

HONG KONG / JUDGMENT

BIG ISLAND CONSTRUCTION (HK) LTD v. WU YI DEVELOPMENT CO LTD AND ANOTHER

COURT

Court of First Instance

DECIDED

20 December 2007

CASE / FILE NUMBER

HCA1957/2005

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bjbj HCA1957/2005, HCA2196/2005 & HCA886/2007 (Heard Together) IN THE HIGH COURT OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE ACTION NO.
1957 OF 2005

BETWEEN BIG ISLAND CONSTRUCTION (HK) LIMITED Plaintiff and WU YI DEVELOPMENT
COMPANY LIMITED 1st Defendant WU YI CONSTRUCTION COMPANY LIMITED 2nd Defendant

ACTION NO. 2196 OF 2005

BETWEEN NATIONBUILD PACIFIC LIMITED Plaintiff and FU YIN FINANCIAL INVESTMENT CO.,
LIMITED Defendant

ACTION NO. 886 OF 2007 (Transferred from District Court Civil Action No. DCCJ 4961 of 2005)

BETWEEN BIG ISLAND CONSTRUCTION (HK) LIMITED Plaintiff and WU YI ENTERPRISES
COMPANY LIMITED Defendant

(Heard Together) Before : Hon Chu J in Chambers Date of Hearing : 12 December 2007 Date of
Decision : 20 December 2007

DECISION

On 26 October 2007, I handed down my decision on the three applications for security for costs made by the defendants in the above three actions. I ordered that the respective plaintiffs provide security for the defendants costs up to trial in the following amounts:

- (1) HCA1957/2005 HK\$950,000
- (2) HCA2196/2005 HK\$600,000
- (3) HCA886/2007 HK\$450,000 I also made an order nisi in each of the three actions that the plaintiff pays the defendant(s) the costs of the application and the costs reserved on the summonses for leave to file further affidavits in any event, to be taxed if not agreed. By summonses filed on 6 November 2007, each of the plaintiffs applied to vary the costs order nisi to the following: The plaintiff shall only pay the defendant(s) the costs of the application for security for costs incurred up to and including 5 September 2007 in any event to be taxed if not agreed; and The defendant(s) shall bear their own costs and pay the plaintiff the costs of the application incurred from and including 6 September 2007, including costs reserved on the summonses for leave to file further evidence and costs of the hearing, in any event to be taxed if not agreed (collectively referred to as the plaintiffs applications) By summonses filed on 23 November 2007, the defendants in the three actions cross-applied to vary the costs order nisi so that their costs of the applications for security for costs shall be taxed and paid forthwith by the respective plaintiffs (collectively referred to as the defendants applications). The plaintiffs applications The plaintiffs applications to vary is based on a without prejudice offer save as to costs made by their solicitors in letter dated 6 September 2007, which was subsequently revised by another letter dated 14 September 2007. The second paragraph of the letter of 6 September 2007, which contained the offer, read as follows: As our clients are anxious to bring these actions to trial, strictly for the purpose of avoiding unnecessary delay in the actions and to save parties costs, we are instructed that our clients are prepared to provide security by way of payment into Court in the amount (inclusive of the costs of these security for costs applications) set out below:-

- (1) HCA886/2007: HK\$575,250.00
- (2) HCA1957/2005: HK\$1,061,875.00
- (3) HCA2196/2005: HK\$739,750.00 The defendants solicitors dealt with the offer in their letter dated 10 September 2007, the relevant part of which is as follows: In your letter, you have failed to indicate whether your clients will pay our clients the costs of their applications for security for costs. Since your client[sic] now effectively concede to pay security, your clients must pay our clients their costs of the applications. Solely for the purpose of saving costs and the Court s time, our clients are prepared to accept 70% of the amount claimed in the summonses as security for their costs provided that your clients pay to ours the costs of the

applications for security for costs to be taxed if not agreed, i.e.,

- (1) For HCA1957/2005: HK\$1,486,553.00
- (2) For HCA2196/2005: HK\$1,035,475.00
- (3) For HCA886/2007: HK\$805,328.00 This counter-offer of the defendants was rejected by the plaintiffs. In their solicitors letter dated 14 September 2007, the plaintiffs revised their offer as follows: With a view to bring these actions to trial expeditiously and to enable the Court to have an early opportunity to scrutinize the evidence filed in these actions, our clients are prepared to provide security by way of payment into Court in the amount (inclusive of your clients costs in these security for costs applications) set out below:-
 - (1) HCA886/2007: HK\$665,770.00
 - (2) HCA1957/2005: HK\$1,210,480.00
 - (3) HCA2196/2005: HK\$843,180.00By letter dated 20 September 2007 from their solicitors, the defendants rejected the plaintiffs revised offer. After pointing out in the second paragraph that the revised offer was equivalent to about 57% of the security claimed, the letter went on to say: In any event, your clients have failed in your letter offered to pay our clients their costs of the applications for security for costs. As we pointed out in our previous letter to you, should the court hold for our clients, your clients must pay our clients costs of the security for costs applications. Moreover, your letter has also failed to state when security for costs will be provided by your clients. Our clients are not in a position to consider your clients offers if such information is not forth coming. Our clients are anxious to have their applications for security for costs to be decided by the Court. However, solely for the purpose of saving costs and the Court s time, our clients are prepared to accept 65% of the amount claimed, i.e., HK\$1,380,370 for HCA 1975/2005, HK\$961,513 for HCA2196/2005 and HK\$747,804 for HCA 886/2007, totally HK\$3,089,687, provided that your clients pay our clients the costs of their security for costs application[sic] to be taxed if not agreed and that the security be paid into Court within 14 days of the signing of the consent summons. The plaintiffs solicitors by letter dated 2 October 2007 rejected the defendants counter-offer as unreasonable. On the basis that the amounts offered in the without prejudice offers are higher than the amounts of security that the plaintiffs were ordered to pay into court, the plaintiffs say that they should be paid their costs of the security for costs applications as from 6 September 2007. Counsel are in agreement that a Calderbank offer should only influence but not govern the exercise of the Court s discretion as to costs: McDonnell v. McDonnell [1977] 1 WLR 34 at 38. In considering a Calderbank offer, the proper approach is to ask whether the party to whom the offer was made ought reasonably to have accepted the proposal in the letter: Butcher v Wolfe & Anor [1999] 1 FLR 334 at 304B. In opposing the plaintiffs applications, the defendants principal argument is that in neither the 6 September 2007 nor the 14 September 2007 letter had the plaintiffs offered to pay the defendants their costs of the security for costs application. It was said that the defendants had not acted unreasonably in refusing to accept the plaintiffs offers. Miss Tong who appeared for the

plaintiffs argued that the plaintiffs offers had already included an offer to pay the defendants costs of the security for costs applications. I am unable to agree. The offers of the plaintiffs in the two letters are very similarly worded. In the first letter, the offer is to provide security by way of payment into Court in the amount (inclusive of the costs of these security for costs applications) set out below . The offer in the second letter is to provide security by way of payment into Court in the amount (inclusive of your clients costs in these security for costs applications) set out below . (Emphasis supplied) Plainly, the offers are to provide security by way of making payment into court. The amounts of security to be paid into court, as the words in brackets indicate, are inclusive of the defendants costs in the security for costs applications. The plaintiffs were offering to provide security for the defendants costs of the security applications by way of payment into court. The plaintiffs were not offering to meet or pay the defendants their costs of the security applications. Miss Tong also argued that the words appearing in brackets indicated that the plaintiffs were willing to pay the defendants costs of the security applications. To say the least, the defendants solicitors did not understand the words in brackets to convey this message. If they had, they would not have in their two reply letters expressed the concern that the plaintiffs had not indicated whether they would pay the defendants costs of the security applications. As an alternative argument, it was said that the defendants solicitors should have asked for clarifications in their reply letters. It was also argued that the defendants solicitors could have asked for a breakdown of the offers. The first and foremost point is that the duty is on the plaintiffs to make a clear offer: *C & H Engineering v. F Klucznik & Son Limited* [1992] FSR 667 at 671, see also *Cheung Yu Tin v. Ho Hon Ka* [2006] 2 HKLRD 674 at para.22. The blame cannot be laid at the defendants doorstep for not asking for a breakdown. That aside, when the defendants solicitors pointed out in their letters that the plaintiffs had not indicated whether they would pay the defendants costs, they had clearly drawn the attention of the plaintiffs solicitors to the problem in the plaintiffs offers. The defendants solicitors had also stated in unambiguous term that the plaintiffs should pay for the costs of the security applications. Further, when counter-offering for 70% and later on 65% of the security claimed, the defendants solicitors had expressly, and stated as a separate condition, that it was subject to the plaintiffs paying the defendants the costs of the security for costs application. Putting it at the lowest, the plaintiffs solicitors should have been alerted to the defendants concern. If indeed the plaintiffs were willing to pay the defendants costs of the security applications, they could have simply said so in reply. If they erroneously thought that the plaintiffs offers already included an offer to pay costs, one would have expected them to say so to the defendants solicitors or indicated that they did not understand the concern, but nonetheless made a clear offer to pay costs. Miss Tong further submitted that the real reason for the rejection of the plaintiffs offers was the defendants regarded the amounts to be too low, and not the lack of indication as to payment of the defendants costs of the security applications. It was pointed out that the defendants were asking for 65% when the plaintiffs would only offer 57% of the security claimed. I agree with Mr Ng that the revised offer of 57% and the revised counter-offer of 65% were not that far apart. Further, the defendants had responded fairly quickly to the plaintiffs offer and revised offer. They did not make an outright rejection

of the plaintiffs offers. Instead they sought clarifications about their costs of the security applications and made counter-offers. All these are indicative of a genuine intention and willingness to negotiate. There is no objective basis for concluding that the question of the defendants costs of the security applications was not a consideration or influencing factor underlying the non-acceptance of the plaintiffs offers. Having regard to the circumstances and the analysis above, I am of the view that the defendants did not act unreasonably in not accepting the plaintiffs without prejudice offers. The plaintiffs applications to vary the costs order nisi therefore fail. The defendants applications The defendants applications for their costs in the security applications to be taxed and paid forthwith are made on the basis that the plaintiffs opposition to the security applications is wholly unmeritorious. It was said that given the admission that the plaintiffs are impecunious, they should at least have conceded liability to provide security. Instead, the plaintiffs had filed substantial affidavits dwelling into the merits of the actions thereby escalating the costs of the applications. I can see the force of the defendants criticism. As explained in my Decision handed down on 26 October 2007, the plaintiffs did not have a convincing case for resisting an order for security for costs. They should have only contested the quantum of the security. Notwithstanding that, this is not a case that the plaintiffs conduct in opposing the applications had been so bad that they should be visited with a forthwith costs order. The defendants bill of costs had included estimation of the costs of the security for costs applications. Although I had adopted a broad-brush approach when determining the amount of security to be provided, I had not excluded this aspect of the bills. Accordingly, the defendants entitlement to the cost of the security applications has been secured. There will not be necessary to make the costs order forthwith. The defendants applications to vary the costs order nisi is therefore refused.

Conclusion

For the above reasons, the summonses issued by the plaintiffs as well as the summonses issued by the defendants in the three actions are dismissed. Having regard to the normal rule of costs follow event and considering that the summonses were heard together and that the evidence and submissions were dealt with together, I am of the view that it is appropriate to make no order on the costs of the summonses. I so order. (C Chu) Judge of Court of First Instance High Court Miss Sara Tong instructed by Messrs Stephenson Harwood & Lo for the plaintiffs in all the three actions. Mr Lawrence Ng instructed by Messrs Ford Kwan & Co for the defendants in all the three actions. PAGE - PAGE A B C D E F G H I J K L M N O P Q 1udk 1udk C D E F G H I J K L M N O P Q R S T U V &`#\$ (#p# r p# r p# O0 ZZn Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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