

HCA 1886/2001

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 1886 OF 2001**

BETWEEN

FORFAIR COMPANY LIMITED

Plaintiff

and

UNIVERSAL DOCKYARD LIMITED

Defendant

Before: Deputy High Court Judge A Cheung in Chambers

Date of Hearing: 19 June 2002

Date of Judgment: 19 June 2002

J U D G M E N T

1. This is an urgent application by the Defendant for an interim stay of execution of a Writ of Possession.

2. The Plaintiff has obtained a judgment against the Defendant for the recovery of possession of a piece of land used by the Defendant as a dockyard, together with a monetary judgment for a sum in excess of \$3.6 million as well as for payment of mesne profits at the rate of \$226,000.00 per month from 26 April 2001 onwards.

3. There was an appeal against the judgment to Deputy High Court Judge A To. The appeal was dismissed by the learned Judge on 25 January 2002. Thereafter, the Plaintiff took steps to enforce the judgment for possession; and the deadline for delivery up of vacant possession of the suit premises expired on 18 June 2002, i.e. yesterday.

4. On that very day, the Defendant, I must say, belatedly took out a Summons applying for a stay of execution of the Writ of Possession under O.45, r.11. The matter was heard as a matter of urgency by Master J Wong. The learned Master adjourned the hearing of the Summons for argument to a date to be fixed. A date has since been fixed and the Summons will be heard by a Master on 18 July 2002. The learned Master rejected the Defendant's application for an interim stay of execution pending the hearing of the Summons.

5. The matter comes before me as a matter of urgency upon the application by the Defendant. The Defendant asks me to grant an interim stay on the basis that it intends to appeal against Master J Wong's refusal to grant an interim stay. The Defendant undertakes to take out

such a Notice of Appeal immediately. It asks for an interim stay of execution of the Writ of Possession pending the determination of the intended appeal.

6. The Defendant offers to pay immediately a sum of over \$0.9 million to the Plaintiff in partial satisfaction of the outstanding judgment. The Defendant also offers to make payment by instalments of the outstanding judgment as from 1 August 2002 as well as to pay mesne profits at the rate stated above as from 19 June 2002. The first such payment, according to the Defendant, will be paid on 1 July 2002 and the subsequent payments will be made on the first day of each month.

7. This application is opposed by Mr Ip acting on behalf of the Plaintiff. Mr Ip complains, in my view, very justifiably, that this application was taken out at the last minute. There was no or no sufficient justification for the late application. As I say, the judgment was entered against the Defendant in December last year, the appeal against the judgment was dismissed by Deputy High Court Judge To in January this year; yet there was no application for a stay of execution of the Writ of Possession until the last day for the Defendant to move out of the suit premises.

8. In the supporting affirmation filed on behalf of the Defendant in relation to the stay application, there is mentioned some unspecified negotiation between the parties. This is denied by Mr Ip according to his presently available instructions.

9. In any event, in my judgment, given the absence of any

suggestion that at any stage of the alleged negotiation, there was a real hope or chance, at least from the viewpoint of the Defendant, that something could be concluded with the Plaintiff's side prior to the deadline for vacating the premises, the alleged negotiation by itself does not provide a valid excuse for not applying for a stay earlier.

10. There is also mentioned in the supporting affirmation some effort made by the Defendant to relocate the dockyard but as Mr Chung, counsel for the Defendant, frankly admits at today's hearing, any moving of the dockyard from its existing premises to a new location would take time and would in any event necessitate the Defendant's continued occupation of the suit premises beyond the deadline, and thus the need to apply for a stay of execution. Yet as I say, the stay was not applied for until 18 June.

11. The upshot of all this is that, as submitted by Mr Ip, a self-induced or generated situation is now presented by the Defendant to the Court in relation to its alleged hardship if the Court does not grant an interim stay of execution pending the determination of the Defendant's application for stay. The alleged hardship or difficulty on the part of the Defendant is, in other words, self-induced or generated. A situation is now, as I see it, being forced on the Court by the Defendant's late application to grant an interim stay so as to preserve the status quo pending the determination of the Defendant's belated application for a stay. In my judgment, this is totally unfair and unjustified.

12. As regards the potential prejudice or hardship to the Plaintiff if an interim stay is granted, I must note that the judgment obtained by the

Plaintiff against the Defendant back in December last year for over \$3,600,000.00 plus mesne profits at a very substantial monthly rate has remained wholly unsatisfied up to this minute. The offer of a payment of a sum of \$0.9 million by the Defendant, if accepted, would only go towards partial satisfaction of the outstanding judgment. The offer of payment of mesne profits for the continued occupation of the premises beyond 18 June 2002 is illusory, given that even taken into account the \$0.9 million now being offered, there would still be over \$2,700,000.00 outstanding under the existing judgment. The offer to make payment of the remaining outstanding judgment by 13 instalments starting from August 2002 this year would not help the situation either.

13. As Mr Ip again correctly pointed out, there is no or insufficient information in the supporting affirmation filed on behalf of the Defendant relating to the Defendant's financial means to satisfy first, the outstanding judgment and second, the mesne profits that would necessarily become payable if the Defendant is allowed to stay in the suit premises beyond 18 June 2002 pursuant to any stay or interim stay of execution. The Defendant has simply failed to demonstrate sufficient financial means to pay mesne profits to the Plaintiff, bearing in mind the outstanding judgment debt in question. If an interim stay is granted, there is, put at the lowest, a real risk of the Plaintiff not being paid mesne profits for the Defendant's continued occupation of the suit premises pursuant to the interim stay.

14. I cannot say, given the substantial rate of mesne profits in the present case, that this is not a real prejudice to the Plaintiff, even though I also bear in mind that the Plaintiff has no definite and immediate

plan for the use of the suit premises once possession is recovered from the Defendant.

15. I also take into account the alleged hardship to the Defendant, particularly bearing in mind that the suit premises has been throughout used as a dockyard and apparently the Defendant owns a large fleet of vessels of various types requiring the service of a dockyard.

16. Bearing all relevant material and circumstances in mind, in the exercise of my discretion, I refuse to grant any interim stay whether pending the determination of the intended appeal against the learned Master's refusal to grant an interim stay, or whether pending the determination of the Defendant's outstanding Summons before the Master for a stay of execution.

17. As regards the costs of this application, having heard the parties on the matter, I order that the costs of the application be paid by the Defendant to the Plaintiff forthwith in the sum of \$12,000.00.

(A Cheung)
Deputy Judge of the Court of First Instance
High Court

Mr Francis Ip, of Messrs Ho & Ip, for the Plaintiff

Mr Boey Chung, instructed by Messrs Ho & Tam, for the Defendant