由此

HCCW 920/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) NO. 920 OF 2002

IN THE MATTER of HI-TECH PRECISION PRODUCTS LIMITED

and

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

Before: Hon Kwan J in Chambers

Date of Hearing: 25 June 2003

Date of Decision: 25 June 2003

D E C I S I O N O N C O S T S

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1. I have initially only one summons issued by Hi-Tech Precision Products Limited ("the Company") on 3 January 2003 to strike out a creditor's petition to wind up the Company presented on 14 August 2002 by Soundwell Far East Limited ("the petitioner"), under O. 18 r. 19 of the Rules of High Court, on the ground that the petition is scandalous,

frivolous or vexatious or is otherwise an abuse of the process of the court, as there is a *bona fide* dispute of the debt in the petition on substantial grounds. This summons to strike out was issued some five months after the petition was presented, after the Company has filed its first affirmation in opposition on 5 November 2002, after the petitioner has filed an affirmation in reply on 11 December 2002, and on the same day when the Company had filed yet another affirmation in answer to the petitioner's evidence in reply.

2. On 23 June 2003, two days before the hearing of the strike out summons, the petitioner issued a summons seeking leave to discontinue the petition under O. 21 r. 3 of the Rules of High Court and an order that the costs of the petition and of this application be paid by the Company.

3. The Company does not oppose the application for leave to discontinue the petition, this also renders its strike out application otiose. However, the Company opposes the petitioner's application that it should pay the petitioner's costs. The Company's stance is that not only is the petitioner not entitled to costs, but the petitioner should pay all the Company's costs on the petition, the strike out application and the application for leave to discontinue on an indemnity basis.

4. On the application for leave to discontinue under O. 21 r. 3(1), the court has a discretion to make such order as to costs "as it thinks just". But it would be most unusual, if not impossible, for a party seeking leave to discontinue proceedings to be awarded costs against the defendant or respondent (*Ta Tung China & Arts Ltd v Fontana Restaurant Ltd & Others* [1999] 1 HKLRD 404 at 406J-407A). I do not think the present case is

such an exceptional or unusual position. I consider there are only two realistic alternatives open to me, one is to order costs in favour of the Company, the other is to make no order as to costs.

5. It is not seriously disputed that if the petitioner knew when it presented the petition, the debt was *bona fide* disputed on substantial grounds, and when the petition is discontinued or dismissed by the court, the petitioner should pay the costs of the company, as it would be an abuse of the process of the court to present a petition for winding up when the petitioner knew it had no *locus standi*. I emphasise the dispute must be on substantial grounds, it is not sufficient merely for the company to "raise an argument without the fundamental evidence to support it" (*Re ICS Computer Distribution Limited* [1996] 1 HKLR 181 at 187C). As Rogers J (as he then was) stated at 183I, the onus is on the company to "adduce sufficiently precise factual evidence to satisfy the court it has a *bona fide* dispute on substantial grounds".

6. That there is now, or at least after the Company has filed its second affirmation in opposition on 3 January 2003, evidence of a sufficiently precise nature to establish a *bona fide* dispute on substantial grounds is not, in my view, open to challenge. What is contended by parties is whether the petitioner had known, before the Company filed its first and second affirmations, that the debt in petition had been or would be disputed by the Company on substantial grounds.

7. The petitioner's case to wind-up the Company is succinctly set out in paragraphs. 5 and 6 of the petition, which read as follows:

> "5. The Company is indebted to Your Petitioner in the sum of HK$374,213.27 ("the Debt") being balance of price for work

> done and goods supplied due and owing by the Company pursuant to an agreement made between the Petitioner and the Company in or around February 2000 for the assembly of speaker box units.
>
> 6. As at 21 March 2001, the date when Your Petitioner's legal advisers sent the first demand letter to the Company, the total outstanding debt due from the Company to Your Petitioner was HK$755,209.72, which debt was admitted by the Company in writing. The Company made a partial settlement of HK$380,996.45 on 20 September 2001, leaving a balance of HK$374,213.27."

8. It is not specified in the petition what was the admission in writing by the Company of its indebtedness. This is clearly a reference to the letter dated 6 March 2001 from Ms Maisy Lui, the Operations General Manager of the Company and the deponent of all the affirmations filed on behalf of the Company, to Mr George Chow, the General Manager of the petitioner. The letter of Ms Lui was apparently written in reply to an earlier letter of the petitioner to the Company dated 26 February 2001, in which Mr Chow referred to a telephone conversation he had with Ms Lui on 12 February 2001, in which Ms Liu "verbally agreed" on that day that the Company owed the petitioner a total of HK$755,209.72 and she promised to send a post-dated cheque of that amount to the petitioner on 16 February 2001. Ms Lui's reply on 6 March 2001 was captioned "Payment HKD755,209.72" and is in these terms:

> "We would like to confirm the above mentioned payment will be settle [sic] in full amount the end of April 01. Thank you for your patiant [sic] and assistance on this matter."

9. This, in my view, is a clear admission of indebtedness. Was there any clear retraction of this admission in subsequent letters of the Company, when the petitioner had sought to rely on this admission?

10. On 28 March 2001, the Company wrote to the petitioner's solicitors, in reply to the letter of demand of the petitioner's solicitors dated 21 March 2001 in which the petitioner's solicitors had referred *inter alia* to the unequivocal admission of indebtedness in the letter of the Company of 6 March 2001. In this reply, the Company pointed out that the figure in the letter of the petitioner's solicitors, i.e. HK$755,209.72 appeared to be incorrect according to the books of the Company and the Company would do a "detailed checking" and reply by 6 April 2001. There being no satisfactory response from the Company, the petitioner issued a writ of summons in HCA No. 1999 of 2001 on 7 May 2001 claiming the sum of HK$755,209.72. In the Statement of Claim filed on 5 September 2001, the admission of the Company by its letter dated 6 March 2001 was pleaded.

11. On 17 September 2001, the Company wrote to the petitioner recording an agreement to settle the High Court Action on these terms. The Company was to pay the petitioner HK$380,996.45, in consideration of the petitioner withdrawing the High Court Action, whilst the outstanding sum of two debit notes numbered 001201 and 001202 were to be "negotiated as separate issues". The total sum owing on these two debit notes is HK$374,213.27, which is the debt claimed in the petition.

12. The petitioner replied on 18 September 2001 stating that it would be prepared to accept payment of HK$380,996.45 with costs of HK$70,000. In consideration of these payments, the High Court Action would be withheld. As for the two debit notes outstanding, in the event that no agreement could be reached between the parties within 30 days

from 20 September 2001, the petitioner proposed to instruct its solicitors to proceed with the High Court Action.

13. In the end, a settlement was arrived at between the parties as there was a payment by the Company on 19 September 2001 by cheque in the sum of HK$380,996.45 and on 20 September 2001, an order was made by consent in the High Court Action for the action to be discontinued with no order as to costs.

14. The next relevant letter is a letter of demand from the petitioner's solicitors on 11 March 2002, seeking payment of the amount due on the two debit notes. In this letter, the petitioner's solicitors again referred to the unequivocal admission of indebtedness by the Company in its letter dated 6 March 2001. A demand under section 178 of the Companies Ordinance (Cap. 32) was served by the petitioner's solicitors on the Company on 15 March 2002. The Company responded to the letter and the statutory demand by letter dated 8 April 2002, stating that it would settle debit note no. 001202 to the extent of HK$64,504 (this debit note was for HK$65,517.93) and enclosing a cheque dated 8 April 2002 for this amount. The Company denied liability for the other debit note no. 001201 in the sum of HK$309,709.27. The ground given for denying liability is that the petitioner was "attempting to unilaterally vary the prices for assembling the speaker box units without [the Company's] agreement". No further details or documents were provided with that letter. The Company did not deal with the admission of indebtedness in its letter of 6 March 2001 at all.

15. The petitioner's solicitors replied by letter dated 10 April 2002 again making reference to the admission by letter dated 6 March 2001. They also enclosed documents in support of the petitioner's claim, being the quotations confirmed by the Company and based on which the price was calculated, and a schedule showing the calculation of the amount claimed.

16. The Company responded to this in its letter dated 12 April 2002, reiterating their stance that the Company had "already settled in full the invoices issued by [the petitioner] pursuant to the relevant purchase orders which had been accepted by [the petitioner]", and stating that the schedule enclosed by the petitioner's solicitors did not mean anything. Again, the Company did not address the admission specifically relied on by the petitioner.

17. The petitioner's solicitors wrote on 26 April 2002 requesting the Company to provide documentary evidence to prove its allegation. In its answer dated 30 April 2002, the Company declined to provide documentary evidence and stated that it was for the petitioner to establish and prove its claim.

18. On 8 May 2002, the petitioner's solicitors wrote a long letter to the Company again seeking substantiation of the Company's position and asking five questions at the end of that letter including the following:

> "What is the basis of your allegation that our client is not entitled to payment under the debit note no. 001201? Could you elaborate your allegation that the charges under the debit note no. 001201 was not due and payable due to the variation of prices for assembling the speaker box units as alleged by you in your letter to us dated 8 April 2002? Could you provide to us the documentary evidence of your allegations?"

19. In the Company's response to this letter dated 31 May 2002, the Company reiterated its stance that it is for the petitioner to substantiate its claim.

20. The last letter before the petition was presented was a letter dated 11 June 2002 from the petitioner's solicitors enclosing five schedules in which the petitioner set out the basis of its claim.

21. In the first affirmation of Ms Lui filed in November 2002 on behalf of the Company, not a word was mentioned about her letter admitting the full indebtedness on 6 March 2001. Nor was this letter exhibited among the many other letters she exhibited, referred to and commented upon in her affirmation. In paragraph 19 of that affirmation, the Company set out its case for disputing liability.

22. According to Ms Lui, the agreed prices for the assembly of the speaker box units were set out in the Company's purchase orders that had been accepted by the petitioner and there was "never any agreement to vary these prices and the petitioner had in fact invoiced the Company for the assembly of the speaker box units according to the agreed prices as stated in the accepted purchase orders". As the petitioner's invoices had been paid by the Company in full, she asserted that there is no basis to the petitioner's claim for HK$308,695.34 under debit note no. 001201. It is alleged that the petitioner is "attempting to unilaterally vary without the Company's consent or agreement the prices for assembling the speaker box units."

23. That, in essence, was the substance of the Company's case for disputing liability. No documents were adduced by the Company to support its case in this respect. It was only after the petitioner had filed evidence in reply in December 2002 and raised yet again the admission in writing (which was pleaded in the petition) that the Company sought to address this in Ms Lui's second affirmation filed on 3 January 2003. According to the second affirmation, Ms Lui stated that she had made a mistake when she sent the letter dated 6 March 2001. It was only then that the Company set out in its second affirmation in detail its case that the Company had not agreed to the quotations relied on by the petitioner and exhibited the complete quotation consisting of five pages.

24. I should mention that according to the second affirmation of Mr Chow Chun Man filed on behalf of the petitioner in December 2002, it is the petitioner's case that there was no variation of the price for the assembly of the speaker box units and that the "accepted purchase orders" of the Company did not give the entire picture. In his affirmation, Mr Chow referred to the quotations of the petitioner and the invoices issued by the Company for the parts supplied by the Company to the petitioner for the assembly. It is the petitioner's case that the Company had over-charged the petitioner for the components supplied. The petitioner did not know about this until it had received the Company's invoices. It was then that the petitioner realized that it had under-charged the Company when it accepted the purchase orders issued by the Company. Hence, the debit note no. 001201 was issued. There was no agreement to vary the price for the assembly of the products. The petitioner's case is that the price was based all along on the quotations accepted by the Company.

25. I should also mention that in all the affirmations filed by the Company, the Company has not exhibited the invoices issued by the Company to the petitioner for the components supplied, in respect of which the petitioner has alleged there is a price discrepancy.

26. On the above evidence, I am unable to agree with the submissions of Mr William Wong that when the petitioner presented the petition, the petitioner had known of a *bona fide* dispute of the debt in the petition on substantial grounds. There was no clear retraction of the admission of indebtedness until January 2003. I do not think the admission in the letter dated 6 March 2001 was overtaken by events as Mr Wong has submitted. I consider that the petitioner has established a *prima facie* case that the debt in the petition was due and owing from the Company. The onus is on the Company to adduce sufficiently precise factual evidence to support its case that it has a *bona fide* dispute on substantial grounds. Such evidence was not adduced until January 2003, even if one were to leave aside the invoices issued by the Company for the component parts supplied which have not been exhibited. The Company's stance all along is for the petitioner to substantiate its entitlement to payment. I do not consider this stance justifiable particularly in view of the fact that the admission of indebtedness of the Company was not retracted until January 2003, despite the petitioner has raised this admission several times in correspondence in 2002 and has pleaded this in the petition.

27. I am not satisfied there was an abuse of the process of the court when the petition was presented. In my view, it would be appropriate to make no order as to costs up to 3 January 2003.

28. As to costs after 3 January 2003, there is placed before the court a Calderbank letter dated 27 January 2003 from the petitioner's solicitors to the Company's solicitors.

29. The proposal in that letter was as follows:

(1) the petitioner was to withdraw the petition with no order as to costs;

(2) the Company was to withdraw the summons for striking out with no order as to costs; and

(3) the Company was to pay the petitioner HK$64,504.00 in full and final settlement of the debit note no. 001202 and the petitioner was to return the cheque dated 8 April 2002 to the Company.

It was stated in that letter that if the above proposal was not accepted by the Company, the petitioner would apply for leave to withdraw the petition and to determine the question of costs incurred so far and seek the costs of the application.

30. This proposal was not accepted by the Company's solicitors and there was no response from them until 11 June 2003 when they made a counter proposal in a Calderbank letter, the details of which I do not need to go into.

31. On 19 June 2003, the petitioner's solicitors again wrote to the Company's solicitors repeating in an open offer the proposal in their Calderbank letter in January 2003. As this proposal was not accepted by the Company, the summons for discontinuance was issued on 23 June

2003. It seems to me that the petitioner's proposal with no order as to costs is an entirely reasonable one. Had that been accepted, the two summonses for striking out and the summons for discontinuance could have been dealt with by consent and the hearing today would not be required. I do not think there is any justification for giving the petitioner only part of its costs on the ground of its offer in relation to the other debit note no. 001202 as Mr Wong has asked me to do.

32. I order the Company to pay the petitioner's costs in these proceedings incurred after 27 January 2003 with the exception of the costs for issuing the summons for discontinuance and the costs in the preparation of the third affirmation of Mr Chow Chun Man, which I have not allowed to be relied on by the petitioner in this hearing.

(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 Company