

CACV 173/2004

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

**CIVIL APPEAL NO. 173 OF 2004
(ON APPEAL FROM LANDS TRIBUNAL
BUILDING MANAGEMENT
APPLICATION NO. LDBM 243 OF 2003)**

BETWEEN

WONG WAI CHUN Applicant

and

SHING SAU WAN Respondent

Before : Hon Cheung JA, Hon Yuen JA and Hon A. Cheung J in Court

Date of Hearing : 21 January 2005

Date of Judgment : 21 January 2005

Date of Reasons for Judgment and Decision on Costs: 28 January 2005

**REASONS FOR JUDGMENT
AND DECISION ON COSTS**

Hon Cheung JA :

REASONS FOR JUDGMENT

1. These are my reasons for our decision given on 21 January 2005.

2. This is an appeal against the decision of H H Judge Chow sitting as the presiding officer in the Lands Tribunal ('the Tribunal'). He dismissed the applicant's application. On review, he affirmed his decision. The applicant appealed.

The claim

3. The applicant was the owner of a flat in a building known as Scenery Mansion at No. 108-110 Waterloo Road, Kowloon, Hong Kong ('the building'). The respondent was also an owner of a flat in the building. She was the chairman of the management committee of the incorporated owners of the building ('the corporation').

4. The nature of the applicant's claim was stated at paragraph 5 of the Notice of Application :

'The respondent had in breach of section 18(2)(aa) of the *Building Management Ordinance* ('the *Ordinance*') and without the approval of the corporation by resolution passed at a general meeting of owners paid or caused to

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be paid to herself out of the funds of the corporation as allowances the total sum of HK\$19,110.00 for the period from July 2002 to July 2003.'

5. The relief sought by the applicant was :

- '(1) An order that the Respondent do pay the sum of HK\$19,110.00 to the Corporation together with such interests thereon as the Court shall deem appropriate;
- (2) An order that the Respondent be restrained from paying or causing to be paid to herself out of the funds of the Corporation as allowance any sum of money not approved by the Corporation by resolution passed at a general meeting of owners or permitted by law.'

The opposition

6. The defence of the respondent was that there were valid resolutions passed by the owners at meetings of the corporation authorising her to receive the allowances. At the annual general meeting of the corporation held on 13 June 2002 it was resolved that a monthly allowance equivalent to one month's management fee which was \$1,400.00 per month was to be granted to her. The treasurer of the management committee was also granted an allowance of \$700.00 per month. Further, by another resolution passed at the annual general meeting of the corporation held on 27 August 2003 the previous resolution

was ratified. It was also unanimously resolved that the payment exceeding \$600.00 per month was to be treated as the travelling and sundry expenses of the respondent and the treasurer for their efforts in arranging for the maintenance and repair works for the building.

The decision

7. The judge dismissed the application on the basis that since the allowance was granted pursuant to resolutions of the corporation, the applicant's case as contained in paragraph 5 was without any foundation.

8. He further held that since the corporation was not a party to the proceedings he should not decide the issue concerning the validity of the resolutions. He held that even if the resolutions were invalid, the respondent should not be held responsible for them.

Points of law

9. Mr. Lau, counsel for the applicant, submitted that the following questions of law were involved in this appeal :

1. Whether the validity of the resolutions passed at the general meeting of the Incorporated Owners on 13 June 2002 and 27 August 2003 is a matter which ought to have been determined by the Tribunal;

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- 2. Whether Section 18(2)(aa) of the *Building Management Ordinance* is binding on the chairman of the Management Committee of an Incorporated Owners;
- 3. Whether in order for an owner to seek relief against the chairman of an Incorporated Owners for the return of allowances unlawfully paid to and received by the chairman, the Incorporated Owners must be joined as a Respondent to the Application;
- 4. Whether the Lands Tribunal has jurisdiction to hear and determine the Application.'

Corporation as a party

10. We dismissed the appeal without calling on Mr. Li, counsel for the respondent.

11. Section 18(2)(aa) of the *Building Management Ordinance* (the '*Ordinance*') provides that,

'subject to subsection (3), and subject to such terms and conditions as to attendance at meetings of a management committee and its sub-committees as the management committee may determine, pay the chairman, vice-chairman (if any), secretary, treasurer and other holders of office of the management committee appointed in accordance with the Second Schedule such allowances as may be approved by the corporation by resolution passed at a general meeting, in accordance with, but not exceeding, the maximum allowances specified in the Fourth Schedule.'

The maximum allowance was \$600 per month.

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12. Paragraph 3(7) of the Third Schedule of the *Ordinance* further provides that,

'No resolution passed at any meeting of the corporation shall have effect unless the same was set forth in the notice served in accordance with paragraph 2 or is ancillary or incidental to a resolution or other matter so set forth.'

13. One odd feature of this case is that the corporation was not joined by the applicant as a party to the proceedings. She was legally represented in the proceedings here and below.

14. I am prepared to assume, without deciding, that the judge had jurisdiction to deal with the matter and there was an issue concerning the validity of the two resolutions because the resolutions were not set out in the notices calling the meetings. However, I am of the view that the applicant was bound to fail in her application because she had not joined the corporation as a party.

15. The joinder was not a mere technicality but was directly related to the relief sought by the applicant. The corporation was obviously an interested party and also a necessary party to the proceedings because the tribunal was asked to make orders that would clearly affect the corporation. If the respondent was ordered to repay money to the corporation, obviously the corporation should be a party because there were already resolutions by the corporation authorising the payment. As the matter now stands such an order will not bind the

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corporation because it was not a party. Faced with such an order, what was the corporation to do? Should it ignore the order because of its own resolutions? Or should it accept the order and face the challenges by the owners who had agreed to the resolutions? Or should it apply to the Tribunal to seek directions to see if the order is binding on it? All these highlighted the problems caused by the corporation not being joined as a party.

16. Furthermore, to restrain only the respondent from causing the corporation to pay funds to her will simply not work because there are other members of the management committee who would be expected to abide by the resolutions. This would create more problems for the corporation.

17. The nature of the relief sought by the applicant required the corporation to be a party to the proceedings. Otherwise the judge would be asked to make orders without any binding effect on the corporation when it is clear that the corporation must be bound in order to make the orders effective and meaningful. The court should not be asked to make orders which would not be effective. The court's duty is to determine real issues between the parties and not academic ones. Hence even if the applicant succeeded on everything else, the orders she sought would simply not be available to her.

Subsequent events

18. Mr. Li disclosed on the hearing of the appeal that the respondent had on 21 April 2004 repaid \$16,800.00 to the corporation. This matter was not disclosed to the judge on the hearing of the review on 28 April 2004. The payment was disclosed to the applicant's solicitors on 14 May 2004 before the present appeal was lodged.

19. The payment will not assist the applicant in her appeal because the respondent did not repay the full sum and apparently there was still a dispute on the balance of \$2,310.00.

20. It was further revealed to this Court that the corporation had passed another resolution in 2004 authorising the payment of allowance to the respondent and the treasurer. The applicant had instituted another proceedings in the Tribunal challenging the payment. The corporation, the respondent and the treasurer were joined as parties in the fresh application.

21. It is unfortunate that the applicant had not included in the fresh application a challenge against the corporation on the resolutions which are the subject matter of this case but chose to pursue an appeal which is doomed to failure. As a matter of fact, prior to the issuance of the application before the judge, the applicant's solicitor had not even ascertained from the corporation its position on the payments. It was said that the corporation was not joined as a party because of costs

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considerations. The logic is difficult to understand because as this case shows more costs are wasted because of the defect in the application.

22. Accordingly we dismissed the appeal.

DECISION ON COSTS

23. We have ordered the applicant to pay the costs of the appeal but reserved the decision on the basis of taxation. I will order the costs to be taxed on an indemnity basis. The issue on the joinder of the corporation is clear and the appeal should not have been pursued in the first place. The respondent should not be prejudiced in terms of costs.

24. The Court has also ordered the solicitors for the applicant to show cause why they should not bear the costs personally. We will give a decision on this upon receiving the affidavits from the solicitors and the applicant.

Hon Yuen JA :

25. I agree.

Hon A. Cheung J :

26. I agree.

(Peter Cheung)
Justice of Appeal

(Maria Yuen)
Justice of Appeal

(A. Cheung)
Judge of the Court
of First Instance

Mr. Walter Lau, instructed by Messrs Kam & Fan, for the applicant

Mr. C. Y. Li, instructed by Messrs Henry Wan & Yeung, for the respondent

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