

HONG KONG / JUDGMENT

CHEER GIANT INTERNATIONAL LTD v. WO MING ENGINEERING LTD

COURT

District Court

DECIDED

27 April 2007

CASE / FILE NUMBER

DCCJ4872/2006

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bjbj z gP ervices rendered and for the striking out of the counter-claim by the Defendant. The Plaintiff s Case The business of the Plaintiff is to provide consultation and advisory service to construction companies, on a project-to-project basis. The Defendant undertook the construction works of and relating to the re-provisioning of Society of Boy s Centre Shing Tak Centre School at New Clear Water Bay Road (the Project). By a contract dated 8 November 2004, the Defendant engaged the Plaintiff to inter alia, advise on the Extension of Time application for the Project (The Contract). It is stipulated in the contract that the Defendant shall pay the Plaintiff, as an incentive, HK\$1,500 for each day of extension of time for the first month, HK\$3,000 for each day of extension of time for the second month and HK\$3,500 for each day of extension of time above and after the second month. And such payment should be made by the end of the month following the notification of grant of Extension of Time. In pursuant to the Contract, the Plaintiff had prepared documents for application for an extension of time on 17 March 2005, 23 May 2005 and 14 July 2005 respectively. As a result of this, 2 extension of time was eventually granted by the Consultant Architect (the Architect) of the Project. On or about 1 April 2005, an extension of time for 53 days was first granted to extend the completion date of the Project from 2 April 2005 to 25 May 2005. Accordingly, the Plaintiff sent out an invoice for the payment of HK\$114,000 being incentive payment to be payable on or before 30 April 2005. Despite repeated demands, the Defendant had only made partial payment of HK\$38,000 on 18 May 2005 and HK\$38,000 on 15 June 2005 respectively, leaving a sum of HK\$38,000 still outstanding (1st Incentive). Another extension of time of 48 days was granted on 10 August 2005. Accordingly, the Defendant is liable to pay to the Plaintiff a further sum of HK\$164,500 as incentive payment on or before August 2005 (2nd Incentive). Despite repeated demands, the Defendant had failed to pay the 2nd Incentive. The Plaintiff denied the contract was terminated by end of April 2006 but admitted 23 May 2005 being his last day of work at site. It is also the case of the Plaintiff that Prolongation Costs is beyond the scope of service under the Contract. The Plaintiff is claiming against the Defendant for the sum of HK\$202,500 with interests. The Defendant s Case The Defendant admits to be the sole sub-contractor of the Project which had delay in completion due to reasons out of the Defendant s control. The delay had caused a corresponding increase of costs and the Defendant

is entitled to claim prolongation costs as well as an extension of time. The Defendant avers that it had been agreed verbally between the Plaintiff and the Defendant that the Plaintiff would act for the Defendant to apply for the extension of time as well as the prolongation costs. The Plaintiff will only be paid a bonus sum, equivalent to 10% of the prolongation costs received on an extension of 30 days and 20% of the prolongation costs on an extension of more than 30 days, if prolongation costs as well as extension of time were being granted. According to Mr. Mo, the Director of the Defendant, the written contract was prepared by the Plaintiff and he was surprised to know that the content of such did not tally with their verbal agreement. Although the Plaintiff had prepared the document for the application in March 2005 and May 2005, the architect found the documents insufficient for the purpose of the application. On both occasions, the staff of the Defendant had significant contribution to it and it was only until the Defendant agreed to waive to claim for prolongation costs then 53 days and 23 days extension was granted. The Defendant, in their Defence filed, had admitted another 48 days extension was granted. But it was denied by Mr. Mo in his Affidavit. In any event, it is Mr. Mo's evidence that the application for extension of time on 12 July 2005 was prepared by the Project Manager of the Defendant Company, so even if there was a grant of further extension of another 25 days had nothing to do with the Plaintiff. The payment of HK\$76,000 to the Plaintiff, according to Mr. Mo, was made on the inducement by the Plaintiff that business would be introduced to the Defendant if such sum was paid. Since the Plaintiff should not be entitled to such amount of money, the Defendant is counter-claiming for the return of it. Principles In an application for summary judgment, it is for the Defendant to satisfy the court that there is an issue or question in dispute which ought to be tried or that there ought for some reason to be a trial of the claim or part (O.14 r.3 of RDC). The test is : is what the defendant says credible? (Ng Shou Chun v Hung Chun San [1994] 1 HKC 155). However it is trite law that assertion must not be taken in isolation. They must be credible or believable in the light of the evidence placed before the court (Mass International Limited v Hillis Industries Limited [1996] 1 HKC 434. And mere assertion in an affidavit of a given situation does not, ipso facto, provide leave to defend, since the defendant must satisfy the court that he has a fair or reasonable probability of showing a real or bona fide defence, i.e. that his evidence is reasonably capable of belief (Hong Kong Civil Procedure 2006 Vol .1 at paragraph 14/4/9). In Hutchvision Asia Limited v. Asia Television Limited, HCA 6757/1992, Godfrey J (as he then was) has this to say about the court's jurisdiction to strike out a defence (in the context of that case) on the ground that it is bound to fail: The court does have jurisdiction to take this course, in order to prevent abuse of its procedure. But it is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. Its exercise is not justified merely because the story told is highly improbable, and one which it is difficult to believe could be proved: see Lawrance v. Lord Norreys (1890) 15 App. Cas.210, per Lord Herschell, at p.219 ... In my judgment, the court will be particularly careful in exercising this very exceptional jurisdiction when the pleading sought to be struck out is a defence, though it will do so if satisfied that the defendant "has not a shadow of defence" : see Reichel v. Magrath (1889) 14 App.Cas. 665, again per Lord Herschell, at p.669. That was a case in which the defendant was seeking to litigate again a question which had already been decided against him in other proceedings by the plaintiff's predecessor in title. The ground of the decision was that to set up the defence, and attempt to prove it, was an abuse of the

process of the court The above decision of Godfrey J applies mutatis mutandis to applications to strike out pleadings. Triable Issues Terms of the Contract The Defendant is endeavouring to say that he was induced to sign the agreement by the misrepresentation of the Plaintiff and he is now seeking by parol evidence to explain the intention of the parties. It is trite law that when parties have reduced an agreement into writing in a form which they can understand, it is not permissible by extrinsic evidence to contradict, vary or add to the terms of the written document. No extrinsic evidence is admissible. Mr. Mo said that he could not understand English and was not aware the content of the Contract was not in line with their verbal agreement. In my judgment, the Contract, the subject matter of this action, is clear as to the scope of service and how the money is to be tabulated and paid. There is not a word about any of the suggestions raised by the Defendant. Mr. Mo can surely understand the figures about the payment in the Contract and would have no difficulty in discovering that it did not tally with his understanding. It is also Mr. Mo's evidence that he had not read the Contract before he put his signature on it. This is, in effect, a claim of non est factum. In considering such a plea in the case of Wing Hang Bank Ltd v Liu Kam Ying [2002] 2 HKC 257, Ma J, as he then was, rejected such a plea, coming from a man of full age and capacity on the basis that if he did not read the terms, that was negligent on his part and the defence of non est factum was unavailable. I found this finding is also applicable to Mr. Mo's assertion and his claim must fail. (ii) The Plaintiff's effort in the 1st and 2nd Application The Defendant's case is that the Plaintiff's work in these 2 applications was poor and it was his staff's effort that resulted in the granting of the extension of time. There is no argument that the draft documents exhibited to the Plaintiff's affidavit were those prepared by the Plaintiff for such purpose. It is not clear from the evidence of the Defendant as to what sort of input, and its extent were made by his staff for the 1st application. As for the 2nd application, it can be seen from the final document submitted to the architect is by and large the same as the draft prepared by the Plaintiff. I do not agree with the Defendant's submission that there has been substantial alteration between the two. From the reading of the 2 documents concerning this 2nd application, the Defendant's contention simply cannot stand. I found the Defendant's allegation concerning the 1st and 2nd application unbelievable. (iii) Who prepared the 3rd Application The issue here is whether the 3rd application was prepared by the Plaintiff or by Mr. Ching, the Project Manager of the Defendant. The Defendant is relying on the affidavit filed by its staff, Mr. Ching to this effect. Mr. Ching's said in his affirmation that after he had prepared the document for the 3rd application, he had faxed it over to the Plaintiff on their request. I found it absurd and beyond belief for Mr. Ching to have faxed something to the Plaintiff whose service, according to the Defence case, had already been terminated by the Defendant. On the other hand, it is the Plaintiff's case that Mr. Ching had acknowledged receipt of their draft for the 3rd application when it's being handed over to him (the alleged signature of Mr. Ching appeared on Exhibit YWF-5 attached to the Plaintiff's affirmation on 24 November 2006). Mr. Ching, in his affirmation filed thereafter, had made no reply to this allegation. It is beyond imagination as to why his signature would appear in this draft if it was faxed over to the Plaintiff. I found Mr. Ching's evidence unbelievable. (iv) The part payment of HK\$76,000 The Defendant alleged that this payment had nothing to do with the Contract but only as a token in exchange for the Plaintiff's promise to introduce more business to the Defendant. Such a contention is only first raised by the

Defendant in the affirmation filed on its behalf. Had this been the case, there is no reasonable explanation as to why such was not so pleaded in the Defence or the Counter-Claim. It is not denied by the Defendant that the sum was being paid by 2 instalments in May and June 2005. If the defence case is to be believed, the Plaintiff had in fact breached the Contract and failed to keep its promise. In the circumstances, it is beyond belief that the Defendant still paid the Plaintiff for an empty promise. The Defendant's explanation as to the payment of this HK\$76,000 is so incredible and defies commercial sense.

Conclusion

I do not consider the Defendant has raised any triable issue. Its version of story is simply unbelievable and self-contradicting. What the Defendant say is incredible and not reasonably capable of belief. For the above reason, the Plaintiff should be entitled to judgment against the Defendant. I therefore give summary judgment in favour of the Plaintiff against the Defendant for the sum of \$202,500 with interest thereon at judgment rate from the date of writ of summons until payment. Striking Out the Counter-Claim Given my ruling above on the part payment of \$76,000, I found the Defendant's claim is bound to fail. The Defendant's counter-claim should be struck out under Order 18 rule 19 of RDC. Costs There is no reason why costs should not follow the event. I order that the Defendant do pay the Plaintiff costs of the action, including costs of this application, with certificate for counsel, to be taxed if not agreed. Signed (Anthony Kwok) Deputy District Judge Representation: Ms. Pauline Leung instructed by Messrs K L Heung & Co for the Plaintiff Mr. Allen Lam instructed by Messrs Ford, Kwan & Co for the Defendant - PAGE A B C D E F G H I J 1udk 1udk (#p# >*6D :i#z *\mT zo/< xC&1 ({m8 =J+> P0} W~7gb W~7g xC&1 ({m8 =J+> n*\U & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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