

HONG KONG / JUDGMENT

CHINLUCK PROPERTIES LTD v. CASIL CLEARING LTD

COURT

Court of First Instance

DECIDED

14 June 2007

CASE / FILE NUMBER

HCA11008/1997

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bjbj HCA 11008/1997 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 11008 OF 1997

BETWEEN CHINLUCK PROPERTIES LIMITED Plaintiff and CASIL CLEARING LIMITED
Defendant (By Original Action)

AND BETWEEN CASIL CLEARING LIMITED Plaintiff and CHINLUCK PROPERTIES LIMITED 1st
Defendant CHENG ZHEN SHU 2nd Defendant (By Counterclaim)

Before: Hon Saunders J in Court Date of Hearing: 10 May 2007 Date of Judgment: 14 June 2007

J U D G M E N T

Background:

This case involved a claim and a counterclaim in respect of a loan agreement and mortgage by Casil to Chinluck and Mr Shu. The total sum agreed to be advanced was \$300 million. The trial as to liability came before me in June 2004, and as to damages in October 2006. Chinluck succeeded in its claim against Casil, that Casil was in breach of contract in failing to advance the full amount of money agreed to be advanced under a loan agreement. Casil, in its defence and counterclaim, pleaded a set-off as a substantive defence against Chinluck's claim. Casil wholly succeeded in that counterclaim and set-off. Chinluck was awarded \$100 nominal damages for Casil's breach of contract. On the counterclaim and set-off, Casil is entitled to judgment for the sum of

\$251,516,821.65, (the sum actually advanced), together with interest thereon, against both Chinluck and Mr Shu. Depending upon how the interest is calculated Casil may be entitled to enforce a judgement that may exceed \$580 million. Two issues now arise. First the question of the costs in the litigation, secondly, the question of interest. Costs: Casil is plainly entitled to its costs on the counterclaim against Chinluck, and the claim against Mr Shu. Mr Lui does not dispute that entitlement. The submission he makes for Chinluck is that there should be no order as to costs on the claim by Chinluck. The usual order, when a claim by a plaintiff has been extinguished by a counterclaim made by a defendant, is to enter judgment for the defendant, with costs, on the claim, and on the counterclaim, to enter judgement for the defendant, for the amount of the counterclaim, with costs: see *Hanak v Green* [1958] 2 QB 9. The court has a discretion as to costs where the plaintiff is successful on the issue of liability, but recovers nominal damages only: see *O 15 r 2(4)*. This enables the court to do justice in respect of a party whose success on liability is a substantial success, although receiving only nominal damages, for example the establishment of a legal right with a continuing importance: see *Alltrans Express v CVA Holdings* [1984] 1 WLR 394. An example of the establishment of a legal right with a continuing importance would be the establishment of an act of trespass, thereby the establishment of a right to exclude the trespasser in the future. In the present case while establishing a legal right, the breach of contract, and recovering nominal damages, Chinluck did not establish anything that is of continuing value. Mr Lui contends that notwithstanding the absence of the establishment of anything with continuing value, Chinluck, having succeeded in establishing a legal right, should still be entitled to its costs. Mr Lui relies upon three factors to contends that Casil unreasonably contested the claim by Chinluck on the issue of liability, saying that its arguments were necessarily weak if not hopeless. The three factors are:

- (i) There was only a blanket denial of Casil's breach of the Agreement in its defence; (ii) Casil called no witness at trial to testify in support of the allegation that it had no knowledge that the Loan was to be used for the Peng Chau project. A suggestion that all of its executive officers had retired and could not be located was criticised by the court as unbelievable; (iii) The defence by Casil to the allegation of breach of the agreement was flimsy. Mr Ho's initial position was that an award of \$100 on a claim for damages for \$499 million could be described only as a complete failure of the claim and consequently the usual rule should apply. In normal circumstances, Mr Ho's submission would be quite right. However, I am satisfied that the consequence of the position adopted by Casil, namely a blanket denial in the defence, calling no witnesses to support its position, and the propounding of arguments which may properly be described as flimsy, all of which added to the length of the trial, is that this is a case where the discretion ought to be exercised, to an extent, in favour of Chinluck. Mr Ho put before me a schedule, with which Mr Lui did not take exception, in which he assessed the various issues in the trial, 12 in all, and attributed a percentage of the time spent at trial on each issue. Mr Ho suggested that the allocation of costs on the trial on liability if not entirely to Casil, ought to be on the percentage of time basis: Chinluck 45%, Casil 55%. I am satisfied that would do justice to the situation and accordingly order that Chinluck and Mr Shu must pay 55% of the costs of the trial on liability, to be taxed on a party

and party basis. Casil is entitled to its costs on the trial as to damages in full. The interest rate issue: The question in relation to interest is as to the rate of interest to be paid following the termination of the Loan Agreement, upon the Loan being called in by Casil on 4 December 1997, consequent upon a event of default having occurred. The documents entered into between the parties comprise a Loan Agreement, dated 24 July 1997, and a Mortgage, dated the same day. The Loan Agreement contains the following provision in respect of interest:

2. Interest A. Interest on the Loan shall accrue at the rate of 15% per annum. B. Interest on the Loan shall be payable on the 28th of December of 1997, 28th of June, 1998, 28th of December, 1998 and 28th of June, 1999 (Interest Payment Dates). Notwithstanding Clause 9 of this Agreement, if any of the Interest Payment Dates shall fall on a date which is not a business day, such Interest Payment Date shall fall on the immediately preceding business day.
3. Repayment The full principal amount of the loan and all other sums payable under the terms of this Agreement shall be repaid by the Borrower on 23rd of July, 1999 (the Repayment Date The Mortgage document describes Mr Shu as the 1st Mortgagor, and Chinluck as the 2nd Mortgagor. Chinluck is also described as the Borrower. The Mortgage contains the following provision in respect of interest:
 2. COVENANT FOR REPAYMENT OF SECURED INDEBTEDNESS 2.01 In consideration of the Lender agreeing at the request of the Mortgagor to grant to the Borrower the Facility applied for the Mortgagor and the Borrower HEREBY COVENANTS with the Lender that, subject as hereinafter provided, the Mortgagor and/or the Borrower will on demand by notice in writing of the Lender made to the Mortgagor and/or the Borrower pays make good and discharged to the Lender:-
 - (i) all sums of money which at the date of such demand may be outstanding and according to the books of the Lender, payable by the Borrower to the Lender in respect of any account whatsoever between Borrower and the Lender; and .. (xii) interest on all sums advanced and all other moneys payable hereunder at such a rate(s) per as is is/are applicable under the terms relating to any facility(ies) granted to the Borrower or at such other rate(s) as may from time to time be determined by the Lender which determination shall be conclusive and binding on the Borrower. Such interest shall be calculated with the usual monthly rests or on such other basis as may from time to time be stipulated by the Lender in any facility letter covering the relevant sums advanced and shall be paid monthly in arrears on such a date in each succeeding calendar month as the Lender shall stipulate. What is significant, is that, contrary to what I would understand to be the usual practice in respect of a mortgage, none of the documents securing the advance make any provision whatsoever for any penalty interest to be payable in the event of default. There is no evidence that Casil made any

determination

permitted by Clause 2.01(xii) of the Mortgage. The case for the Borrowers: The primary argument for Chinluck and Mr Shu is that the contractual interest rate of 15% is chargeable only on the sum of \$176,516,821.65, from 24 July 1997, (the date of the advance of that sum) to 4 December 1997, (the date of default), and on \$75,000,000 from 4 August 1997, (the date of the advance of that sum), to 4 December 1997. The argument is that in the absence of a provision in either the Loan Agreement, or the Mortgage, for default interest, the Loan Agreement having come to an end upon default, interest thereafter should be charged at a commercial rate. Thus, Mr Lui accepts that interest is payable at the rate of 15% until 4 December 1997, but he says that thereafter pre-judgement interest should be awarded at the usual rate under s 48 High Court Ordinance, that is prime plus 1%. The starting point, Mr Lui argues, is that Chinluck and Casil had not agreed on the chargeable rate of interest upon default of repayment. Instead, Clause 2 of the Loan Agreement is, he says, specifically confined to the two-year term. Mr Lui says that the court should have regard to the factual matrix, and points to the evidence of an advance of \$30 million by Casil to Chinluck, less than two weeks prior to the Loan Agreement being executed, (11 July 1997), in which the parties expressly agreed on how, and at what rate, interest would be charged in case of default in repayment. Consequently, Mr Lui says, post-default interest was not a matter that was not in the consideration of the parties. Mr Lui argues that the court should not rewrite the Loan Agreement by implying a 15% default rate, and further that it is neither obvious nor necessary to give business efficacy to the Loan Agreement to warrant its implication. He says that the prior course of dealings shows that had Chinluck and Casil considered it necessary to agree on post-default interest payments they would have done so. Mr Lui argues that there is no rule that the court must award pre-judgement interest on the debt or damages at a rate higher or equal to that chargeable to the amount of the principle of for default: see *Ward v Morrison* (1842) Car & M 368. He further argues that once the outstanding principal at the time of default, agreed at \$251,516,821.65, became payable by Casil's demand, the outstanding principal and interest merged to become a single debt, and the Loan Agreement came to an end: see *Niagara Air Bus Inc v Camerman* (1991) 80 DLR (4th), (Ontario, Canada). Both of those cases involved promissory notes which provided for interest during the term of the note, but made no provision for interest on the note after maturity. The case for the Lender: Mr Ho argues that in determining the interest rate payable I should have regard to Clause 1.01(h) and Clause 4.01 of the Mortgage, in addition to those set out above: 1.01(h) Secured Indebtedness means all sums from time to time advanced by the Lender to the Borrower and outstanding and interest thereon and all other moneys and obligations in respect of the moneys which the Mortgagor and/or the Borrower covenants to pay to the Lender under the terms of this Charge. 4.01 If the Mortgagor and/or the Borrower shall on demand as aforesaid or otherwise pay to the Lender the Secured Indebtedness and have duly performed and observed all the terms, covenants and agreements herein provided THEN THE LENDER SHALL at any time after such payment shall have been so made upon the request and cost of the Mortgagor execute a receipt or otherwise discharge this security. Mr Ho argues, relying upon the provisions of the Loan Agreement and the Mortgage that have been set out, that where the covenant to pay interest is an independent covenant, so as to entitle the mortgagee,

(Casil), to hold the title deeds until all outstanding principal and interest has been repaid, the covenant to pay interest would not be merged in the judgement obtained upon the principal covenant to repay. Consequently, he says that upon a true construction of all the relevant documents Casil should be entitled to the benefit of charging interest at the rate of 15% on the principal outstanding until full payment. Mr Ho relies upon *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147 HL(I) to support the proposition that ultimately it is a question of the construction of the relevant documents. In that case the lender succeeded in obtaining interest at a rate higher than the judgement rate, the rate being the rate for which provision was made in the loan documents. Discussion: Both counsel agree that the governing principle is that interest should usually be awarded to a plaintiff, not as compensation for damage done, but for being kept out of money which ought to have been paid to him: see *London Chatham & Dover Railway Co v South Eastern Railway Co* [1893] AC 429 at 437. That is undoubtedly right. But that principle does not govern the interpretation of the relevant documents. In his submissions, Mr Ho set out a passage from the speech of Lord Davey, in *Economic Life*, at p 155, in which the learned judge referred to the right of the mortgagee to sit upon the title deeds until they have been paid every penny of the sum advanced together with interest, measured by what was expressed in the covenant. I accept Mr Ho's submission that Casil is entitled to sit upon the title deeds until they had been paid the principal and the interest due, measured by what is expressed in the covenant. That right arises from the Mortgage. But that right alone does not determine Casil's entitlement to interest rate of 15%, the prescribed rate of the two-year period of the loan. The rate to be paid during the period of default must be determined by the construction the loan documents, the Loan Agreement and the Mortgage. The Mortgage in the present case defines Secured Indebtedness to mean: all sums from time to time advanced by the Lender to the Borrower and outstanding and interest thereon (my emphasis). In the construction of the documents securing the loan effect must be given to all the words that are contained therein. I am satisfied that the expression and outstanding and interest thereon, when read with the other provisions of the Mortgage, makes it plain that Casil are entitled to sit upon the title documents until all moneys due repaid. But unlike a provision prescribing the payment of interest so long as any sum should remain due, or words to that equivalent, the expression contained in the definition of Secured Indebtedness, does not make it clear that a specified interest rate is payable after default. The deeds in consideration in *Economic Life* contained a covenant for the payment of principal and interest on a certain day, and for the payment of subsequent interest if the principal was not paid upon that day, (see p 154). Consequently, as a matter of construction, interest was payable in terms of the documents, until the principal was repaid. Neither the Loan the Agreement nor the Mortgage document in the present case make any reference whatsoever to a requirement for the payment of interest, if the principal is not paid, either upon the due date, or upon demand been made consequent upon default by the borrower. In the absence of such a provision, and with the Court having the power to order the borrower to pay a commercial rate of interest from the date of default or due date, it is not necessary to imply into the agreement between the parties any requirement for interest at the contractual rate following those dates. I accordingly reject Mr Ho's submission that interest should be calculated at the rate of 15% to the date of judgement, and thereafter until the date of payment. Had there been a

provision in the documentation for default interest, or a provision that interest should be paid at contractual rate so long as the loan was outstanding, the position would be different. But the documentation is quite devoid of any such provision. The appropriate rate of interest to be charged from 4 December 1997, is prime plus 1%: see *Komala Deccof & Co SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1984] HKLR 219 CA. I accordingly order that the interest to be paid by Chinluck and Mr Shu from 4 December 1997, to the date of judgement, shall be calculated at prime plus 1%. The post-judgement interest rate shall be in accordance with the usual rates applying in that circumstance. Costs: Chinluck and Mr Shu have succeeded in the arguments as to costs, (partially), and on the question of interest, (substantially). In those circumstances I am satisfied that the proper order for costs on the argument on interest and costs is that Chinluck and Mr Shu must have their costs paid by Casil, to be taxed on a party and party basis. (John Saunders) Judge of the Court of First Instance High Court Mr Mike Lui, instructed by Messrs Lo & Lo, for the Plaintiffs by original action and the Defendants by counterclaim Mr Ambrose Ho SC and Ms Joyce Leung, instructed by Messrs Winston Ch 1udk 1udk O P Q R S T U V A(\$0N i\$&`G hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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