

HCA 1209/2016 and
HCA 1948/2016
(Heard together)
[2022] HKCFI 3767

HCA 1209/2016

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1209 OF 2016**

BETWEEN

HAPPY FISH COMPANY LIMITED

Plaintiff

and

TANG JEB MING

Defendant

AND

HCA 1948/2016

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1948 OF 2016**

BETWEEN

MARK O'KANE

Plaintiff

and

TANG JEB MING

Defendant

Before: Deputy High Court Judge Jonathan Chang SC in Court

Dates of Hearing: 5-9 and 16 September 2022

Date of Judgment: 16 December 2022

J U D G M E N T

INTRODUCTION

1. In April 2007, O’Kane¹ and Happy Fish² each entered into a written sale and purchase agreement (“**Agreement**”) with Tang³ for the sale to them respectively of Lot No.3059 (“**Lot 3059**”) and Lot No.3060 (“**Lot 3060**”) (collectively, the “**Lots**”) in Demarcation District No.316 on Lantau Island with a 3-storey village house to be erected on the Lots.

2. Tang would line up the indigenous villagers who own the Lots⁴ to apply to the Lands Department for permission to build the village houses, arrange for and supervise their construction, and upon completion and after payment of premium, arrange for the transfer of ownership of the Lots (with the village houses erected thereon) to O’Kane and Happy Fish.

3. Construction of the two village houses was only completed in November 2013, and Certificate of Compliance was issued in April 2015. Premium was paid in April 2016. Rather than arranging for the transfer of

¹ Plaintiff in HCA 1948/2016.

² Plaintiff in HCA 1209/2016.

³ Defendant in both Actions.

⁴ Ho Tak Kwong of Lot 3059, and Ho Che-kwong Lewes of Lot 3060.

the Lots to O’Kane and Happy Fish, Tang arranged for their transfer to one Wong Chun Fai Henry (“Wong”) in May 2016 at \$9 million for each lot.

4. O’Kane and Happy Fish contended that Tang had repudiated their Agreements. Their main complaints are two-fold: (1) there was a significant delay in the construction of the village houses; and (2) Tang arranged for the transfer of the Lots to Wong when their Agreements were subsisting. Both acts evinced Tang’s intention not to honour their Agreements. O’Kane and Happy Fish accepted Tang’s repudiation and claimed damages against him.

5. Tang’s main defences are: (1) there was no delay given there was no express provision in the Agreements on the date of completion of the construction of the village houses; (2) the long time taken to build the village houses was caused by the request from O’Kane and Happy Fish to build a basement, and the remedial works required by the Government to be done to after the construction of the basement was abandoned; (3) Tang all along acted with reasonable diligence; (4) any breach arising from delay was waived or affirmed by O’Kane and Happy Fish and they were estopped from complaining; and (5) Wong was a personal friend of Tang who would be able to transfer the Lots as Tang directed as and when required. Tang’s pleaded defence based on illegality⁵ was not pursued at trial.

AGREEMENT WITH O’KANE

6. By late 2006, O’Kane was identifying a house to purchase in South Lantau for his family to reside in. He was an airline pilot and wished to live close to his work at the airport. His friends introduced him to Galy

⁵ Namely, construction of a basement in the village house was illegal as against the Small House Policy which permits the construction of a 3-storey village house only.

Wong (“Galy”) who is Tang’s wife. They had previously purchased a house in South Lantau through her.

7. O’Kane and his wife met Galy for the first time in March 2007 in South Lantau. Galy told them that Tang was an expert in building houses. She showed them several houses said to be built or renovated by Tang. She identified an empty plot of land and said Tang could build a village house for them. That plot was Lot 3059.

8. Later that month, O’Kane and his wife met Tang and Galy at their office. They were shown photographs of some houses that Tang had built or renovated and were impressed by his work. Tang said that he had built many houses with empty spaces (voids) underneath them which could be turned into a liveable basement for extra cost, and he said he could do a similar design for Lot 3059 for an extra price of \$200,000. He said whilst it was illegal to build a house with a basement within the house, it was not illegal to build a void underneath a house, and he could turn the void into a liveable basement with the Buildings Department’s consent.

9. O’Kane said that he considered what Tang told him about the basement “dubious” and Tang was trying to take advantage of some “grey area” in the law to build a basement. He did not want to get involved in anything illegal given this would be against the conditions of the house purchase scheme offered by his company through which he planned to purchase the house, nor would he put his job at risk by involving himself in anything illegal. He made clear to Tang that he would not risk losing the house with anything illegal. He never made any request to Tang for a basement to be built in the village house on Lot 3059.

10. At this juncture, I note that Tang's case is that the discussion with O'Kane about building a basement first took place only after O'Kane had signed his Agreement, and it was O'Kane who requested to build a basement after he knew that Tang was constructing one for Happy Fish on the neighboring Lot 3060.

11. O'Kane and his wife inspected Lot 3059 again in March 2007 with Tang and Galy, and they expressed interest to purchase the lot with the village house to be built on it. Galy said that the purchase price was \$4.8 million inclusive of all construction costs, and the village house would be ready before Christmas in 2007 and in any event before Chinese New Year in 2008. She also suggested that O'Kane only needed to renew his lease for his serviced apartment where he was then residing until late January 2008. O'Kane agreed with the provisional terms discussed.

12. On 1 April 2007, O'Kane (as purchaser) and Tang (as vendor) signed the Agreement at Tang's office. The key provisions are as follows:

- "1. The Vendor agrees to sell and the Purchaser agrees to purchase the land known as Lot No.3059 in Demarcation District No.316 Pui O, Lantau Island together with the 3-storeyed New Territories small house erected thereon ("the Property") subject to the terms and conditions herein contained.
2. The Purchase Price of the Property shall be HK\$4,800,000.00 which shall be paid by the Purchaser to the Vendor in the following manner:
 - (i) HK\$480,000.00 being initial deposit shall be paid upon the signing of this Agreement;
 - (ii) HK\$480,000.00 being further deposit shall be paid within 14 days of the Purchaser being notified that the superstructure of the land shall have been completed;

(iii) HK\$480,000.00 being further deposit shall be paid either within 14 days of the Purchaser being notified in writing that the Letter of Compliance has been issued or upon the handover of the keys of the Property to the Purchaser;

(iv) HK\$3,360,000.00 being the balance of the Purchase Price shall be paid on completion.

3. The date of completion for the sale and purchase of the Property shall be within 45 days of the Purchaser being notified in writing that all the necessary consent and approval have been obtained in respect of the completion and sale of the Property.

...

5. Should the Certificate of Exemption in respect of the Building Works not be issued on or before the last day of December 2007, then it is hereby agreed by the parties hereto that the Purchaser shall be at liberty by notice in writing to the Vendor to rescind this Agreement and upon service of such notice, this Agreement shall be rescinded and the Vendor shall repay to the Purchaser within 10 days thereafter all the deposits paid by the Purchaser but without interest.

...

8. The drawing of the Property is attached."

13. There is no reference to any basement to be constructed in the village house on Lot 3059 either in the body of the Agreement or in the drawing attached to the Agreement.

AGREEMENT WITH HAPPY FISH

14. Happy Fish was incorporated in April 2007 by Yukiko Nozaki ("Yuki"), her husband and their friends for the purpose of purchasing Lot 3060 for investment. Yuki's husband and O'Kane are work colleagues.

15. In January 2007, Yuki was put in touch with Galy through the same friends of O'Kane who had introduced him to Galy. Later that month,

A Galy drove Yuki and her husband around South Lantau to view properties.
B Yuki told Galy that they were looking to purchase an investment property
C to lease out. Galy said her husband Tang was an experienced local builder
D and he had built all the village houses which she had shown them. She
E explained that the houses in the area were village houses which must be
F constructed in accordance with the restrictions set by the Government, but
the interior layout could be built to their requirements. She also said that
Tang already had the necessary permissions from the Government to build
a brand-new village house.

G 16. In or about February 2007, Yuki called Galy and expressed an
H interest to purchase a brand-new village house in Lantau Island. A week
I or two later, Galy showed Yuki and her husband an empty plot of land and
J said Tang already had the permission to build a village house on it. That
plot was Lot 3060. Galy said it would cost \$5 million inclusive of kitchen
and other internal fittings, and the village house would be ready for
occupation by the end of the year.

K 17. On or about 14 February 2007, Galy sent Yuki and her
L husband an offer letter which reduced into writing the proposal she had
previously pitched to them. The essential terms are as follows:

M "Location: San Wai Tsuen, Pui O, Lantau Island. (DD316 Lot
30xx)

N House type: Semi-detached Small Village House

Area: 700 sq ft x 3 storey (2100 sq ft) plus 700 sq ft roof top.

O Selling Price: \$4,800,000 5,000,000 inclusive

P a.) building cost

b.) furnished fitted kitchen with appliance

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c.) furnished wardrobe for master bedroom

d.) split type air-conditioners.

Excluding light fittings and curtains or blind.

Estimate building commencing: June 2007

Estimate building times: 5 months.”

18. There is a handwritten annotation on the offer letter with a line drawn through “\$4,800,000” and “5,000,000” written above it. Yuki could not recall who did that and when, but she maintained that it was not written by her nor anyone from Happy Fish since they would not raise the purchase price nor add to the original document prepared by Galy and Tang. Galy’s evidence is that the offer letter was all in type print when it was provided to Yuki. Her offer to Yuki at that time was at \$4.8 million. The handwritten price was added in later but not by her or Tang, and they only became aware of the handwritten price in these proceedings.

19. In April 2007, Happy Fish was incorporated as the vehicle to purchase Lot 3060 for investment. After its incorporation, Yuki informed Galy that she would be purchasing Lot 3060 with some friends through a company. Galy arranged her to sign the Agreement at Tang’s office on 24 April 2007. The terms are identical to those in O’Kane’s Agreement, save that the purchase price is \$5 million and there is an inventory list appended to it. There is no reference to any basement to be constructed in the Agreement or the inventory list.

20. Yuki and Galy gave different accounts as to how the purchase price of \$5 million came about in Happy Fish’s Agreement:

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- (1) Yuki said that Galy had increased the price from \$4.8 million in the offer letter to \$5 million by the time when Yuki signed the Agreement, claiming that the market had gone up.
- (2) Galy said that Yuki requested to build a basement in the village house on Lot 3060 in or around early to mid-April 2007. Tang reminded Yuki that this was illegal because that meant an extra storey for a 3-storey village house permitted under the law, and the additional cost would be around \$200,000. Yuki insisted on its construction and agreed to pay the additional price. That was why the price was eventually agreed at \$5 million.
21. Yuki's evidence in this regard is not satisfactory:
- (1) Her evidence is that in February 2007, Galy offered to sell Lot 3060 at the price of \$5 million and this was later recorded in the offer letter: [16]-[17] above. This does not sit well with her evidence that Galy has "increased" the price to \$5 million by the time when the Agreement was signed.
- (2) Under cross-examination, Yuki said that before she signed the Agreement on 24 April 2007, she had asked Galy why the price was not \$4.8 million previously offered. It is not clear when and how the price of \$4.8 million was offered to her. On Yuki's evidence, the offer letter recorded what Galy had offered in February 2007, which was \$5 million.
- (3) Yuki's evidence that Galy had increased the price from \$4.8 million to \$5 million supported Galy's evidence that the

printed price in the offer letter was the price that Galy had offered to Yuki, and the handwritten price was only made subsequently to reflect a change in understanding.

22. Mr Damian Wong who appeared for Tang⁶ invited me to find that Yuki was the one who made the handwritten price change in the offer letter to reflect (for record purpose) the new price which she had agreed with Galy following the agreement to build the basement in the village house. I do not believe it is necessary for me to come to a finding in this regard, when it appeared common ground that Galy did offer \$4.8 million at one stage, which was increased to \$5 million, albeit on different accounts of Yuki and Galy set out in [20] above. I do bear in mind the unsatisfactory nature of Yuki's evidence highlighted above when I assess the overall credibility of the parties' respective cases.

WHETHER THERE WAS A REQUEST TO BUILD A BASEMENT

23. O'Kane's evidence is that the suggestion to build a basement came from Tang in March 2007, which he did not take up. Yuki's evidence is that there was never any discussion on building a basement and the price in Happy Fish's Agreement did not factor that in.

24. The evidence⁷ of Tang and Galy is that O'Kane approached them in around mid-April 2007 after he had signed his Agreement. He said he knew Tang was building a basement for Happy Fish in the neighboring Lot 3060 and he also wanted one for his village house. Tang said this could be done at an additional price of \$200,000, but he (through Galy) reminded O'Kane that the construction of the basement was illegal. Mark insisted

⁶ With Mr Andrew Tse and Mr Leon Guo.

⁷ In their supplemental witness statements.

on its construction and agreed to pay the additional price. Further, given all of them knew that the building of a basement in the village house was illegal, they agreed to omit the basement from all the written documents, and it would be unnecessary for O'Kane to sign a new contract to include the basement. On one occasion at Tang's office, Tang used a drawing to explain to O'Kane and his wife how the basement would be constructed. O'Kane and his wife even suggested that a cupboard could be used to hide the entrance to the basement if and when the officers from the Lands Department came for inspection.

25. As to Happy Fish, the evidence of Tang and Galy is that Yuki approached them in around early to mid-April 2007 and requested to build a basement for the village house on Lot 3060. Tang agreed to build it at an additional price of \$200,000. Given the construction of a basement was illegal, Tang and Yuki to omit this from all the written documents, and for this reason Happy Fish's Agreement made no mentioning of it.

26. As to how the construction of the basements was later abandoned, Tang's case is as follows:

(1) Construction of the village houses on the Lots commenced on or around 21 May 2007, on the strength of a Certificate of Exemption granted in April 2007 in respect of each lot. The certificate exempted the buildings to be erected on the Lots from the provisions of the Buildings Ordinance (Cap 123) and the regulations made thereunder in relation to building works, subject to the conditions set out in the certificate.

(2) Given the need to build the basements, Tang had to excavate the Lots and a slope nearby to make a void for them.

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- (3) On 26 June 2007, the District Lands Office issued a letter to the owners of the Lots, warning them that the site formation works adjoining the Lots were unauthorized, and excavation works were carried out on Government land without permission. The letter also referred to the District Lands Office having received complaints from owners / tenants of nearby houses who were worried that the works on the Lots might have a negative impact on the structural safety of their houses, and the owners of the Lots were advised to stop the works until Government inspection was completed.
- (4) On 6 July 2007, the District Lands Office revoked the Certificate of Exemption in respect of site formation works on the Lots on the ground that there was a breach of the exemption condition in that a cut slope of higher than 1.5 metres had been formed. By then, a void for the basements had already been excavated on the Lots.
- (5) Tang approached Poon Wood Keung (“**Poon**”) who was an authorized person, registered structural engineer and registered geotechnical engineer for advice on the remedial works to be done on the Lots. Poon put forward various remedial proposals to the Buildings Department.
- (6) Once the Certificate of Exemption was revoked, all building plans for the village houses would be subject to scrutiny of the Government departments which would not allow anything against the regulations to be built. By that time, Tang knew that it would be impossible to build the basements.

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(7) In August 2007, Tang and Galy informed O'Kane (by phone) and Yuki (at a meeting) that by reason of the involvement of the Buildings Department following the revocation of the Certificate of Exemption, it would not be impossible to build their basements, and it would also be uncertain as to when the construction of the village houses could be completed. O'Kane and Yuki expressed understanding of the situation and agreed to give up on the construction of the basements.

27. For the reasons set out below, I reject Tang's case and find, on balance of probabilities, that O'Kane and Yuki never requested to build a basement for their respective village houses on the Lots.

28. As regards O'Kane:

(1) Tang's first witness statement states that O'Kane requested to build a basement in his village house about two months after Yuki had asked for a basement to be built for Happy Fish on Lot 3060. On Tang's case, Yuki made such request in April 2007. O'Kane's request could therefore only be made, at the earliest, in June 2007, which was after the commencement of construction of the houses and basements on 21 May 2007, and in any event could not be in mid-April 2007 as Tang and Galy state in their supplemental witness statements.

(2) There was no discussion at all on when O'Kane should pay the extra sum of \$200,000. The instalments in his Agreement did not factor in such sum. Tang said Galy told him this sum was to be settled later (遲啲先計). This made no commercial

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B		sense at all, especially when it was the first time Tang and Galy had any business dealings with O'Kane.	B
C	(3)	There was likewise no discussion at all on whether O'Kane still had to pay the extra sum after the construction of the basement was (on Tang's case) abandoned.	C
D			D
E	(4)	It is incredible for Tang not to record O'Kane's agreement to pay the extra sum of \$200,000, or Tang's agreement to build a basement, in a private document between the parties.	E
F			F
G	(5)	The drawing which Tang said he had used to explain to O'Kane and his wife about the basement had no meaningful details. It was undated and made no reference to Lot 3059 at all, and was no more than a rough sketch with a few lines purporting to show what appeared to be a flight of stairs, some columns and spaces. The ground floor level was not even depicted. The refined drawings which Tang claimed to have made showed no connection between the ground floor level and the basement. Tang pointed to a spot under a flight of stairs on the ground floor level in a drawing and claimed that it was the proposed access to the basement. There is no reason why this has not been clearly stated in the drawing.	G
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N	29.	As regards Happy Fish / Yuki:	N
O	(1)	There was no discussion at all as to whether the price to be paid by Happy Fish would be reduced, when (on Tang's case) the construction of the basement was abandoned. Even if Tang may have thought that he had done sufficient work by	O
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then such that no price reduction should be given, this was never communicated to Yuki. On Tang's case, Happy Fish simply did not ask whether (and if so, why) it still had to pay for the basement. This made no sense.

(2) That a reduction in price for the abandoned basement was never broached by Happy Fish was inherently implausible, especially when Happy Fish did negotiate and manage to agree with Tang for a \$123,000 price reduction in August 2013 to release Tang from certain fit out obligations.

(3) It is incredible for Tang not to record Happy Fish's agreement to pay the extra sum of \$200,000, or Tang's agreement to build a basement, in a private document between the parties.

(4) The drawings prepared for the house showed no connection to any basement: see [28(5)] above.

30. It follows that I also reject Tang's case that any delay in the construction of the village houses on the Lots was attributable to the construction of a basement or any resultant remedial works. Incidentally, Poon's evidence is that the refusal of consent by the Government for the site formation works on the Lots did not relate to any basement works on the Lots, but related to retaining wall and slope works next to the Lots. The incident report and remedial proposals prepared by Poon for submissions to the Buildings Department did not refer to any remedial works for any "void" created on the Lots. This undermines Tang's case that the delay in construction resulting from remedial works required to be done was related to the construction of a basement.

CONSTRUCTION AND DELAY

31. After the Certificate of Exemption was revoked in July 2007, Poon submitted site formation proposal which, upon various revisions, was accepted by the Buildings Department in August 2008. In September 2009, Poon applied for consent to commence site formation works which, after a number of rejections by the Buildings Department, was granted in February 2011.⁸ Permission to carry out works on Government land was given in April 2011. Site formation works on the Lots were completed in late 2011 and was acknowledged by the Buildings Department in July 2012. Construction of the village houses commenced in December 2012 and was completed in or around mid-November 2013.

32. Certificate of Compliance was issued in April 2015. In order for the Lots to be transferred to third parties, premium had to be paid to remove the alienation restriction clause imposed under the Small House Policy. In December 2015, the District Lands Office assessed the premium at \$4,347,900 for each of Lot 3059 and Lot 3060. Tang engaged lawyers to appeal against the premium assessment on 11 January 2016. The appeal was eventually withdrawn on 4 March 2016, and the premium for both Lots was paid on 29 April 2016.

33. O’Kane and Happy Fish complained that there was substantial delay in the construction of the village houses, and Tang further delayed in completing the Agreement by unjustifiably appealing against the premium assessment. As a result, Tang breached the implied term to the Agreement

⁸ Consent for commencement of site formation works was granted on 2 July 2010. An application was made for approval of proposals in respect of site formation amendment on 19 January 2011. Consent to the commencement of such works was granted on 16 February 2011.

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B to exercise due and reasonable diligence in procuring completion of the Agreement and not to unreasonably delay or obstruct its completion. B

C 34. There are two obstacles which O’Kane and Happy Fish have C
not crossed to make good their complaint against Tang on delay.

D 35. First, there is no express provision in the Agreement on the D
E date of completion of the village houses. There is no plea of an implied E
F term as to the reasonable completion date in the circumstances of the case. F
Without a reference completion date, it would be impossible both on the
G facts and in law for any complaint on delay to be made out. G

H 36. Mr Toby Brown appearing for Happy Fish drew my attention H
I to the estimate of 5-month construction time in the offer letter: [17] above. I
J That is no more than an estimate, and did not give rise to an agreement to J
K complete the construction within 5 months, beyond which it could be said K
that there would be unreasonable delay. The same applies to what Galy
rise to any agreement of a fixed completion date or period.

L 37. Further, I agree with Mr Wong that O’Kane and Happy Fish L
M could not rely on the mere fact that the construction of the village houses M
N took 6 years to complete to make out a case on delay, let alone repudiatory N
O breach by Tang. They must specifically point out which period of time O
cause such delay. There is no relevant plea in the Statement of Claim.

P 38. Also, as Mr Wong submitted, a large part of the time during P
Q the 6-year period was taken up for applications for approval from the Q
R

Government departments. The applications were handled by Poon. There is no plea as to how Tang had acted unreasonably in the process.

39. Second, it is clear from the evidence that O’Kane and Happy Fish had by words and conduct agreed to proceed with their Agreements notwithstanding any delay in the construction of the village houses.

40. As regards O’Kane:

(1) By letter dated 22 September 2010, Tang invited O’Kane to rescind the Agreement pursuant to clause 5 (see [12] above) by reason that no Certificate of Exemption was issued on or before 31 December 2007. O’Kane chose not to exercise the right and insisted on proceeding with the Agreement.

(2) In a pre-action letter dated 7 November 2012, O’Kane stated that he remained willing to discharge his obligations under the Agreement and insisted that Tang do so as well, but reserved the right to claim damages.

(3) Whilst O’Kane commenced HCA 2254/2012 against Tang on 5 December 2012 for return of all the paid deposits, the Writ was not served on Tang. Instead, O’Kane paid the 2nd deposit of \$480,000 on 22 April 2013 upon Galy’s demand.

(4) It was O’Kane’s evidence that when he received Galy’s email on 5 December 2013 informing him that the building works of the village house on Lot 3059 was completed, it was still his intention to continue with the Agreement despite the lapse of 6 years since the Agreement had been signed.

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- (5) After being told by Galy on 13 May 2015 that the Certificate of Compliance had been issued, O’Kane asked her to “advise when appropriate for next payment from us”. He was clearly referring to clause 2(iii) of the Agreement which provided that the 3rd deposit had to be paid within 14 days upon notification of the issuance of the Certificate of Compliance.
- (6) Following a meeting on 24 December 2015 with Tang and Galy, on 28 December 2015, O’Kane emailed Galy and stated that whilst the assessed premium was far greater than what Tang and Galy had initially planned, “the best solution for us would be to go ahead with the original contract”.
41. As regards Happy Fish / Yuki:
- (1) By letter dated 22 August 2008, Tang invited Happy Fish to rescind the Agreement pursuant to clause 5. Happy Fish did not exercise such right.
- (2) Happy Fish’s letter dated 4 November 2010 to Tang stated that despite the delay of three and a half years, “it is our unchanged opinion since the last letter we sent you on August 15th, 2008 that both sides should honor the contract despite the external and governmental interruptions in the meantime.”
- (3) In a pre-action letter dated 7 November 2012, Happy Fish stated that it remained willing to discharge its obligations under the Agreement and insisted that Tang do so as well, but reserved the right to claim damages.
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(4) Whilst Happy Fish (with Yuki and her husband) commenced HCA 2243/2012 against Tang (and his company which issued the offer letter to Yuki) on 4 December 2012 for return of all the paid deposits, the Writ was not served.

(5) On 23 August 2013, Happy Fish and Tang agreed to reduce the contract price under the Agreement from \$5 million to \$4.877 million by releasing Tang from certain fit out works.

(6) On 17 December 2013, Happy Fish paid the 2nd deposit of \$500,000 to Tang upon Galy's demand.

(7) By email dated 24 June 2015, after viewing the village house earlier that day, Yuki said to Galy that "we are looking forward to own it at last".

(8) By letter dated 13 February 2016, Happy Fish through its solicitors demanded Tang to rectify all defects in the village house on Lot 3060 and complete the Agreement.

42. I agree with Mr Wong that the above words and conduct on the part of O'Kane and Happy Fish showed that they were desirous to proceed with the Agreement despite any delay in the construction of their village houses, and had accordingly elected to treat their Agreements as continuing and thereby abandoned their inconsistent right to treat them as repudiated by reason of any delay. Whilst pleaded as a waiver generally, its true legal nature was one of waiver by election (or affirmation). Such waiver would not bar O'Kane and Happy Fish from claiming damages, nor alleging repudiation by Tang on grounds other than delay.

43. For the reasons set out above, I conclude that there was no repudiation by Tang for any delay in completing the construction of the village houses and transferring the Lots to O’Kane and Happy Fish. Even if there was any delay in completing the Agreements, O’Kane and Happy Fish had waived their right to terminate the Agreements on such basis.

TRANSFER OF THE LOTS TO WONG

44. On Tang’s case, he caused the Lots to be transferred (from their owners) to Wong in May 2016 in the following circumstances:

- (1) The premium assessed for the Lots far exceeded what Tang had originally expected, and he had no means to pay it.
- (2) Tang approached his friend Wong who agreed to assist in the payment of the premium.
- (3) After payment of the premium, the owners of the Lots would be free to dispose of the Lots at their own will. To prevent that from happening, Tang arranged the Lots to be transferred to Wong “on a temporary basis”. This was also to protect Wong’s interest given he had paid the premium. The transfer to Wong was conditional upon Wong transferring the Lots to any party at any time as Tang directed.

45. Tang contended that he was able to complete the Agreement even though the Lots had been transferred to (or “parked” with) Wong for the time-being. There was no repudiation on his part.

46. I reject Tang’s case as being unbelievable:

(1) There was no document evidencing Tang's arrangement with Wong, despite the documentation of the sale of the Lots to Wong by way of a formal sale and purchase agreement drafted by solicitors. Tang did not call Wong as a witness, despite his evidence that he was "partnering" with Wong in relation to the Lots after their transfer to Wong.⁹

(2) Tang gave no details of his agreement with Wong, including in particular the conditions Tang had to meet before Wong was required to transfer the Lots as Tang directed:

(a) As Mr Brown submitted, transferring the Lots at Tang's direction could be a terrible deal for Wong. Based on the documents, Wong paid \$18 million for the Lots and \$1.35 million as stamp duty. If Wong were to transfer the Lots to O'Kane and Happy Fish free of charge, he would be out of pocket for \$19.35 million and would be unsecured for repayment from Tang. Someone other than O'Kane and Happy Fish would have to pay the substantial special stamp duty for a second transfer of the Lots within a short period after Wong's acquisition.

(b) What is unknown from Tang's evidence is: (i) how much Wong paid to Tang; (ii) whether Wong's transfer of the Lots as Tang directed was subject to any condition that Wong be paid back in full what he had

⁹ Mr Brown invited me to draw adverse inference against Tang for not calling Wong as a witness. I do not believe it is necessary to do so for the resolution of the factual dispute, especially when Tang was not cross-examined as to why Wong did not come forward as a witness for him. It suffices for me to note that Tang's assertion was not corroborated by any evidence from Wong.

paid; (iii) what price did Wong expect O’Kane and Happy Fish to pay him for the Lots, and when did Wong expect payment and in what manner; and (iv) who would pay the special stamp duty on the sale of the Lots from Wong to O’Kane and Happy Fish.

(3) Tang did not seem to have an idea how much money was paid by Wong. He suggested that Wong had contributed to both the premium and stamp duty but did not pay all. Galy seemed to suggest that Wong had paid both in full. Tang appeared to suggest that Wong’s payment of the premium was in the form of a loan to him. There was no discussion on the terms of the loan such as repayment time and interest.

(4) On the evidence of Tang and Galy, the price set for the transfer of the Lots at \$9 million for each Lot was based on the market price. This suggested that it was an outright sale of the Lots to Wong; otherwise, the price would be set for the minimum possible sum, at least for attracting a lower stamp duty. The explanation was that if the sale price to Wong was set too low, it risked a Government valuation. Neither Tang nor Galy could explain what “too low” meant. Crucially, if Wong were to transfer the Lots to O’Kane and Happy Fish at the agreed price under their Agreements, the massive drop in value on the second sale within a short period of time (which under the Agreement would take place within 45 days after the premium was paid) would cause immediate suspicion.

(5) Tang's evidence was that the transfer of the Lots to Wong was to protect against any sale by the owners to third parties after the premium was paid. There was no evidence that there was a legitimate threat from the owners, when both (according to Tang) were his long time personal friends of over 20 years, had been paid for their *ding* rights and for assisting in resolving road disputes with the owners of neighboring lots, and Tang had been authorized to deal with the Lots on their behalf pursuant to written authorizations (although none was disclosed) that had not been revoked by the owners.

47. I find on balance of probabilities that the transfer of the Lots to Wong in May 2016 was an outright sale; there was no agreement for Wong to transfer the Lots at any time to any party as Tang directed. By arranging for the Lots to be sold by the owners to Wong without recourse, Tang clearly evinced an intention not to perform his Agreements with O'Kane and Happy Fish, and as such had repudiated them.¹⁰

48. Mr Wong argued that it was O'Kane and Happy Fish which refused to complete their Agreements. O'Kane issued his termination letter on 20 July 2016 when on the same day Tang informed him by letter that he was ready to complete. Happy Fish issued its termination letter on 6 May 2016 without knowing of the transfer of Lot 3060 to Wong 3 days earlier. Given my rejection of Tang's case that he had an agreement for Wong to transfer the Lots as and when Tang directed, it lies ill in Tang's

¹⁰ Whilst there was evidence suggesting that Tang had sold the Lots to Wong in order to back out from his bad bargains with O'Kane and Happy Fish caused by the escalation in construction costs due to the long time for completion and the high premium assessed, I do not find it necessary to come to a conclusion in this regard. It suffices for the disposal of this case for me to find, on a balance of probabilities based on the evidence before me, that there was no alleged agreement between Tang and Wong. Why Tang had decided to sell to Wong is not a matter which I had to come to a conclusion.

mouth to maintain that he was still able to complete the Agreements at any time, and that O’Kane and Happy Fish had somehow “jumped the gun” to terminate their respective Agreements. To put simply, Tang had no plans to cause the Lots to be transferred to O’Kane and Happy Fish at all.

49. Mr Wong further argued that O’Kane and Yuki appeared to “accept” that Tang retained control of the Lots after the sale to Wong:

(1) O’Kane found out that the village house on Lot 3059 was put up for lease through an estate agency in which Tang’s sister was a consultant and she had told people interested in renting Lot 3059 that Tang and Galy were the landlords.

(2) Yuki’s friend who has rented the village house on Lot 3060 negotiated only with Tang and Galy who were representing themselves as the landlords of the property, and she therefore had reason to believe that Wong was a mere nominee for Tang and/or Galy who remained in full control of Lot 3060.

50. I fail to see how any of the above assertions amounted to any acceptance by O’Kane and Happy Fish that Tang had in fact control over the Lots after their transfer to Wong. Their evidence reflects no more than their impression and inference drawn from surrounding circumstances. Nor could I see how that could further Tang’s case on whether as a matter of fact, there was an agreement between him and Wong for transfer of the Lots, which case I have rejected.

RELIEF

51. The parties agreed that in the event that Tang is found liable for repudiation of the Agreement, the appropriate damages are the agreed

value of the Lots¹¹ at the time when they should have been transferred to O’Kane and Happy Fish (namely, 13 June 2016 which was 45 days after payment of premium which triggered completion of the sale and purchase pursuant to clause 3 of the Agreement), less the unpaid balance of the contract price under the Agreement:¹²

(1) For O’Kane: \$6,265,000;¹³

(2) For Happy Fish: \$6,228,000.¹⁴

52. In his closing submissions, Mr Brown also sought a lien over the Lots for the judgment and interest accrued. This was premised on his argument that Wong was holding the Lots for Tang and was therefore not a third party without notice of the rights of O’Kane and Happy Fish in the Lots. Given there was no agreement between Tang and Wong and the sale of the Lots to Wong was an outright sale, the claim for a lien does not get off the ground, and was sensibly not seriously pursued by Mr Brown.

INTEREST

53. Mr Wong submitted that if the Court finds Tang to be liable to pay damages, the Court should disallow pre-judgment interest for the period from 10 July 2020 to 13 April 2021 or other appropriate period as the Court sees fit. The basis was that the Court would have been able to set down the Actions for trial on 10 July 2020, had O’Kane not sought leave to file his supplemental witness statement which was filed only on

¹¹ This was initially subject to rival expert valuations from the parties but was agreed at trial in the sum of \$10,105,000 with the experts dispensed from attendance.

¹² *McGregor on Damages* (21st ed. 2021) at para 27-005.

¹³ \$10,105,000 minus balance due under O’Kane’s Agreement at \$3,840,000.

¹⁴ \$10,105,000 minus balance due under Happy Fish’s Agreement (as varied by the price adjustment in August 2013) at \$3,877,000.

11 January 2021 and was hardly referred to in the parties' submissions, and as a result leave to set down was only given on 13 April 2021.

54. Unreasonable delay in pursuing or prosecuting a claim may be a ground in reducing the award of interest. This is because it would be wrong in principle that interest should accrue during a period when the claimant has kept out of the judgment sum by his own fault. The Court must apply a broad brush and realistic approach. It is not reasonable to expect a party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterized as unreasonable on the question of interest when, making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period. The Court should also bear in mind that the defendant has had the use of money during that period of delay: *China Agri-Products Exchange Limited v Wang Xiu Qun & Anor* [2022] HKCFI 1533 at [9]-[10].

55. Whilst O'Kane's supplemental witness statement (which ran through 146 pages with 407 paragraphs, and set out extensive recitations from documents and arguments) provided no real value to the Court's resolution of the disputes, it is part of the Court process and within O'Kane's right for him to seek leave to file his supplemental witness statement and for such purpose applied for extensions of time to do so. Tang had made no application to expunge O'Kane's supplemental witness statement on the ground of irrelevance. I do not see how the delay in setting the matter down for trial resulting from the filing of O'Kane's supplemental witness statement could be characterized as unreasonable on the question of interest in that this showed that O'Kane had neglected or declined to pursue his claim during that period.

56. Interest on the judgment sum should run from 13 June 2016 (being the day when the Lots ought to have been transferred to O’Kane and Happy Fish pursuant to clause 3 of their Agreements) up to the date of this Judgment (16 December 2022) at the commercial rate (HSBC prime rate +1%) and thereafter at judgment rate until full payment.

COSTS

57. Costs should follow the event. Tang should therefore pay the costs of O’Kane and Happy Fish in the Actions, to be taxed if not agreed. I decline to allow certificate for two counsel for O’Kane.

58. This is subject to this Court disallowing all the costs incurred for preparation of the trial bundles to mark the Court’s disapproval:¹⁵

- (1) There are 16 trial bundles.
- (2) 3 contain entirely of solicitors’ correspondence which were not referred to at all at trial.
- (3) 1 contains entirely of the lists of documents filed by parties.
- (4) The 2 bundles of Court documents include Orders that were plainly spent, e.g. Orders for extension of time.
- (5) At the PTR, K Yeung J directed the parties to prepare a joint common core bundle. None was prepared.
- (6) In fact, based on the joint chronology of events and the parties’ questions at trial and written submissions, the total number of

¹⁵ I have also considered disallowing costs of O’Kane’s supplemental witness statement given the wholly unsatisfactory nature of its contents: see [55] above. On reflection I decided not to do so but to leave it for taxation. It is not for me to micro-manage what should go into a witness statement.

documents that were truly necessary for the fair disposal of the matter would be no more than 200 pages. There are 6 bundles of documents in total: 2 for each Action, and 4 said to contain “common documents”. A large part of them were not referred to at trial or in submissions.

59. In view of the poor preparation of the trial bundles, on Day 1 of the trial, I directed the solicitors for all parties to show cause as to why they should not personally bear the costs of preparing the trial bundles. Parties have a positive obligation to put their minds together and prepare the trial bundles in a manner that best assists the Court and facilitates the just and fair disposal of the case in a costs efficient and proportionate way. Only documents truly relevant to the Court’s determination of the dispute should be included. If in the course of trial any relevant document is found to have been left out, it can always be added back. Input from trial counsel should be sought, given they are best positioned to decide what are the key documents for the case. Trial counsel are expected to take a proactive step to assist in the preparation of trial bundles.

60. In the end, the solicitors for all parties gave an undertaking to the Court that they would not charge their clients the costs of preparation of the trial bundles regardless of the outcome of the case. I commend them for taking such a sensible approach.

DISPOSITION

61. I enter judgment against Tang in favour of O’Kane for the sum of \$6,265,000 and in favour of Happy Fish for the sum of \$6,228,000, with interest at HSBC prime rate +1% from 13 June 2016 to 16 December 2022 and thereafter at judgment rate until full payment.

62. I make a costs order *nisi* that Tang do pay the costs of O’Kane and Happy Fish (including all costs reserved) in these Actions, to be taxed if not agreed, save that all the costs of preparation of the trial bundles are disallowed. The costs order *nisi* will be made absolute in the absence of any application for variation by way of *inter partes* summons within 28 days from the date of this Judgment.

(Jonathan Chang SC)
Deputy High Court Judge

Mr Toby Brown, instructed by Payne Clermont Velasco, for the Plaintiff
in HCA 1209/2016

Mr Foster Yim and Mr Owen Kun, instructed by Payne Clermont Velasco,
for the Plaintiff in HCA 1948/2016

Mr Damian Wong, Mr Andrew Tse and Mr Leon Guo, instructed by
Rowdget W. Young & Co., for the Defendant in both Actions