

Property

What Can I Do If I Wish to End the Co-ownership of My Property?

Introduction

Partition is one of the ways which ends the co-ownership of properties and thus each co-owner becomes the sole owner of the land allotted to him. It is different from severance of a joint tenancy, which merely leads to co-owners remaining in co-ownership as tenants in common. Partitions may be done voluntarily by execution of deed. Where there is no voluntary agreement, co-owners may bring an action for partition or sale under the Partition Ordinance (Cap 352) (the “**Ordinance**”).

In *Silver Wealth Capital Investment Limited v Lai Wai Cheun & Lai Kam Cheung* (HCMP 512/2013), the Plaintiff made an application to court pursuant to the Ordinance, seeking an order for the sale of a property located at Shanghai Street (the “**Property**”). The question which the court had to decide was whether to make an order for sale or to maintain the status quo of the co-ownership among the parties.

Facts

The Plaintiff and the 1st and 2nd Defendants are tenants in common, holding 40%, 40% and 20% of the Property respectively.

The 1st Defendant operates the business of Wing Cheong Shing at the Property. Wing Cheong Shing was founded by the father of both 1st Defendant and Mr. Lai Wai Hai (the predecessor of the Plaintiff) in 1935 and has been operating at the Property since 1965. From 1974 to 1980, the 1st Defendant and Mr. Lai Wai Hai operated “Wing Cheong Shing” as a partnership at the Property. Thereafter, the 1st Defendant became the sole proprietor. Throughout the years, the 1st Defendant paid “rent” in the amount of HK\$7,500 per month to Mr. Lai Wai Hai for the use of 40% of the Property to carry on the business.

In May 2012, Mr. Lai Wai Hai sold his 40% interest in the Property to the Plaintiff for a consideration of HK\$3,600,000. After completion, the Plaintiff served a notice to quit on the 1st Defendant and asked for delivery up of vacant possession of the Property. Eventually, the Plaintiff commenced legal actions for an order for sale in March 2013.

Legal Principles

Section 2 of the Ordinance provides, inter alia, that where any property in land is held by 2 or more persons, whether as joint tenants or as tenants in common, the court may make an

order for partition or sale of the property. Section 6(1) of the Ordinance provides that the court may make an order for the sale of the property (instead of a partition order) by reason that a partition would not be beneficial to all the persons interested due to the nature of the land, the number of persons interested, the absence/disability of some persons etc.

Wong Chun Kei v Poon Vai Ching [2007] 1 HKLRD 825 summarised the current law:

1. a co-owner has a basic right to rid himself of the shackles of co-ownership and, if he has no other remedy, ask for an order for partition or sale;
2. when it is impracticable to make an order for partition, the court should make an order for sale unless it is persuaded (the burden being on the opposing co-owner(s)) that such an order will not be beneficial to all the co-owners or that it will result in very great hardship to one co-owner; and
3. whether an order for sale is beneficial to all the co-owners is not determined by the dissent of the opposing co-owners or the assertion by them that it is not beneficial. It has to be determined by the court objectively.

Issues

It was common ground that it is impracticable to partition the Property (a saleable area of about 521 sq. ft. with a yard of about 44 sq. ft.) into 2 smaller shops. Thus, the focus was on whether a sale of the Property should be ordered. The two main issues were:

1. whether an order for sale would result in very great hardship to the Defendants; and
2. whether the Plaintiff had any other remedy to rid itself of the shackles of co-ownership.

Very Great Hardship to the 1st Defendant?

The Defendants submitted that an order for sale of the Property would result in very great hardship to the 1st Defendant because:

1. The 1st Defendant was over 80 years old and he had devoted his entire life running the business of Wing Cheong Shing at the Property. In view of the origin of Wing Cheong Shing and the Property, the history of Wing Cheong Shing operating at the Property for over 50 years, his long association with Wing Cheong Shing and his close friendship and bonding with the employees, customers and the neighbours, the 1st Defendant had developed a very strong and unique emotional attachment to Wing Cheong Shing.

2. If the Property was sold, the 1st Defendant would have no time, energy, motivation or money to move Wing Cheong Shing to another place for business, having regard to the relocation expenses, the loss of character and heritage of Wing Cheong Shing, the loss of customers and the emotional pain that the 1st Defendant would suffer arising from the cessation of business of Wing Cheong Shing at the Property.
3. Further, the 1st Defendant had been residing at the the premises immediately above the Property for many years. Thus, the Property could in substance be regarded as an extension of the 1st Defendant's home.

On the other hand, the Plaintiff pointed out that the Property is a shop and not the 1st Defendant's residence. At that time, the Plaintiff did not enjoy any rental income and had been deprived of any use of the Property. Further, the 1st Defendant had not produced evidence of his financial position or that of Wing Cheong Shing and evidence to show that the 1st Defendant could not afford to relocate Wing Cheong Shing.

In view of the Plaintiff's submissions, the court accepted that it is less likely that a co-owner would develop a strong emotional attachment to commercial premises as opposed to residential premises; but this is a matter of fact and not a matter of principle. It was further accepted that HK\$7,500 per month was unlikely to represent 40% of the current market rent of the Property and that the 1st Defendant may be liable to pay a proper occupation rent to the Plaintiff for being deprived of the use of the Property. Yet, regardless of whether the 1st Defendant was financially capable of relocating Wing Cheong Shing to another place, as a matter of practical reality, the 1st Defendant could not reasonably be expected to do so.

On the other hand, in view of the Defendants' submissions, the court held that the sale of the Property would result in very great hardship to the 1st Defendant and thus was not minded to order a sale of the Property.

Any Alternative Remedy Available to the Plaintiff?

The court commented that, at first sight, in view of the small floor area, it would be difficult for the Plaintiff to sell its undivided interest. Nevertheless, it was precisely what happened when Mr. Lai Wai Hai sold his undivided interests in the Property to the Plaintiff.

It was also found that there was a market for the sale and purchase of undivided interests in a small single shop in an old district in Hong Kong. On the other hand, it was not suggested that the Plaintiff had taken any steps to look for, but failed to find, any buyer for its undivided interests in the Property. Thus, it was concluded that there was indeed an alternative remedy available to the Plaintiff to rid itself of the shackles of co-ownership.

Conclusion

Given the potential hardship caused to the 1st Defendant and the existence of alternative remedy available to the Plaintiff, the Plaintiff's application was dismissed. However, the court made a final note that this judgment does not preclude the Plaintiff from re-applying for an order for sale of the Property in the future should there be any material change of circumstances (e.g. if 1st Defendant decides not to, or is unable to, continue to carry on the business of Wing Cheong Shing or if the 1st Defendant refuses to pay a proper rent).

In recent years, occasionally there are sales of partial ownership of properties by way of auction in the market at discounted market prices. Some property investors specifically target at acquiring such kind of partial ownership notwithstanding that the conditions of sale stipulate that there would not be vacant possession of the properties. These investors will then try to obtain the entire ownership of the properties either by persuading the remaining owners to dispose of their shares to them, or more often, by applying to court for an order for sale pursuant to the Ordinance. Yet, the present case is a very good example that the property investors' investment realisation plan will not always succeed.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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