

HONG KONG / JUDGMENT

HOI CHENG PAN v. HEADSTART EDUCATIONAL GROUP LTD

COURT

District Court

DECIDED

27 April 2007

CASE / FILE NUMBER

DCCJ4028/2006

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bjbj DCCJ4028/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 4028 OF 2006

BETWEEN HOI CHENG PAN Plaintiff and HEADSTART EDUCATIONAL GROUP LIMITED
Defendant

Coram: H H District Judge Marlene Ng in Court Dates of Hearing: 23rd and 24th April 2007 Date of
Handing Down Ruling on Costs: 27th April 2007

RULING ON COSTS

I. Introduction The Plaintiff is the registered owner of premises known as Unit 2 on 14th Floor, Eastern Harbour Centre, No.28 Hoi Chak Street, Hong Kong (Premises). The Defendant is a limited company whose principal business was/is the provision of education services. The Plaintiff as landlord and the Defendant as tenant entered into a tenancy agreement dated 26th May 2006 (Tenancy Agreement) whereby the Plaintiff agreed to let and the Defendant agreed to rent the Premises for a period of 2 years from 16th June 2006 to 15th June 2008 at a monthly rent of HK\$13,500.00 inclusive of management fee, air-conditioning charges, government rates, government rent and electricity charges in respect of the Premises. The Defendant paid the rental deposit of HK\$27,000.00 (Deposit) and advance rent for the first month (Advance Rent), but failed to pay rent since 16th July 2006 or take up possession of the Premises. The Plaintiff claimed the Defendant was in repudiation of the Tenancy Agreement and he accepted such repudiation by his solicitors letter dated 20th July 2006 to the Defendant. On 16th August 2006, the Plaintiff commenced the present proceedings to claim for arrears of rent of HK\$13,500.00 for the

period from 16th July to 15th August 2006 and general damages arising from the Defendant's repudiation of the Tenancy Agreement. The Defendant denied the Plaintiff's claim and averred it was entitled to rescind the Tenancy Agreement by reason of (a) misrepresentations by the Plaintiff's alleged estate agent Midland Realty (Comm & Ind) Ltd and/or (b) the Plaintiff's breach of the express/implied terms of the Tenancy Agreement. The Defendant further claimed the Plaintiff had failed to mitigate his loss. The Defendant counterclaimed for refund of the Deposit and Advance Rent totalling HK\$40,500.00 and for damages it suffered as a result of having to rent alternative premises totalling HK\$58,136.00. On 1st October 2006, the Plaintiff re-let the Premises to another tenant for a period of 2 years from 1st November 2006 to 31st October 2008 with a rent-free period from 1st to 31st October 2006. By reason of such re-letting, the Plaintiff's loss and damages were reduced to HK\$27,815.00 being (a) arrears of rent as well as loss and damages for the period from 16th July to 31st October 2006 at HK\$13,500.00 per month, (b) stamp duty for the Tenancy Agreement in the sum of HK\$815.00, and (c) estate agent commission in the sum of HK\$6,750.00, less the Deposit in the sum of HK\$27,000.00. The Plaintiff did not disclose the re-letting in these proceedings until 3rd April 2007 when (a) the Plaintiff's solicitors wrote to the Defendant's solicitors to advise them of the same and (b) filed/served supplemental list of documents disclosing the relevant documents. On 16th April 2007, the Plaintiff filed/served Voluntary Further and Better Particulars of paragraph 5 of his Statement of Claim (Voluntary FBP) which quantified his claim in the manner set out in the above paragraph. The trial was scheduled to be heard before me on 23rd April 2007 with the following day reserved. On the first day of trial, I heard arguments on 2 summonses, one from the Plaintiff seeking to amend the Voluntary FBP to remove the deduction of the Deposit in respect of the quantification of its claim, and another from the Defendant seeking to strike out the Plaintiff's claim for want of jurisdiction. On the following day, I orally delivered my decision (Decision) and dismissed both summonses with costs to be taxed if not agreed on District Court scale with certificate for counsel. To assist the taxing master, I apportioned one third of the whole day of hearing on 23rd April 2007 together with 2 hours of hearing on 24th April 2007 for the Plaintiff's summons and the remaining two thirds of the aforesaid hearing periods for the Defendant's summons. Immediately after I delivered my Decision on the aforesaid summonses, Mr Chu, counsel for the Defendant, informed me that the Defendant would submit to judgment on the Plaintiff's claim and would not pursue its Counterclaim. Mr Suen, counsel for the Plaintiff, accepted such proposal. In the circumstances, by consent I granted judgment in favour of the Plaintiff against the Defendant for the sum of HK\$27,815.00 together with interest thereon at the rate of 10.75% pa from the date of the writ of summons (16th August 2006) to the date of judgment (24th April 2007) and thereafter at judgment rate until payment. Further, by consent I dismissed the Defendant's counterclaim. II. Costs issue Mr Chu informed me that the Defendant was willing to pay the Plaintiff's costs of the action (including costs of the Counterclaim). Mr Suen had no quarrel with that. But the parties were unable to agree on the relevant scale of costs. Mr Chu submitted that such costs should be taxed on a basis similar to the scale applicable in the Small Claims Tribunal. On the other hand, Mr Suen argued that the District Court scale should apply. III. Legal principles Costs are in the discretion of the court. Order 62 rule 3(2) of the Rules of the District Court provides inter alia that : If the Court in the exercise of its discretion sees fit to make any order as to the costs of or

incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. In *M Beraha & Co Ltd v Ng Wai Lun* CACV256/2003 (unreported, 18th June 2004), Woo VP in giving the judgment of the Court of Appeal said that O 62, r3(2) combined with O 62, rule 9(4)(b), in our judgment, are wide enough to entitle the District Court to order costs to be not more than a specified sum, or to be assessed on a basis, for want of a more certain term, similar to the scale applied in the Small Claims Tribunal. The question here is whether in considering all the circumstances of the case I should exercise my discretion to order costs of the action (including the Counterclaim) in favour of the Plaintiff to be taxed in accordance with the scale of the Small Claims Tribunal or that of the District Court.

IV. Pre-1st October 2006 costs In my Decision, I held that the Plaintiff's claim was properly brought in the District Court at the commencement of the action. In the Statement of Claim endorsed on the Writ of Summons, apart from the special loss pleaded therein, the Plaintiff also claimed for repudiation damages being actual loss of rental income for the unexpired term of the Tenancy Agreement. Such general damages as pleaded well exceeded the jurisdictional limit of the Small Claims Tribunal of HK\$50,000.00 for monetary claims in contract or quasi-contract. Since then, the Defendant filed its Defence and Counterclaim. The Defendant's monetary Counterclaim in contract as pleaded also exceeded HK\$50,000.00 and was clearly within the jurisdiction of the District Court. The position remained unchanged until 1st October 2006 when the Plaintiff re-let the Premises to a third party and such successful mitigation of loss resulted in reduction of the Plaintiff's loss and damages to HK\$27,815.00. In the circumstances, I have no hesitation in coming to the conclusion that the Plaintiff's costs of the action (including costs of the counterclaim and any costs reserved) up to 1st October 2006 should be taxed in accordance with District Court scale. V. Post-1st October 2006 costs I am of the view that having properly commenced the action in the District Court, even though the Plaintiff re-let the Premises on 1st October 2006 which resulted in reduction of his monetary claim to below HK\$50,000.00, he was entitled to continue with his claim in the District Court. This is because the District Court had no power to transfer the Plaintiff's claim to the Small Claims Tribunal. I have in my Decision explained why the District Court continued to have jurisdiction over the Plaintiff's claim despite the reduction in its quantum due to events that occurred after the commencement of the action. Likewise, since amount of the Counterclaim exceeded HK\$50,000.00, it also had to continue in the District Court. In any event, although the Plaintiff's reduced claim was below HK\$50,000.00, the pleaded basis of the Counterclaim was so interlinked with the Plaintiff's claim that the Plaintiff's claim and the Defendant's Counterclaim should be dealt with or heard together. In such circumstances, the whole of the present proceedings necessarily had to remain in the District Court, so prima facie it appeared that the District Court scale of costs would be relevant for the whole action (including the Counterclaim). Mr Chu took a single point of objection against such proposition. He submitted that the Plaintiff was in breach of his continuing obligation of discovery in failing to disclose at an early stage the documents relating to his successful mitigation of loss by re-letting the Premises. He complained that the re-letting was not dealt with in the Reply and Defence to Counterclaim or in the Plaintiff's witness statement, and that the Plaintiff's solicitors did not even mention such fact at the Pre-Trial Review hearing on 19th

December 2006. Mr Chu argued that because the Defendant was kept in the dark about the reduced quantification of the Plaintiff's claim, it lost an opportunity for quick resolution of the litigation by settlement or by removal of the litigation to the Small Claims Tribunal which would have minimised costs. It was suggested that had the Defendant been aware at an early stage that the amount of the Plaintiff's claim was only HK\$27,815.00, the Defendant would have offered to settle such claim and/or reduced his counterclaim to below HK\$50,000.00 to facilitate settlement or removal of the case to the Small Claims Tribunal. But because the Defendant was ignorant of the true quantum of the Plaintiff's claim until 3rd April 2007, the window of opportunity for settlement was lost since more costs had been incurred in the meantime. Mr Chu acknowledged that whilst he could not say for sure the present proceedings would have settled had the Defendant been told of the re-letting at an earlier stage, he submitted that it was a real possibility, which I should take into account in exercising my discretion in determining the scale of costs. I accept that the Plaintiff had a continuing obligation of discovery and it would have been more desirable if he had discovered the documents in relation to the re-letting of the Premises at an earlier time prior to 3rd April 2007. However, I am of the view that the Defendant was not helpless even without early disclosure of such information by the Plaintiff. I bear in mind that it was the Defendant that pleaded and carried the burden to prove the defence argument that the Plaintiff failed to mitigate loss. Although no documents in relation to the re-letting of the Premises were discovered by the Plaintiff or the subject was not touched upon in the Plaintiff's witness statement prior to April 2007, it is open to the Defendant to seek specific discovery of such documents and/or to seek leave to administer interrogatories on such subject. Neither step was taken by the Defendant. Further, since the burden was on the Defendant to prove the Plaintiff failed to mitigate loss, the Defendant could have adduced evidence to show the reasonable mitigation steps that the Plaintiff could have been taken (eg taking such steps as were necessary to re-let the Premises at a market rental) and the reasonable timeframe for proper mitigation of loss (eg the anticipated period required to effectively re-let the Premises in the market). But there was no such evidence from the Defendant (whether by way of witness statement(s) or discovery) at all. This raises a doubt as to whether the Defendant was as concerned about the quantum of the Plaintiff's claim with a view to settlement as suggested by Mr Chu. It is difficult to say what would have happened had the Defendant been told of the reduced quantification of the Plaintiff's claim at an earlier stage. There must inevitably be a degree of guesswork. I have carefully reminded myself that I should not exercise judicial discretion on costs based on uncertain speculation. However, there can be no objection for me to consider Mr Chu's submission against the known facts before me. But after careful consideration, I am not persuaded that the Defendant has sufficiently shown a real possibility that this case would have been settled or otherwise resolved prior to trial had the Defendant been informed of the Plaintiff's reduced quantification of his loss and damages at an early stage. First, I will consider the argument that had the Plaintiff been told of the re-letting of the Premises at an earlier stage, the Defendant would have considered voluntary reduction of its Counterclaim to below HK\$50,000.00 in order to bring both parties' claims within the jurisdiction of the Small Claims Tribunal. I cannot see how this will assist the Defendant on the costs issue presently before me. I have explained in my Decision that notwithstanding the reduction of the Plaintiff's

claim to HK\$27,815.00, the District Court (a) continued to have jurisdiction over the Plaintiff's claim, and (b) had no power to transfer the present case to the Small Claims Tribunal. So if the present case were to be removed from the District Court to be re-litigated in the Small Claims Tribunal, both parties had to agree to discontinue their respective claims against each other and to re-issue them in the Small Claims Tribunal. There is no evidence that such consent would have been forthcoming from the Plaintiff and this is in fact contra-indicated by the Plaintiff's vigorous resistance of the Defendant's summons to dismiss the Plaintiff's claim for want of jurisdiction. In my view, this option suggested by Mr Chu has not been shown to be realistically viable. But would a settlement of the case have been a real possibility or probability if the Plaintiff had told the Defendant of the re-letting of the Premises at an earlier stage? In my view, the known facts before me suggest that such possibility cannot be anything more than a mere assertion let alone a realistic probability. In my view, this is self-evident from the conduct of the Defendant after its solicitors were informed of the re-letting of the Premises on 3rd April 2007. On that day, the Plaintiff's solicitors issued to the Defendant's solicitors (a) an open letter setting out the reduced quantification of the Plaintiff's claim, and (b) a without prejudice save as to costs letter proposing an offer to settle the matter amicably on the following terms : To save avoidable court attendance and costs, we are instructed to propose that the above action be settled amicably on the following terms :- Judgment be entered for our client against yours for an agreed sum of HK\$15,000.00 together with costs to be taxed at the District Court scale if not agreed; Your client's counterclaim be dismissed with no order as to costs. In light of the imminent trial, please take your client's instructions on the aforesaid and revert to us at your soonest possible but not later than 5 pm on 10th April 2007, after which our client's offer would have lapsed. There was no constructive reply to the above without prejudice save as to costs letter. The Defendant's solicitors wrote to the Plaintiff's solicitors by way of open letter on 4th April 2007. They pointed out that the contents of the Plaintiff's solicitors' 2 letters were contradictory and wanted to know the Plaintiff's actual instruction and wishes and which is the latest letter to be carefully considered . On the same day, the Plaintiff's solicitors replied and explained the nature of the 2 letters, namely, that one was an open letter and the other was clearly marked without prejudice save as to costs . However, despite such clarification and notwithstanding the assurance by the Defendant's solicitors that careful consideration would be given to the Plaintiff's proposal upon clarification, the Defendant did not respond to the Plaintiff's offer. Mr Chu confirmed that the Defendant did not make any counter-offer for settlement. Mr Chu submitted that due to escalation in costs incurred by the Defendant for the present proceedings as a result of its ignorance of the re-letting of the Premises, it was the lateness of the Plaintiff's letters that caused the Defendant to lose an opportunity to settle. However, if the Defendant were (a) anxious to settle, (b) willing to pay the Plaintiff's reduced claim, and (c) willing to accept reduction or dismissal of its Counterclaim to facilitate a settlement, but was concerned with its position on costs, I see no difficulty for the Defendant (had it wanted to do so) to propose a counter-offer setting out its stance on the Plaintiff's claim coupled with its position on costs, or even to premise its counter-offer on the Plaintiff's acceptance of its position on costs. In the absence of any counter-offer, I am doubtful of any real intention on the part of the Defendant to settle. This view is reinforced by the Defendant's subsequent conduct. When the Defendant was notified of the reduced quantum of the Plaintiff's

claim, it was not prompted to consider negotiation for settlement, but instead it issued a summons to seek transfer of the present proceedings (including Plaintiff's claim) to the Small Claims Tribunal by offering to reduce and limit its Counterclaim to HK\$50,000.00. As explained in the Decision, the District Court had no power to effect any transfer of proceedings before it to the Small Claims Tribunal. The Defendant was therefore constrained to withdraw the application. Still the Defendant did not consider possible settlement, but mounted an attempt by summons to dismiss the Plaintiff's claim for want of jurisdiction. Pursuant to my Decision, that attempt also failed. It was only upon such failed attempt that the Defendant conceded liability for the Plaintiff's claim and decided not to pursue its Counterclaim. In my view, the materials before me strongly suggested that the Defendant was taking procedural or tactical steps to avoid a trial and defer the present proceedings, which steps dismally failed. I am not persuaded on the materials before me that the Defendant had any genuine intention to settle or even to constructively negotiate a settlement even after it became aware of the Plaintiff's reduced claim. The possibility of settlement at an early stage had the Defendant been informed of the re-letting of the Premises prior to 3rd April 2007 remains at best speculative and unsupported by the available materials before me. I am unable to attach any weight to such speculative possibility in the exercise of my discretion on costs. I will conclude by dealing briefly with the authorities canvassed by counsel during their submissions. I have stated the facts of M Beraha & Co Ltd's case (*supra*) in my Decision and shall not repeat them again. Suffice to say that such case dealt with a wholly different factual matrix. In that case, it was held that the plaintiff should have taken into account a set-off sum so that its proper claim at the commencement of the action should be below HK\$50,000.00. It was for this reason that the judge in the lower court (as approved by the Court of Appeal) granted and assessed costs in favour of the Plaintiff on Small Claims Tribunal scale (see para.21 of the judgment of the Court of Appeal). Here, the Plaintiff's claim (at the commencement of the present action and subsequently when the quantification was reduced) was properly within the jurisdiction of the District Court at all times. In the circumstances, whilst I agree with the laudable considerations canvassed by the judge in the lower court in M Beraha & Co Ltd's case (*supra*) in granting costs on Small Claims Tribunal scale in that case (see paras.5 and 7 of the judgment of the Court of Appeal), I see no basis for transporting and applying those considerations to the present situation. Mr Suen referred to Ramos Mirazul A v Pro Search (Asia) Limited DCCJ5878/2002, H H Judge L Chan (unreported, 10th June 2005). In that case, the plaintiff commenced his claim in the High Court. After the claim was so instituted, the defendant launched a counterclaim for the sum of HK\$61,015.34. But for the fact that the plaintiff commenced his action in the High Court, the counterclaim could have been brought in the District Court. Subsequently, the whole proceedings were transferred to the District Court, and still later judgment was granted in favour of the plaintiff in a sum within the Small Claims Tribunal's jurisdiction. The learned judge took the view that even so the applicable scale of costs should be that of the District Court because of the existence of the counterclaim. Therefore the costs of the parties should be taxed on the District Court scale from [the date of transfer of the proceedings from the High Court to the District Court] onwards. In my view, the learned judge's observation is applicable to the present situation. It should be noted that when the Defendant withdrew the application to transfer the proceedings to the Small Claims Tribunal, the whole

summons was withdrawn so that the Defendant's proposal to cap its Counterclaim at HK\$50,000.00 was withdrawn as well. This means that until the Defendant eventually submitted to judgment on the Plaintiff's claim and abandoned the Counterclaim, the quantum of the Counterclaim as pleaded remained all along at HK\$98,636.00. Plainly, the existence of such Counterclaim in excess of HK\$50,000.00 would have ensured the present proceedings would remain in the District Court in any event. VI. Conclusion on costs issue In the circumstances, I consider that the relevant scale of costs is the District Court scale. I therefore order the Defendant to pay the Plaintiff costs of the action (as well as costs of the Counterclaim and all costs reserved if any) to be taxed if not agreed on District Court scale. Both counsel agreed there should be no certificate for counsel save and except that there be certificate for counsel for preparation of part of the written opening submissions for the purpose of trial (ie exclusive the parts that dealt with the Plaintiff's and the Defendant's summonses referred to in paragraph 10 above which costs had been dealt with by separate costs orders). I therefore grant certificate for counsel to the extent as agreed by the parties as aforesaid. VII. Costs of argument on the costs issue Both counsel agreed that costs of the argument on the costs issue should follow event. As I have decided that the correct scale of costs is District Court scale, I further order that the Defendant do pay the Plaintiff costs of the argument on the costs issue to be taxed if not agreed on District Court scale with certificate for counsel. To assist the taxing master, I have apportioned 40 minutes of the hearing on 24th April 2007 as the hearing time for the costs issue. Signed (Marlene Ng) District Court Judge Representation: Mr Jenkin Suen instructed by Messrs Chan, Wong & Lam for the Plaintiff. Mr Chu Wai Kei instructed by Messrs Lau Pau & Co for the Defendant. PAGE - PAGE DCCJ4028/2006/Judgment DCCJ4028/2006/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 ygygyRy & `#\$ & `#\$ @\\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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Prepared on 26 October 2026 · Esheria