

HONG KONG / JUDGMENT

FUJITSU PC ASIA PACIFIC LTD v. TECHNIQUE COMPUTER SYSTEM (HK) LTD AND ANOTHER

COURT

Court of Appeal

DECIDED

28 March 2007

CASE / FILE NUMBER

CACV220/2006

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bjbj cacv 220/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 220 of 2006 (on appeal from HCA NO. 1422 of 2003) BETWEEN FUJITSU PC ASIA PACIFIC LIMITED (formerly known as FUJITSU ICL TRADING HONG KONG LIMITED) Plaintiff TECHNIQUE COMPUTER SYSTEM (H K) LIMITED 1st Defendant LI SZE YUEN PETER (ore the judge was an application for summary judgment and the judge gave judgment under Order 14. The claim by the Plaintiff that is involved in this appeal is the claim against the 2nd Defendant who gave a guarantee for the trading debts of the 1st Defendant. The 1st Defendant had been buying computers from the Plaintiff and, by July 1996, had run up a debt of some \$3,146,450. As a result, there was some negotiation between the parties and, on 4 July, an agreement was signed in the following terms:

- (1) TCS agrees to settle the current outstanding debt due to FITA-HK amounting to HK\$3,146,450 monthly starting from July 1996. The first payment will be payable by TCS on/before 31 July 1996 upon signing of this agreement by both parties. (Details of the amount due attached)
- (2) The said monthly settlement amount paid by TCS to FITA-HK should not be less than HK\$100,000 payable by cheque or other payment method as informed by FITA-HK.
- (3) Without any prejudice, FITA-HK agrees to hold the legal actions against TCS provided there is a personal guarantee provided by the undersigned and there is no settlement in default as described in point 2 in any two consecutive months.
- (4) TCS intends to settle the whole sum HK\$3,146,450 by 30 June 1997. Should there be any outstanding amount left at 30 June 1997, TCS agrees to pay FITA-HK interest at 10 per cent per annum on the outstanding amount until the debt is fully settled. So it might emerge from that that if there were any interest to be paid prior to 30 June 1997, it would, at any rate, probably be considerably less than 10 per cent, if there were to be any at all. The other thing

which emerged from that agreement is that the agreement to withhold action would last until 30 June 1997 and that it was conditional on two things: first of all, that there would be a personal guarantee; and secondly, that there would be payments of at least \$100,000 a month and that if they lapsed for two months, then that agreement to withhold action would cease. The guarantee which was signed on the same day by the 2nd Defendant recites that, first of all, that the 1st Defendant owed that sum of \$3,146,450 to the Plaintiff. Then it goes on: Further to our meeting earlier today, I hereby personally undertake to pay the said sum of HK\$3,146,450 (or any balance left) to FITA-HK if the aforesaid sum should not be fully settled by TCS according to attached agreement made between FITA-HK and TCS on 4 July 1996. Based on my understanding above, FITA-HK agrees to hold the legal actions against TCS unless there is any monthly settlement in default in 2 consecutive months by TCS as per attached agreement and/or any breach of the agreement by TCS. So that last paragraph ties in with the paragraphs

- (2) and (3) of the main agreement. What the guarantee is, is a guarantee for the full amount and, importantly, it is based on the premise that it will come into effect if the sum is not fully settled by TCS according to the attached agreement. As already indicated, paragraph
- (4) of that agreement provides that TCS intends to settle the whole sum by 30 June 1997 and the withholding of the action is only up until 30 June 1997 and, thereafter, quite clearly, there is no undertaking to withhold action. That really disposes of the first point on this appeal because it was said that paragraph
- (4) of the agreement between the Plaintiff and the 1st Defendant extended the time, as I understood the argument, to an unlimited extent, and all it did was it extended the time on the basis that the interest would run at 10 per cent. That, I regret, is not my understanding of this agreement. My understanding of this agreement is quite clear, that the money had to be discharged by 30 June. The next argument was somewhat convoluted because it was based upon a combination of what was said to be two undertakings. It has to be said as a background that, although this agreement was made in July 1996 that there would be minimum monthly payments of \$100,000, by the end of March 1997, only \$600,000 had been paid when it would appear that something in the region of \$900,000 should have been paid. Nevertheless, the 2nd Defendant, in his affirmation, in paragraph 7, says that in July 1996, the Plaintiff's representative undertook to the 1st and 2nd Defendants, orally, that they would continue without break to supply products to the 1st Defendant and would fully support and assist the 1st Defendant to sell the products in order that the 1st Defendant would be able to perform its repayment obligations. In my view, concurrently with that must be the implied undertaking on behalf of the 1st Defendant that it would pay off its debts at, at least, at the rate of \$100,000 a month. There would be no purpose in the Plaintiff supplying products to the 1st Defendant on the basis that it could repay its debts when, far from paying for those products, it seems to have not even been paying off the past debts. The 2nd Defendant then goes on, in paragraph 9, to say that: Believing that the Plaintiff would honour its above-said verbal undertaking, the 1st Defendant had made payments

totalling hundreds of thousands to the Plaintiff before March 1997. As already indicated, in fact, before March 1997, on the evidence, there was only half a million dollars paid. Be that as it may, the affirmation goes on: Later, at the same time... and I pause there to say that it is totally unclear what time he is talking about; nevertheless, the affirmation goes on - ...the 1st Defendant made it clear to Mr Nakamura, the Plaintiff's representative, that as the Plaintiff had not honoured its verbal undertaking, the 1st Defendant would suspend repayments until the Plaintiff honoured its above verbal undertaking, and Mr Nakamura indicated that he understood and accepted that. Then in paragraph 10: However, at the same time, Mr Nakamura asked the 1st Defendant to give the Plaintiff 12 post-dated cheques with dates 24 May 1997 to 31 December 1997. And I pause there to say that those cheques were apparently \$50,000 each: The 1st Defendant made it clear to Mr Nakamura acting as the Plaintiff's representative that none of the cheques could be honoured and that Mr Nakamura assured the 1st Defendant clearly that those cheques would be used only for internal reporting purpose only and that even if the Plaintiff could not honour the said verbal undertaking, it would not take any legal recovery actions against the 1st and 2nd Defendants. It would appear, therefore, that on the 2nd Defendant's case, those cheques were, so to speak, irrelevant. On the 2nd Defendant's case, they were given to the Plaintiff on the basis that they would not be cashed and it was agreed by the Plaintiff that they would not be cashed and used for internal purposes only, no doubt by being shown to the Accounts Department. What the 2nd Defendant has said in this paragraph is, in effect, that the Plaintiff is not going to sue the Defendant if the Plaintiff itself does not supply the Defendant with any computers, and in the previous paragraph, the 1st Defendant has said that it is not going to pay because the Plaintiff has stopped supplying computers. The net effect of this seems to be that it is the 2nd Defendant's case that the Plaintiff has thereby agreed to waive its debt because it is not supplying any more computers to the 1st Defendant and, according to what is said in the paragraph, the Plaintiff has now agreed that it is going to withhold action altogether. The judge refused to accept this piece of evidence and said it was unbelievable. In my view, he was totally correct about that: such an agreement does not make sense. Indeed, Miss Yang, who appeared on behalf of the 2nd Defendant on this hearing, sought to argue the matter rather differently. Her submission was that the withholding of legal action against the 1st Defendant was consequent upon the giving of the cheques. In my view, that is not what is said by the 2nd Defendant in his affirmation at all, and I see no basis for that. The final argument that was put forward on behalf of the 2nd Defendant was that the cheques alone showed that there was an extension of time and the argument was put that the giving of the cheques and the acceptance of them - and as I have already indicated, they were only for \$50,000 each - extended to 31 December 1997 and the total amount was therefore \$600,000. It was said that it must be implied from that, that the Plaintiff had extended the time for the repayment of the debt. In my view, that is not correct at all. It is the 2nd Defendant's evidence, in any event, that the cheques were given simply to satisfy the Accounts Department and for no other purpose. But simply because the Plaintiff was prepared to take some cheques, which may or may not have been worth anything in any event, did not mean that they were extending the time and agreeing to withhold demanding payment of the

contractual sum. In my view, the attempt to frame some concluded agreement simply from the provision of those cheques must fail. In those circumstances, the three arguments which have been raised today on this appeal must fail and the appeal must be dismissed. Hon Le Pichon JA: I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal Mr Jeremy Bartlett, instructed by Messrs Clifford Chance, for the Plaintiff/Respondent Ms Elizabeth Yang, instructed by Messrs F Zimmern & Co., for the 2nd Defendant/Appellant

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