

HONG KONG / JUDGMENT

CHIN WUI LEONG v. TECH TEAM DEVELOPMENT LTD

COURT

District Court

DECIDED

25 June 2007

CASE / FILE NUMBER

DCCJ350/2007

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bjbj DCCJ 350/2007 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 350 OF 2007 BETWEEN CHIN WUI LEONG Plaintiff and TECH TEAM Defendant DEVELOPMENT LIMITED Coram: His Hon. Judge Leung in Chambers (Open to the public) Date of Hearing: 25 June 2007 Date of Delivery of Ruling: 25 June 2007 R U L I N G In this action, the Plaintiff claims on two dishonoured cheques drawn by the Defendant in favour of the Plaintiff for the total sum of HK\$182,890.78. Particulars of those cheques are stated in the Statement of Claim and they are not in dispute. The Plaintiff applied for summary judgment. On the day following the service of the Plaintiff's summons, the Defendant, by letter from their solicitors, demanded security for costs from the Plaintiff on the basis that the Plaintiff was ordinarily resident overseas. There is no dispute that the Defendant had countermanded the cheques in question. According to the pleading, it was said that the Defendant drew the two cheques in favour of the Plaintiff conditional upon the Plaintiff successfully procuring one Compass Consulting PTE Ltd. (Compass) to refund a total sum of HK\$420,000.00 to Tech Team Holdings Limited (Tech Team Holdings) on or before 15 November 2006. Compass and Tech Team Holdings are companies registered outside the jurisdiction. The Defendant, according to the pleading, said that the plaintiff has failed to successfully procure Compass to refund the amount of HK\$420,000.00 on or before 15 November 2006. It was also said that there was no consideration for the two cheques, or alternatively, there was a total failure of consideration of the two cheques. On such basis, the Defendant said that they were not liable. In the second affirmation filed on behalf of the Defendant, there was an additional allegation made by the Defendant and this additional allegation, on the face of it, was related to the alleged conditional delivery of the cheques. It was said that there has been some dispute about bad and useless service in relation to a contract dated 28 April 2005 between Compass and Tech Team Holdings and it was argued that Tech Team Holdings should be entitled to a refund of HK\$420,000.00 paid under the contract. As I understand it, this was the basis for the amount said to be refunded by Compass to Tech Team Holdings under the alleged conditional delivery agreement. Apart from the pleading and this affirmation which I have just referred to, I am not able to gather any further particulars or evidence of the alleged bad or useless service or how the conditional delivery came

about. Instead, it was the Plaintiff's second affidavit which gave the details of the underlying transactions and which gave rise to various payments including the two cheques in question. The contemporaneous documents exhibited by the Plaintiff included invoices from Compass to Tech Team Holdings. They clearly evidence that the Plaintiff was at all times the agent of Compass receiving payments under that contract from Tech Team Holdings through the Defendant. The invoices evidence the payments of the outstanding amount and the interest that were to be payable by Tech Team Holdings to Compass. The bank statements the Plaintiff exhibited also evidence all these payments that were made before the two cheques in question. In fact, the two cheques in question represented the last payments of the entire outstanding amount payable by Tech Team Holdings to Compass. It is important to note that notwithstanding the repeated affirmations filed by the Defendant, including the last say (meaning the very last affirmation which could be filed by the Defendant in these proceedings), the above payment arrangements have not been disputed. Instead, the defence being run was that first of all there was no consideration from the plaintiff personally for the two cheques in question. I say that such argument must fail in the light of the payment arrangements that have been proceeding all along between the parties. They were for the payments of the outstanding amount owed by Tech Team Holdings to Compass and Compass have provided consideration in the form of time allowed for the settlement of the outstanding balance. That also included the time allowed for the two cheques in question being post-dated cheques. There was no question of the Plaintiff having to personally provide consideration for the cheques in the light of such arrangements. It was suggested that the Plaintiff had no authority to receive payment on behalf of Compass. Such point was only made in the last affirmation filed on behalf of the Defendant, but never before. That allegation must be bluntly contradicted by the invoices issued by Compass to Tech Team Holdings in the past. The wordings in the invoices are perfectly clear and I see no contrary evidence of such alleged lack of authority on the part of the Plaintiff to receive payments on behalf of Compass. The other defence was conditional delivery. Regarding this, I must first of all say that I find the allegation illogical. It is illogical in the way that the Defendant was suggesting that the Defendant would pay the outstanding balance of the amounts payable by Tech Team Holdings to Compass on condition that Compass would refund all the previous payments that have already been made by Tech Team Holdings to them. Now, to be fair, there might be an explanation for that but I am entirely at a loss for the purpose of these proceedings to speculate. It was actually the duty of the Defendant in these proceedings to provide any explanation for that. I have heard none by way of proper presentation of evidence. So, in any event, due to the serious lack of particulars and evidence of such conditional delivery as alleged by the Defendant, I would say such allegation is tantamount to bare assertion. There was also the defence of bad and useless service rendered by Compass to Tech Team Holdings under their contract. It should not be in dispute that performance of underlying contract is not a defence to an action on dishonoured cheques. What is more, we can see in the circumstances of this case, the cheques were part of the payments of the outstanding amounts payable by Tech Team Holdings and such amounts payable included both fees and disbursements - that means expenses incurred by Compass on account of Tech Team Holdings. There could not be any total failure of consideration in these circumstances. And once again I also see a complete lack of particulars or evidence of such

allegation of bad and useless service. There was also the suggestion of possible fraud on the Singaporean tax authority. Basically, I see no pleading or particulars or evidence of that, if that was relevant to this action at all. I also heard suggestion that the Plaintiff has failed to account to Compass what the Plaintiff has received so far from the Defendant as payments payable by Tech Team Holdings to Compass. This was, I must say, a very strange concern of the Defendant which, I would have thought, would be concerned with whether payment by the Defendant or Tech Team Holdings would be valid discharge even though it was made to the Plaintiff instead of Compass directly. But again, I see no evidence in support of such allegation. In fact, apparently the Defendant was not even aware that the bank account into which all these previous payments were made was in the joint name of the Plaintiff and the Principal of Compass. That should be known if one reads the contract between Compass and Tech Team Holdings carefully. In my view, this is a typical example of putting forward bare assertion to resist a claim on dishonoured cheques. There is serious lack of particulars and evidence. There should be no doubt that according to the law, the burden should be on the Defendant to satisfy the court that the Defendant has a credible defence. This has been the legal principle since the case of *Ng Shou Chun v Hung Chun San* [1994] 1 HKC 155. In fact, in a case like the present one, it would even be more incumbent on the Defendant to discharge such evidential burden, as we all know that in a case of dishonoured cheque, available defences are very limited. And in the case of an allegation of conditional delivery, more care and more effort would have to be taken and made in preparing the evidence in order to satisfy the court that there is a credible defence and that the alleged conditional delivery is indeed a genuine one. In the circumstances, I am not satisfied that the defence put forward or the allegations put forward by the Defendant amount to bona fide defence. In any event, in the light of the evidence in hand, I do not find that the defence is a credible one. In the circumstances, the Plaintiff should have judgment in this case. In respect of the Defendant's application for security for costs, I am not to, and I do not believe I need to, really say whether this was some kind of tactical move upon the Plaintiff's application as in the circumstances, the Defendant's application for security for costs must fail. I add that even if for some other reason this case should go to trial, the discretion shall still not be exercised in favour of the Defendant. Under the rule, the court may consider the question of merits of the case. The court, according to the rule, will have to regard to all the circumstances of the case. Security nowadays cannot be ordered as a matter of course from a foreign plaintiff but only if the court thinks that it is just to order the security in the circumstances of the case. A major consideration is the likelihood of the plaintiff succeeding. Of course, I remind myself that this is not to say that in all cases the court will have to enter into a detailed examination of the merits of the case. This will not be the function of the court. However, the starting point is the court would still have to take into account the likelihood of the plaintiff succeeding. In the circumstances of this case, as I have explained when I dealt with the Plaintiff's application, I have no reservation that should this case go to trial for some other reason, discretion should not be exercised in favour of the application because of a very high likelihood of the Plaintiff succeeding in its claim. Paragraph 23/3/3 of the White Book is referred to. In respect of the Plaintiff's application, I grant an order in terms of the summons and just to add that in respect of paragraphs 1 and 2, the costs of this action and costs of this application would have to be taxed if not agreed. In respect of the

Defendant s application for security for costs, I dismiss that with costs of that application be to the plaintiff, again to be taxed if not agreed. In respect of the Plaintiff s application, costs of the action would also include all the previous costs order reserved. For clarity, I also make similar order in respect of the Defendant s application and any costs order reserved in respect of the Defendant s application would also be to the plaintiff, to be taxed if not agreed. Regarding the Defendant s application for leave to appeal, I have heard the arguments and in trying my best to understand those arguments, I find that in fact the Defendant was basically repeating the arguments that it has raised during the hearing of these applications and I could not really be pointed to, in a satisfactory manner, the point(s) on which I have made error. In any event, the points would have to satisfy the test for an application for leave to appeal to be granted, namely, such point(s) raised by the Defendant in the intended appeal would have reasonable prospect of success on appeal. So, in the circumstances, I would dismiss the Defendant s application for leave to appeal with costs of the application to the plaintiff to be taxed if not agreed. (Simon Leung)

District Judge Representation: Mr Jeffrey Chan of Messrs Au, Thong & Tsang for the Plaintiff Mr Raymond Chung of Messrs Chung, Fong & Co. for the Defendant

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