

HONG KONG / JUDGMENT

ALDO TRADING LTD v. PARTNER DECORATION ENGINEERING LTD

COURT

Court of First Instance

DECIDED

14 August 2007

CASE / FILE NUMBER

HCA1199/2005

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bjbj HCA1199/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 1199 OF 2005

BETWEEN ALDO TRADING LIMITED Plaintiff and PARTNER DECORATION ENGINEERING
LIMITED Defendant (by original action) AND BETWEEN PARTNER DECORATION ENGINEERING
LIMITED Plaintiff and ALDO TRADING LIMITED 1st Defendant CHARLIE LEE CHUN KEE 2nd
Defendant (by counterclaim)

Before : Hon Chu J in Chambers Date of Hearing : 14 August 2007 Date of Decision : 14 August
2007

DECISION

There is before the court an application by the 2nd defendant (by counterclaim) for further security for costs. The application was opposed by the plaintiff in the counterclaim principally on the following grounds: There was a previous order made by Master Au Yeung on 24 April 2006, whereby she ordered the plaintiff (by counterclaim) to provide \$50,000 as security for the costs of the 2nd defendant (by counterclaim) up to and including the trial. The defendants (by counterclaim) had in their checklist warranted that there would be no further application for security for costs. There were no new circumstances in that there were no additional witnesses or additional experts subsequent to the granting of the first order for security for costs. The lack of means on the part of the plaintiff (by counterclaim) was brought about by the conduct of the 2nd defendant (by counterclaim) in refusing to pay the balance of the payment of the renovation project in question. In respect of the first two grounds of objection, I am of the view that they by

themselves are not determinative of the matter. The critical question is whether there are any subsequent material changes in the circumstances of the case. If there are, then notwithstanding there was an earlier order for security for costs up to and including trial or an indication in the checklist that there would not be any further application, an application for further security for costs may be justifiable. Mr Wong refers to the case of *AS Elektronik v. Great Wall Electronics Limited & Others* (unreported) HCA 442/1994, 21 December 1998 in support of his opposition. However, it is apparent from paras.7 and 8 of the Decision that Yeung J (as he then was) considered the critical question is whether there has been a material change of circumstances. In para.7, Yeung J observed that security for costs by its very nature would render it appropriate for the court to revisit the matter if there is any change of circumstances. He went on in para. 8 to identify the issue in that case, which is also the issue for this case, is whether there is any material change of circumstances as to justify the ordering of further security, bearing in mind also that this is a matter of exercise of discretion.

5. It is to this critical question of whether there is subsequent material change of circumstances that I now turn. As I can see, there are two important developments. The first is that the trial originally to start on 12 to 16 February 2007 had been re-fixed with another PTR also ordered. The second is that the estimated length for the trial is now much longer. So far as the question of re-fixing of the trial is concerned, despite counsel s submission, I take the view it was not brought about by the fault of any one party. The fact is that this case was set down for five days when the estimates given in counsel s certificates already produced a six days total. Further, at the pre-trial review, all parties confirmed that five days were sufficient. Before the trial judge, however, parties agreed that the trial would need more than five days and the case was ordered to be re-fixed for a 10 days trial. Really, the re-fixing is not the fault of any one party but seems to be a matter that is almost inevitable because if the trial was not re-fixed, it would have to be part-heard to a day some months later. This is undesirable since the trial judge is a Recorder.
6. As to the question of the revised estimation for the trial, when Master Au Yeung made the Order last year, the case was estimated to need three days. This was subsequently revised to five days. The current estimate is 10 days, representing an increase of seven days. Mr Wong made the point that he did not believe the case would need 10 days. I think he is probably right. Looking at counsel s revised estimates given in the latest certificates, they only produced a seven days total.
7. Be that as it is, seven versus three still produces an additional four days and, in my view, the additional four days, plus the re-fixing of the trial together with a pre trial review inevitably means more costs. This is a material change of circumstances in the context of an application for further security for costs.

- I now turn to the objection that it is the conduct of the 2nd defendant (by counterclaim) that causes the plaintiff (by counterclaim) to be lacking in means. This is clearly a matter in dispute because the 2nd defendant (in counterclaim) is disputing the counterclaim on the basis of defective work. So whether it is justified to withhold payment of the balance of the contract sum is a matter that can only be decided when the main claim is decided upon.
9. In all the circumstances of this case, I am satisfied that there are material change of circumstances that justify the application for further security for costs.
10. I now deal with the amount of the additional security. The additional costs as appeared by the revised bill of costs of the 2nd defendant (by counterclaim) are approximately \$560,000. This was projected on the basis of an additional seven days trial plus an additional expert witness and one more pre-trial review. Out of this figure I would discount, first of all, the expert expenses because as confirmed by Mr Leung, the expert evidence relates primarily to the main claim. Secondly, counsel s revised estimates only produce a seven-days case. Hence, instead of an additional seven days, further costs should be worked on the basis of an additional four days. Three days costs for counsel and solicitor should be discounted. Thirdly, I would also discount junior counsel s fee. Additionally, Mr Wong made the point that when Master Au Yeung ordered \$50,000, she was not proceeding on a 25 % apportionment of the amount sought for by the 2nd defendant (by counterclaim), which was \$298,000. Taking all these matters together, I would assess the additional security for costs to be in the sum of \$30,000.
11. Accordingly, there is an order that the plaintiff (by counterclaim) do provide further security for costs of the 2nd defendant (by counterclaim) up to and including the trial in the sum of \$30,000 by making payment into court in the said amount within 28 days from the date of this order.
12. Mr Leung asks for the costs of the application. Mr Wong asks that costs of this application be in the cause of the trial. The normal rule is costs follow event. In this case, the 2nd defendant (by counterclaim) had by letter invited the plaintiff (by counterclaim) to agree to provide further security, to which there was no reply. The present summons was unsuccessfully opposed. In these circumstances, there is no reason to depart from the normal rule of costs follow event. I therefore order that the plaintiff (by counterclaim) pays the 2nd defendant (by counterclaim) the costs of this application in any event, to be taxed if not agreed. (C Chu) Judge of Court of First Instance High Court Mr Herbert Leung, instructed by Messrs Joseph Chu, Lo & Lau, for the Plaintiff (by original action) and the 2nd Defendant (by counterclaim). Mr Samuel Wong, instructed by Messrs Sit, Fung, Kwong & Shum, for the Defendant (by original action) and the Plaintiff (by counterclaim).
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Prepared on 26 October 2026 · Esheria