

HONG KONG / JUDGMENT

WU YI DEVELOPMENT CO LTD v. BIG ISLAND CONSTRUCTION (HK) LTD

COURT

District Court

DECIDED

15 February 2007

CASE / FILE NUMBER

DCCJ5174/2005

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bjbj DCCJ 5174/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 5174 OF 2005

BETWEEN WU YI DEVELOPMENT COMPANY LIMITED Plaintiff and BIG ISLAND CONSTRUCTION (HK) LIMITED Defendant

Coram : Her Honour Judge H.C. Wong in Chambers (Open to Public) Dates of Hearing : 10th January 2007 and 2nd February 2007 Date of Handing Down Decision : 15th February 2007
DECISION Decision on application for leave to appeal The Plaintiff applies for leave to appeal against my decision of 8 December 2006 granting leave to the Defendant to transfer this District Court action to the Court of First Instance for the Defendant to apply for consolidation with HCA 2134 of 2005. The Defendant s application is made under S. 42 District Court Ordinance Cap. 336. The Plaintiff s Counsel, Mr. Ng, submitted that the Defendant s defence has no merits and the Defendant is employing delaying tactics by applying to transfer to the Court of First Instance. Mr. Ng s further grounds of appeal are that I have failed to take into account the Court of First Instance s consideration of S. 43 of the District Court Ordinance, and that I have made reference to Order 15 rule 4 Rules of High Court which indicated I have taken into consideration irrelevant matters. Mr. Ng further submitted that I have failed to consider the facts sufficiently and was wrong to find there were common questions of facts and law between this action and HCA 2134 of 2005. He further submitted that even if there were common facts and law, I have failed to consider the overwhelming merits of the Plaintiff s claim and the absence of the same in the Defendant s defence. Mr. Ng argued further that leave to appeal should be granted in an interlocutory appeal and the criteria set out in Lord Woolf s judgment in Smith v. Cosworth Casting Processes Ltd. (Practice Notes) [1997] 1 WLR 1538 apply. The criteria set out in Lord Woolf s Practice Note in Smith s case are important guidelines, they are as follows:-

1. The Court would only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has any prospect of success e.g. the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises an issue where the law requires clarifying; where leave is refused, the Court gives reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave. There may be only one issue that the judge or judges giving leave felt it was necessary to draw to the attention for the parties and the Court hearing the appeal. The basis of Mr. Ng's leave application is the Plaintiff's good prospects of success in the appeal because the Defendant's case has no merits and there is no case law on S. 42 of the District Court Ordinance, therefore a decision from the Court of Appeal is called for. Mr. Ng's premise is correct. Should I find the Plaintiff has realistic prospects of success in the appeal, leave to appeal should certainly be granted. Before evaluating the prospect of success in a leave to appeal application, the Court will have to differentiate an interlocutory appeal and an appeal after trial because different considerations and criteria apply. The Practice Notes at Order 59/1/49 in the Hong Kong Civil Procedure 2007 p. 872 stated:- an appeal will not be entertained from an order which it was within the discretion of the judge to make, unless it is shown that he exercised his discretion under a mistake of law or disregard of principle or under a misapprehension as to the facts; or that he took into account irrelevant matters or the conclusion which the judge reached in the exercise of his discretion was outside the generous ambit within which a reasonable disagreement is possible. The present application for leave to appeal is against my exercise of discretion to transfer the District Court action to the Court of First Instance on the basis the Court of First Instance may transfer a claim under \$1 million to the District Court under S. 43 of the District Court Ordinance Cap. 336. My understanding of S. 43 is that claims within the jurisdiction of District Court, i.e. claims under \$1million, will be tried in the District Court with the exception of cases transferred under S. 42. The present action is one such case. Mr. Ng referred to Yam J's judgment in *Hang Seng Credit Card Limited & Ors. v. Tsang Nga Lee & Ors.* [2000] 3 HKC 269 at p. 281I and the judgment of Waung J. in the case of *Pacific Bridge Services Ltd. v. Wide Tech Shipping Ltd.* HCA 12492 of 1999 (unreported judgment on 25 October 2000). Mr. Ng particularly relied on the conclusion of Yam J's judgment at p. 281I where he directed all cases within the District Court jurisdiction should be transferred by order nisi of the master to the District Court shortly after the institution of the action in the Court of First Instance. It must be noted that both judgments of Yam J. and Waung J. were decided soon after the increase of jurisdiction in the District Court and during that period a large number of actions commenced in the Court of First Instance before the increase of jurisdiction came to fall within the District Court jurisdiction. At P. 280 C E of Yam J's judgment in the *Hang Seng Credit Card* case, he held Unless there are very

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