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HCA2002/2001

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO.2002 OF 2001**

BETWEEN

FONFAIR COMPANY LIMITED

Plaintiff

and

UDL MANAGEMENT LIMITED

Defendant

IN THE MATTER OF AN APPLICATION ON
BEHALF OF FONFAIR COMPANY LIMITED

Applicant

and

CHAN KIM LEUNG
FOR AN ORDER OF COMMITTAL

Respondent

AND

IN THE MATTER OF AN APPLICATION ON
BEHALF OF FONFAIR COMPANY LIMITED

Applicant

and

LEUNG YU OI LING IRENE
FOR AN ORDER OF COMMITTAL

Respondent

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Before : Hon Poon J in Chambers

Date of Hearing : 4 July 2007

Date of Decision : 12 July 2007

D E C I S I O N

Introduction

1. In the judgment handed down on 24 November 2006 (“the Judgment”), I dismissed the applicant’s applications for committal against the respondents and made an order *nisi* that the respondents do have the costs to be taxed if not agreed. This Decision should be read together with the Judgment.

2. By summons dated 19 December 2006 (“the Summons”), the applicant applied to extend the time for varying the costs order *nisi* and to vary it such that the applicant do pay the respondents costs of the Notices of Motion and Issue (2) (as defined in the Judgment) on which the respondents succeeded, to be taxed if not agreed.

3. Subject to costs, the respondents did not oppose the application for extension of time. They however took issue on the variation sought by the applicant.

Discussion

4. Section 52A(1) of the High Court Ordinance, Cap.4, provides that subject to the provisions of the rules of court, this court shall have full power to determine by whom and to what extent the costs of an incidental

to all proceedings are to be paid. However, the discretion must be exercised on fixed principles, that is, according to rules or reason and justice : see *Hong Kong Civil Procedure 2007, Vol.1* para.62/2/6 at p.934.

5. In *re Elgindata Ltd (No.2)* [1992] 1 WLR 1207, Nourse LJ set out the general principles governing the award of costs. These principles have been adopted and applied consistently by the courts in Hong Kong and recently by the Court of Appeal in *Wang Din Shin v. Nina Kung alias Nina TH Wang*, CACV460/2002 & CACV67/2003, unreported, 19 April 2005, *per* Yuen JA at para.40; *KWKM nee WKM v. KSW*, CACV432/2006, unreported, 15 June 2007, *per* Yuen JA at para.27. (See also *Edmund Kung Chiu Nam v. The Insider Dealing Tribunal and the Financial Secretary*, CACV176/2006, unreported, 22 May 2005.) Yuen JA set out the principles thus :

- (1) costs are in the discretion of the court [Order 62, rule 2(4) of the Rules of the High Court (“RHC”)];
- (2) they should follow the event, except where it appears to the court that in the circumstances of the case some other order should be made [Order 62, rule 3(2), RHC];
- (3) the general rule does not cease to apply simply because the successful party raised issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs; and
- (4) where the successful party raises issues or makes allegations “improperly or unreasonably” [in Hong Kong, “improperly or unnecessarily”], the court may not only deprive him of his

costs but may order him to pay the whole or part of the unsuccessful party's costs [Order 62, rule 7(1), RHC].

6. The main thrust of the argument of Mr Kat, appearing for the applicant, is this. In the Judgment, four issues were identified. The applicant succeeded on Issue 1, while the respondents succeeded on Issue 2, which Mr Kat referred to as the pleading point for present purposes. And the court disposed of the applications for committal on Issue 2 without reference to the merits of the applications, to which Issues 3 and 4 related. However, the pleading point was only raised after close of evidence in Ms Lam's closing submissions dated 9 February 2006 and fully argued by Mr Fung, SC on 8 June 2006. The pleading point would have been adequate to dispose of the applications for committal at any time after the Notices of Motion were served and in particular 17 June 2005 when the respondents' solicitors went on record. The considerable volume of affidavit evidence put on after that date on both sides was addressed to the issues of fact. All the costs expended on those issues of fact were therefore wasted. The respondents could and should have taken the pleading point at the outset. The matter could have been dealt with two years earlier and at far less costs. It is unjust to require the applicant to pay the respondents' costs on those issues, which need never have been tried or argued.

7. Mr Kat went on to submit that viewed objectively, the respondents' conduct of defence may fairly be characterized both as "calculated to occasion unnecessary litigation and expense" (*Ritter v. Godfrey* [1902] 2 KB 47, pp.60-61) and fitting precisely into *Elgindata* principle (3). By arguing the facts through a trial and upon those factual

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issues but omitting the pleading point until the last moment, the respondents had effectively caused all the costs of this matter (except those of the Notices of Motion themselves and argument on the pleading point) to be thrown away.

8. For present purposes, a closer examination of the respondents' conduct of their defence is in order.

9. The respondents had all along been acting in person until 17 June 2005. I do not think they could be criticized for not taking the pleading point, which is a very technical point, before that date.

10. By 17 June 2005, all affidavit evidence had already been filed. (In fact, the affidavit evidence was closed in February 2005.) So even if the pleading point were raised soon after that date, the costs for preparing the affidavit would have already been incurred. The respondents' conduct had not caused those costs to be wasted or thrown away as contended.

11. Even had the pleading point been raised shortly after 17 June 2005, I do not think it would have a significant impact on the conduct of the committal proceedings. It is most unlikely that the pleading point could be argued at another hearing before the proceedings resumed on 6 February 2006. It is most likely that the point would be dealt with at the resumed hearing on 6 February 2006. Given the applicant's stance on the pleading point, it is probable that the court would just proceed to receive the evidence on the factual disputes any way and to deal with the pleading point as one of the points at the closing submissions. In other

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words, most probably the trial would just proceed and costs would be incurred any way even if the pleading point were taken before the proceedings resumed on 6 February 2006.

12. It is true that the pleading point was only raised in Ms Lam's closing submissions dated 9 February 2006. Ms Lam submitted that the point dawned on her during the cross-examination of Mrs Irene Leung of the respondents when she was asked to give further details of matters which were not previously covered in her affirmations. Ms Lam's submission is not challenged. So I accept her submission that it is not the case where the respondents withheld the pleading point until the very last moment. Instead, it was made known to the applicant as soon as Ms Lam spotted it.

13. In the circumstances, I do not think the respondents' conduct can be criticized as being calculated to occasion unnecessary litigation and expense or that it fell within *Elgindata* principle (3) in that it had caused a significant increase in the length or cost of the proceedings.

14. For these reasons, I reject Mr Kat's submissions.

15. For completeness, I will deal with the costs pertaining to Issue 1. Although the respondents lost on Issue 1, I do not think their conduct in raising and arguing Issue 1 had caused a significant increase in the length or cost of the proceedings. *Elgindata* principle (3) accordingly applies. They should not be deprived of the costs on Issue 1 simply because they had failed to persuade me to accept their argument.

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Conclusion

16. I will dismiss the applicant’s application to vary the costs order *nisi* and make it absolute.

17. I further order that the applicant do pay the costs of the entire Summons, to be taxed if not agreed.

(J. Poon)
Judge of the Court of First Instance
High Court

Mr Nigel Kat, instructed by Messrs Ho & Ip, for the Applicant

Ms Catrina Lam, instructed by Messrs Tsang & Lee, for the Respondents