

HONG KONG / JUDGMENT

VINSON ENGINEERING LTD v. KIN SHING ENGINEERING (H.K.) CO LTD AND ANOTHER

COURT

District Court

DECIDED

24 October 2007

CASE / FILE NUMBER

DCCJ489/2007

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bjbj DCCJ489/2007 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 489 OF 2007 BETWEEN VINSON ENGINEERING LTD. Plaintiff and KIN SHING ENGINEERING 1st Defendant (H.K.) CO. LTD. PETER LAU & CO. 2nd Defendant Before: Her Honour Judge H C Wong in Chambers (Open to the public) Date of Hearing: 24 October 2007 Date of Delivery of Decision: 24 October 2007 D E C I S I O N The defendants apply to strike out the plaintiff's amended statement of claim under Order 18, Rule 19 of the Rules of District Court on the ground that it discloses no reasonable cause of action or it is frivolous, vexatious and otherwise abuse of the process of court. The plaintiff opposes the application.

Background

The plaintiff and the 1st defendant engaged in a series of litigation. The 1st defendant is and was represented by the 2nd defendant in all those litigations and the present action. The 2nd defendant continues to represent the 1st defendant in the present proceedings and at today's hearing. The 1st defendant succeeded in the first action, HCCT 108 of 2002 in the High Court and obtained a judgment for the sum of approximately \$1.6 million-odd plus costs against the plaintiff. Costs were taxed by Master Hui in March 2006. The plaintiff applied for review on a large number of items of the defendants bill as taxed by Master Hui, leaving certain items unchallenged, amounting to the sum of \$400,213 (the unchallenged taxed sum.). On 11 May 2006, Master Hui ordered an interim certificate to be issued for the unchallenged taxed sum which was not under review. The plaintiff failed to pay the unchallenged taxed sum and the 1st defendant through the 2nd defendant, its solicitor, served a statutory demand on the plaintiff for the unchallenged taxed sum. The parties then engaged in negotiations in June 2006. The negotiation was for a settlement of all judgment debts in the various proceedings and the costs involved. The parties failed to reach any global agreement. On 19 June 2006, the 1st defendant received the sum of \$4,500 costs payable pursuant to Master's order of 11 May 2006. In the amended statement of claim, the plaintiff claimed that at the end of June 2006, it reached an

agreement with the defendant that the plaintiff would settle the unchallenged taxed sum of \$400,213 by two instalment payments, the first payment of \$200,213 to be paid on or about 5 July 2006, the second payment of \$200,000 on or about 5 August 2006. At the end of June 2006, as the plaintiff intended to lodge an appeal of the judgment in a second High Court action, HCCT 108 of 2003 between the same parties, it requested the defendants for a deferment in the payment of the two instalment payments of the unchallenged taxed costs. The parties then corresponded on the plaintiff's proposed deferment of payment of the two instalments in early July 2006. The plaintiff claimed the parties eventually reached an agreement that the time for the two instalment payments would be amended to 12 July 2006 and 12 August 2006 respectively. The plaintiff further explained that the payments would be met by two post-dated cheques to be signed by two of the plaintiff's directors. As one of the directors was in Canada, it would dispatch by courier the two cheques for his signature. They were duly dispatched on 8 July 2006 by courier to Mr Tang in Canada for his signature. However, before the two cheques were returned after Mr Tang had signed them, the defendants had presented a petition to wind up the plaintiff on 18 July

2006. The plaintiff claimed that the defendants' petition to wind up on 18 July 2006 was in breach of the parties' agreement on 7 July 2006 and it had the effect of freezing the plaintiff's bank accounts, resulting in the plaintiff suffering from losses in its business for loss of opportunity to trade. The plaintiff further claimed, alternatively, for a declaration to be released from any liabilities or future liabilities under the settlement agreement. The defendants deny there was any valid agreement between the parties relating to the payment of the unchallenged taxed sum. Furthermore, even if there was an agreement, it is not enforceable in law. I was urged by Miss Chong to look at the correspondences between the parties in July 2006 in order to ascertain the terms of the agreement. At page 183 of the bundle, the 2nd defendant wrote a letter to the plaintiff, confirming it had agreed to accept two post-dated cheques both in the sum of \$200,000 dated 12 July 2006 and 12 August 2006 respectively to be delivered to the 2nd defendant before 10.30 am on 6 July 2006 or the 2nd defendant would present a petition to wind up the plaintiff. At page 184, the 2nd defendant sent another letter on 7 July 2006 to the plaintiff, confirming that the plaintiff had prepared a cheque for \$200,000 in the 2nd defendant's favour. The date of the cheque was 5 July 2006. The 2nd defendant further confirmed that it would not present the said cheque for payment before 12 July 2006 and the plaintiff would deliver a cheque for a further sum of \$200,000 post-dated to 12 August 2006 by 21 July 2006. In the letter, the 2nd defendant stated that the collection of the first cheque was scheduled at 12 noon, 7 July 2006 or the 2nd defendant would issue a petition for winding-up. On the same day, 7 July 2006, the plaintiff wrote to the 2nd defendant, confirming a telephone conversation between them that the parties had agreed the two post-dated cheques of \$200,000 each dated 12 July 2006 and 12 August 2006 would be faxed to the 2nd defendant as evidence of their issuance pending the signature of Mr Tang in Canada. On 18 July 2006, the defendants, having failed to receive the two cheques from the plaintiff, presented a petition for winding-up. The petition for winding-up was scheduled for 16 April 2007 in the High Court. The defendants settled with the plaintiff and withdrew the petition for winding-up

when the unchallenged taxed sum was settled by a payment of \$500,000 from the plaintiff to the defendants. At today's hearing, Miss Chong submitted that the plaintiff's case is based on the defendants' failure to give notice before presenting the winding-up petition. Miss Chong further argued that the plaintiff should be given a reasonable time to deliver the two cheques to the 2nd defendant under the agreement although no date or deadline was mentioned in their agreement. The defendants' solicitor, Mr Lui, submitted that no settlement agreement was reached and even if it was reached, it could not be enforced in law. He referred to Treitel's Law of Contract, 11th edition, page 94 and Chitty on Contracts, volume 1, 29th edition, page 251, and the case of *Vanbergen v St Edmund's Properties Limited* [1933] All ER 488. The second paragraph on page 94 of Treitel's Law of Contract stated: A debtor's promise to pay in stated instalments a debt that is already due is no consideration for the creditor's promise not to take bankruptcy proceedings in respect of the debt. A similar statement can be found at page 251, at the end of the first paragraph of Chitty on Contracts. At page 95 of Treitel, The Law of Contract, the author further stated: The now more general held view is that the new promises in the present group of cases are unenforceable for want of consideration and the reason for this view seems to have been that the promisee suffered no legal detriment in performing what was already due to him. In the *Vanbergen* case, the English Court of Appeal held that: The agreement conferred no benefit on the defendants independent of merely obtaining payment of the money due which might otherwise be difficult or delayed. Its effect was a voluntary concession to the plaintiff made entirely to oblige him and of no advantage to the defendants and therefore it was made without consideration and it was nudum pactum and unenforceable. The facts of the present case bear resemblance to the *Vanbergen* case in that in the *Vanbergen* case, the landlord took Mr Vanbergen to court for unpaid rental in a series of claims which the landlord won. Mr Vanbergen duly paid the judgment sums but failed to pay the costs awarded against him. The landlord informed him that it would serve a bankruptcy order on him should he fail to make payment by a certain deadline. On the date of the deadline, Mr Vanbergen did make a payment into the landlord's bank account, but it was not known to the landlord for the landlord did not get the letter of notification from Mr Vanbergen in the post. The landlord then filed a bankruptcy petition against Mr Vanbergen. The Court of Appeal found the landlord was not liable for the loss suffered by Mr Vanbergen upon the filing of a bankruptcy petition against him because the agreement not to present the petition was not supported by consideration on the landlord's part. In the present case, there was no payment effected to the defendants of the unchallenged taxed sum even if there was an agreement to allow the plaintiff time to pay by two instalments. The agreement was that payment by two instalments would be due on 5 July 2006 and 5 August

2006. This was deferred at the plaintiff's request to 12 July

2006. No payment was made on 12 July 2006 because the plaintiff extracted an agreement from the defendants not to present the cheque issued by the plaintiff to the 2nd defendant for the first instalment dated 5 July 2006 and the plaintiff promised to replace the 5 July 2006 cheque by two post-dated cheques dated 12 July and 12 August 2006. It is quite apparent

that this deferment was not supported by any consideration on the defendants part. The debt of the unchallenged taxed sum of \$400,213 was due upon Master Hui s order on 11 May 2006. The defendants received no benefits for the agreement to accept settlement by instalments or by the subsequent deferments as in the case of Vanbergen. For the aforesaid reasons, I cannot find a reasonable cause of action in the plaintiff s amended statement of claim. I therefore strike out the amended statement of claim and order the plaintiff s action be dismissed with costs, to be taxed if not agreed. (H C Wong) District Court Judge Plaintiff represented by Ms Chong Lee-hing, Director Mr P C Lui, of Peter Lau & Co., for both Defendants PAGE - PAGE CRT8/24.10.2007/SC DCCJ489/2007/Decision A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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