

HONG KONG / JUDGMENT

MAYSUN ENGINEERING CO. LTD. v. WORMALD ENGINEERING SERVICES LTD

COURT

Court of Appeal

DECIDED

11 January 2007

CASE / FILE NUMBER

CACV199/2006

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bjbj CACV 199/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CIVIL APPEAL NO. 199 OF 2006 (ON APPEAL FROM DCCJ NO. 2885
OF 2003)

BETWEEN MAYSUN ENGINEERING CO. LTD. Plaintiff WORMALD ENGINEERING SERVICES
LIMITED Defendant

Before: Hon Tang VP, Yuen JA and Waung J in Court Date of Hearing: 21 December 2006 Date of
Judgment: 11 January 2007

J U D G M E N T

Hon Tang VP (giving the judgment of the Court): This appeal arose out of a claim, by the plaintiff against the defendant, in respect of certain construction work. The plaintiff's claim was for the sum of \$552,350.29 and interest. The action was commenced on 20 May 2003. In its defence dated 30 June 2003, the defendant admitted liability for \$214,278.51. On the same day, the defendant paid into the court the sum of \$214,278.51. In the defence the defendant pleaded that a cheque for the sum of \$214,278.51 was sent to the plaintiff on 15 April 2003 but was refused. The trial lasted five days and was devoted almost exclusively to the balance of the plaintiff's claim. Judge C B Chan gave judgment on 10 March 2006, in favour of the plaintiff, in the sum of \$214,278.51 together with interest thereon at judgment rate from the date when this became due on 24 December 2002 to the date of judgment and thereafter until payment at judgment rate. The date of 24 December 2002 was a mistake and was subsequently amended to 15 April 2003. The judge also made a cost order nisi, in favour of the plaintiff. On application by the defendant to vary the

order nisi, by the decision dated 2 May 2006 (the decision), the judge varied the cost order so that the defendant was required to pay only 70% of the costs. However, she refused to vary the order regarding interests. On 1 June 2006, the judge granted leave to appeal. In this appeal, the defendant seeks an order that the plaintiff's claim for interest on the sum of \$214,278.51 be disallowed, and that the defendant be awarded the costs of the trial. Although the defendant has made a payment-in on 30 June 2003, the payment-in had not included the interest from 15 April 2003 up to the date of payment-in. As one can see from Hong Kong Civil Procedure 2007, Vol. 1 at page 396, para. 22/1/10, which applies by analogy to the District Court: Under para. (8), the defendant has to pay into court a sum in satisfaction, to cover not only the debt or damages claimed, but also any interest which might be awarded in respect of the period down to the date of payment-in. The defendant is not bound to pay into court any sum in respect of interest, but if he fails to do so, and if an award of interest is eventually made, he will be at risk on the question of costs, having paid into court an inadequate sum. Since no interest had been paid in, the judge disregarded the payment-in on the basis that it was inadequate. She allowed the plaintiff only 70% of the costs because as noted the trial was concerned basically with the balance of the plaintiff's claim. So the critical issue in the appeal is whether the plaintiff should have been awarded any interest after 15 April 2003. Mr Edward Chan SC, who appeared for the defendant in the appeal, submitted that the judge treated interest as if it followed judgment as a matter of course, whereas the principle is as stated by Templeman J (as he then was) in *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 at 587 that: In my judgment the judicial discretion is not so narrowly confined. The principle is that- when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding that money from the other ought not in justice to benefit by having the money in his possession and enjoying the use of it per Lord Denning M.R. in *Jefford v Gee* adopting a principle first stated by Lord Herschell LC. (Emphasis added) He submitted that since prior to the commencement of proceedings, the defendant had by its solicitors letter on 15 April 2003, tendered to the plaintiff a cheque in the amount of \$214,278.51, which was refused by the plaintiff, it could not be said that the defendant had wrongfully withheld the money from the plaintiff. The offer which came in the letter from Messrs C C Lee & Co (), the defendant's solicitors, dated 15 April 2003, was in the following terms: We enclosed a revised final account together with copies of the said debit note and its supporting documents, and a cheque for HK\$214,278.51 drawn in your client's favour for your handling. That was a valid tender. However the plaintiff's solicitors, Messrs Shaw & Ng (), replied as follows by their letter dated 25 April 2003: With regard to the cheque drawn by your client in our client's favour for HK\$214,278.51, our client would only take it as partial payment of the said outstanding sum of HK\$552,350.29. Unless we hear from you otherwise within the next 3 days, we will deliver your client's cheque to our client in partial payment of the said outstanding sum of HK\$552,350.29 without further notice. CCL replied by letter to S&N dated 25/4/2003 which said: our client does not agree that the cheque drawn by our client in your client's favour for HK\$214,278.51 is partial payment of your client's alleged outstanding sum of HK\$552,350.29. S&N returned the cheque under cover of their letter dated 28/4/2003 with the following remarks: We fail to see the reason why your client does not agree to pay HK\$214,278.51 in settlement of part of

the items under our client's final account which have been agreed as due and owing by your client. In the circumstances, we return you herewith the said cheque for HK\$214,278.51 for your action. Our client reserves all its right to claim interest thereon. Lastly, CCL wrote back on 30/4/2003 as follows: We put on record that the legal effect of our client's disagreement of its cheque of HK\$214,278.51 is partial payment of your client's alleged outstanding sum of HK\$552,350.29 is not the same as what you referred to in your said letter of 28/4/2003. We stress that the nature of the said sum of HK\$214,278.51 had been clearly stated in our letter of 15/4/2003. In these circumstances, we have the view that your client's return of the cheque is inappropriate and we do not agree that your client is entitled to claim for any interest thereon. Mr Rimsky Yuen SC, appearing for the plaintiff, submitted that CCL should have allowed the plaintiff to accept the cheque without prejudice to the plaintiff's claim for the balance. Mr Yuen accepted, correctly in our view, that the principle regarding the award of interest is as stated in *Business Computers Ltd*, he submitted that the correspondence showed that the defendant has wrongfully withheld the money from the plaintiff. After careful consideration of the correspondence, we cannot agree with Mr Yuen that the defendant had wrongfully withheld payment. Nor can we gather from the correspondence, any suggestion on the part of the defendant, that acceptance of the cheque was conditional upon the plaintiff foregoing any claim for the balance. CCL's letter of 30 April 2003 quoted in para. REF _Ref154553198 \r \h above made it clear that the defendant was disagreeing with the statement that its cheque of \$214,278.51 is partial payment of your client's alleged outstanding sum of \$552,350.29 and that is not the same as what you referred to in your said letter of 28th April 2003. In the circumstances, we are of the view that the defendant has not wrongfully withheld payment. The judge dealt with the question of interest in para. 66 of her judgment:

66. The Defendant admitted in its Defence that a sum of \$214,278.51 is due to the Plaintiff in accordance with the Defendant's Revised Final Account in Appendix A of the Statement of Claim. I grant judgment for the Plaintiff in the sum of \$214,278.51 together with interest thereon at judgment rate from the date when this became due on 24 December 2002 to the date of judgment and thereafter until payment at judgment rate. Even though the Defendant had admitted this sum being due to the Plaintiff in the Defence, and had tendered a cheque to the Plaintiff by letter on 24 December 2002 for this sum, I do not know whether the Defendant had made payment into Court for this sum. Payment into Court is a provision enacted by the District Court Rules to protect the Defendant's position in relation to costs. I make an order nisi for costs of the action to the Plaintiff to be taxed if not agreed with Certificate for Counsel. The parties have 14 days to make application for variation of the costs order nisi so that full submissions could be heard on the issue of costs of the action. She referred to the tender of the cheque, but it is not clear, upon what basis she awarded interest to the plaintiff. Mr Chan submitted that the judgment of Litton VP (as he then was) in *Lea Tai Property Development Limited v The Incorporated Owners Of Leapont Industrial Building*, CACV 137 of 1995, unreported, 14 September 1995, is authority that since the judge gave no reason for the exercise of her discretion, we are entitled to exercise the discretion afresh having regard to all the circumstances of the case. With respect, we do not believe the

judgment of Litton VP has such sweeping effect. Here, since the principle for the award of interest is well established, we should proceed on the basis that the judge acted in accordance with such principle. So the question for us, is whether on the evidence, the judge was right in holding that the defendant had wrongfully withheld payment, notwithstanding the offer of the cheque on 15 April 2003. As noted, the trial last five days, and involved the plaintiff's claim for the balance. Understandably, little was said about the \$214,278.51. In para. 16 of the defence, the sending of the cheque to the plaintiff for payment on 15 April 2003 was pleaded. In counsel's (Ms Terry Chan) written submission dated 9 December 2005, the last paragraph, para. 43 stated:

43. As regard to the undisputed sum of \$214,278.51, the Defendant respectfully submit that the sum was tendered to the Plaintiff with their letter dated 15th April 2003 (before action) [B2/260], but the Plaintiff unreasonably refused to accept the cheque [B2/273; 274; 275]. Now, although payment-in was made on 30 June 2003, when the defence was filed, the fact of payment-in, was not pleaded in the defence. O. 22 r. 7(1) expressly permits the pleading of payment-in when a defence of tender before action is pleaded. O. 18 r. 16 deals with the defence of tender and provides:
16. Where in any action a defence of tender before action is pleaded, the defendant must pay into court in accordance with Order 22 the amount alleged to have been tendered, and the tender shall not be available as a defence unless and until payment into court has been made. However, the notes to O. 18 r. 16 go on to say: Effect of rule - If the defendant desires to rely upon the defence of tender before action, he must (a) plead the fact of tender before action, state the fact of payment in and the amount in the defence; (b) pay the money into court, with his defence; and (c) give notice to the plaintiff of the payment in. The defence of tender is excepted from the rule that the payment into court must not be pleaded or disclosed to the trial judge until all questions of liability and damages have been decided (see O.22, r.7). Mr Yuen submitted that since the fact of payment-in has not been pleaded, the defence of tender has not been made out. Mr Chan argued that O. 18 r. 16 itself does not require the payment-in to be pleaded. He also relied on O. 18 r. 7(4) and submitted that since payment-in was a condition precedent necessary for the case of a party that is to be implied in his pleading. However, it is accepted that up to the time of the judgment, as the judgment itself made clear, there was no evidence of payment-in. That being the case, it is not surprising that the judge did not deal with any defence of tender. However we do not believe the question whether pleading of tender is necessary has any importance. If the defence is relied on, there must be evidence of payment-in. The absence of express pleading of the payment-in would normally not be fatal to the defence. Since notice of payment-in must be given to the other party and the tender specifically pleaded, the absence of pleading of the payment-in would normally be of academic importance and can be cured by an amendment at any time. In any event, Mr Chan's main point is that the judge should not have awarded any interest, and that does not depend on the defence of tender being made out. It is not clear, whether and if so to what extent the judge was influenced by the fact that payment-in had not been pleaded. As noted, it is unclear on what basis the judge awarded interest,

however, in para. 6 of the decision, after saying that after judgment, the question of interest could not be reopened, the judge went on to say: I also see that the Defendant had the use of this sum from 15th April 2003 until payment-in of this sum under Order 22 Rule 1 of the Rules of the District Court on 30th June 2003. If that was the reason why she awarded interest in the judgment we believe she erred. The test is not whether the defendant had the use of the money. The plaintiff who has rejected a tender cannot say that the defendant has wrongfully withheld payment. In such circumstances, the defendant, perforce, would have the use of the money, until he could pay the money into court. That is not a good reason to award interest to the plaintiff. For the above reasons, we are of the view that, in the exercise of her discretion, the judge has erred in principle. Mr Yuen correctly accepted that if the decision on interest is wrong, the defendant must have the costs of the action after payment-in, since the award was covered by the payment-in. We turn then to the question of the costs prior to payment-in. Had the defence of tender been made out, the plaintiff's claim would have been dismissed. Since the defence of tender has not been made out, the plaintiff was entitled to judgment in the sum of \$214,278.51. Although the plaintiff should not have been awarded interest because the money had not been wrongfully withheld, costs up to the date of payment-in was in the discretion of the court. In the circumstances of this case, we can discern no principle which impels us to any particular decision. In exercise of our discretion, we would make no order as to costs up to the date of payment-in. The appeal is allowed. The costs of the appeal should follow the event and we make an order nisi to that effect. (Robert Tang) Vice-President (Maria Yuen) Justice of Appeal (William Waung) Judge of the Court of First Instance Mr Rimsky Yuen SC, instructed by Messrs Peter Lau & Co., for the Plaintiff. Mr Edward Chan SC and Ms Terry Chan, instructed by Messrs C C Lee & Co., for the Defendant. PAGE - A B C D E F G H I J K L M N O P Q R S T 1udk 1udk Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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