

HONG KONG / JUDGMENT

JEBSEN & CO LTD v. WATFIELD TECHNOLOGY LTD

COURT

Court of First Instance

DECIDED

17 August 2007

CASE / FILE NUMBER

HCCT68/2003

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bjbj HCCT68/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION PROCEEDINGS NO.
68 OF 2003

BETWEEN JEBSEN & COMPANY LIMITED Plaintiff and WATFIELD TECHNOLOGY LIMITED
Defendant

Before: Mr Recorder Kwok SC in Chambers Date of Hearing: 10 August 2007 Date of Decision: 17
August 2007

DECISION

Application for stay pending appeal AUTONUMOUT By a judgment handed down on 13 March
2007, I ordered that :

- (a) the plaintiff's claim against the defendant be dismissed; and
- (b) judgment in the sum of \$1,919,465, with interest thereon at judgment rate(s) from 24 April 2001 to the date of judgment, be entered for the defendant against the plaintiff; and made an order nisi on costs in favour of the defendant. AUTONUMOUT By a Notice of Appeal dated 19 April 2007, the plaintiff gave notice of appeal against my judgment. AUTONUMOUT By a summons issued on 9 May 2007, the plaintiff applied for a stay of execution of my judgment pending the outcome of its appeal on condition that the plaintiff do pay the judgment sum plus interest up to the judgment date in the respective sums of HK\$1,919,465.00 and HK\$1,017,147.31 into court within 7 days from the date of the Order to be made. On 14 May

2007, Reyes J ordered an interim stay of execution pending the outcome of the stay application. AUTONUMOUT I heard the stay application on 10 August 2007. Neither counsel who argued the stay application appeared at the trial.

Applicable principles

AUTONUMOUT Counsel agreed that the applicable principles governing stay of execution pending appeal are correctly set out in paragraph 5 of the judgment of Ma J (as he then was) in *Wenden Engineering Service Company Limited v. Lee Shing Yue Construction Company Limited*, HCCT90/1999, unreported, 17 July 2002 Stay of execution : the applicable principles

6. Though in the court's discretion whether or not to grant a stay, it is important to bear in mind that the starting point is RSC Order 59, rule 13(1) : Except so far as the court below or the Court of Appeal or a single judge may otherwise direct
 - (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;
 - (b) no intermediate act or proceeding shall be invalidated by an appeal.
7. In other words, unless the defendant can justify a stay of execution, one will not be ordered. The practice of the court is that justification can be demonstrated only if good reasons exist.
8. Good reason can exist in a variety of forms. It will be wrong to set out any exhaustive definition of what would constitute good reasons, but, commonly, reference is made to factors such as whether the absence (or existence) of a stay would render an appeal nugatory (thus bringing into focus the relative prejudice that may be caused to the appellant and to the respondent by a stay of execution), and the merits of the appeal.
9. In the context of these two factors, I would make the following observations :
 - (1) In determining the question whether or not an appeal would be rendered nugatory, the court must of course first have regard to the nature of the order that is the subject matter of the appeal. If the order appealed against is a money judgment, the court will require evidence as to why the levying of execution will result in the appeal being rendered nugatory, such as, for example, an appreciable risk that the respondent to the appeal would not be able to repay in the event of a successful appeal. Sometimes, though, the nature of the order will by itself almost be determinative of the question. Where the relevant order is, for example, an injunction (and particularly so if it is a mandatory injunction), it may well be that, without a stay, an appeal would be rendered nugatory in the event of a successful appeal. Similarly where, as in the present case, the relevant order is one for the possession of premises, again it can readily be appreciated that without a stay of execution, more often than not, it is likely that an appeal would be rendered nugatory : see *Ketchum International plc v. Group Public Relations Holdings Limited* [1997] 1 WLR 4, at 10H.

- (2) That said, whatever the nature of the order or judgment appealed from, the court will still require evidence as to why an appeal will be rendered nugatory in the event of a stay not being granted. The requisite quality of the evidence will, of course, depend on the nature of the order or judgment appealed against.
- (3) I now deal with a common facet relied on in any argument relating to an appeal being rendered nugatory, namely that of financial ruin or serious financial consequences. Where, as in the present case, it is said that the levying of execution would result in financial ruin or serious financial consequences for the appellant, the court will require good evidence to support this contention, such as the production of accounts or other documents to justify the assertion. A bare assertion is unlikely to meet with much sympathy where more substantial evidence is available : see the observations of Mr Justice Litton, JA in *World Trade Centre Group Limited v. Resourceful River Limited*, unreported, 12 May 1993, Civil Appeal 70 of 1993, Court of Appeal, at 3 4.
- (4) An appeal being rendered nugatory does not mean in all cases that without a stay, the appellant faces financial ruin or the loss of all his property. Demonstrating that the failure to grant a stay would have a serious deleterious effect is enough : see *Caine Tai Investment Company Limited v. Ayala International Finance Limited* [1983] 1 HKC 163, a decision of the Court of Appeal which made reference to *Wilson v. Church (No.2)* [1879] 12 Ch. D. 454.
- (5) How relevant then is the court's consideration of the merits or strength of the appeal? In my view, while it is impractical and even undesirable for the court in dealing with an application for a stay of execution, to go deeply into the merits and strengths of an appeal, it must however form a preliminary view of these aspects. This I believe to be an inevitable consequence of the starting point I have earlier mentioned in referring to Order 59, rule 13(1).
- (6) The existence of merely an arguable appeal cannot by itself amount to sufficient reason to justify a stay. It can be put this way : the existence of an arguable appeal (that is, one with reasonable prospects of success) is the minimum requirement before a court would even consider granting a stay. In other words, however exceptional the circumstances may be otherwise justifying a stay of execution, if the court is not convinced that there exist arguable grounds of appeal, no stay will be granted.
- (7) Conversely, however, the existence of a strong appeal or a strong likelihood that the appeal would succeed, will usually by itself enable a stay to be granted because this would constitute a good reason for a stay : see *World Trade at 2; Winchester Cigarette Machinery Limited v. Payne (No.2)*, unreported, 15 December 1993, English Court of Appeal (a case referred to by the Court of Appeal in *Fung Kwong William v. The Insider Dealing Tribunal* [2001] 1 HKC 44).
- (8) In most cases, the court will not be dealing with the extreme situations I have referred to. Often, it will be faced with simply the existence of an arguable appeal. Here, it becomes necessary for the appellant to provide additional reasons as to why a stay is justified. The

demonstration of an appeal being rendered nugatory is one example, albeit a common one. Here, where it is demonstrated that an appeal would be rendered nugatory if a stay was not granted, the court may require no more than the existence of an arguable appeal. Correspondingly, where it cannot be shown that an appeal would be rendered nugatory if a stay were not granted, the court will require, in the absence of any other factors, the appellant to demonstrate strong grounds of appeal or a strong likelihood of success. This I understand to be the sentiment found in authorities such as *lant*. It is important to stress that the court must not at any stage forget the position of the successful party. It is always relevant to consider the prejudice that would be caused to the successful party (the respondent in the appeal) in the event a stay is granted and if necessary, to impose conditions so as to minimise the prejudice caused to him. A fortiori, the court must consider any contention that the appeal would be rendered nugatory to him (in the event the appeal is dismissed) should a stay of execution be imposed.

10. Ultimately, the court embarks on a balancing exercise and uses its common sense, but bearing in mind at all times the starting point that the successful party is not to be deprived of the fruits of his success : see *Winchester Cigarette Machinery*, per Ralph Gibson LJ. Preliminary view of merits and strengths of the appeal AUTONUMOUT Johnny SC argued that there was a real prospect of success of the appeal. Mr Anthony Chow argued that I was plainly correct. AUTONUMOUT Whether or not the appeal will succeed is a matter for the Court of Appeal. With all respect to Mr Mok and having carefully considered his arguments, I am not persuaded that the plaintiff has anything more than an arguable appeal. While I would like to think that Mr Chow was correct, I am not persuaded to go so far as to say that this is a hopeless appeal. Many of the grounds of appeal have been argued at the trial. As the matter is going on appeal and as I have given my reasons in my judgment for holding in favour of the defendant against the plaintiff, I do not think it is appropriate for me to go any further into this question on forming a preliminary view on the merits and strength of the appeal. Whether appreciable risk that defendant unable to repay in the event of a successful appeal AUTONUMOUT In considering the question of whether there is an appreciable risk of not being able to repay, one must not lose sight of the fact that this is in the context of determining the question whether or not an appeal would be rendered nugatory. Not every conceivable or possible risk will do. AUTONUMOUT The defendant seemed to be in the good books of the plaintiff in 1999. AUTONUMOUT I asked Mr Mok what had happened since. Although the affidavits filed on behalf of the plaintiff made all sorts of allegations and accusations against the defendant and some of its directors, Mr Mok relied only on the following four matters :
 - (a) a civil claim by Kenworth;
 - (b) charges against two of the defendants directors;
 - (c) seven of eight specialised licences on probation; and

- (d) charging of the defendant's assets. Civil claim by Kenworth AUTONUMOUT On 9 January 2007, Kenworth Engineering Limited issued HCA48/2007 against the defendant claiming the sums of HK\$9,797,740.63 and HK\$2,787,126.22 and other reliefs. AUTONUMOUT The plaintiff sued the defendant in this action but I found in favour of the defendant against the plaintiff. AUTONUMOUT If Kenworth's case is that it has an unanswerable claim against the defendant, Kenworth could, and should, have applied for and obtained summary judgment against the defendant by the time of hearing of the stay application. There is no evidence on whether an application for summary judgment has been made. AUTONUMOUT I am not persuaded by the plaintiff to treat Kenworth's claim as anything more than Kenworth's assertions and allegations at this stage. AUTONUMOUT There is no evidence on the likelihood or probability of Kenworth obtaining judgment against the defendant before the determination by the Court of Appeal of the plaintiff's appeal. AUTONUMOUT I am not satisfied that there is an appreciable risk of the defendant being unable to repay because of Kenworth's claim. Charges against two directors AUTONUMOUT In December 2004, two of the directors of the defendant were charged by the ICAC with two charges of conspiracy to falsify account, contrary to section 19(1)(a) of the Theft Ordinance, Cap. 210 and sections 159A and 159C of the Crimes Ordinance, Cap.
200. The case will come up for mention in the District Court on 24 August 2007. AUTONUMOUT I start with the presumption of innocence. AUTONUMOUT There is no evidence before me that the two directors intended to plead guilty on 24 August 2007. AUTONUMOUT There is also no evidence on the likelihood or probability of the directors being convicted before the determination by the Court of Appeal of the appeal. AUTONUMOUT I note that the directors were charged as early as December
2004. The directors must have appeared before a magistrate sometime ago. Although the mere fact of prosecution may have some effect on the defendant, there is no evidence on the extent of such possible influence on the financial well-being of the defendant. AUTONUMOUT I am not satisfied that there is an appreciable risk of the defendant being unable to repay because of the prosecution of the two directors. Seven of eight specialised licences on probation AUTONUMOUT The defendant is the holder of eight specialised licences, being on probation in respect of seven of them. A holder may be on probation because it is new or has been demoted or downgraded. There is no evidence that the defendant has been demoted or downgraded. Mr Mok asked me to draw such inference. He argued that regulatory action might be taken by the regulatory authority against the defendant on the ground of suspected misconduct. He also argued that holders of licences not on probation would have an edge over those on probation. AUTONUMOUT The crux of the matter is that there is no evidence that the defendant has been demoted or downgraded. I do not think that the inference that the defendant has been demoted or downgraded in respect of any of the seven licences is obvious or irresistible. I decline to draw the inference. AUTONUMOUT There is no evidence on the likelihood of the regulatory authority taking action against the defendant on the ground of suspected misconduct. In the absence of evidence, I am not persuaded that there is any appreciable

risk of the regulatory authority taking any regulatory action before any relevant conviction, bearing in mind the presumption of innocence. AUTONUMOUT A licensee not on probation may have an edge over one who is. I come back to the point that there is no evidence that the defendant has been demoted or downgraded or is a new licensee and thus on probation. Having just acquired (if such be the case) a licence, albeit on probation, cannot be a risk factor. AUTONUMOUT I am not satisfied that there is an appreciate risk of the defendant being unable to repay because of its probationary status as a holder of seven specialised licences. Charging of the defendant's assets AUTONUMOUT The defendant has created a total of seven charges in favour of banks or financial institutions to secure banking facilities granted to the defendant, six of which are against deposits. There is no evidence of any secured indebtedness exceeding the value of the security. AUTONUMOUT The defendant's capital is \$5 million and has been in business for over 20 years. I would be surprised if the defendant has not obtained any banking facilities. I would also be surprised if the banks or financial institutions did not insist on adequate and proper security before providing banking facilities. AUTONUMOUT There is no evidence to show that any of the charges is created otherwise than in the ordinary course of the defendant's business as a going concern. AUTONUMOUT I am not satisfied that there is any substance in this point. Balancing exercise AUTONUMOUT The starting point is that the successful party is not to be deprived of the fruits of its success. AUTONUMOUT A director of the defendant deposed in paragraph 27 of his affirmation affirmed on 1 June 2007 that [The defendant] is a financially strong and sound company. It maintains good business relationship and has good commercial credit reference with its banks. [The defendant] is a reliable customer of the banks. It has never been in default of its payment or financial obligations, and is and has always been able to pay its debts as and when they fall due. AUTONUMOUT Except to the extent where appropriate under the four matters relied on by Mr Mok, the defendant's evidence remains unchallenged. AUTONUMOUT I have given the matters urged by Mr Mok careful consideration. AUTONUMOUT On balance, I am not satisfied that those matters, whether taken alone or collectively, establish on a balance of probabilities that the appeal would be rendered nugatory. Order AUTONUMOUT Counsel agreed that costs should follow the event. AUTONUMOUT I order that the plaintiff's summons issued on 9 May 2007 be dismissed with costs to the defendant, to be taxed if not agreed, including any costs reserved. (Kenneth Kwok, SC) Recorder of the Court of First Instance High Court Mr Johnny Mok SC, instructed by Messrs W K To & Co., for the Plaintiff Mr Anthony Chow, instructed by 1udk 1udk R S T U V &`#\$ vaIP\ vaIP\ vaIP\ vaIP\ vaIP\ vaIP\ i\$&`G JWXD & 6" ABC-j.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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