

HONG KONG / JUDGMENT

CONDUMEX INC v. STARASIA COMPONENTS LTD

COURT

District Court

DECIDED

9 August 2007

CASE / FILE NUMBER

DCCJ6287/2005

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bjbj DCCJ6287/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 6287 OF 2005

BETWEEN CONDUMEX INC Plaintiff and STARASIA COMPONENTS LIMITED Defendant

Coram: H H Judge Marlene Ng in Chambers (Open to the Public) Date of Hearing: 25th July, 2007
Date of Judgment: 9th August, 2007

JUDGMENT

I. Introduction The Plaintiff was/is a United States company. The Defendant was/is a Hong Kong company that carried/carries on business as a sourcing agent for goods. As evident from the Statement of Claim and Draft Defence (see below), the following facts are not in dispute : By an agreement made on or around 10th March 2005 (Agreement) between the Plaintiff and the Defendant (Parties), the Defendant agreed to sell and deliver to the Plaintiff and the Plaintiff agreed to buy 1,545 pieces of steel flanges (Goods) with details contained in purchase orders nos.97043 and 97055 both dated 10th March 2005 (1st and 2nd POs or collectively) issued by the Plaintiff to the Defendant for a total price of US\$172,531.76 (Price). In pursuance to the POs, the Plaintiff on 28th March 2005 deposited and paid to the Defendant a sum of US\$86,265.88 being 50% of the Price (Deposit). The POs were subsequently cancelled. The Defendant did not refund the Deposit to the Plaintiff. Although there was some suggestion in (a) the Defendant s affidavit evidence (see paragraphs 4 and 12 of the 2nd affidavit of Mr Rajeev Tayagi (the sole director/ shareholder of the Defendant, s 2nd Affidavit)) and (b) the Acceptance of Order Provision (see paragraph 16 below) in the alleged attachment (Annexure) to Proforma Invoice No.SCL/

FLANGES/0036/2005 dated 3rd February 2005 allegedly issued by the Defendant to the Plaintiff (3/2/05 Proforma Invoice) that the Defendant was purely a sourcing agent for the Plaintiff on a back-to-back arrangement with the supplier, there is in fact no dispute that the Parties were in a contractual relationship for sale and purchase of the Goods (see paragraph 7 of the 3rd Affidavit of RT (s 3rd Affidavit) and paragraph 1 of the draft defence exhibited to the 1st Affidavit of RT (s 1st Affidavit) which RT verified to be true (Draft Defence)). The Plaintiff claimed that (a) on or about 19th and 20th April 2005 respectively the Parties agreed to cancel the 1st and 2nd POs, and (b) pursuant to such cancellation the Defendant agreed to refund the Deposit to the Plaintiff. Since the Defendant did not do so, the Plaintiff commenced the present proceedings to claim for such refund. The Defendant did not give any notice of intention to defend. Default judgment was entered on 10th January 2006 in favour of the Plaintiff against the Defendant for the sum of US\$86,265.88 or the Hong Kong dollar equivalent at the time of payment together with interest and fixed costs (

Judgment

). On 28th April 2006, the Defendant applied by summons (a) to set aside the Judgment, and (b) subject to the application to set aside the Judgment, to order the foreign Plaintiff to pay sufficient security for costs (Summons). Master K W Wong dismissed the Summons on 11th June 2007. On 13th June 2007, the Defendant appealed against such decision (Appeal) and relied on RT s 1st, 2nd and 3rd Affidavits. The Plaintiff relied on the affirmation of Mr Octavio Corona Puente (s 1st Affirmation) and the affidavit of its solicitor Ms Lam Sze Man (LSM Affidavit). The Plaintiff s solicitors gave an undertaking to file and serve a further affirmation by OCP within 14 days of the hearing of the Appeal to verify the contents of paragraphs 3-5 of the LSM Affidavit (Undertaking). Pursuant to the Undertaking, the Plaintiff filed the further affirmation of OCP on 4th August 2007 (s 2nd Affirmation). Mr Collins, solicitor for the Defendant, criticised the LSM Affidavit for failing to verify that the matters deposed therein were (a) pursuant to LSM s communication with OCP and (b) true. There is no merit in such objection given the Undertaking as accepted by the court and OCP s 2nd Affirmation. II. Regularity of the Judgment It is common ground that the Judgment was regular. III. Law on setting aside regular judgment Since the Judgment was a regular judgment, the Defendant must show a meritorious defence with real prospect of success or which carried some degree of conviction (Premier Fashion Wears Ltd v Lee Hing Chung [1994] 1 HKC 213, 219). Godfrey JA said at pp.219-220 that [it] seems to me that unless potentially credible affidavit evidence from the defendant has demonstrated a real likelihood that he will succeed on fact, he cannot have shown that he has a real prospect of success (see also Tong Yi Sang & anor v Fung Law & Ng & ors [1993] 2 HKC 665, 671-672). Kaplan J in Tong Yi Sang (supra) went on to say as follows : I believe that there is a substantial onus on an applicant who seeks to set aside a regular judgment. I would expect a defendant to condescend to particulars of his Defence on the merits in his own words. What is far more preferable (and I leave over the question whether it is strictly necessary) is an affidavit in narrative form explaining precisely what the proposed defence will be so that the court can be assisted in forming a value judgment as to whether it can be satisfied that there is some degree of conviction and a real

prospect of success in the proposed defence. This required the court to form some provisional view of the probable outcome of the action. Where the outcome depended on whose evidence was likely to be accepted, the appropriate test for determining whether the defendant had a real prospect of success was to ask whether the defence could well be established at trial or whether the defence witnesses could well be believed at trial (*Guangdong International Trust and Investment Corp Hong Kong (Holdings) Ltd v Yuet Wah (Hong Kong) Wah Fat Ltd & anor* [1997] 2 HKC 696, *Morigood Development Ltd (supra)* and *L & M Specialist Construction Ltd v Wo Hing Construction Co Ltd* [2000] 3 HKLRD 262). There are other considerations which a court must consider in deciding whether or not to set aside a default judgment, such as the reason why default judgment was allowed to occur in the first place, any delay in setting aside and any consequent prejudice caused to the plaintiff. The court's approach was to conduct a balancing exercise of all relevant factors (see *Morigood Development Ltd (supra)* and *Chekiang First Bank Limited v Ng Chun Hing Benjamin* HCA3473/2000, Ma J (as he then was) (unreported, 12th December 2001) at paragraph 13). But as Ma J (as he then was) pointed out in paragraph 14 of the judgment in *Chekiang First Bank Limited (supra)*, the critical factor and starting point are the merits of the defence. If the defence has no real prospects of success, there is no point in setting aside the same (see also *Premier Fashion Wares Ltd (supra)*). IV. Defence on the merits

- (a) Synopsis of the Defendant's defence First, the Defendant argued that pursuant to Clauses 2 and 8 and the Prices Provision (see below) of the terms and conditions () of the 3/2/05 Proforma Invoice and Annexure which were applicable to the Agreement for supply of the Goods, the Plaintiff was not entitled to any refund of the Deposit. On the contrary, the Defendant was entitled to forfeit the Deposit when the Plaintiff cancelled the POs some time in April or May 2005 (Forfeiture Defence). For better understanding, it is useful to set out the 3/2/05 Proforma Invoice in its entirety below : Starasia Components Limited [address] Proforma Invoice No. SCL/FLANGES/0036/2005, Date : 03 Feb , 2005 Dear Mr. Corona, With reference to our discussions, we are pleased to offer you firm, as per the following for reply by 18.00 hours by Hong Kong time 15th, March 2005. [Reply Deadline]
- Seller : Starasia Components Limited (Manufacturer: Sushila Forgings Limited)
 - Buyer : Condumex, Inc.
 - Commodity : Steel Flanges
 - Origin : India/China
 - Quantity : 1545 Pcs.
 - Shipment Material to be shipped by the factory within 60 days from the date of receipt of advance. You can arrange shipping from the factory. [Shipment Provision]
 - Packing Sea worthy packing.

- Specification : as under Consigned to: Ex-Works We supply the following goods in accordance with our terms & conditions appended below. Sr No. Description of Goods No. of Pcs. Total Quantity weight IN Kg Unit Price US\$/Kg Value in US\$ Heavy Flanges, ASM A-105, various Sizes and Types, ASME B 16.5 1103 104567 1.650 172,535.55 Heavy Flanges, ASM A-105, various Sizes and Types, ASME B 16.5 C & F COST 172,535.55 Sourcing charges 17,253.55 TOTAL COST = US DOLLARS 189,789.10 TERMS & CONDITIONS:- The offer is Valid for 30 days. [Clause1] Advance will be forfeited in case of cancellation of Order. [Clause 2] The Factory will buy steel raw material only after getting 50% advance. [Clause 3] Any price increase (by Main Steel Producer) of the steel will be given to you. [Clause 4] Delivery will be within 30 days from the date of starting the production. Production will be started after 10 days from the date of receipt of Advance Payment. [Clause 5] Kindly make the arrangement for delivery within 7 days from OUR NOTICE. Kindly confirm if any change. Payment - 50% advance and 50% against fax copy of shipment. Please make the advance payment to our banker Name of Bank :DBS Bank (Hong Kong) Limited 11/F, The Center, 99, Queen s Road Central, Hong Kong. [Clause 8] Insurance - Shall be arranged by us. Please intimate shipping details, immediately after shipment. General (i) One Non-negotiable set of shipping documents must be sent to us over FAX. (ii) Material to conform to the specifications of the samples sent along with the PO. Covered by the Factory Original PI No.: 06JY1004 DATE: JAN.24, 2005 PENALTY TERMS:- As per Indian Supplier s standard Premium/ penalty terms. Determination of Quality/Quantity:-BY SGS at port of Loading Other terms and conditions as per seller s sales contract made out in line with Indian Supplier s standard sales contract for year 2005. For STARASIA COMPONENTS LIMITED PI sign and seal RAJEEV T SHANDILYA XIE WEI WEI Vice President (Mktg.) The key T&C of the Annexure were as follows : TERMS AND CONDITIONS: STARASIA COMPONENTS LIMITED These conditions shall be incorporated in and form part of every contract for the sale by STARASIA COMPONENTS LIMITED (hereinafter called the Seller) of any industrial/manufactured or any other goods, (hereinafter called the Goods) which shall be the subject of the contract between the seller and the persons, company or other organization (hereinafter called the Buyer) purchasing the goods. Quotation [Quotation Provision Quotation by the Seller are sales offers but subject to fulfil only when the terms with the offer. No deviation can be acceptable in the PO issued by the Buyer. The Seller shall be free to accept or refuse an order for any reason whatsoever. Acceptance of Order [Acceptance of Order Provision] The seller is selling the goods on behalf of the factory. but once the buyer place an order construed that Buyer will buy the goods. No cancellation is permissible, if Buyer cancel the order The Buyer will give up to 90% advance to buy raw material. Save as otherwise agreed in writing all orders are accepted by the Seller subject to these Conditions of Sale Prices [Prices Provision] The Seller may at any such time before receiving the advance payment increase the price of the Goods by notice to the Buyer. In such an event the Buyer may on receipt of such notice cancel the order for the Goods, but if the advance payment received and factory has started production in instalments the Buyer shall not be entitled to cancel the order and advance will be forfeited. However, the seller will request to the factory to deliver the goods to the Buyer to the value equal to the Advance payment and Seller will work as an agent to

solve the dispute between Buyer and the Factory. No other remedy shall be available to the Buyer in respect of such variation in price. Payments [Payments Provision] Payment is required in full at time of order to include the cost of goods, packaging and delivery. No goods will be despatched nor special orders manufactured until after receipt of cleared funds to the full invoice value including packaging and delivery. Cancellation of Orders [Cancellation of Orders Provision] Subject as herein provided, order for Goods may not be cancelled or suspended without the seller s written consent. Any cancellation or suspension of an order is acceptable only on the express condition that the Seller shall be indemnified against any loss incurred wholly or in part by the cancellation or suspension. No refund of advance is permissible in case of cancellation. Secondly, the Defendant denied having ever agreed to refund the Deposit to the Plaintiff (No Agreed Refund Defence).

- (b) Synopsis of the Plaintiff s opposition The Plaintiff claimed RT never told OCP or the Plaintiff that the Deposit would be forfeited in case of cancellation of the POs. According to OCP, the Plaintiff had never seen, received, agreed to or been made aware of the 3/2/05 Proforma Invoice. If the 3/2/05 Proforma Invoice allegedly evidenced the Parties agreement for sale and purchase of the Goods, it would be illogical for Clause 8 to omit details of the Defendant s bank account for remittance of the Deposit. In any event, the Forfeiture Defence would not have assisted the Defendant because notwithstanding such alleged defence (which was denied by the Plaintiff) the Parties agreed to a refund of the Deposit upon cancellation of the POs.
- (c) Court s approach Mr Collins submitted that conflicts in the Parties affidavit evidence should be left for trial. In my view, how much evidence is required to raise a meritorious defence with real prospect of success depends on the facts and circumstances of each case, but it does not mean the court must accept the Defendant s assertions. The court should assess whether there is sufficient evidence to cast doubt on the Defendant s credibility and/or the inherent probability or otherwise of its assertions such that the court should not accept its defence allegations.
- (d) Forfeiture Defence I am not satisfied the Forfeiture Defence has any real prospect of success. As will be evident from the analysis below, the 3/2/05 Proforma Invoice and Annexure (and hence the Forfeiture Defence) do not sit well with the contemporaneous documents, and the Defendant has failed to give any persuasive explanation for the contradictions or discrepancies.
- (1) Background Before considering the 3/2/05 Proforma Invoice and Annexure against the factual matrix and contemporaneous documents, it is necessary to bear in mind the common ground between the Parties, ie (a) the Agreement between the Parties was based on sale and purchase of the Goods with details as contained in [the POs] and (b) the Plaintiff paid the Deposit in pursuance of the [POs] (see paragraphs 2-3 above and paragraphs 1-2 of the Draft Defence). The issue here is whether certain T&C in the 3/2/05 Proforma Invoice and Annexure were additionally applicable to the Agreement. Unless otherwise stated, the events/documents set out below are drawn from RT s 1st to 3rd Affidavits. RT claimed the

Defendant had substantial international sourcing experience. The Plaintiff was interested to know about suppliers for steel flanges and sourcing from India/China for its annual purchase requirement. With the Parties sharing the same office premises in Shanghai, the Defendant proposed to work as the Plaintiff's sourcing agent and submitted a report to the Plaintiff on the Indian steel-forging industry. As per the Plaintiff's requirements, RT identified a steel-forging factory, Sushila Forgings Ltd (Sushila), that exported steel products to inter alia United States. Pursuant to the Defendant's enquiry, Sushila signed/ issued Proforma Invoice no.06JY1004 dated 14th January 2005 (14/1/05 Sushila Invoice) to the Defendant for supply of the Goods at the Price on inter alia the following terms :
PAYMENT: BY T/T 50% OF THE TOTAL INVOICE VALUE PREPAID AND 50% OF THE TOTAL INVOICE VALUE PAID AFTER SHIPMENT 7 DAYS REMARKS: The Offer is Valid for 30 days. Advance will be forfeited in case of cancellation of the Order. We will buy steel raw material only after getting 50% advance. After cutting steel as per your design and forgings as per your size no change in specification is possible. So send final design with the buyer's order. Any price change in the steel before making advance will be given to you. Delivery will be within 30 days from the date of starting the production. Production will be started after 10 days from the date of receipt of Order. Kindly confirm and sign with your seal and send it with your PO. Sushila signed/issued Proforma Invoice no.06JY1004 (ie same number as the 14/1/05 Sushila Invoice) dated 24th January 2005 (24/1/05 Sushila Invoice) for supply of the Goods at the Price on the same T&C as the 14/1/05 Sushila Invoice. Although the Defendant countersigned the 24/1/05 Sushila Invoice, there is no evidence that the Defendant sent the signed 24/1/05 Sushila Invoice together with its purchase order in accordance with the Clause 7 of the Remarks therein before expiry of the offer after 30 days. On 2nd February 2005, Mr Matt Wu () of the Plaintiff by email to RT invited the Defendant to be the Plaintiff's agent for purchasing flanges from India. Paragraphs 5 and 7 of RT's 2nd Affidavit claimed the Plaintiff approved Sushila as supplier. On 10th March 2005, the Plaintiff issued the POs. MW emailed them to RT on the same day. 8th April 2005 was the shipment date specified in the POs which further provided as follows : Condumex acceptance is required for any delays to the p.o. past the confirmed ship date. Condumex acceptance of revised ship date must be in the form of revised p.o. to the supplier showing the revised ship date. This p.o. term is non-negotiable & will be assessed to all late shipment. The express payment terms in the POs were LETTER OF CREDIT without any provision for split payment of the Price with 50% advance payment. Indeed, paragraphs 3d and 4 of RT's 2nd Affidavit admitted that the payment terms of 100% letter of credit shown on the POs appeared to be consistent with international trade practice and favoured by the Defendant. The POs further specified that [it] is the vendor responsibility to review P.O. information for accuracy. Discrepancies should be reported and a revised order be sent to vendor. The Defendant signed/issued to Sushila Purchase Order No.SCL/ FLANGES/0036/2005 dated 14th March 2005 requesting for supply of the Goods at US\$174,260.91 which comprised C&F cost of US\$172,535.55 (ie almost same as the Price) and bank charges of US\$1,725.36 (14/3/05 Sushila Purchase Order). The T&C therein were inter alia as follows :

1. Your [14/1/05 Sushila Invoice] JAN.14, 2005 Payment 50% advance and 50% against fax copy of shipment. Please present ORIGINAL Shipping documents to our bankers, Name of Bank : DBS Bank (Hong Kong) Limited 11/F, The Centre, 99, Queen s Road Central, Hong Kong. The notation pl sign and seal we have received the advance of USD \$86,265.87 was printed/typed at the bottom of the 14/3/05 Sushila Purchase Order. The Defendant did not explain why there were two versions of the 14/3/05 Sushila Purchase Order signed by Sushila and the Defendant but with the same contents (one in exhibit RTS-1 of the RT 1st Affidavit and the other as Annex G of exhibit RT-1 of the RT 3rd Affidavit) save to say that the one exhibited as Annex G was the original signed version RT received since February 2007 . On 14th March 2005, the Defendant received the POs and its Mr Xie Wei Wei () emailed OCP (14/3/05 Email) as follows : Dear Sir, We are thankful to you mail [1st and 2nd POs] dt 10th March, 2005 received on 14th March (after weekend holidays on 12 & 13th March) against our offer dated 7th Feb., 2005 [7/2/05 Offer] valid until 8.00 hours by Hong Kong time Feb. 20th 2005 and further validity date extended till 3rd March, 2005 which was expired. We have contacted the factory and discussed the delivery of materials against you PO. Because we late to deliver the PO to the factory so it is possible that we can booked the material on same prices to the factory if you send TT for 50% advance and open LC for the 50%, pl. confirm it asap. Kindly open LC in our favour and send to our bank asap. The letter of credit should be with this conditions :-- We like to submit our request to make the following changes in PO. Date of Shipment: As we have mentioned in our Offer dated 7th Feb., 2005, we like to inform you to the shipment date is 60 day after receipt of LC. Kindly change the shipment date. Payment Terms: 50% By advance TT and 50% by Letter of Credit; We have already given u details fo our banks, so send the LC to our bank clearly 100% irrevocable letter of credit payable at sight. With best regards For and on behalf of [the Defendant] Later on the same day, RT emailed MW stating that [as] per detailed talk with the factory we like to inform you about modifications and payment terms. 1. 50% by Advance TT 2. rest 50% by LC DA 15 days. So pl. confirm as we are anxious due to the shipping mentioned in the PO
- s. Pl. clarify to your head office that date of shipment is 60 days from the date of [receipt] of TT and LC. On 21st March 2005, OCP emailed RT enclosing the POs corrected and stating he had been given instructions for the advance which the Defendant should receive in the following few days. OCP stated the date of delivery would be changed once he received confirmation from his headquarters concerning the wire transfer. OCP s 1st Affirmation stated that pursuant to the POs and at the request of the Defendant, the Plaintiff on 28th March 2005 deposited and paid to the Defendant the Deposit being 50% of the Price. Sushila took the view that in the volatile steel business the price in the 14/3/05 Sushila Purchase Order was only good if accepted and the advance paid on the date of acceptance (see paragraph 12 of RT s 1st Affidavit). RT claimed to know of increase in the price of steel from the newspapers on/about 28th March 2005. The Defendant claimed that by the time the Plaintiff was in a position to pay the Deposit or by the time the Defendant received the Deposit, the price of steel had risen. [Due] to delay in confirmation only , Sushila increased its price following change in (a) price of steel by the main producers and (b) government tax policy. RT, who

was then in India checking with Sushila, informed OCP by email on 4th April 2005 that Sushila had asked for price hike (about 20%) whatever genuine and that up to 30th March 2005 the Defendant had not received the Deposit. Paragraph 15 of RT's 3rd Affidavit claimed that despite the price increase, OCP asked RT to negotiate with and persuade Sushila to supply the Goods at the original Price. On 5th April 2005, RT emailed OCP to say he would meet with Sushila again and then let him know the shipment schedules. On 6th April 2005, OCP by email required the Defendant to confirm acceptance of the POs and the production/shipment schedules due to pressure from his headquarters and lack of news from the Defendant. On 7th April 2005, RT emailed inter alia OCP saying the primary steel producers had increased steel raw material prices by 20%, so it was not possible for Sushila to supply the Goods as per their earlier offer which has been closed on 21st March. He added the following: Till today we have not received the final PO, however you informed us that the money has been sent to our account. Without signing the final PO this advance is not useful to us. As per my suggestion pl. discuss with your head office and make few changes in your PO. Origin: India/China Prices: Increase 10% for Indian origin and it should be based on Ex Factory Kindly send the final PO so that we can discuss the supply conditions with the suppliers. As per Indian Price situation of Steel Prices, I suggest you to take all the material from China so I can try our old offers. Pl. send us ur reply asap so that we can send you supply schedules. According to RT, the advance of US\$86,000.00 (see paragraph 11 of RT's 3rd Affidavit) or US\$90,000.00 (see paragraph 3c of RT's 2nd Affidavit) or US\$86,265.88 (see paragraph 8 of RT's 2nd Affidavit) was sent to Sushila on 9th April 2005. He further suggested that an additional advance of US\$56,000.00 was remitted to Sushila (see paragraphs 11 and 12 of RT's 3rd Affidavit) to meet the supplier's deadline or to Red Arrow China East Communications Holdings Ltd of Ningbao, China (see paragraph 8 of RT's 2nd Affidavit) for purchasing steel from China. Although RT hoped to have further evidence of the payment of US\$56,000.00, none has been adduced to date. RT negotiated with Sushila in person or by telephone, but Sushila refused to supply the Goods at the price stated on the 14/3/05 Sushila Purchase Order. On 11th April 2005, RT reported to OCP by email that due to non-confirmation till 21st March 2005 Sushila had asked for 20% price increase. I have already informed you but you told me that your head office is not ready to increase the prices. However you have sent money later into my account but there is no use without confirming the PO. RT indicated there were serious problems in getting supplies from India and suggested there was no alternative but to source from China in order to get supply on time. On the same day, OCP emailed back to say that was bad news and would reply the following day. On 19th April 2005, Mr C F Wong of the Defendant emailed OCP to say RT had gone to India and then China to finalize the supply of Steel Flanges as per our quotation sent to you. Till today we have not received the Purchase Order for you. Pl. fax us ur PO to our HK office so that we can start the production process. Pl. understand that the date of shipment must be 60 days after opening of LC. We need final purchase order immediately to give to our Suppliers. RT said the Defendant's attempts to retrieve the position came to nothing. OCP's 1st Affirmation also confirmed the Defendant could not supply/deliver the Goods at the Price, so the Plaintiff had no alternative but to cancel the POs. The 1st and 2nd POs were

cancelled on 19th and 20th April 2005 respectively (see revision 7 of the POs (Cancelled POs)), The Cancelled POs showed that by the time of cancellation the shipment date in the POs had been changed to 3rd May 2005 and the payment terms therein had been changed to Please See Below . Paragraph 17 of the Important Notes confirmed a wire transfer on 24th March 2005 and delivery of the Goods no later than 35 days beginning on the third day after the wire transfer was made. RT believed the Defendant s order with Sushila was cancelled only on 23rd May 2005, by which time Sushila had done part of the work that required tailor-made cutting, stamping and forging to the Plaintiff s specific requirements. The steel plates once cut could only be disposed of as scrap and could not be reused. Sushila sent a letter dated 29th May 2005 to the United States Embassy complaining of financial and goodwill loss as a result of the buyer cancelling the order on May 21st when Sushila had already purchased steel and started production for the order and had informed the Buyer and its agent of the increase in price of steel before receiving the advance payment.

- (2) Analysis The issue is whether the Defendant has by credible affidavit evidence demonstrated a real likelihood that the T&C of the 3/2/05 Proforma Invoice and Annexure had been made known to the Plaintiff and were applicable to the Agreement between the Parties for supply of the Goods. Although RT referred to a back-to-back arrangement, Mr Collins clarified that the Defendant was not saying the T&C in the 14/3/05 Sushila Purchase Order were incorporated into the Agreement between the Parties. He submitted that even though the Plaintiff could have been made aware of Sushila s T&C inasmuch as specific reference is made to [Sushila s] agreement in the agreement between [the Parties] , the Defendant s case was rather the T&C of the Agreement between the Parties included those in the 3/2/05 Proforma Invoice and Annexure (eg Clauses 2 and 8 and the Prices Provision) that corresponded to the T&C in the 14/3/05 Sushila Purchase Order. On the other hand, Mr Pao, counsel for the Plaintiff, submitted it was incredible that the Defendant had given or made known the 3/2/05 Proforma Invoice and Annexure to the Plaintiff. The 3/2/05 Proforma Invoice and Annexure were not mentioned in any contemporaneous document. It was more than a year later that the 3/2/05 Proforma Invoice was implicitly referred to in the Draft Defence on 20th June 2006 and more specifically in the letter of the Defendant s solicitors to the Plaintiff s solicitors dated 19th July 2006 that requested adding such document to exhibit RTS-1 of RT s 1st Affidavit. The Annexure was first exhibited to RT s 3rd Affidavit of 25th June 2007 although RT explained he did on 28th April 2006 email the Annexure together with the 3/2/05 Proforma Invoice to the Defendant s solicitors who omitted to download the same. Even accepting such explanation for present purpose, the 3/2/05 Proforma Invoice and Annexure were still raised inter partes for the first time in June 2006. There were unexplained incongruities on the face of the 3/2/05 Proforma Invoice that raise doubts as to whether the T&C therein were binding contractual provisions between the Parties : The Defendant did not offer any plausible explanation for the discrepancy between Clause 1 which stated that the offer therein was valid for 30 days (ie the offer expired on 5th March 2005) and the Reply Deadline which stated that the offer was open for reply 15th, March 2005 . Paragraph 15 of RT s 3rd Affidavit stated that RT recalled speaking with OCP almost

everyday between 1st and 14th March 2005 and during these conversations the deadline was extended to 15th March 2005 . If the 3/2/05 Proforma Invoice were truly open for reply up to 15th March 2005, there would not have been any need to orally extend time for reply. If, on the other hand, the Parties had to orally extend time for reply, it is perplexing why the 3/2/05 Proforma Invoice would on 3rd February 2005 already specify 15th March 2005 as the deadline for reply. The 3/2/05 Proforma Invoice was not signed by either of the Parties even though there was space for signature by RT and XWW and the Plaintiff was requested to sign and seal . This is contrasted to the 24/1/05 Sushila Invoice and the 14/3/05 Sushila Purchase Order both of which were signed by inter alia the Defendant. Mr Collins emphasised that the Parties also did not sign the POs, but I do not regard that as significant. In contra-distinction to the 3/2/05 Proforma Invoice, MW s email of 10th March 2005 left no doubt that the POs were issued by the Plaintiff to the Defendant and the Defendant s subsequent emails left no doubt that it had received the same. The Shipment Provision and Clause 5 did not sit well together. The former provided for shipment within 60 days from receipt of the advance and the latter provided for shipment within 30 days from starting production. There is no explanation as to which was the applicable provision even if the T&C in the 3/2/05 Proforma Invoice were applicable to the Agreement between the Parties for supply of the Goods. The contemporaneous documents also suggest it is doubtful whether the T&C of the 3/2/05 Proforma Invoice and Annexure were applicable to the Agreement between the Parties for supply of the Goods : The preamble and the Quotation Provision of the Annexure stated that the T&C therein formed part of every contract of sale from which no deviation was possible in the buyer s purchase order. Yet there was no complaint whatsoever in the contemporaneous documents subsequent to the POs that the Plaintiff failed to comply with and was in breach of the T&C of the 3/2/05 Proforma Invoice and Annexure by inter alia deviating from such T&C, refusing to accept/pay the increased price for the Goods, cancelling the POs and/or demanding for refund of the Deposit. Clause 8 of the 3/2/05 Proforma Invoice provided for advance payment of 50% of the quoted price and for payment of the 50% remaining balance against fax copy of shipment. However, the Payments Provision of the Annexure provided for full payment at the time of the order. Such fundamental discrepancy raises doubt on the Defendant s claim that the T&C of the 3/2/05 Proforma Invoice and Annexure were applicable to the Agreement. It is also telling that the POs issued more than a month later did not conform to either Clause 8 or the Payments Provision. Not only was there no provision for payment of any advance or deposit, the express payment provision was for 100% letter of credit at sight. Further, the Plaintiff by the POs was adamant that any discrepancies had to be dealt with by way of a revised order. This was inconsistent with any acceptance of or acquiescence in Clauses 8 or the Payments Provision by the Plaintiff. It further appears that the Plaintiff did not agree to the Shipment Provision and Clause 5 (which differed from each other) because the subsequent POs not only provided for shipment to be made on 8th April 2005 but went further to expressly provide that any revision of such non-negotiable shipment date must be by way of revised order showing revised shipment date. In my view, it is most telling and inconsistent with the Defendant s case that there was no complaint at all by the Defendant in any of the

contemporaneous documents that the Plaintiff failed to bring the POs in line with the T&C of the 3/2/05 Proforma Invoice and Annexure that were allegedly applicable to the Agreement between the Parties for supply of the Goods. There is also no evidence as to how the 3/2/05 Proforma Invoice and Annexure were sent to or acknowledged by the Plaintiff. Mr Collins submitted the Plaintiff accepted the T&C therein by silent acquiescence before issuance of the POs, but the T&C in the POs as analysed above belies such suggestion. The mismatch between the T&C of the 3/2/05 Proforma Invoice and Annexure on one part and those of the POs on the other part might well be explained by the Defendant's own admission in the 14/3/05 Email that the POs were made against the expired 7/2/05 Offer (ie not against the offer in the 3/2/05 Proforma Invoice and Annexure). However, the Defendant failed to condescend upon the particulars of the 7/2/05 Offer or to explain why such subsequent offer did not supersede the earlier 3/2/05 Proforma Invoice when both offers dealt with supply of the Goods. In the 14/3/05 Email, the Defendant admitted it was late in delivering its purchase order to Sushila (note that the 14/3/05 Sushila Purchase Order was issued after expiry of the offer in the 24/1/05 Sushila Invoice in late February 2005), but urged it might still be possible to secure supply of the Goods at the Price if the Plaintiff paid 50% Deposit in advance and 50% remaining balance by letter of credit. On 21st March 2005, the Plaintiff sent to the Defendant POs corrected confirming instructions for split payment of the Price by 50% Deposit by remittance and 50% remaining balance by letter of credit. In my view, such alteration of the payment terms in the POs was pursuant to the requests in RT's emails of 14th March 2005 and not due to the T&C of the 3/2/05 Proforma Invoice and Annexure or, as alleged in paragraph 4 of RT's 2nd Affidavit, because the Plaintiff received the proforma invoice of Sushila because Sushila (factory) require 50% and 50% at the time of delivery. This conclusion is supported by inter alia the following: the Defendant discussed with Sushila before making the request in the 14/3/05 Email for split payment and in particular requiring payment of 50% remaining balance of the Price by irrevocable letter of credit at sight; the Defendant had further detailed talk with Sushila before reiterating in RT's further email on 14th March 2005 the request for split payment but requiring payment of 50% remaining balance of the Price by letter of credit DA 15 days (ie documents accepted 15 days); whilst the modifications in the POs evolved with RT's emails of 14th March 2005, such emails did not complain that the payment terms in the POs failed to follow the agreed understanding in Clause 8 which, according to the Defendant, was already applicable to the Agreement between the Parties; in the 14/3/05 Email the Defendant requested alteration of the shipment date to 60 days after its receipt of the letter of credit in contra-distinction to Clause 5 which provided for delivery within 30 days of starting production and to the Shipment Provision which provided for shipment within 60 days from the date of receipt of advance. Given the POs corrected were received on 21st March 2005, even though the 14/3/05 Sushila Purchase Order was dated 14th March 2005, the Defendant waited until 21st March 2005 to confirm the purchase with Sushila (see RT's email of 11th April 2005 suggesting non-confirmation to Sushila until 21st March 2005 and RT's suggestion that the offer from Sushila closed on 21st March 2005 see paragraphs 37 and 39 above). Nevertheless, apart from a reference to the unparticularised 7/2/05 Offer, there was still no mention of the

3/2/05 Proforma Invoice and Annexure let alone any T&C therein in the contemporaneous inter partes emails. On the Defendant's case, this is difficult to understand. The 14/3/05 Sushila Purchase Order (which incorporated the Remarks in the 14/1/05 Sushila Invoice) provided that Sushila would only buy steel raw material after receipt of the advance, start production 10 days after receipt of such advance and deliver the Goods within 30 days from starting production (ie similar to Clauses 3 and 5 of the 3/2/05 Proforma Invoice), yet the Defendant did not in any inter partes email expressly mention these T&C to press for early payment of the Deposit. Instead, it gave an express but untrue assurance in the 14/3/05 Sushila Purchase Order that it had already received the Deposit. The Defendant did not offer any explanation. Indeed, when the Defendant confirmed the 14/3/05 Purchase Order with Sushila, the Plaintiff had not agreed to alter the shipment date in the POs as requested in 14/3/05 Email. According to the Cancelled POs, even as at the time of cancellation of the POs, the shipment date had only been changed to 3rd May 2005 and delivery of the Goods was to be made no later than 35 days from the third day after payment of the Deposit, which was not in line at all with the request in the 14/3/05 Email. Yet it was the Defendant's case that Sushila proceeded to purchase steel raw material and commence production pursuant to the 14/3/05 Sushila Purchase Order. This suggests there was little correlation between the T&C of the Agreement between the Parties and those of the agreement between the Defendant and Sushila. The above matters raise serious doubt as to whether the Defendant's commitment to supply the Goods was premised on the 3/2/05 Proforma Invoice and Annexure and/or whether there was any back-to-back arrangement premised on the T&C in the Proforma Invoice and Annexure which were similar to those in the agreement between the Defendant and Sushila. In my view, the tenor of the evidence was that even the Defendant was not proceeding on the basis of the 3/2/05 Proforma Invoice and Annexure (see reference to the T&C of the unparticularised 7/2/05 Offer which had expired and/or the requests for modifications to the POs in the Defendant's emails to the Plaintiff). It is also interesting to note the Defendant not only did not complain that the Plaintiff should have paid the Deposit pursuant to Clause 8 which was said to be applicable to the Agreement between the Parties, by RT's emails the Defendant emphasised that the Deposit received from the Plaintiff was not useful unless the POs were corrected (see paragraphs 37 and 39 above). This does not hang well with Mr Collins' submissions that the risk of price increase fell on the Plaintiff due to delay in paying the Deposit. In respect of the increase in price requested by Sushila, had the T&C of the 3/2/05 Proforma Invoice and Annexure (eg Clause 4 and the Prices Provision) been applicable to the Agreement, it is inexplicable why the Defendant's emails on/after 4th April 2005 failed to rely on Clause 4 and the Prices Provision to rebut the Plaintiff's refusal to accept such price increase. The Defendant did not sufficiently explain why it merely (a) requested for further modifications to the POs to reflect a 10% price increase, and (b) urged the Plaintiff to supply finalised POs without which the Deposit was useless to the Defendant. Further, the Defendant appeared anxious to complete the POs by sourcing steel from China and had allegedly paid an advance for such purpose. By email dated 7th April 2005 the Defendant requested the Plaintiff to revise the POs to Origin : India/China . But it did not explain why such request was necessary at all if the 3/2/05 Proforma Invoice (which already

specified Origin : India/China) were applicable to the Agreement between the Parties. The matters discussed above based largely on contemporaneous documents adduced by the Defendant seriously cut against the suggestion that the 3/2/05 Proforma Invoice and Annexure as well as Clauses 2, 4 and 8 and the Prices Provision therein were applicable to the Agreement between the Parties. I also draw assistance from the analysis of the No Agreed Refund Defence below. In the circumstances, the Defendant has failed to demonstrate the Forfeiture Defence has any real prospects of success.

- (e) No Agreed Refund Defence According to OCP's 1st Affirmation, after the cancellation of the POs it was agreed (which was also the common understanding) between the Plaintiff and the Defendant that the Defendant would return the Deposit to the Plaintiff (my emphasis). Mr Collins criticised OCP's 1st Affirmation in that it failed to provide particulars of the agreement to refund the Deposit and the emails exhibited thereto were merely consistent with but did not confirm an agreement to refund. He submitted that the court should bear in mind the Defendant was not in a position to prove a negative (ie its denial of any agreement to refund the Deposit). To properly consider such submissions, it is necessary to consider OCP's 1st Affirmation and the relevant emails and correspondence in some detail. But I note at the outset that the Defendant did not give any explanation about such emails and correspondence that might contradict their consistency with such agreement. The No Agreed Refund Defence is nothing more than a bare denial. On 21st April 2005 (ie 1-2 days after the cancellation of the POs), OCP emailed RT as follows : According to our last phone call. Concerning the cancellation of the POs to [the Defendant] and the devolution of the advance payment [the Plaintiff] has given to [the Defendant], here is the account in dollars of [the Plaintiff] in where [the Defendant] can deposit the money back. I also attach the cancelled POs for your reference. I will appreciate your confirmation of the deposit into [the Plaintiff's] Account. [details of account] Thanks for your understanding and hope we can have business in a near future. It is plain from such email that it was the prior telephone conversation between RT and OCP that led to the arrangement for devolution of the Deposit by way of refund. Such email did not request for a refund, but simply provided the account details for the Defendant to proceed with the refund. In my view, the agreement and common understanding for refund of the Deposit as referred to in OCP's 1st Affirmation were necessarily according to the said telephone conversation between RT and OCP. The agreement to refund was reinforced in the subsequent emails. On 22nd April 2005, RT emailed OCP over the cancelled POs as follows : In continuation of our offers to supply steel flanges against your enquiries we like to submit that :-- but your head office is not interested in buying from us, however we have invest a lot of time and money in your two enquiries. We are in severe losses. We hope your company can appreciate our efforts and consider this business form us. WE are [hopeful] to supply you all the materials on time. To locate your funds and [transfer] back we need a letter from you for our Bank. Pl. send a fax letter stating that the money sent from [the Plaintiff] to [the Defendant] requested to return back to [the Plaintiff] (same as sender). [The Defendant] is not responsible for loss, damages or claim. [The Defendant] or its subsidiaries will not ask for any claim against [the Plaintiff]. I am in

HK today and like to do it so pl. send this fax msg signed and sealed by Sender. On the same day, OCP replied by email saying that according to the Plaintiff's finance department, the Deposit was for US\$86,265.00. He also gave the bank reference number to RT to locate the Deposit in the Defendant's account with its banker. The Plaintiff Controller issued a letter dated 23rd May 2005 to the Defendant as follows : We have cancelled [the 1st and 2nd POs] in the total amount of \$172,531.76 USD. Kindly reund the advance payment made to the account of Starasia on the 28th of March, 2005 for 50% of the order (\$86,265.88 USD) less any bank fees which have been paid by Starasia Components Limited. On 27th May 2005, OCP emailed RT as follows : I am happy to receive such news. I am also waiting for the letter from headquarters for you to make the deposits beck to Condumex Account. Hope they will provide it by early next week. There are more projects in where we can involve StarAsia, for sure. Let me first solve the first issue and then we can go to the second issue. Condumex is a very conservative company in some ways and [always] wants to have a long term relationship with capable providers, just as you are. There is no merit in the suggestion that the request for refund in the Plaintiff's letter of 23rd May 2005 was inconsistent with the plea of an agreement to refund the Deposit. It is quite clear that such letter was issued pursuant to the RT's request for assistance to locate the Deposit and to arrange the refund in his email of 22nd May 2005, which request was confirmed in OCP's email of 27th May 2005. Mr Pao quite rightly pointed out that had the Defendant never agreed to refund the Deposit, RT would have raised objection in his email of 22nd May 2005. Such deafening silence not only corroborates the tenor of such email (ie RT being wishful of locating the Deposit for refund as soon as possible since he was in Hong Kong on that day) but calls into question the applicability of the T&C of the 3/2/05 Proforma Invoice and Annexure to the Agreement between the Parties as it did not sit well at all with Clause 2 and the Cancellation of Orders and Prices Provisions. In light of the aforesaid analysis, I find the Defendant has failed to establish any credible basis for the No Agreed Refund Defence.

- (f) Miscellaneous matters The Defendant suggested it suffered substantial loss. RT even assumed (although it is difficult to comprehend the basis for his assumption) that if the Defendant suffered greater loss than the Plaintiff it would help demonstrate a meritorious defence (see paragraph 13 of RT's 3rd Affidavit). But with my rejection of the Forfeiture and No Agreed Refund Defences, there is no viable basis for laying any loss allegedly suffered by the Defendant at the Plaintiff's door. It was further suggested that the Defendant received several promises from the Plaintiff for large quantity of sourcing business if the Deposit would be refunded. However, it is plain from RT's email of 22nd April 2005 and OCP's email of 27th May 2005 that the Plaintiff wanted to first solve the first issue [ie the refund of the Deposit] and then we can go to the second issue [ie future projects where the Plaintiff could involve the Defendant] . There were some unsigned minutes of meeting in July 2005 included as part of exhibit RT-1 in RT's 1st Affidavit which inter alia (a) claimed the Defendant having remitted the Deposit to its account in China could not return the same due to financial control and (b) alluded to an inconclusive proposal yet to be presented the Defendant's board for refund of the Deposit against new orders to be placed by the Plaintiff.

But such unsigned minutes also recorded that OCP asked for full refund of the Deposit even though the Plaintiff might in future consider a new order. Such inconclusive proposal following on the Defendant's own difficulties in effecting refund of the Deposit could not assist the Defendant. In any event, I am unable to place much weight on such minutes when (a) they were not explained in RT's 1st to 3rd Affidavits, (b) the maker thereof was not identified and (c) the circumstances in which they were made were unknown. V. Delay Since 2001 RT had been staying in China and since 2004 he worked exclusively to source business for the Defendant. The Defendant had no physical presence in Hong Kong other than its registered office at the address of a firm of chartered accountants (Accountants). RT claimed that although the Accountants tried to inform him by email about the letters and enclosures from the Plaintiff's solicitors dated 12th October 2005, December 2005 and 7th April 2006 delivered by post to the Defendant's registered office, he believed he did not receive those emails since his previous website hosted through a United States server broke down in early December 2005. Due to lack of funds and having to operate his one-man company in Shanghai, he could only come to Hong Kong to attend to these matters and meet the Defendant's solicitors on 27th April 2006. The Summons was issued on the following day. I accept that had the Defendant been able to establish a meritorious defence with real prospect of success, the delay in setting aside the Judgment would not have weighed against the exercise of discretion in favour of the Defendant to set aside the Judgment. However, the Defendant has not established any meritorious defence that justifies setting aside the Judgment. VII. Security for costs There is no dispute that the Plaintiff was/is a foreign company. Mr Collins submitted it was the usual practice (subject to the discretion of the court) to require sufficient security for costs when a foreign plaintiff took legal action against a local defendant. I referred the parties to *Izumo Mokko Co Ltd v TS Lines Ltd* [2007] 2 HKLRD 363 in which H H Judge Lok held that it was not an inflexible rule that a foreign plaintiff must provide security, but in considering all the circumstances the focus of the courts should be on the difficulties faced by the defendant in enforcing the judgment rather than on the status of the plaintiff. In the present case, there is no dispute the United States and Hong Kong have different legal systems and there is no reciprocal arrangements for enforcement of judgments between the two territories. In my view, it will require extra costs and time to enforce any judgment and to recover costs in the United States, and no doubt foreign lawyers will have to be engaged for such purpose. There is no evidence before me that the Plaintiff has any asset in Hong Kong. In the circumstances, had I allowed the Judgment to be set aside, I would have been prepared to order the Plaintiff to provide security for costs. Mr Pao did not dispute the quantum of security up to the stage of trial in the sum of HK\$106,800.00 proposed by Mr Collins. VII. Conclusion The Appeal is therefore dismissed. There is no reason why costs should not follow event. I therefore grant a costs order nisi that the Defendant do pay the Plaintiff costs of the Appeal to be taxed if not agreed with certificate for counsel. In my view, the issues arising from the Appeal justify involvement of counsel, and I am grateful to Mr Pao for his submissions. (Marlene Ng) District Court Judge Representation: Mr Jin Pao instructed by Messrs Vincent T K Cheung, Yap & Co for the Plaintiff. Mr Gilbert Collins of Messrs Boase Cohen & Collins for the

Defendant. PAGE - PAGE DCCJ6287/2005/Judgment DCCJ6287/2005/Judgment A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V `VHVHV dvYdYd J ? J ? J ? tftftftft zl[lz &`#\$;w&7@ yXe?RM() l0Bv 1YLS.:06 j~BpM EU(n)i"q 3O2q)i"q 1YLS EU(n 3O2q ;w&7 yXe? l0B b&2q &(6 @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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