge over the property and therefore the presence of the manager

s claim (albeit disputed) for payment of such outstanding fees and contributions gave rise to a real risk that such a charge had already arisen?

Mr Lee, counsel for the plaintiff, submits in the affirmative. His argument essentially is that clause 11(a) in the Second Schedule to the Sub-DMC, which the co-owners of the ground floor premises are bound to observe and perform (see clause 9(h) of the Sub-DMC), provides that:

It is hereby declared that:-

- (a) Any sums or part thereof payable by any Owner under this Deed as shall be unpaid for 30 days next after the due date for payment of the same shall be a charge upon the share and interest of the defaulting Owner of and in the Property.

Counsel argues that whenever there is an amount outstanding for 30 days or more, a charge on the share and interest of the defaulting owner in the ground floor premises (essentially the defaulting owner

s shop unit) will arise automatically by operation of clause 11(a). He recognises that the manager s claim for payment of management fees and contributions in the present case is disputed. But as it is common ground that at least in relation to the management fees which form the bulk of the allegedly outstanding amount, the manager

s claim is not frivolous but reasonably arguable, there is a real possibility that such a charge has already arisen against the property. Counsel argues that this suffices for his purposes because what the plaintiff as purchaser in the present case has contracted to buy is a good title, rather than a piece of litigation with the manager over whether the management fees (and other charges) are due and payable.

Counsel also recognises that the charge that has arisen (according to his argument) is an equitable charge, yet section 5(1)(a) of the Conveyancing and Property Ordinance (Cap 219) provides that:

No equitable interest in land can be created or disposed of except by writing signed by the person creating or disposing of the same, or by his agent and thereunto lawfully authorised in writing

He seeks to overcome this difficulty by relying on the well-known maxim of equity, namely that equity looks on that as done which ought to be done. In particular, he relies on a decision of Godfrey JA (as he then was), sitting as an additional High Court judge, in *Beacon Heights (Management) Ltd v Leung Ping-hung, Antonio* [1995] 1 HKLR 181, in support of his argument. There his Lordship was faced with a clause in a deed of mutual covenant which provided that if money payable was not paid within 14 days, the amount outstanding

shall then be charged

on the undivided shares of the defaulting owner and the manager shall be entitled to register a memorial of such charge in the Land Registry. An objection was raised to such an automatic charge by reference to section 5(1)(a) of the Conveyancing and Property Ordinance. His Lordship dealt with the objection thus (at p 184, lines 29 to 45):

I am quite prepared to construe clause 27 as imposing on the first owner (which did sign the Deed of Mutual Covenant) an obligation, akin to that of a positive covenant, to give a charge, when called on to do so, to secure payment of arrears due by the first owner, and to hold that this obligation binds successors in title of the first owner. Successors in title of the first owner take their interests as purchasers for value with notice of the terms of the Deed of Mutual Covenant. Accordingly, it does not lie in the mouth of a successor in title of the first owner to say that the covenant to give the charge should not be taken as enforceable against him, simply because he has not signed anything in writing; it is enough that the obligation is in writing signed by the first owner through whom he claims.

On that construction it will not be necessary for the manager to call on the defaulter to sign an equitable charge to secure payment of the arrears. That would be to require unnecessary circuitry of action. Equity will not demand that such a step to be taken. It is unnecessary because the express words of the obligation are that the interest shall

stand charged

. Equity will treat as done that which ought to be done. Accordingly, I am prepared to hold, as I do, that the provisions of clause 27 of the Deed of Mutual Covenant are enforceable in accordance with their terms against both the first owner and successors in title of the first owner, even though the successors in title have not themselves signed any instrument of charge.

Mr Lee likewise argues in the present case that it is quite unnecessary to ask the defaulting owner (ie the defendant) to sign a charge in favour of the manager. Equity will treat as done that which ought to be done. A charge has arisen automatically.

As regards the requirement for registration under section 3 of the Land Registration Ordinance (Cap 128), Mr Lee argues that the section only has application to registrable instruments affecting land. It governs priority of registered instruments (section 3(1)) and the effect of non-registration of registrable instruments (section 3(2)). It does not apply, however, to a situation where there is no registrable instrument affecting land. Mr Lee argues that since the charge in question has arisen automatically by reason of clause

11(a) and the fact that there has been outstanding for over 30 days the amount in question, there is no registrable instrument to register for the purposes of section 3. The only document in question, namely, the Sub-DMC, has, of course, been registered in the Land Registry a long time ago.

Mr Lee therefore submits that as at the time of completion, there had already arisen a charge, or alternatively, there was a real possibility that such a charge had arisen, on the property, for the payment of the (allegedly) outstanding amount. This charge was a blot on the title of the property. Counsel argues that even though the plaintiff was a bona fide purchaser for value of the legal title, it would not be able to take the property free from the charge because before completion, it had already got notice of the material facts giving rise to the charge. In other words, the plaintiff was not equity

s darling on the facts of the case. It would not be able to take the property free from the unwritten equity created under clause 11(a).

I do not accept counsel

s argument.

In my view, counsel has read too much into Beacon Heights. Section 5(1)(a) of the Conveyancing and Property Ordinance clearly sets out the formal requirements for the creation of an equitable interest, including an equitable charge. It requires something in writing signed by the chargor. In the context of the Sub-DMC and clause 11(a), section 5(1)(a) requires a written charge signed by the defaulting owner.

As has been pointed out by Godfrey JA in Beacon Heights, to call on the defaulting owner to sign an equitable charge to secure payment of the arrears would be to require unnecessary circuity of action.

Indeed that would be quite an absurd requirement, rendering the arrangement for the creation of a charge to secure payment of the arrears quite unworkable. It would defeat the obvious intention of the Sub-DMC.

In those circumstances, one can fully understand why equity would step in to remedy the situation by militating against the injustice or harshness caused by the rigidity of the law. It is, however, here that one must be particularly careful. What is, one must ask, the rigid requirement of the law that gives rise to the harshness or injustice in the first place? The answer, in my view, must be the indiscriminate requirement that the written charge be signed by the chargor. It is the requirement of his signature that is producing an absurd result in the context of a deed of mutual covenant or the Sub-DMC. How can one expect a defaulter to sign a written charge over his own property to secure his payment of the arrears?

That being the offending element in the legal requirement, when equity steps in, it is that element which equity would deal with, by treating as done that which ought to be done. In other words, by treating as

signed

that which ought to be

signed

. In that way, through the intervention of equity, the requirement of the law has been met albeit notionally.

Thus analyzed, it can be clearly seen that the intervention of equity does not relieve the intending chargee from having a written charge, another statutory requirement in section 5(1)(a), which requires the creation of an equitable interest

by writing

. What he need not obtain is the intending chargor

s signature, which is beyond his power to obtain, on the written charge. But as far as the written charge is concerned, it must be within his power to prepare. There is simply no place for equity

s intervention to override the express statutory requirement under section 5(1)(a).

And in this regard, Beacon Heights has nothing to do with dispensing with the need for a written instrument. Indeed the clause there (clause 27) clearly envisaged the preparation of a memorial of the charge by the manager to be registered in the Land Registry. The discussion of the legal position and the solution his Lordship came up with in that case must therefore be read in the context that the manager wished to register a memorial of the charge prepared by himself against the property in the Land Registry, which memorial did not have the signature of the defaulting owner on it. That was the factual situation faced by his Lordship, who invoked the maximum of equity to resolve the difficulty of getting the defaulter

s signature on the memorial.

My analysis sits well with general principles of equity that require a person seeking the assistance of equity to take all the steps that lie exclusively in his power to do. When he has done that, and there are still steps to take which are beyond his power to do, equity will step in and treat as done that which ought to be done. See, for instance, cases of an imperfect gift, such as *Re Griffin* [1899] 1 Ch 408 and *Re Rose, Midland Bank Executor & Trustee Co Ltd v Rose* [1949] Ch

78, where the emphasis was on the donor doing everything in his power to divest himself of the subject of donation in favour of the donee.

If a written instrument be required, as in my view it is, could the Sub-DMC be treated as the instrument in writing creating the charge? That possibility was in fact mentioned by the opposing owners in *Beacon Heights* (see p 183, lines 41 to 42). Their argument was that the charge was (Godfrey JA

s emphasis) given in writing in the deed of mutual covenant. However, as the deed was not signed by the defaulting owner but only by his predecessor in title, it did not satisfy the requirement of section 5(1)(a), the opposing owners argued.

It is important to note that his Lordship did not accept the argument. He did not construe the deed of mutual covenant as creating a charge per se. Rather, he construed clause 27 in the deed of mutual covenant as an agreement or obligation

akin to that of a positive covenant, to give a charge, when called on to do so, to secure payment of arrears

(at p 184, lines 30 to 31), binding on a subsequent purchaser/co-owner.

In those circumstances, it is quite clear that his Lordship did not treat the deed of mutual covenant as the instrument creating the equitable charge. Rather, it was an instrument creating an obligation on the part of all co-owners to give a charge in future.

I agree with that analysis. In the present case, likewise, I do not construe clause 11(a) as something creating a charge by itself. Rather, it imposes an obligation on a co-owner to give a charge whenever money is outstanding for over 30 days. The Sub-DMC cannot double as the instrument in writing required by section 5(1)(a).

It is true that in the present case, clause 11(a) does not specifically provide for the registration of a memorial of the charge against the defaulting owner

s property in the Land Registry, unlike clause 27 in Beacon Heights. In my view, this is an immaterial distinction. It does not affect the proper construction of clause 11(a) as imposing an obligation to give a charge in future regarding arrears. It does not turn clause 11(a) into something creating a charge by itself. Nor can the lack of a reference to the preparation and registration of a memorial in a sub-deed of mutual covenant between private co-owners affect or otherwise undermine the statutory requirement under section 5(1)(a) of the Conveyancing and Property Ordinance for something in writing to create an equitable charge.

For the sake of completeness, I should also point out that once the manager prepares an instrument in writing for the creation of the charge, it is valid as against the defaulting owner due to equity

s intervention, even though it is not signed by the latter. However, if the manager does not register the charge in the Land Registry, section 3(2) of the Land Registration Ordinance will bite and his charge will lose priority to a bona fide purchaser for value of the property and as against such a purchaser, the charge will be

absolutely null and void

even though such a purchaser may have had notice of the existence of the charge before the purchase: section 4, *ibid*.

For these reasons, I conclude that the mere presence of outstanding management fees and contributions, or for that matter, of a disputed claim for payment of such fees and contributions which has not resulted in any (unsigned) instrument in writing purporting to create a charge to secure their payment

whether registered in the Land Registry or not, does not give rise to a charge over the property of the defaulting owner or a risk thereof. I therefore reject Mr Lee

s first argument for saying that there is a title problem.

Title problem: the plaintiff as successor in title would become liable to pay the arrears after completion?

However, that is not the end of the matter. The second perspective to look at the matter is this. The claim for payment of the outstanding management fees and contributions, albeit disputed, is a contingent liability that may eventually result in a charge over the subject property, thus affecting title. In any event, there is a title problem where the amount outstanding or allegedly outstanding is extraordinarily substantial and beyond the reasonable contemplation of a purchaser, who is liable or potentially liable to pay it after completion.

The argument runs essentially like this: Grant no charge has yet arisen on the mere fact that management fees and contributions are outstanding or that there is a disputed claim for payment of such fees and contributions. After completion, the purchaser steps into the shoes of the vendor as the new owner of the shop unit in question. As the fees and contributions have been outstanding or allegedly outstanding for over 30 days, the manager can at any time pursuant to clause 11(a) prepare an instrument in writing for the creation of a charge. In that event, even though the instrument is not signed by the purchaser as the new owner, and regardless of whether it is registered in the Land Registry, the purchaser as the chargor under the charge over his own property is bound by the charge, as equity will treat the instrument as having been signed by him. In that way, after completion, if the manager should take action, the purchaser's property will be encumbered with a charge. The fact that the claim is a disputed one does not help, because the purchaser as the new owner, in order to contest the claim, will end up with a piece of unwanted litigation. That is against the general principle that save where otherwise provided, a purchaser does not contract to buy a litigation but a good title.

A basic premise of this argument, run by Mr Lee for the plaintiff, is that as from completion, the purchaser as the new owner will be liable for payment of all outstanding management fees and contributions even though they became payable by the vendor as the previous owner prior to completion. Mr Lee is ambiguous as to whether the vendor/previous owner after completion will remain liable for payment of the fees and contributions as well. But the main thrust of his argument is that the purchaser as the new owner will become liable to pay the same upon completion. That being the case, clause 11(a) will apply directly to the new owner because the outstanding fees and contributions are fees and contributions payable by the purchaser as the new owner.

Mr Lee relies on the definition of
owners

in the Sub-DMC, which says that reference to the owner or owners of any part of the ground floor premises of the building means the owner or owners
for the time being

whose undivided shares in the land and building entitle him or them to the exclusive right to use occupy and enjoy part of the ground floor premises.

Mr Lee relies heavily on the Court of Final Appeal decision in *Chi Kit Co Ltd v Lucky House International Enterprise Ltd* [2000] 2 HKLRD 503 in support of his argument. There, a huge personal injuries claim was made by an injured workman against the incorporated owners of a multi-storey building. The vendor, owning a unit in the building, entered into an agreement to sell his unit to a purchaser. Shortly before completion, the court gave judgment against the incorporated owners in the sum of HK\$25.7 million together with interest and costs. The purchaser refused to complete, arguing that under section 17(1)(b) of the Building Management Ordinance (Cap 344), the judgment creditor could, with the leave of the court, levy execution to enforce the judgment against an individual co-owner of the building. Also in issue was the question of contributions towards the judgment debt payable by the co-owners pursuant to sections 20 to 22 of the Ordinance.

The Court of Final Appeal emphasized in its judgment that

owner

in the Ordinance means a person who

for the time being

is a registered co-owner of a multi-storey building and proceeded therefore on the basis that the judgment could be enforced, with the leave of the court, against a co-owner of the building for the time being; moreover, a co-owner for the time being of the building would be liable to pay contribution to the incorporated owners so as to meet the incorporated owners

liability towards the judgment creditor. In those circumstances, title was affected because after completion, it would be the purchaser, as the current owner for the time being of his unit, who would be liable to execution or to pay contribution towards the incorporated owners

liability under the judgment.

Mr Lee therefore relies on this decision to support his argument that after completion, the plaintiff as the new owner would be liable to settle the (allegedly) outstanding management fees and contributions. And thus the implication of clause 11(a).

Mr Chiu, appearing for the defendant, relies on section 41 of the Conveyancing and Property Ordinance and a decision of His Honour Judge Downey in *Discovery Bay Services Management Limited v Buxhaum* [1995] HKDCLR 7 to contend that only the burden of a covenant runs with the land, not the breach thereof. A purchaser/new owner is only liable for breaches of covenant committed after he has become the owner of the land. For breaches of covenant committed before, the vendor/previous owner remains liable after completion. This is so, counsel submits, save for the case of a continuing breach of covenant or where there is a specific agreement between the vendor and purchaser for the purchaser to take up the liability for the breach committed before completion.

Mr Chiu therefore argues that after completion, the plaintiff as the new owner would not be liable to the manager for payment of the allegedly outstanding management fees and contributions. Rather it would be the defendant who would continue to be liable to pay such fees and contributions: section 41(8) (

a covenant shall not bind a person after he has ceased to have any estate or interest in the land affected by that covenant except in respect of a breach of that covenant committed by him before that cessation

).

Moreover, Mr Chiu argues that after completion, since the defendant is no longer the owner of the property, there is no question of the manager imposing any charge against the property pursuant to clause 11(a), which only provides for the imposition of a charge upon the share and interest of the

defaulting owner

of and in the ground floor, ie the property.

Mr Chiu seeks to distinguish Chi Kit by emphasizing that Chi Kit involved the proper construction of provisions in the Building Management Ordinance, whereas in the present case, one is solely concerned with the provisions in the Sub-DMC. Moreover, counsel argues that whilst the provisions in the Building Management Ordinance have statutory force and are therefore binding on the parties, the provisions in the Sub-DMC are only contractual in nature and their binding effect on subsequent owners is dependent on the common law regarding running of covenants, as aided by section 41 of the Conveyancing and Property Ordinance. In those circumstances, in the final analysis, what is or is not binding on a subsequent owner is dependent on the common law and rules of equity relating to negative covenants, which are extended by section 41 to cover positive covenants, making such covenants run with the land. Counsel repeats his point that nothing in the section makes the person against whom the covenant is enforceable liable for any breach thereof committed before he becomes bound by the covenant: *Discovery Bay*.

I agree that the provisions of the Building Management Ordinance have no direct application in the present case. It must be remembered that one is not concerned with the incorporated owners of the building here. One is merely concerned with the claim of a manager appointed under a Sub-DMC, which governs the management of the ground floor premises of the building. The focus is on the provisions in the Sub-DMC.

In my view, on a proper construction of the provisions of the Sub-DMC, all outstanding management fees and contributions are payable by the owner of the shop unit for the time being. First, the Sub-DMC specifically states that references to the owner or owners of any part of the ground floor shall mean the owner or owners

for the time being

whose undivided share(s) in the ground floor entitle him or them to the exclusive right to use occupy and enjoy that part of the ground floor. The position is similar to that in the Building Management Ordinance where

owner

refers to the owner for the time being, a fact emphasized by the Court of Final Appeal in Chi Kit.

Secondly, construing the liability to pay outstanding management fees and contributions as being the responsibility of the owner for the time being makes good sense on a purposive interpretation of the Sub-DMC. Such a construction effectively attaches the liability to the unit in question. Put another way, it attaches to the defaulting owner

s interest in the shop unit and it passes to his successors in title. This makes good sense because the manager need only look to the current owner for payment of the arrears. He need not seek out the previous owner, who has assigned his shop unit to a new owner, for payment. That greatly eases and simplifies the task of management, which is also to the general benefit of all co-owners of the ground floor. Moreover, apart from suing the current owner for repayment, the manager can also prepare an instrument in writing creating a charge over his property pursuant to paragraph 11(a), so as to secure payment of the arrears, and in reality, to put pressure on the current owner to pay up. As between the current owner and the previous owner, sorting out whether there are any management fees and contributions outstanding and agreeing on the responsibility for payment of the same should not be too difficult a matter for the previous owner and new owner to handle before completion.

To construe otherwise would make management of the ground floor, which comprises over 20 shop units,

a highly complex affair

(cf Litton PJ

s observations in Chi Kit at p 512C/D in relation to the scheme of the Building Management Ordinance). In other words, the manager would have to seek out and sue the past owner for any outstanding management fees and contributions that had become payable prior to completion, whereas he had to look to the current owner for payment of any management fees and contributions that had become payable after completion.

Moreover, depending on whether a charge had been created by an instrument in writing before completion, there might or might not be a charge available to secure payment.

Furthermore, if such a charge had already been created before completion, it would mean that on the one hand, the manager had to look to the previous owner for payment of the outstanding management fees and contributions incurred by him before completion, but on the other, he had to turn to the new owner

s property for enforcement of the charge.

However, if no such charge had come into being prior to completion, one could not be created after completion against the new owner, because he was not the

defaulting owner

and therefore clause 11(a) would not be engaged.

Moreover, given the wording of clause 11(a), there has to be a period of 30 days default before a charge can be created. If there should be a change of ownership during that 30-day period, Mr Chiu

s argument would mean that the manager cannot create any charge over the property in question even if the previous owner/vendor does not pay up. If what is involved is a month or two

s management fees, this may be a small matter. But if one is concerned with a substantial contribution, say towards repair, and the demand for contribution happens to be made within 30 days before completion, no charge can be imposed on the property even in case of refusal or failure to pay the contribution. This does not make good sense. Nor is it conducive to good management of the shopping arcade.

In my view, the arrangement under the Sub-DMC is in broad outline similar to the scheme of the Building Management Ordinance analysed by the Court of Final Appeal in Chi Kit. There the court construed the Ordinance as meaning that once a demand for payment has been made of an owner for the time being, the liability attaches to his interest in land and passes to his successors in title.

Mr Chiu relies on clause 9(b) of the Sub-DMC, which provides that each owner shall pay to the manager on the due date the manager

s remuneration and management expenses, and argues that as

owner

means the owner for the time being, the liability to pay must be peculiar to the owner for the time being when the demand is made. If he fails to pay as demanded, a cause of action accrues in favour of the manager against him. It is not a continuing breach giving rise to a continuing cause of action; rather it is a breach simpliciter giving rise to a cause of action with an accrued date, ie the due date referred to in clause 9(b).

In my view, this does not prevent one from construing the Sub-DMC as meaning that once a demand is made of an owner for the time being, the liability attaches to his interest in land and passes to his successors in title. The two are not mutually exclusive. It is really a matter of construction. Clause 9(b) is simply concerned with when an owner becomes liable to pay. It does not say what will happen to that liability upon his assigning his interest in land to a new owner.

In short, as a matter of construction, I take the view that the liability to pay passes with an owner s interest in land to his successors in title.

This therefore distinguishes Discovery Bay because in that case, there was no mention whether the deed of mutual covenant and sub-deed of mutual covenant defined an owner as meaning an owner for the time being, or whether on their true construction, those documents had the effect of rendering a liability to pay run with an owner

s interest in land, passing to his successors in title. There was no mention of the existence or involvement of the incorporated owners, nor was the Building Management Ordinance referred to. The case simply turned on section 41 of the Conveyancing and Property Ordinance, to which I will presently turn. But so far as the preceding discussion on the proper construction of the Sub-DMC is concerned, I do not think anything said in Discovery Bay stands in the way of the construction that I prefer.

I now turn to Mr Chiu

s argument that unlike Chi Kit, which involved the position of an individual co-owner vis-
-vis the incorporated owners

under the provisions in the Building Management Ordinance, here one is merely concerned with a Sub-DMC which purports to make the owner for the time being liable for breaches committed prior to his being an owner. Counsel argues this goes further than what is allowed under common law and equity, as extended by section 41 of the Conveyancing and Property Ordinance.

I do not agree with counsel

s argument. I accept that Discovery Bay is authority for saying that only the burden of a covenant runs with the land, not the breach thereof, as a matter of common law/equity (as extended by section 41 to positive covenants). I also accept that section 41(8) specifically provides that a covenant shall not bind a person after he has ceased to have any interest in land except in respect of a breach of that covenant committed by him before that cessation.

However, in my view, all this has nothing to do with the present analysis. What I have concluded thus far is that as a matter of proper construction of the Sub-DMC, the original parties to the Sub-DMC have agreed among themselves by way of covenants that the owner for the time being is liable for all outstanding management fees and contributions, regardless of whether they have become payable before or after his becoming the owner. And for that purpose, a charge can be created against the current owner

s property for securing payment of the outstanding fees and contributions. That is, as I have emphasized, the result of a proper construction of the Sub-DMC. It has been agreed to by way of covenants between the original parties. They are positive covenants.

Under common law and equity, as extended by section 41, such covenants are binding on the owner for the time being of the ground floor premises. The moment a purchaser becomes an owner of an interest in the land and building, giving him a right to exclusively use, occupy and enjoy a shop unit on the ground floor, he becomes bound by the relevant covenants in the Sub-

DMC. Those covenants say that he has to be responsible for all outstanding management fees and contributions that have become payable even before he becomes the owner. That being the case, he is bound by those covenants by virtue of common law/equity/section 41. It must be remembered that common law/equity/section 41 do not concern themselves with the contents of a covenant or differentiate covenants by reference to their contents, apart from the old distinction between positive and negative covenants (which section 41 has essentially abrogated).

Thus analysed, it can be seen that there is no contradiction between enforcing against a current owner covenants which are to the effect that the current owner is liable for past breaches by virtue of common law/equity/section 41 and the proposition that by themselves, common law/equity/section 41 only make a covenant run with the land, not the breach thereof. Put another way, if the covenant so made to run with the land itself provides that the present owner shall be responsible for past breaches, that must be binding on the new owner as the covenant runs with the land.

I therefore reject Mr Chiu

s argument.

How title is affected

This being the position, I further take the view that on the facts of the present case, there is a title problem. First, the very substantial amount of management fees and contributions outstanding, which is, by common experience, quite outside the reasonable expectation of any purchaser, and which indeed exceeds 10% of the purchase price, renders the title defective. This is because the liability to pay the allegedly outstanding management fees and contributions of such a huge amount would rest upon the plaintiff as purchaser/new owner upon completion. That per se would amount to a defect in title as per Chi Kit. In that case, it must be remembered that the Court of Final Appeal approached the question of possible title problem not by reference to any possible charge that might be imposed by the incorporated owners on any defaulting owner

s interest in land (or for that matter, any charging order that the judgment creditor might obtain over the individual owner

s interest by way of execution with the leave of the court). Rather, the title problem was said to arise from the mere liability to make contribution by the new owner after completion to the incorporated owners for payment of the astronomical judgment debt.

A liability which attaches to an owner for the time being is one which binds successive owners and thus runs with the property. It is an inseparable incident of the ownership of the undivided shares. For that reason, where the liability is substantial and beyond the reasonable expectation of any purchaser, it affects title: Chi Kit at p 513D (per Litton PJ) and pp 518I to 519D (per Bokhary PJ and Sir Anthony Mason NPJ).

As has been explained more than once, the fact that the claim of the manager is disputed is neither here nor there. The Court of Final Appeal in *Chi Kit* has expressly recognized that at least in Hong Kong, a real risk of a successful claim is sufficient to constitute a blot on title: see the detailed discussion at pp

517B to 518G/H.

Secondly (and one can say the present case is in a sense stronger than *Chi Kit*), we have clause 11(a) here. In other words, given that liability to pay the allegedly outstanding management fees and contributions would rest with the new owner after completion, the manager could always create a charge over the property after completion pursuant to clause 11(a). The risk of such a charge being created over the property amounts to a blot on title. As noted, this does not seem to be the basis upon which *Chi Kit* was decided. But no doubt in an analogous kind of situations, the possibility of a charge being created against a property with an unauthorized structure in it was a reason in many conveyancing disputes in which the courts held that there was a title problem: see *Active Keen Industries Ltd v Fok Chi-keong* [1994] 1 HKLR 396, 409 to 410, where how an unauthorized building structure could affect title in a multi-storey building in some situations but not others was analysed by Litton JA, as he then was, in great detail.

In the present case, no argument has been raised that because of what the manager has not done in the past, there is no real risk of the manager imposing a charge over the property after completion in the present case. One is therefore not concerned with the situation where there is no real risk of enforcement. In other words, the possible charge is an additional reason for concluding that there is a title problem in the present case.

Clause 32

parties

respective arguments

I now turn to clause 32 in the formal sale and purchase agreement, which is identical to the 4th additional term included by the defendant in the preliminary sale and purchase agreement already reproduced above.

Both parties seek to make use of clause 32 for their own purposes. For the plaintiff, Mr Lee argues that regardless of whether there is a title problem, on its true construction, clause 32 imposes an obligation on the part of the defendant to pay off the outstanding management fees and contributions prior to completion. It is a condition or an intermediate term, the breach of which entitles the defendant not to complete in the circumstances of the present case.

On the other hand, Mr Chiu argues on behalf of the defendant that clause 32 actually amounts to an exemption clause. In other words, it prevents the purchaser from objecting to title by reason of the disputed claim for management fees and contributions and the resulting title problem.

All this turns on the proper construction of clause 32. Although evidence has been heard regarding the parties

negotiation and what the defendant (through Mr Adam To) subjectively thought the term meant, such evidence is not admissible for the purpose of construction. However, the Court must bear in mind the admissible factual matrix of the case.

I turn first to Mr Lee

s position. Given my conclusion above on title, Mr Lee

s argument based on clause 32 has become academic. In any event, I do not accept his argument. In particular, I do not accept his construction of clause 32 as meaning that the defendant has promised to pay off the

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e manager should take any action for payment, such as commencing proceedings, the defendant will be responsible. And if liability to pay is established, likewise the defendant will be responsible. In other words it is essentially an undertaking to pay or otherwise indemnify the plaintiff, should liability for payment of the disputed management fees and contributions be pursued or established in the court.

I believe this construction accords better with the wording of clause 32 as well as the factual background of the case than the competing construction. The whole purpose of the inclusion of clause 32 is to enable the defendant to carry on disputing the allegedly outstanding management fees and contributions with the manager and not to make any payment in the meantime.

In short, I reject the plaintiff

s argument. But this does not matter, given my conclusion on title above. The plaintiff does not need to rely on clause 32 to refuse completion.

Turning then to the defendant

s argument based on clause 32, it is essentially that clause 32 prevents the plaintiff from objecting to title by reason of the disputed management fees and contributions. Mr

Chiu relies heavily on the factual matrix that the defendant was quite plainly seeking a way to sell the property without settling the disputed management fees and contributions first. Of course, if a charge was registered before completion, the defendant as vendor would have no choice but to pay off the outstanding fees and contributions (under protest) in order to clear the title of the encumbrance. However, if no charge was so registered, the defendant

s plain intention, counsel submits, was to sell the property without paying the disputed management fees and contributions first. The only thing that the purchaser would get in such circumstances would be the defendant

s undertaking to be
responsible

.

I will come to all this in due course, when I deal with the argument based on waiver. However, even assuming that that was really the defendant

s intention, in the construction of clause 32 as a contractual term, the intention of the defendant would, taken at the highest, only form part of the factual background. One must still look at the entire contract and examine the wording used in order to find out objectively the true intentions of the parties and the proper construction of the relevant terms.

And having done so, I have no doubt that clause 32 does not have the effect contended for by Mr Chiu. In my view, clause 32 is insufficient to prevent the plaintiff from raising a title objection based on the disputed management fees and contributions. It only deals with who is responsible for payment of the disputed fees and contributions. It does not deal with the question of title. Rather, title is expressly covered by clause 7 in the formal sale and purchase agreement. Clause 7(a) categorically states that

the vendor shall give good title to the property

. Nothing in clause 32 expressly qualifies that obligation to give a good title. Nor, in my view, is there anything implicit in clause 32 to qualify the express requirement under clause 7(a) to give a good title.

As I said, clause 32 only deals with the incidence of payment and apportionment account. It does not refer to title. Neither does it, for that matter, say that the purchaser cannot object to title by reason of the disputed management fees and contributions. It only says that there should be no apportionment account in relation to the same.

Mr Chiu argues that it does not make sense to say that there should not be any apportionment account in relation to the disputed management fees and contributions, unless the parties mean that completion should go ahead notwithstanding that there are these disputed items remaining unpaid. Counsel argues that the significance of not preparing an apportionment account in relation to the same, which is otherwise covered by clause 13 (ie 14 days after completion to prepare and settle the apportionment account relating to the rent and outgoings of the property), is that it means there need be no verification of payment of the disputed management fees and contributions for the purposes of preparation and settlement of the apportionment account. The intention must be that there can be no title objection based on those fees and contributions. Otherwise, there would not be any completion, nor, in that case, would it be meaningful to refer to apportionment account at all.

I can see the logic of the argument. But in my view, in a contract of sale of land, the onus is squarely on the vendor to make it abundantly clear, if that be his intention, that what he is offering to sell is something less than a good title, ie a marketable one only. This is so because in an open contract situation, the law implies that the vendor is selling a good title. A fortiori, when there is a formal contract which expressly provides for the sale of a good title

ie clause 7(a). In such circumstances, if the vendor only wishes to sell a marketable title, it is, in my view, incumbent upon him to make that doubly clear in the contract by expressly and specifically qualifying his obligation to give a good title upon completion with unambiguous words.

As has been pointed out by Lord Hoffmann NPJ in *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, 299G, prima facie, it is the duty of the vendor to deduce and then convey a good title and if he relies upon the terms of the contract to shift the risk of any defect in title to the purchaser, the language must clearly do so. See also *Chi Kit* at p 521F/G to J; *Becker v Partridge* [1966] 2 QB 155.

In my view, in the present case, clause 32 has failed woefully to achieve that purpose. As I said, it does not refer to the obligation to give a good title. It does not state that the vendor is merely selling a marketable title. It does not say that the purchaser cannot object to title by reason of the disputed management fees and contributions. Nor does it provide that there must be completion notwithstanding that those fees and contributions are outstanding or allegedly outstanding at the time of completion.

Moreover, the clause has been inserted into the contract by the defendant. The general principle of *contra proferentum* applies in construing the term in the context of the contract. Mr To was the author of that term and I am afraid he only has himself to blame for the situation the defendant has found itself in.

The contrast between clause 32 in the formal sale and purchase agreement and clause 31 there (which is equivalent to additional term (3) in the preliminary agreement for sale and purchase dealing with the cockloft) is stark. Clause 31 specifically says that the cockloft is

self-constructed

and the purchaser cannot use that as a reason to cancel the transaction or make claim. Without deciding whether clause 31 itself is sufficient to prevent the purchaser from not completing by relying on a title objection regarding the so-called

self-constructed

cockloft (in this regard, see *Large Land Investments Ltd v Cheung Siu Kwai* [2003] 1 HKLRD 313, *infra*, where a similar

self-constructed cockloft

was involved), at least clause 31 makes it very clear that something preventing non-completion is involved. Clause 32, in so far as it is said that it is intended to deal with a potential title objection or constitutes an exemption clause, has been drafted in the most obscure way.

As I said, I have no doubt that the construction contended for by Mr Chiu (an exemption clause) is incorrect. I reject it. In other words, clause 32 does not provide an answer to the plaintiff

s claim that it is justified not to complete the sale and purchase given the title problem identified above.

Waiver

Mr Chiu, on behalf of the defendant, then runs an argument based on waiver. In short, he argues that given what Mr To has told the plaintiff through the two estate agents during their meeting, the plaintiff has agreed to waive any title objection based on the disputed management fees and contributions. He submits that clause 32, under this present argument, merely forms part of the circumstances giving rise to the suggested waiver. In relation to this argument, it must be remembered that there is a factual dispute as to when the two agents met Mr To at his office and what was discussed.

I will presently return to this aspect of the case.

But I should say immediately that in my view, the argument based on waiver is a non-starter.

First, one must remember that one is concerned with the formal sale and purchase agreement here. On the other hand, the alleged discussion between Mr To and the two agents took place before the preliminary sale and purchase agreement was signed. There was no subsequent meeting between the parties through the agents or otherwise. However, the preliminary agreement was subsequently superseded by the formal sale and purchase agreement. Whatever waiver there may have been affecting the preliminary agreement cannot, in my view, affect the parties

strict legal positions under the formal agreement.

The alleged wavier did not feature in the solicitors

correspondence leading to the preparation and execution of the formal agreement for sale and purchase. Nor was it mentioned in the formal agreement itself. Indeed clause 23(c) expressly states that the formal agreement

supersedes all previous agreements, whether oral or in writing, entered into by the parties [to the agreement] or their agents

.

The entire agreement clause supersedes the preliminary agreement and renders meaningless any waiver of the rights under it. More specifically, it catches precisely the alleged oral agreement between Mr To and the two agents on behalf of the plaintiff that in case no charge is registered before completion, all the defendant would do is to undertake to be responsible for the disputed management fees and contributions up to completion and the plaintiff as purchaser must complete the sale and purchase,

whether or not in such case there [is] still a title problem

(paragraph 40 of Mr To

s witness statement

adopted as evidence in chief). Such oral agreement cannot survive the entire agreement clause in clause

23(c).

In *Large Land Investments Ltd*, supra, at pp 322-323, paras 34-36, the Court of Appeal relied on a similar entire agreement clause in the formal agreement to reject an argument based on waiver. There the vendor relied on an addendum to the provisional sale and purchase agreement to base its argument on waiver. The court had no difficulty in rejecting the argument in paragraphs 34-36 as follows:

34. But in any event, even if it could be said that the addendum showed that the Purchaser knew that there was a defect in the title, the addendum was superceded by the sale and purchase agreement, in which the Vendor had expressly contracted to give a good title. It has been the common law for more than a century that where a vendor contracts expressly to give a good title, he must do so, and it makes no difference that the purchaser was aware of a defect in title at the time the contract was entered into (*Cato v Thompson* (1882) LR 9 QB 616 and *Re Gloag and Miller*

s *Contract* (1883) LR 23 Ch 320). Counsel for the Vendor did not seek to persuade us that the law was otherwise, nor did he seek to advance the

subject-matter of sale

argument that had been disallowed in the Court of Final Appeal in *Flywin Co Ltd v Strong & Associates Ltd* [2002] 2 HKLRD 485 (ie that the property that the parties had contracted to buy and sell was an encumbered title).

35. In the present case, the parties had expressly agreed in cl.13 of the sale and purchase agreement that

the Vendor shall

show and give good title

and in cl.27 that

this Agreement supercedes and annuls all representations and previous agreements between the parties whether implied or expressed verbal or written

. This wiped the slate clean.

36. Therefore, it matters not even if the words

self-constructed cockloft

in the addendum could be read to mean

unauthorised structure

, and that the Purchaser knew that the title was encumbered. The Vendor had expressly contracted to give a good title, and he had to do so unless, between the execution of the sale and purchase agreement and completion, the Purchaser waived the requirement to give good title.

The same reasoning, in my view, applies in the present case.

Secondly, waiving a title objection is a serious matter. The party alleged to have waived his legal right must not only be aware of the facts giving rise to the existence of his right but also his legal right of affirming or rescinding the contract arising from those facts and the right in question: *Giant River Lid v Asie Marketing Ltd* [1990] 1 HKLR 297; *Large Land Investments* at p 318 (para 15).

Here, the closest that Mr To came to regarding asking the purchaser to waive the title objection and complete the sale and purchase was when he allegedly told the agents during their meeting what he has since set out in paragraph

40(viii) of his witness statement

adopted as evidence in chief at trial:

(viii) I also told them that the purchaser

s solicitors would as a matter of conveyancing procedure definitely write to the manager inquiring the alleged outstanding management fees and other charges. If the manager then proceeded to charge the Property, the Defendant would clear the alleged outstanding management fees and charges before completion of the sale and purchase of the Property and then claim against the manager for over-payment for management fees and for damages for loss suffered by us. But if the manager chose not to register a charge against the Property, then the Defendant would resolve the dispute with the manager after the sale was complete. In which case the Defendant would undertake to the purchaser to be responsible for the disputed outstanding management fees and charges up to completion and the purchaser would be responsible for those fees and charges arising after completion. The purchaser must accept that or else the sale would not proceed because we did not want to argue whether or not in such case there was still a title problem. I further explained to them that since the dispute would in the latter case stand

unresolved, the purchaser must also not request for an apportionment of account on the management fees and charges upon completion because by the nature of things that could not be done while the dispute remained unsolved.

In my view, even if one were to accept Mr To

s evidence in total, what he had said is insufficient to found the waiver now relied on by the defendant. There was no mention that there would be a title problem even if no charge was registered before completion. All Mr To said was that the defendant did not want to

argue whether or not in such case there was still a title problem

. Indeed one may notice that there was no express reference that the purchaser had to complete. All Mr To said was that the purchaser had to agree that there should be no apportionment account. For present purposes, I am prepared to assume that the necessary implication of what Mr To said to the agents was that in the event that there was no charge, the purchaser had to complete. But my earlier point still remains, namely there was no mention that even in case there was no charge, there would still be a title problem. In other words, Mr To had actually understated the position by simply saying that the defendant did not want to argue whether or not there would still be a title problem when no charge was registered by the time of completion.

Thirdly and factually, I do not accept Mr To

s evidence in this regard. Although generally speaking, I prefer Mr To

s (and Ms Clara Lee

- s) evidence to the evidence of the two agents, I am not prepared to accept his evidence as set out in paragraph 40(viii) of his witness statement that he has expressly told the two agents that in the event no charge is registered before completion, the purchaser must accept the arrangement that there be no apportionment account as the vendor does not wish to dispute whether or not there is still a title problem in that event. I do not accept that he has said so to the agents (infra).

In relation to the witnesses

credibility, both counsel have put in very detailed written submissions. I do not wish to refer to them one by one. Suffice it to say I have borne all their submissions in mind. Indeed I have borne in mind the demeanour of the witnesses, the contents of their evidence, the solicitors correspondence and documents, and the inherent probabilities or improbabilities of their respective versions. But on this crucial point, I wish to highlight the fact that it is clear to me that Mr To throughout thought that if there was a charge registered before completion, there would be a title problem and the vendor had to pay off the disputed management fees and contributions so as to clear the charge and covey a good title. However, it is equally plain to me and I find it as a fact that throughout it was Mr To

s genuine and subjective belief that if no such charge was registered before completion, the allegedly outstanding management fees and contributions would not constitute a title problem. The only problem that they would give rise to in that event was the question of apportionment account, because the apportionment account would require the vendor to produce documents, such as receipts for management fees to prove that the vendor had discharged all outstanding fees before completion. Those documents would be required by the purchaser

s solicitors for verification purposes. The contract gave the parties 14 days after completion to do that (clause 13). Mr To could foresee difficulties in providing such documents because the manager was claiming management fees and contributions that the defendant was disputing. He did not want to pay them unless strictly necessary. So he could foresee difficulties in the preparation and verification of the apportionment account. It is plain to me and I find as a fact that in his mind, where there was no charge registered before completion, the only problem would be with the apportionment account. That was why he was eager to explain the position to the agents and to include additional term (4) to the preliminary sale and purchase agreement, which eventually became clause 32 in the formal agreement for sale and purchase. Throughout, as I said, his concern, in case no charge was registered before completion, was with the apportionment account. This was because, in his mind, in the eventuality under consideration, the only problem would be with the apportionment account, but not with title.

As I said, this is clearly evidenced by additional term (4) and clause 32 which only refers to the apportionment account but not to title. It does not say that the purchaser cannot use the disputed arrears as an excuse for not completing, in sharp contrast to additional term (3). Nor does it refer to the situation where a charge is registered before completion, because in that case, as Mr To has explained, there is obviously a title problem, the only solution to which is for the vendor to pay off the disputed management fees and contributions (under protest) in order to clear the charge and convey a good title.

Thus understood, it is no surprise to see that originally in the defendant

s defence where the genesis of additional term (4) and the conversation between Mr To and the two agents were pleaded, there was no mention that the defendant did not want to argue whether there would still be a title problem if there was no charge registered before completion.

Paragraph 14(iii) is the relevant paragraph:

(iii) That there were the Running Disputes between the Defendant and New City which might affect the title to the said Property. Details thereof (including the approximate sum in dispute) were supplied to the agents. Mr. Adam To then made it clear to the agents that:

If New City should register a charge against the said Property before completion, the Defendant would undertake to clear the charge before completion by paying New City the amount claimed in the Running Disputes and to seek to reclaim it from New City later.

If New City did not register a charge against the said Property by the time of the completion, the Defendant would be responsible to take up the Running Disputes with New City over the alleged outstanding fees. The purchaser must consent to the course and must not insist on apportionment of those outstanding fees which would be impossible.

In my view, this paragraph is much nearer to the truth than what is subsequently asserted in paragraph 40(viii) of Mr To

s witness statement, in terms of what has been said by Mr To in his mini-lecture to the two agents. And of course based on what has been pleaded in paragraph 14(iii), I do not think there is any possibility of making out a case of wavier on title.

For the sake of completeness, I make findings as follows: I do accept that Mr To met the two agents together in his office, more probably on 16 November 2004 than immediately before signing the preliminary agreement on 25 November 2004. This difference, however, does not really matter. Furthermore, in that meeting, Mr To did tell the two agents about the long running disputes that the defendant had been having with the manager and that there was a very substantial amount of management fees and contributions outstanding. I accept Mr To

s evidence that he even gave the two agents a copy of the demand note from the manager. I further accept that Mr To did tell the two agents the distinction between the registration of a charge before completion and no such charge being registered before completion by the manager. I accept Mr To

s evidence that he told the agents that in the former case, the defendant would be responsible for paying off the charge before completion. I also accept Mr

s evidence that in the latter case the defendant

s obligation was merely to be responsible for the management fees and contributions and there was to be no apportionment account in relation to the same.

However, I do not accept Mr To

s further evidence that he told the two agents that in that latter case, the purchaser had to accept this arrangement as the defendant did not wish to argue on whether there would still be a title problem. For the reasons explained above, the possibility that there would still be a title problem in that latter case was not something Mr

To thought of at the time. During evidence at trial, some answers given by Mr To could well be interpreted as meaning otherwise. But having listened carefully to his evidence and considered it as a whole, I have come to the firm view that the correct way of reading his evidence as a whole was that at the time, he never thought that there was any title problem arising from the disputed management fees and contributions in case no charge was registered before completion; the only problem was with the apportionment account. In so far as may be necessary, I reject any evidence from him to the contrary.

I find as a fact that the agents were aware of the above matters. However, they did not see fit to inform Mr Lawrence Lau of the same because no soon thereafter, they received from Mr To additional term (4) which they, very understandably as laymen, interpreted to mean that the defendant would be responsible for paying the management fees and contributions before completion. That was also the way Mr Lau read additional term (4). None of them was alive to the fine distinction between

be responsible

and

to pay

. In those circumstances, the preliminary agreement was signed. The parties were simply at cross-purposes.

I therefore reject the defendant

s argument based on waiver.

Conclusion on liability

In short, I reject the defence of the defendant. I find that the plaintiff was justified in not completing the sale and purchase on the scheduled date of completion.

Specific performance and other relief

The plaintiff seeks specific performance. The title problem is capable of cure. The outstanding purchase price should be more than sufficient to pay off the disputed management fees and contributions. But not only that. The plaintiff has very reasonably through counsel agreed to complete the sale and purchase on the terms set out in its last substantive letter written back on 28 February 2005. In that letter, the plaintiff through solicitors offered to complete the purchase and pay the balance purchase price in a particular manner, namely \$3,573,000 in favour of the defendant and \$510,000 (which was \$840.30 less than the management fees and contributions then outstanding) to K B Chau & Co as stakeholder. The money was not to be released to the defendant until the existing disputes between the defendant and the manager were concluded or one year after completion, whichever was earlier.

Quite obviously, it was a very reasonable offer in the circumstances of the case. The plaintiff has through counsel maintains essentially the same terms for completion. I see no reason not to order specific performance of the sale and purchase on such terms. The only adjustment required is that presumably the total amount outstanding by now has increased due to interest. I would therefore order specific performance based on the above terms, subject to updating the figures appropriately in accordance with what is (allegedly) due and owing by way of management fees and contributions as at the time of completion. I also give the parties liberty to apply for further directions relating to specific performance and completion.

I also order that the defendant pay to the plaintiff damages to be assessed on top of specific performance: Tony Investments Ltd v Fung Sun Kwan [2006] 1 HKLRD 835, 860, para 54.

Both counsel agree that costs should follow the event. I therefore order the costs of the action be paid by the defendant to the plaintiff, to be taxed if not agreed.

I thank counsel for their assistance.

(Andrew Cheung)

Judge of the Court of First Instance

High Court

Mr Lee Tung Ming instructed by Messrs Kenneth C C Man & Co,
for the plaintiff

Mr Simon C W Chiu instructed by Messrs K B Chau & Co,
for the defendant

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Prepared on 29 October 2026 · Esheria