

HONG KONG / JUDGMENT

RIKON LTD v. WINWAY TECHNOLOGY DEVELOPMENT LTD AND ANOTHER

COURT

Court of First Instance

DECIDED

3 August 2007

CASE / FILE NUMBER

HCA2342/2006

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bjbj HCA 2342/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2342 OF 2006

BETWEEN RIKON LIMITED Plaintiff WINWAY TECHNOLOGY DEVELOPMENT LIMITED 1st
Defendant ALVIN CHAN ASSOCIATES LIMITED 2nd Defendant

Coram : Before Master J. Wong in Chambers (Paper Disposal) Date of Plaintiff s Written
Submission: 21 June 2007 Date of 2nd Defendant s Written Submission: 13 July 2007 Date of
Plaintiff s Written Submission in Reply: 19 July 2007 Date of Decision: 3 August 2007

DECISION

Application

1. This is an application of interim payment by the Plaintiff against the 2nd Defendant.

Background

2. On 20 October 2006, the Plaintiff commenced the present proceedings. It is the Plaintiff s case that, by a tenancy agreement (the Tenancy) dated 21 January 2005, it let to the 1st Defendant Unit 01, 28/F, Citicorp Centre, 18 Whitfield Road, Hong Kong (the Premises) for 3 years from 1 December 2004 at \$43,371 per month. However, on the date that the Writ herein was issued, the 1st Defendant failed and/or refused to pay the Plaintiff the sum of \$243,734.91, being unpaid rent, management fees, rates and government rent.

3. Further, the 2nd Defendant is a trespasser to the Premises because, among others, sub-letting is prohibited under the Tenancy.
4. The Plaintiff therefore claims against both Defendants for, inter alia, possession of the Premises, mense profits, interest and costs. The Plaintiff obtained a default judgment on 16 November 2006 against the 1st Defendant.
5. In the meantime, on 14 November 2006, the 2nd Defendant filed its Defence. It was pleaded that the Plaintiff had knowledge of and consented to the sub-tenancy. Paragraph 6 of the Defence states that: The 2nd Defendant further avers that on or about 22nd June 2006, a Miss Janet Lam of Cheng Hsong Holdings Limited, being the agent of the Plaintiff, orally agreed with Miss Katrina So of the 2nd Defendant that if the 2nd Defendant was to agree to pay the monthly rent and share of outgoings under the sub-tenancy directly to the Plaintiff, the 2nd Defendant would be allowed to remain in possession of portion of the subject premises already occupied by the 2nd Defendant until 30th November 2007 (hereinafter referred to as the said Oral Agreement), and such agreement is binding on the Plaintiff. Then, pursuant to the Oral Agreement, the 2nd Defendant paid the Plaintiff rent, management fees and rates for the period from about April 2006 to November 2006 in the total sums of over \$200,000.
6. On 14 February 2007, the Plaintiff issued the present summons under Order 29 rule 12 RHC against the 2nd Defendant for interim payment from 16 November 2006 at \$43,371 per month for use and occupation of the Premises during pendency of this action. The 2nd Defendant did not agree to it.
7. When the parties appeared before Mr. Registrar C. Chan on 30 March 2007, they agreed that the application could be dealt with by parties written submissions without a hearing. Affidavit evidence and written submissions have been filed and I read them in the afternoon on 31 July 2007 in my chambers.

Ruling

8. Upon consideration of the evidence authorities and submissions from the parties, I have decided to allow the Plaintiff s application to the extent of \$32,624.63 per month from 15 November 2006. My reasons appear in below.

Reasons

9. The parties do not dispute on the applicable law relating to interim payment. The underlying principle is that the landlord should not be deprived of money it would receive from the occupier in any event.
10. In our case, I opine that even if judgment will be given to the 2nd Defendant at the end of the proceedings, it only amounts to a defence for possession. The 2nd Defendant still has to pay for the use and occupation of the Premises or the portion thereof.

11. No doubt, there are quite some disputes of facts between the parties. Did the Plaintiff know the existence of the sub-tenancy to the 2nd Defendant? Was there consent, acquiescence or estoppel? Is the Oral Agreement true? How much space did the 2nd Defendant occupy? However, in my view, I agree with the Plaintiff that these questions need not be, and indeed cannot be, revolved under the present summons by way of affidavit evidence. They will be determined at the trial herein in its due course.
12. For the time being, it suffices for me to accept on balance of the followings: The Plaintiff was and is the landlord of the Premises. The 2nd Defendant was and is the occupier of the Premises. The 2nd Defendant did pay the Plaintiff, among others, a monthly sum of \$32,624.63 for the period from about April 2006 to November 2006. Both this Court and the parties are bound by the pleadings. There is no plead of set-off, cross-claim or counterclaim by the 2nd Defendant against the Plaintiff within the pleadings filed by the parties before me. Even if the 2nd Defendant will eventually amend its pleadings to include set-off and counterclaim, with respect, I am not optimistic about the same being proved at the trial.
Costs
13. Both parties ask for costs. It is also the 2nd Defendant's case that it is willing to pay the Plaintiff the rent or mense profit after November 2006. However, the Plaintiff has refused to accept payment. In this respect, the Plaintiff explained that it had to resort to O.29 r.12 RHC for the avoidance of waiver or estoppel.
14. I believe that both parties have not acted unreasonably in the circumstances. In my opinion, a neutral costs order is appropriate in the circumstances.

Conclusion

15. In conclusion, I order that:
 - (1) Without prejudice to the claim of the Plaintiff herein for possession, the 2nd Defendant do pay the Plaintiff the following interim payments during the pendency of this action in respect of and/or on account of the use and occupation of the subject property by the 2nd Defendant, namely:- HK\$293,621.67 being interim payment for the period from 16 November 2006 to 15 August 2007 at HK\$32,624.63 per month; and A monthly sum of HK\$32,624.63 per month being interim payment as from 15 August 2007 until further order of the Court.
 - (2) The interim payment for the period from 16 November 2006 to 15 August 2007 shall be paid by the 2nd Defendant within 21 days from the date hereof and all subsequent payments shall be paid on the fifteenth day of each and every calendar month as from 15 August 2007; and
 - (3) The costs of this application shall be in the cause. (Jack Wong) Master 1udk 1udk & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 25 October 2026 · Esheria