

HONG KONG / JUDGMENT

SUPER EASTERN LTD v. HARBOUR BASE PROPERTIES LTD

COURT

District Court

DECIDED

23 July 2007

CASE / FILE NUMBER

DCCJ1365/2006

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bjbj DCCJ 592/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FORMTEXT CIVIL ACTION NO. 592 OF 2006

BETWEEN WAN CHI HING Plaintiff And WONG CHUNG KAI trading as KAI HING TRADING
COMPANY Defendant

DCCJ 1365/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FORMTEXT CIVIL ACTION NO. 1365 OF 2006

BETWEEN SUPER EASTERN LIMITED Plaintiff And HARBOUR BASE PROPERTIES LIMITED
Defendant

DCCJ 1497 AND 1498/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION FORMTEXT CIVIL ACTION NO. 1497 AND 1498 OF 2006

BETWEEN WAN CHI HING Plaintiff And STRONG MASTER CORPORATION LIMITED Defendant

DCCJ 1673/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FORMTEXT CIVIL ACTION NO. 1673 OF 2006

BETWEEN WAN CHI HING Plaintiff And LAU WAI FUN trading as FAN S TRADING COMPANY
Defendant

Coram: Deputy District Judge Abu B. bin Wahab (in Chambers, open to public) Date of Hearing:
18 May 2007 Date of Decision: 23 July 2007

FORMTEXT D E C I S I O N

This is an application for various actions to be tried together at the same time or, alternatively, one immediately after the other by the same judge.

2. Alleging breaches of various written agreements entered into on divers dates, Mr. Wan (Mr. Wan) has sued Mr. Wong (Mr. Wong) and other defendants. The actions brought are DCCJ 592/2006, 1497/2006, 1498/2006 and 1673/2006. Pursuant to a Consent Order dated 5 January 2006, DCCJ 1497/2006 and 1498/2006 were consolidated (see Hearing Bundle pages 100 to 102). The written agreements provided to the effect that the party contracting with Mr. Wan (the other contracting party , which was either Mr. Wong or one of the other defendants) would manage or operate car parks on land leased from the government by the other contracting party. Mr. Wan was to contribute certain sums towards the running of the car parks. In return, Mr. Wan would get a share of the profits. The dispute (in essence and in gist) was this: Mr. Wan alleged that he had made all the necessary or required contributions under the relevant contract but the other contracting party had made wrongful deductions from his entitlement or wrongfully failed to pay him his share of profits. The other contracting party contended that deductions made were legitimate and as per contract, Mr. Wan failed to make his contribution in time or at all, certain sums claimed had already been paid in full satisfaction and Mr. Wan had wrongfully repudiated the particular contract. I realize that I am generalizing here and that not every contention just mentioned applies to all the actions. I am satisfied, however, that such generalization suffices for present purposes. It is noted, however, that in each case the other contracting party alleged that the written contract was made pursuant to and as a result of a prior general agreement between Mr. Wan and Mr. Wong. As I understand it, the allegation here is that the written agreements were part of a series of transactions spawned under an umbrella agreement. This general or umbrella agreement is denied by Mr. Wan. Parties in the actions above-mentioned have agreed, through Counsels, that those actions be tried together at the same time by the same judge. I see no reason to refuse to so order. So far so good. There is, however, action number DCCJ 1365 of 2006. DCCJ 1365 was brought by Super Eastern Limited (Super Eastern) against Harbour Base Properties Limited (Harbour Base). As I understand it, the stance of Mr. Wong, the other defendants sued by Mr. Wan and Super Eastern is that they all form the

same camp the other defendants and Super Eastern are nominees or agents of Mr. Wong, or parties under the control of or owned by Mr. Wong. There is nothing from Mr. Wan or Harbour Base to dispute this. I will adopt the term used by Counsel and collectively refer to Mr. Wong, the other defendants sued by Mr. Wan and Super Eastern as Wong's camp. It is the contention and application of Wong's camp that DCCJ 1365 should also be tried together at the same time as the actions brought by Mr. Wan. Harbour Base and Mr. Wan resist such an application. It is this application by Wong's camp that forms the bone of contention between parties in the hearing before me. In DCCJ 1365, Harbour Base took a lease from the government to operate a car park. A written agreement was entered into between Super Eastern and Harbour Base to the effect that Super Eastern was to contribute sums towards the running of the car park. In return, Super Eastern would be entitled to a share of the profit of the car park. Super Eastern alleged that the written agreement was made pursuant to the general/ umbrella agreement mentioned in paragraph 3 above, all contributions had been made by Super Eastern but Harbour Base failed to account for or pay Super Eastern its share of profits. Harbour Base countered that Super Eastern failed to make the required contributions, that it had breached an implied condition to keep the written contract confidential, that the written contract was void for illegality or it was against public policy to enforce it. Super Eastern specifically denied there was any duty of confidentiality. I am here only summarising the main features of each party's case based on the pleadings. In considering the application to join DCCJ 1365, one looks at Order 4, rule 9 of The Rules of the District Court, Cap.336. The relevant parts reads as follows:

- (1) Where 2 or more causes or matters are pending, then, if it appears to the Court that some common question of law or fact arises in both or all of them; or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order under this rule, the Court may order them to be tried at the same time, or one immediately after another. It is not in dispute that the written agreements in Mr. Wan's actions and the written agreement in DCCJ 1365 were all entered into within a short time frame i.e. end of August 2004 to beginning of April 2005. They are all concerned with the operation of car parks on land secured from the government on short-term leases. The terms of the written agreements appear to be materially the same. Mr. Wan admitted that he was also involved / engaged directly or indirectly in the agreements relating to the actions he brought and DCCJ 1365. Mr. Wan further admitted that (Mr. Wong) is also involved directly or indirectly in the same agreements (see, for example, paragraph 2A of Amended Reply in DCCJ 592/2006; Hearing Bundle page 19). This scenario suggests that all the written agreements (and the relief claimed) arise out of the same series of transactions and that there is some prior general or umbrella agreement. I must stress that I am not deciding on the merits of each party's case. I am merely saying that on the information before me, the situation appears to be such (and Order 4 rule 9 speaks in terms of what it appears to be to the Court).

9. One of the key issues in each case is the content and interpretation of the agreement entered into by the parties. It is clear that Mr. Wan and Mr. Wong will be the key witnesses in all the cases. It appears to me that the outcome of the cases hinges on the Court's assessment of these 2 gentlemen. I consider it more desirable for the same court to assess and make conclusions on their credibility and reliability. In DCCJ 1365 Harbour Base raised the point of illegality or that enforcement of the written agreement (in that case) was against public policy in that it contravened clause 2(g) of the tenancy from the government. Clause 2(g) provided that the tenant shall not assign, mortgage, charge, demise, underlet, part with the possession of or otherwise dispose of the premises or any part thereof or any interest therein or enter into any agreement so to do (Hearing Bundle page 38, paragraph 8). I think one can safely assume that such a clause is standard in government leases. If the question of illegality or public policy arises in DCCJ 1365, it will appear that the same question will arise in the actions brought by Wan. I consider it desirable for the same court to decide on such issue of illegality or public policy. Quite a number of points were raised (particularly by Counsel for Wong's camp) in the course of argument and in the affirmations. I do not propose to deal with each and every point. I will merely mention the following: Wong's camp argued that Harbour Base was Mr. Wan and vice versa. Harbour Base and Mr. Wan said that Mr. Wan was merely a consultant for Harbour Base, that Harbour Base was an entity separate and distinct from Mr. Wan and that, in any event, there was no basis for piercing the corporate veil. I do not think it proper for me to resolve this issue based solely on affidavit evidence. There cannot be a mini-trial based on affidavits. However, even if the parties in DCCJ 1365 and the actions brought by Wan were different, that alone does not and cannot prevent my ordering DCCJ 1365 to be tried together with the actions brought by Mr. Wan; Mr. Wong believed that the main reason for Wan to oppose this application is that he is fully aware that he has unwittingly put up a defence of illegality in DCCJ no. 1365/2006 which contradicts his position in pursuing his claims in the other 4 actions (Hearing Bundle page 170, paragraph 25). I regard this as pure speculation on the part of Mr. Wong. I will not act on speculation; and Harbour Base is concerned with substantially increased costs if DCCJ 1365 were consolidated with the actions brought by Mr. Wan (or, I suppose, ordered to be tried at the same time as them). Such concerns can be addressed, if and when appropriate, by asking the Court to make the appropriate cost orders.
12. Pursuant to agreement of the parties, I order that DCCJ 592/2006, DCCJ 1497 and 1498/2006 and DCCJ 1673/2006 be tried at the same time. Having considered matters stated in paragraphs 7 to 11 above, I exercise my discretion and order that DCCJ 1365/2006 be tried at the same time as those actions.
13. I make an order nisi that costs of the present summonses or applications be costs in the cause with certificate for Counsel. (Abu B. bin Wahab) Deputy FORMTEXT District Court Judge Representation: FORMTEXT Mr William Wong instructed by Messrs. Or, Ng and Chan for the Plaintiff in DCCJ 592/2006, DCCJ 1497 and 1498/2006 and DCCJ 1673/2006 Miss Sara Tong instructed by Messrs. T. H. Koo & Associates for Plaintiff in DCCJ 1365/2006 and Defendant in DCCJ 592/2006, DCCJ 1497 and 1498/2006 and DCCJ 1673/2006 Mr. Simon H. W.

Lam instructed by Messrs. David Hui & Co. for Defendant in DCCJ 1365/2006 PAGE - PAGE A
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