

For hearing before Master Siu in Chambers at 9:00am on 6 October 2007

RE: HCA NO. 9999 OF 2006

DEFENDANT (RESPONDENT) SKELETON SUBMISSIONS

1. Introduction

1.1. This is D's response to an application brought by the claimant for summary judgment. The claimant is claiming for 4 dishonoured cheques (the "**4 Cheques**") with a total value of HKD 990,000 (the "**Debt**"). The bases for the respondent's argument are:

- (1) That there is a credible defence to this action brought by the claimants; and
- (2) that there are issues that need to be resolved by trial.

Therefore, this is not a suitable case for summary judgment to be granted.

2. Defendant's Arguments

2.1 1st Defence – Promissory Estoppel

D argues that P was estopped from presenting the 4 Cheques because:

- (1) D had only drawn the 4 Cheques on the representation that they would be used as interim security pending payment by the principal debtor. P held out to D that the cheques would not be presented until further arrangement between P and FFG.
(See D's affirmation at ¶15 p.29)
- (2) The intention of P not to present the cheques until later arrangement can be seen from the deed of guarantee dated 17 July 2005 (the "**Deed**") in which D was made a guarantor of the Debt owed to P by FFG. The Deed evidenced a 'continuing security' until the Debt was repaid in full. Generally, a guarantor is not liable for a debt until the principal debtor defaults in payment, which is not the case here.
(See TW-13 p.73)

The Law

Where two parties enter into agreement during which Party A makes a promise to Party B which he knows will be acted on and which is in fact acted on by Party A, the court will treat the promise as binding on Party A to the extent that he cannot act inconsistently with it.

(See *Central London Property Trust Limited v High Trees House Limited* [1946] KB 130).

P should therefore be estopped from arguing that it had the right to present the 4 Cheques when in fact, it told D that it would not do so and its intention to withhold from doing so is spelled out in the Deed. Furthermore, there had indeed been further arrangements between P and FFG which effectively absolved D's liability for the cheques.

2.2 2nd Defence – Settlement and Discharge

D argues that his liability for the 4 Cheques was absolved because:

- (1) The Deed stipulated that D would guarantee P for the full Debt using the 4 Cheques. However, it appears that P had accepted the 15 promissory notes issued by FFG (the “**Notes**”) in full settlement of the value of the 4 Cheques that P now claims, and a deed of guarantee is generally discharged when full payment has been made by the principal debtor.
(See *Chitty on Contracts*, (27th ed), Sweet & Maxwell, London, 44-064)
- (2) According to correspondence between P and D dated 2 and 3 December 2005, P had agreed with D's terms of settlement (i.e. discharge of the Deed and liability for the cheques). Indeed, P expressly conveyed their intention to use those Notes to satisfy overdue rents.
(See VS-5 p.103)
- (3) Evidence that P accepted such settlement terms is further confirmed in correspondence between P and D on 10 March 2006.
(See VS-3 p.85)
- (4) The Notes themselves provide evidence that they effectively substituted the 2 cheques dated 30 November 2005 and 31 January 2006, the other 2 already having been presented and dishonoured.
(See VS-4 p.94)

Given that P has accepted the Notes, it is unreasonable that they have not presented them for payment since their due date of 30 June 2006. P has proffered no evidence that they have presented the Notes for payment and the maker of the Notes, FFG, is shown to have enough liquid assets in its account to make good the payment of HKD 990,000. (See TW-10 p.66)

2.3 Triable Issues

There are issues in the defence that constitute triable issues, including:

- (1) Whether P did represent to D that he would not present the cheques until later arrangements with FFG;
- (2) whether the Notes were presented by P for payment; and
- (3) whether the Notes and related correspondence constitute discharge of the Deed.

Accordingly, even only relying on evidence available at this interlocutory stage, the Defendant's has made out credible defences in addition to several triable issues. The Defendant therefore humbly seeks an order to dismiss the Plaintiff's application for summary judgment.

Dated this 5th day of October, 2007

CLIFF LUI
Counsel for the Defendants
(Respondents)