

LO WO & ORS v CHEUNG CHAN KA JOSEPH & ANOR

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COURT OF APPEAL
CIVIL APPEAL NO 217 OF 2000
ROGERS VP, KEITH AND LE PICHON JJA
17, 31 MAY 2001

Contract – Unconscionable bargain – Property sold at gross undervalue – Developer not informing elderly owners to seek independent advice in property transaction or disclosing true value of property – Rescission of contract – Whether rescission appropriate remedy despite subsequent sale of interest in property

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Land – Sale of land – Property sold at gross undervalue – Order for rescission granted – Property remaining unit on lot to be acquired for redevelopment – Whether developer prejudiced by order for rescission – Whether developer deprived of chance to redevelop whole lot – Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545)

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Remedies – Rescission of contract – Property sold to third party after relief of rescission granted – Whether rescission appropriate remedy despite subsequent sale of interest in property

合約 – 不合情理的交易 – 物業出售遠低於一般市值 – 發展商沒有通知年長物業持有人就物業交易尋求獨立意見或揭示物業的真正價值 – 撤銷合約 – 雖然其後售賣物業權益，撤銷是否適當的補償

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土地 – 售賣土地 – 物業出售遠低於一般市值 – 命令撤銷 – 物業是地段上僅餘單位並被收購以作重建 – 命令撤銷是否對發展商造成不公 – 發展商是否被剝奪發展整個地段的機會 – 《土地（為重新發展而強制售賣）條例》（第 545 章）

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濟助 – 撤銷合約 – 物業在給予撤銷合約的濟助後售予第三者 – 雖然其後售賣物業權益，撤銷是否適當的補償

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The three plaintiffs (respondents in the appeal) were elderly sisters living in a remote part of Guangdong Province in Mainland China. They were the surviving successors to a half share interest in a property in North Point, Hong Kong (the flat), which was owned by their other sister who had died intestate in 1984. The second defendant (the appellant developer) was a property developer in Hong Kong. In 1993, the developer had acquired all the units in two buildings of which the flat was located for the purpose of redevelopment, with the exception of the half share of the deceased sister's flat, as well as the remaining half share which belonged to a third party.

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In between August 1993 and October 1996, representatives of the developer travelled several times to the Mainland to negotiate with the plaintiffs for the purchase of the deceased's half share in the flat, subject to the grant of letters of

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- A administration in relation to the flat in the plaintiffs' favour. In due course the plaintiffs appointed a representative of the developer (the first defendant) as their attorney for the purpose of obtaining the letters of administration of the deceased sister's estate. Letters of administration were duly granted and in October 1995, the plaintiffs' half share in the flat was assigned to the developer for \$870,000.
- B The representatives did not inform the plaintiffs that the developer had recently paid \$2.4m to the other half share owner for the assignment of its interest to the developer. In the event, the developer did not attempt to pay the plaintiffs the balance of the purchase money until a year later. By then the plaintiffs realized that the assignment of their interest was at a gross undervalue of the then market price of the flat and refused to accept the money. In January 1997, the plaintiffs
- C took action against the developer and its representative (the first defendant) seeking to set aside the contract of sale of their interest in the flat on the basis that the sale was an unconscionable contract.

The trial judge gave judgment to the plaintiffs and ordered rescission of the contract on condition that there was reimbursement of sums paid to the plaintiffs together with interest. Following the judgment, the plaintiffs sold their interest in the flat to another party for \$2.4m. On appeal, the appellant developer did not seek to argue that the findings of the judge were wrong, rather it sought to argue that the order for rescission was inappropriate given that the buildings had since been demolished, the relief granted against it was unjust in that the appellant could not redevelop the empty site as it did not own the whole interest in the lot.

E **Held, dismissing the appeal:**

per Rogers VP (Keith and Le Pichon JJA agreeing):

- (1) The judge was clearly right to conclude that the contract was unconscionable. The price offered to the plaintiffs was ridiculous in view of the price which had been paid to the co-owner of the same flat. The defendants had
- F full knowledge that they were gaining an unconscionable bargain against the plaintiffs. Not only were the plaintiffs not told of the true price of the other half flat (in the region of HK\$2.7m, plus removal expenses), the plaintiffs were not informed that the nature of the transaction was such that they should seek independent advice so that their full interests could be protected (at 74D-76B).
- (2) Although the flat was subsequently sold and the plaintiffs could no longer
- G enjoy any interest in the flat, the court could not award damages in lieu of rescission. If it were to do so, it would, in effect, be rewriting the contract. In any event, the second defendant or the party at fault would be the party which would have to bear the consequence of any possible injustice arising from the order of rescission to which the plaintiffs were entitled (at 76I-77D).
- (3) It would appear that the defendant developer's position would be
- H protected by the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545). This Ordinance enabled a person who had acquired 90% of the undivided shares in a lot to apply to the Lands Tribunal for an order for the sale of all the undivided shares in the lot for the purposes of redevelopment. Thus, the developer could apply for and obtain an order for sale under this Ordinance,
- I thereby avoiding any injustice and inequity. In the circumstances, the subsequent sale of the plaintiffs' interest did not render the relief of rescission inappropriate (at 77E-H).

Legislation referred to

Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545)

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Appeal

This was an appeal by the second defendant, Bond Star development Ltd, from the decision of Waung J, dated 9 June 2000, in which the judge ordered the rescission of a sale and purchase agreement on the grounds that it was an unconscionable contract. The facts appear sufficiently in the following judgment.

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Denis Chang SC, Isabella Chu and Sheena Chan (Liau, Ho & Chan) for the appellant/second defendant.

Leo Remedios (Tsang, Chau & Shuen) for the respondents/plaintiffs.

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Rogers VP: This is an appeal from a judgment and order of Waung J given on 9 June 2000. The three plaintiffs in the action are sisters. They brought this action against the defendants to set aside a contract of sale of their interest in the third floor flat at 28 Ming Yuen Street, North Point, on the basis that the sale was an unconscionable contract. The defendants in the action were a conveyancing clerk of a Hong Kong solicitor's firm and a property developer. The judge ordered rescission of the contract on condition that there was reimbursement of sums that had been paid to the plaintiffs, together with interest. The judge also made further consequential orders. The second defendant alone appeals.

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Background

The three plaintiffs were the only surviving family members of their fourth sister Po Lo Yin. That sister had died intestate in 1984. She had had a half share in the flat in question. The flat was located in a building at 28-30 Ming Yuen Street which the second defendant wished to redevelop together with the adjacent building at Nos 24-26.

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As recorded by the judge, the second defendant was a substantial Hong Kong property developer. By 24 August 1993 it had entered contracts to acquire all the units of both buildings with the exception of the half share of the third floor flat, which had been owned by Po Lo Yin. In his judgment, the judge set out two tables indicating the prices that the second defendant had paid for the respective flats. These prices varied from flat to flat. In respect of the other half share of the third floor flat the second defendant had paid \$2.4m plus \$300,000 removal expenses.

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Mr Lum was an estate agent who had been engaged by the second defendant to arrange the purchase of all the flats in the two buildings on the second defendant's behalf.

The first defendant and Mr Lum had ascertained that the persons entitled to Po Lo Yin's share in the flat were the three plaintiffs. In August 1993 they travelled to a remote part of Guangdong Province where the three sisters lived. They took with them \$100,000 to pay as a deposit and

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- A** also blank sale and purchase contracts. The third plaintiff was the sister with whom they negotiated. They told her that they wished to purchase the plaintiffs' interest in the flat. She was told that it was intended to demolish the building and that the premises were to be used to store sand. The plaintiffs were offered \$870,000. They were told that a higher sum
- B** could not be paid. The price was agreed. It was to include the plaintiffs' legal costs.

- C** The three plaintiffs were, as the judge found, not only very elderly but were simple country folk. They lived in a remote area far removed from sophisticated city life. The third plaintiff was the youngest of the plaintiffs. She was about 78 years old at the time.

- D** The provisional agreement was made on 24 August 1993. It required the three plaintiffs to sell their late sister's half share of the flat at a price of \$870,000. There would be an immediate payment of a deposit of \$50,000. The sisters were required to use their best endeavours to apply to the authorities in the Mainland for certification that they were the lawful successors of their deceased sister. They appointed the first defendant as their attorney to apply to the Hong Kong authorities for the grant of letters of administration in relation to the flat. Completion was to take place within three weeks after the first defendant had successfully obtained
- E** letters of administration. All the legal expenses relating to the estate and the purchase of the property were to be borne by the second defendant. The three plaintiffs had thus entered an absolute obligation to sell the interest in the flat to the second defendant. The three sisters signed the agreement by using crosses.

- F** Once the agreement had been signed the second defendant proceeded to execute formal agreements of purchase in relation to all the other units in the buildings at Nos 24-26 and 28-30 Ming Yuen Street.

- G** The first defendant revisited the plaintiffs in January 1994 for the purposes of arranging appropriate applications to the Mainland authorities and for his appointment as their attorney to obtain letters of administration. On that occasion a further sum of \$100,000 was paid to the third plaintiff. Letters of administration of the deceased sister's estate were granted to the first defendant in September 1995. The first defendant then proceeded to sign the formal sale and purchase agreement on
- H** 9 October. The assignment to the second defendant of the half share in the flat also took place on 9 October. A further notable feature of the events is that the first defendant did not attempt to pay the purchase money to the three plaintiffs within a reasonable time of the assignment. It was not until September or October 1996 that the first defendant visited the third
- I** plaintiff at her home and attempted to give the plaintiffs the balance of the purchase money. That was rejected. By then the plaintiffs had become aware that the price which had been offered to them, and to which they

had agreed, was a gross under value in comparison with the true value of their interest in the property.

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Shortly thereafter the plaintiffs executed a deed for revocation of the letter of appointment of the first defendant in relation to the Mainland certification. They appointed one Cai Shi as their lawful attorney. In January 1997 these proceedings were launched.

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The trial of the action lasted some 20 days. The judge heard evidence from the third plaintiff, the first defendant and from Mr Lum. The judge accepted the third plaintiff's evidence. He was critical in the extreme of the first defendant's and Mr Lum's evidence. In respect of the first defendant, his conclusion was that he did not inspire confidence and that he formed a very negative view of his credibility and trustworthiness. In short he rejected his evidence in all material respects except where he specifically indicated to the contrary. Mr Lum fared no better as regards the finding of credibility. The judge found himself in a position where he could not accept a single word of what he said unless there was some independent contemporaneous evidence.

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The judge had no difficulty in coming to the conclusion that the first defendant and Mr Lum had achieved an unconscionable bargain against the three plaintiffs. He concluded that the manner of making the agreement in 1993 and the formal agreement in 1995 was reprehensible and to be condemned. He considered that the parties were culpable to a high degree.

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The judge summarised his findings as to the culpable conduct of the parties on pp 29 to 31 of his judgment as follows:

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The starting point for this is of course the knowledge of the Developer and its agents, Lum and Cheung, of the serious disadvantages suffered by the Plaintiffs as I have found earlier. Knowing of these serious disadvantages of the Plaintiffs, the Developer and its agents Cheung and Lum took various steps to ensure that these serious disadvantages continued and that the Developer would obtain the oppressive terms of the August Agreement. The steps taken (or not taken) by Cheung and Lum consisted of amongst others: —

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1. ensuring that the August Agreement was entered into in great haste when there was no necessity to do so and in this respect I particularly accept the Lo Lan's version of the visit to her rather than the Cheung's and Lum's version;
2. deliberately not informing the Plaintiffs as to the purchase prices of the other units in 1st and 2nd Building;
3. by not informing the Plaintiffs the true price of the Sister Half Flat was not less than \$2.7 million with deposit term of \$100,000;
4. deliberately not informing the Plaintiffs that the Pons Half Flat was purchased by the Developer (just 8 days ago) for \$2.7 million with \$100,000 deposit;

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- A** 5. Cheung lying to Lo Lan saying that the Sister Half Flat was to be acquired by the Developer to store sand rather than for property redevelopment;
6. by dangling the cash deposit sum of \$50,000 before the Plaintiffs well knowing that to the Plaintiffs and their relatives this was a very large sum in the eyes of rural people of China;
- B** 7. by offering the Developer's agent Cheung to act as their attorney and the Administrator, thereby giving the Developer and Cheung the advantages which I had indicated earlier with the consequence of depriving the Sisters the opportunity to have proper representation and proper independent advice and thereby minimising the chance that the Sisters might wish to back out of the transaction;
- C** 8. by deliberately not bringing into the transaction independent professionals to act and advise the Sisters so that their full interests could be protected;
9. by deliberately not informing the Sisters that the nature of the transaction was such that they should have the benefit of proper independent professional advice and to give the Sisters time to seek such advice;
- D** 10. by not explaining to the Sisters in the circumstances that the true nature of the transaction they were proposing to enter into with Developer was extraordinarily disadvantageous to them and that they did not seem to be capable of making judgment of what was in their best interests;
- E** 11. by not structuring the August Agreement in such a way as to be binding on the parties only after the Sisters had obtained independent advice and such advisors had on behalf of the Sisters confirmed the August Agreement;
12. by not giving a copy of the August Agreement to the Sisters and in this respect again I accept the evidence of Lo Lan and not the evidence of Lum and Cheung.
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The judge concluded that the second defendant and its agents, the first defendant and Lum, had full knowledge that the second defendant was gaining an unconscionable bargain against the plaintiffs. He said that they knew that if proper steps had been taken and the true position had been made known to the plaintiffs and if the plaintiffs had not been disadvantaged, then they would not have entered the August 1993 agreement. The judge concluded that the manner of the making of the August 1993 agreement and the formal 1995 agreement was reprehensible and to be condemned. He said that the conscience of the court was shocked.

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Although this appeal raised, in part, a question as to whether the contract was unconscionable this factor was only pursued very tentatively by Mr Chang SC on behalf of the second defendant. After an indication from the court as to the difficulty he faced, Mr Chang did not pursue the argument that these findings of the judge were wrong, although he did not formally concede the matter.

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Having considered the points which were sought to be raised in this respect I have no hesitation in saying that the judge's conclusion was clearly right. The price which the first defendant and Mr Lum had offered the plaintiffs was ridiculous in view of the price which had been paid to the co-owner of the same flat. Although attempt was made in submissions to suggest that the price was not grossly undervalued by drawing attention to the price which had been paid for another flat, the circumstances of that sale are largely unknown. In my view the second defendant can achieve no help by reliance upon that.

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The relief granted

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Mr Chang's submissions in this appeal were directed to the question of relief. In summary the submission was that by ordering rescission of the agreements of sale, the second defendant was put in a position whereby it was likely to be excessively penalised by the order made and that this penalisation did not compensate the plaintiffs.

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The second defendant had purchased all the other interests in the lots on which the two buildings in question had stood. The buildings had been demolished. There was now an empty site. The second defendant could not redevelop the site with a view to selling property in the redevelopment because it did not own the whole interest in one of the lots.

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The position had indeed changed since the judgment. At the commencement of the hearing of the appeal leave had been given to the second defendant to adduce fresh evidence. That evidence showed that in the month after judgment was delivered the plaintiffs sold their interest to Capital Well Ltd, a company of which little was known. The sale price was \$2.4m. Mr Chang pointed to passages in the transcript which indicated that this sale might have resulted from a previous arrangement between the plaintiffs and Capital Well Ltd. The third plaintiff had, in the course of her evidence, indicated that the plaintiffs would receive \$2.4m for the flat.

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On this basis Mr Chang's argument was that the equitable remedy in respect of an unconscionable contract was one directed to protecting the plaintiffs' rights and not one directed to punishment of the unconscionable party. Whereas at the trial there was an element of interest in land which the plaintiffs enjoyed, that element now no longer existed. The plaintiffs had clearly demonstrated that their purpose in bringing the proceedings was their concern to receive a fair price for their interest in the flat.

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Mr Chang submitted that, on the other side of the coin, the developer was in a position whereby it had left the purchase of the interest in the land to its agent. It had to be conceded that the second defendant was legally responsible for the actions of the agent, but it was submitted that the moral responsibility was different. In any event, it was submitted, the

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A second defendant should not be held to ransom in respect of the investment which it had made in the land. On this basis, the case was put that the court should arrive at a remedy which was appropriate and met the justice of the case.

B On the face of the matter, there is an attractiveness to the point which was made. There would nevertheless be difficulties in respect of it. The contract for sale was made as long ago as 1993. There has almost certainly been considerable fluctuations in the value of the land. It is extremely difficult for a court to put itself in the position of a bargaining party. If the court were to award a sum of damages in lieu of rescission, it would, in effect, be rewriting the contract. That would pose a task which, for my part, I doubt that the court could undertake in the circumstances of this case. In that situation, if for no other reason, the party at fault would be the party which would have to bear the consequence any possible injustice arising from the order to which the plaintiffs were entitled. I, for my part, would not have been disposed to set aside the order for rescission.

However, in the event it would appear that the second defendant's position would be protected. Mr Remedios, on behalf of the plaintiffs, drew our attention to the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545). This Ordinance enables a person who has acquired 90% of the undivided shares in a lot to make an application to the Lands Tribunal. If the applicant establishes that it is in a position to redevelop the lot and has taken reasonable steps to acquire all the undivided shares in the lot, the tribunal may make an order for sale of all the undivided shares in the lot for the purposes of redevelopment of the lot. The person applying for the order may himself purchase the lot.

Given the fact that now the plaintiffs have sold their interest in the flat to Capital Well Ltd, I can see no reason why the second defendant should not be able to put itself in a position where it can apply for and obtain an order for sale under this Ordinance. Indeed, neither Mr Remedios nor Mr Chang could indicate any such reason. In these circumstances the supposed injustice and inequities of the position which were relied upon on behalf of the second defendant are not such as will materialise.

I would conclude simply by saying that, in my view, in the face of the position as it existed at the trial the order made by the judge was correct. The situation which has arisen because of the subsequent sale of the plaintiffs' interest does not render the relief granted inappropriate.

I would therefore dismiss this appeal with an order *nisi* of costs in favour of the plaintiffs.

Keith JA: I agree and have nothing to add.

Le Pichon JA: I agree.

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Reported by Shin Su Wen

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