

由此

A

A

B

HCCW 920/2002

B

C

IN THE HIGH COURT OF THE

C

D

HONG KONG SPECIAL ADMINISTRATIVE REGION

D

E

COURT OF FIRST INSTANCE

E

COMPANIES (WINDING-UP) NO. 920 OF 2002

F

F

G

IN THE MATTER of HI-TECH
PRECISION PRODUCTS LIMITED

G

H

and

H

I

IN THE MATTER of the Companies
Ordinance (Cap. 32)

I

J

J

K

Before: Hon Kwan J in Chambers

K

L

Date of Hearing: 17 September 2003

L

M

Date of Decision: 17 September 2003

M

N

DECISION

N

O

O

P

P

Q

1. On 25 June 2003, I gave a decision on costs upon giving leave to the petitioner to discontinue the petition to wind up Hi-Tech Precision Products Limited (“the Company”). I made no order as to costs up to 3 January 2003. I ordered the Company to pay the petitioner’s costs in these proceedings incurred after 27 January 2003, with the exception of the costs

Q

R

R

S

S

T

T

U

U

V

V

由此
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

for issuing the summons for discontinuance and the costs in the preparation of the 3rd affirmation of Chow Chun Man.

2. A summons was issued by the Company on 24 July 2003, under section 14(3)(e) of the High Court Ordinance (Cap. 4), for leave to appeal from my decision on costs. A draft Notice of Appeal is annexed to the summons.

3. The Company seeks to reverse the decision and to obtain an order that the petitioner should pay the Company's costs in the petition, the Company's strike out application and the petitioner's application for leave to discontinue, and that such costs be taxed on an indemnity basis.

4. It is provided in section 14(3)(e) of Cap. 4 that no appeal shall lie against an order of the Court of First Instance "relating only to costs which are by law left to the discretion of the court or tribunal", without the leave of the court making the order or the Court of Appeal.

5. The approach of the appellate court as succinctly stated in paragraph 62/2/11 of *The Hong Kong Civil Procedure 2002* Vol. 1 is as follow:

"The Court of Appeal will not interfere with the exercise of a judge's discretion in the award of costs unless it was shown that he failed to exercise the discretion, or exercised it upon a false principle, or did not exercise it judicially (*Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Ltd* [1997] HKLRD 1327, CA) or the exercise of discretion was demonstrably flawed (*China Venturetechno International Co. Ltd v New Century Chain Development Co. Ltd* [1996] HKLY 1093.)"

6. It is contended by Mr William Wong, who appeared for the Company, that the intended appeal is not an appeal against an exercise of

由此
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

the discretion of the court on a costs order simpliciter, as the Company is appealing against substantive findings made by the court in the decision on costs, the substantive finding being that at the time the petition was presented the petitioner had not known that the debt in the petition was disputed by the Company on *bona fide* and substantial grounds. It is contended in the draft Notice of Appeal that the court had erred in fact and in law in making that finding.

7. I suppose implicit in that argument is the acknowledgment that the Company is not seeking to attack the exercise of discretion as to costs, in the event that its contention that the court had erred in making the above finding is rejected.

8. As I understand Mr Wong's submission, he seems to be saying that if the finding had been made after a full trial on the substantive relief sought in the petition, no leave would be required to appeal against that finding. In the present case, there was not a trial because the petitioner sought leave to discontinue the petition and the court was only required to decide on costs. Hence, the test or burden that the Company is required to satisfy in obtaining leave to appeal should be no higher than establishing realistic prospects of success, the Company should not be "penalized" because only the question of costs fell to be determined by the court.

9. It is not a question of the Company being penalized. It is simply that an appeal against costs is an appeal against the exercise of a discretion left to the court, as provided in section 14(3)(e). Where the exercise of discretion is based on findings of fact or law, or mixed fact and law, in accordance with the approach of the appellate court in interfering with the exercise of a judge's discretion, it must be shown that the exercise

由此
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

of that discretion was demonstrably flawed.

10. Six grounds of appeal were advanced in the draft Notice of Appeal. I will deal with each of them.

11. The first ground is that the court has erred in finding that the letter of the Company to the petitioner dated 6 March 2001 constituted an unequivocal and clear admission of indebtedness of the Company. Even on the basis all that the Company is required to do is to show realistic prospects of success, I am quite unable to see any such prospects for this ground of appeal.

12. The second ground is that the court has erred in finding there was no clear retraction of the admission of indebtedness until January 2003 in view of these matters:

- (a) the parties had reached agreement in the withdrawal of the petitioner's claim against the Company in HCA No. 1999 of 2001 and the High Court Action was based on the admission of indebtedness in the letter of the Company dated 6 March 2001;
- (b) the withdrawal of the High Court Action on payment of HK\$380,996.45 by the Company;
- (c) the admission by the Company was overtaken by events in that in the Company's letter dated 8 April 2002, the Company had put on record that the High Court Action was discontinued without admission of the petitioner's claim in respect of two debit notes, that the computation of the petitioner was wrong and that the Company had denied

liability for debit note No. 001201 as the petitioner was attempting to vary prices unilaterally;

(d) in the letter of the Company dated 12 April 2002, the Company reiterated its stance in its letter of 8 April 2002 and the Company had settled in full the invoices issued by the petitioner;

(e) in view of (a) to (d) above, any admission was clearly and demonstrably retracted.

13. All of the above matters were considered and addressed in the decision on costs. After a full review of the evidence before me, I rejected Mr Wong's submission on the last occasion that the admission of indebtedness was overtaken by events and formed the view that there was no clear retraction of this admission until January 2003. I remain unpersuaded that the view I have formed on the evidence is one that I am not entitled to form or that my reasoning is shown to be demonstrably flawed. Whether the petitioner can succeed in obtaining judgment against the Company based on the admission under O. 27 of the Rules of the High Court as contended by Mr Wong is irrelevant, as I did find that the admission was clearly retracted by the Company in its affirmation filed in January 2003.

14. The third ground is that the court has erred in law in ruling:

(a) the onus is on the Company to adduce evidence in support of its case that it has a *bona fide* dispute on substantial grounds;

(b) it is not for the petitioner to substantiate and establish its claim based on admission of liability and the two debit notes, despite the same were disputed by the Company as early as

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

April 2002; and

- (c) the onus is not on the petitioner to prove its entitlement under the two debit notes, despite having full knowledge there were real issues in dispute and the burden somehow shifted to the Company to prove the contrary.

15. These rulings in the decision have been taken out of context. As submitted by Mr Hingorani for the petitioner, prior to making the finding in paragraph 26 of the decision that the petitioner has established a *prima facie* case the debt in the petition was due and owing from the Company, I had dealt with at some length the admission of indebtedness by the Company and the petitioner's evidence in support of the outstanding debit note. It was in that context that I said that the onus was on the Company to adduce precisely factual evidence to support its case that it has a *bona fide* dispute on substantial grounds.

16. The fourth ground is that the Company has repeatedly adduced evidence to the effect that all invoices issued by the petitioner pursuant to "relevant purchase orders" were fully settled and there had never been any allegation the petitioner is entitled to payment based on its quotations rather than invoices. These are matters of contention and have yet to be resolved in other proceedings. I cannot see how they can be taken any further at this stage.

17. The fifth ground is that the court should have found that the petitioner knew when it presented the petition, the admission of indebtedness and the underlying debt as well as the two debit notes were *bona fide* disputed on substantial grounds. This is a general ground premised on the success of other grounds I have already dealt with.

18. The sixth ground is that the court has erred in failing to award part of the costs to the Company regarding debit note No. 001202 when the petitioner had insisted upon the full amount of this debit note but only accepted payment of a lesser amount, which had been offered by the Company since 8 April 2002, less than a week before the hearing on 25 June 2003.

19. The submission for part of the costs to be awarded to the Company was made by Mr Wong at the hearing on 25 June 2003 and I have rejected it after taken into account the offer referred to. Whether to award part of the costs to the Company is an exercise of the discretion of the court. I declined to do so having regard to the whole circumstances. I am not persuaded that I have failed to exercise my discretion judicially or that the exercise of the discretion is plainly wrong.

20. For the above reasons, I refuse the application for leave to appeal. I award costs of this application to the petitioner.

(S Kwan)
Judge of the Court of First Instance
High Court

Mr Jeevan Hingorani, instructed by Messrs Alvan Liu & Partners, for the
Petitioner

Mr William Wong, instructed by Messrs Angela Wang & Co. for the
Respondent