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DCCJ 4418/2005

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**
CIVIL ACTION NO. 4418 OF 2005

BETWEEN

Hong Kong Pre-Fabricated Products Limited Plaintiff

and

Pollard Construction Company Limited Defendant

DCCJ 4438/2005

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**
CIVIL ACTION NO. 4438 OF 2005

BETWEEN

Pollard Construction Company Limited Plaintiff

and

Hong Kong Pre-Fabricated Products Limited Defendant

Coram : H.H. Judge Chow in Chambers

Date of Hearing : 28th June, 2006

Date of Handing Down Decision : 23rd August 2006

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DECISION

1. This is the application of Pollard Construction Company Limited (“the Defendant under DCCJ 4418/2005”) for summary judgment under Order 14, Rules of the District Court. The Defendant’s counterclaims are for loss and damage caused by the Plaintiff’s failure to supply a pre-fabricated office pursuant to its contract with the Defendant as evidenced by a Letter of Acceptance dated 16 June 2005 (“the Agreement”).

2. The Plaintiff’s case is that the Agreement was varied by a verbal agreement between the parties. The Defendant argued that verbal evidence is inadmissible to alter the terms of the Agreement. The key issue in this case is whether there is a verbal agreement which varied the terms of the Agreement.

3. Under the Agreement, the terms of payment were stipulated as follows:-

- 30% deposit be paid after signing of the Agreement;
- 65% be paid within 30 days after completion of the works;
- 5% being retention money.

4. On 18 August 2005 the Plaintiff sent a letter to the Defendant, expressing its concern over the Defendant’s ability to pay upon the Plaintiff’s completion of work. The letter reads:-

“Pursuant to the terms of the Contract you have paid us a sum of HK\$136,800.00 as a deposit for the supply a Pre-fabricated

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Office (“the goods”) and upon receipt of the said deposit we had purchased various materials for performing the contract and providing the goods to you. The amount incurred by us so far for buying the necessary materials for the goods is HK\$330,000.00, which exceed the said deposit by HK\$193,200.00.

We understand that there are about 57 legal proceedings against you for monetary and other claims. We have also been advised by others who were or are your business clients and/or partners that it would be wise for us to obtain more funds from you before we continue with the Contract. Such advise from those of your business clients and/or partners has caused our concern and worry.

In view of the large amount of money to be incurred for buying materials and workmanship costs to supply you with the goods under the Contract, we have no confident that you could settle the balance of the contract sum under the Contract.

In the circumstances, kindly pay to us a sum of HK\$190,000.00 within SEVEN (7) days from the date hereof upon receipt of which we shall supply you with the goods pursuant to the Contract, otherwise we shall have no alternative but to withhold further action on the Contract until the said sum of HK\$190,000.00 is received by us.”

5. The Plaintiff’s case is that on 18 August 2005, a Mr. Yeung of the Plaintiff and a Mr. Mingo Li of the Defendant had a telephone conversation in which Mr. Yeung requested the Defendant to pay the Plaintiff \$190,000 as partial payment of the balance of the contract price. Mr. Mingo Li agreed that they would pay a further sum of \$190,000 to the Plaintiff upon delivery of the materials and components to the Peng Chau Site. He further confirmed that the Defendant would not inspect the materials and components. In view of such agreement, the Plaintiff confirmed that the materials and components would be delivered to the Peng Chau Site on 25 August 2005, provided that the Defendant would fax a copy of the cheque for the sum of \$190,000 to the Plaintiff for the confirmation first. Mr. Mingo Li agreed to that. However, the Defendant did not fax any copy cheque as promised. Subsequently, by a letter dated

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23 August 2005, the Plaintiff informed the Defendant that delivery of the materials and components to the Peng Chau Site would be by 27 August 2005 upon receiving a fax copy of the cheque for the said sum of \$190,000.

6. On or about 25 August 2005, the Defendant faxed a copy of the cheque for the said sum of \$190,000, but it was post-dated to 25 September 2005. Because the Defendant did not observe the Agreement as varied by the verbal agreement, the Plaintiff immediately withheld delivery of the materials and components. On 26 August 2005, the Plaintiff received a letter from the Defendant's solicitors, which said that the Defendant would not pay the sum of \$190,000 as verbally agreed by the Defendant.

7. Mr. Tso Hung Chuen of the Defendant explained in his 2nd affidavit that, according to his knowledge, that the Defendant faxed to the Plaintiff a copy of the cheque for the sum of \$190,000 on or about 25 August 2005. It was faxed by Mr. Tommy Wan, the procurement officer of the Defendant. The cheque was post-dated to 25 September 2005 because the payment schedule under the Agreement required the Defendant to make further payment only after completion of the Sub-Contract Works which was scheduled to take place on or before 10 September 2006. The Defendant faxed the post-dated cheque to the Plaintiff merely for the purpose of showing that the Defendant was financially sound and was prepared to settle the balance of the contract price in due course. This was only done in order to make the Plaintiff feel more secure. The Defendant never agreed to pay in any way other than in accordance with the Agreement.

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8. The issue is whether the verbal agreement effected a variation of the Agreement by altering its terms by agreement. Whether there is such a verbal agreement is a matter to be tried. If there is really such an agreement, there is clearly a commercial advantage to both sides from a pragmatic point of view. In the absence of such a verbal agreement, it was open to the Plaintiff to be in deliberate breach of the Agreement in order to cut its losses commercially, as indicated in its letter dated 18 August, 2005. But as a result of the verbal agreement, the Plaintiff would not withhold the performance of the Agreement; both parties thereby secured their positions commercially, and derived benefit from the verbal agreement. In these circumstances consideration existed for the verbal agreement. That being the case, the Plaintiff is entitled to enforce the Agreement as varied by the verbal agreement. Therefore unconditional leave to the Plaintiff to defend its case against the counterclaim should be granted. The Defendant's argument that verbal evidence is inadmissible to alter the terms of the Agreement is inapplicable in this case, as this is a subsequent variation of the Agreement. The verbal agreement, being supported by consideration, constituted a new agreement. The Plaintiff is not trying to introduce verbal evidence, which existed at the time the Agreement was formed, to prove the genuine intention of the parties regarding the real terms of the Agreement. The Plaintiff is trying to prove that, subsequent to the formation of the Agreement, a new agreement was reached between the parties, and this new agreement varied the terms of the Agreement. For these reasons, I dismiss the Defendant's application for summary judgment against the Plaintiff.

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Costs

9. I make an order nisi for costs, to be made absolute in 14 days' time, that the Defendant is to pay costs of this application to the Plaintiff.

(S. Chow)
District Judge

The Plaintiff: represented by Miss Doris To instructed by M/S Au Yeung, Cheng, Ho & Tin, Solicitors.

The Defendant: represented by Mr. Timothy Haynes instructed by M/S Alvan Liu & Partners, Solicitors.