

HONG KONG / JUDGMENT

PROFIT BOAT DEVELOPMENT LTD v. CRAFT PROJECTS (HK) CO LTD

COURT

Court of First Instance

DECIDED

8 November 2007

CASE / FILE NUMBER

HCCT122/2000

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bjbj HCCT 122/2000 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION PROCEEDINGS NO.
122 OF 2000

BETWEEN PROFIT BOAT DEVELOPMENT LIMITED Plaintiff and CRAFT PROJECTS (HK)
COMPANY LIMITED (formerly known as CRAFT ENGINEERING COMPANY LIMITED) Defendant

Before: Mr Recorder Rimsky Yuen, SC in Chambers Dates of Hearing: 23 October 2007 Date of
Handing Down Decision: 8 November 2007

D E C I S I O N

This is the Plaintiff's application to vary the Order nisi as to costs made by this Court following
the dismissal of the Plaintiff's claim after trial.

Background

The background of this action can be seen from the Judgment handed down on 31 August 2007. For the present purpose, the material events can be summarized as follows. The Plaintiff's claim against the Defendant was based on an alleged joint venture agreement (). Its primary case is that there was an oral JVA made between the parties in respect of certain construction work (Oral JVA). Alternatively, the Plaintiff contended that the JVA was partly oral, partly in writing and partly by conduct in that the parties' dealing and conduct during the relevant period in 2000 gave rise to a JVA (Implied JVA). The Plaintiff's case from the commencement of the action up to the first day of the trial was that the Oral JVA was made by Mr Lee Kwok Leung, Alex (Mr Lee) on

behalf of the Plaintiff and Mr Grant Craft (Mr Craft) on behalf of the Defendant at a meeting held in Hong Kong on 20 May 2000. Until the filing and service of Mr Craft s Third Supplementary Witness Statement on 3 November 2006, the Defendant did not dispute the meeting on 20 May 2000 although it at all times denied the existence of the Oral JVA or the Implied JVA. On the late afternoon of the Friday before the commencement of the trial on the following Tuesday, the Defendant served on the Plaintiff the Third Supplementary Witness Statement of Mr Craft and asserted, for the first time, that Mr Craft was not in Hong Kong on 20 May 2000. Mr Craft s passport was disclosed and exhibited to his Third Supplementary Witness Statement, which confirmed his absence from Hong Kong on 20 May 2000. This meant that the Oral JVA could not have been made on 20 May 2000, since the parties did not have any meeting on that day. Faced with this new evidence, the Plaintiff applied for a one-day adjournment at the commencement of the trial so that the Plaintiff and its legal team could consider the matter. When the trial resumed on the second day, the Plaintiff amended its pleadings and put in an additional witness statement of Mr Lee. The Plaintiff s case was revised to the effect that the meeting between Mr Lee and Mr Craft took place, and the Oral JVA was made, on 26 May 2000 (as opposed to 20 May 2000). The trial then proceeded on that basis. Judgment was handed down on 31 August 2007 and the Plaintiff s claim was dismissed. The Plaintiff s case was dismissed as this Court rejected the Oral JVA and the Implied JVA. The costs occasioned by the one-day adjournment was awarded to the Plaintiff. In addition, an Order nisi as to costs was made as follows: Save as otherwise ordered or directed by previous Court Orders, the Plaintiff do pay to the Defendant the costs of this action to be taxed if not agreed . After the Judgment was handed down, the Plaintiff applied to vary the Order nisi. Its primary contention was that the Defendant should pay to the Plaintiff the costs incurred in this action during the period from 30 March 2001 to 3 November 2006 (Relevant Period). As a fallback, the Plaintiff argued that there should be no order as to costs for the Relevant Period. The significance of these two dates is this. The date of 30 March 2001 is the date when the Defendant filed its first List of Documents, whilst 3 November 2006 was the date on which the Defendant served Mr Craft s Third Supplementary Witness Statement. The Defendant did not challenge that the costs occasioned by the one-day adjournment of the trial should be given to the Plaintiff. However, it opposed the Plaintiff s present application to vary the Order nisi as to costs. The Plaintiff s Contentions The Plaintiff accepted that costs are a matter of discretion and should normally follow the event. The Plaintiff s contentions in the present case rested on the basis that the Defendant s delay in disclosing Mr Craft s absence from Hong Kong until a few days before the trial constituted improper conduct and that such improper conduct justified a departure from the general principle that costs should follow the event. At one stage, the Plaintiff suggested that there were breaches of Order 24 and Order 38, rule 2A on the part of the Defendant. However, Mr Jonathan Wong, Counsel for the Plaintiff, had clarified in the course of his oral submissions that the Plaintiff no longer suggested such breaches. Mr Wong, instead, argued that the provisions in Order 24 and Order 38, rule 2A highlighted the spirit of how litigation should be conducted. In particular, they reflect the cards on the table approach and also the modern standard of openness and fairness required in litigation. Mr Wong argued that had the Defendant conducted this litigation properly, the Defendant should have disclosed Mr Craft s absence from Hong Kong on 20 May 2000 much earlier and would not have admitted the meeting

with Mr Lee on 20 May 2000. Had that been done, the Plaintiff would have an opportunity to review the merits of its claim and might have conducted this litigation in a different way. Hence, relying on *Re Elgindata Ltd.* (No. 2) [1992] 1 WLR 1207 and Lam J's observation in *Cheung Wei Man Vivien v Centaline Property Agency Ltd.*, unrep., HCA No. 286 of 2000 (15 December 2006) (para. 28), the Plaintiff contended that the Order nisi should be varied in the ways it contended. In support of this argument, Mr Wong stressed the importance of the Defendant's delay in disclosing the fact that Mr Craft was not in Hong Kong on 20 May 2000 and its impacts on the outcome of this matter. Mr Wong pointed out that the new evidence constituted a withdrawal of admission on the part of the Defendant. This is because, as stated above, the Defendant admitted the meeting on 20 May 2000 with Mr Lee until the service of Mr Craft's Third Supplementary Witness Statement.

Analysis

If the costs incurred by the Plaintiff during the Relevant Period would not have been incurred had the Defendant revealed Mr Craft's absence from Hong Kong on 20 May 2000, I can see the logic and force of the Plaintiff's argument. However, for the reasons summarized below, I do not think the Defendant's change of stance had the effects contended by the Plaintiff. There is no evidence to show what would be the Plaintiff's reaction had the Third Supplementary Witness Statement of Mr Craft been served earlier. In other words, there is no evidence to suggest that the Plaintiff's conduct of the trial would have been fundamentally different had Mr Craft's Third Supplementary Witness Statement been served earlier. On the contrary, Leading Counsel for the Plaintiff submitted at the start of the trial that the point about Mr Craft's absence from Hong Kong on 20 May 2000 is not really such a life or death point as one perhaps may get the impression when one suddenly sees the evidence. Further, when making closing submissions, Leading Counsel for the Plaintiff accepted (and I think rightly) that the Court would have to consider all the relevant events and evidence so as to consider whether the Oral JVA was made. As dealt with in the Judgment handed down on 31 August 2007, the date of the meeting that allegedly took place between Mr Lee and Mr Craft and that this meeting led to the Oral JVA of course has its significance and relevance. However, it was only one of the various factors that the parties relied on and one of the various factors that was considered by this Court when deciding whether the Oral JVA was made as contended by the Plaintiff. This Court took into account various other factors when assessing whether the Oral JVA was made. Amongst others, this Court took into account the parties' conduct as well as the events that took place from May to July 2000 when assessing the inherent probability of the parties' contentions. Furthermore, the Oral JVA was only one part of the Plaintiff's case. The Plaintiff also ran the alternative case of Implied JVA right from the commencement of this action and throughout the trial. When assessing the existence or otherwise of the Implied JVA, the meeting between Mr Lee and Mr Craft on 20 or 26 May 2000 cannot be said to have an overwhelming importance. The Defendant was clearly late in revealing the fact that Mr Craft was not in Hong Kong on 20 May 2000 and thus could not have met Mr Lee and made the Oral JVA on that day. It is unfortunate that Mr Craft did not check his passport until shortly before the trial. However, there is no evidence to suggest that Mr Craft's

absence from Hong Kong on 20 May 2000 was deliberately concealed by the Defendant. Hence, this case can be readily distinguished from the case of Cheung Wei Man Vivien v Centaline Property Agency Ltd. (above) and Lam J s remark in paragraph 28 thereof is not applicable here. Besides, the Plaintiff was granted the one-day adjournment it asked for and was also awarded the costs of the adjournment. Hence, the Defendant had paid the price for its delay in disclosing Mr Craft s absence from Hong Kong on 20 May 2000. In the circumstances, I do not see any reason for varying the Order nisi as to costs in the ways contended by the Plaintiff. I therefore dismiss the Plaintiff s present application. Insofar as may be necessary, I rule that the Order nisi should be confirmed and made absolute. In addition, I make an Order nisi that the Plaintiff do pay to the Defendant the costs of and incidental to the Plaintiff s present application (including the costs of the hearing on 23 October 2007). (Rimsky Yuen, S.C.) Recorder of the Court of First Instance High Court Mr Jonathan 1udk 1udk D E F G H I J K L M N O P Q R S T U V i\$&`G t .4 hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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