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CACV 147/2010

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO. 147 OF 2010
(ON APPEAL FROM HCCL 16 OF 2006)

BETWEEN

WANG RUIYUN

Plaintiff

and

GEM GLOBAL YIELD FUND LIMITED

Defendant

Before : Hon Tang Ag. CJHC, Cheung and Fok JJA in Court

Date of Hearing : 3 June 2011

Date of Judgment : 20 June 2011

J U D G M E N T

Hon Tang Ag. CJHC :

1. I have the advantage of reading Cheung JA's judgment in draft. I agree with it and have nothing to add.

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Hon Cheung JA :

2. This is an appeal by the defendant against the assessment of damages by Master de Souza.

Procedural background

3. On 22 March 2006 the plaintiff commenced the present action against the defendant and obtained an injunction from Yam J to restrain the defendant from dealing with certain shares in Bestway International Holdings Ltd ('Bestway') and from withdrawing money from an escrow account. After the service of the Amended Statement of Claim and the Defence and Counterclaim, the plaintiff obtained summary judgment from Stone J on 6 March 2007 against the defendant for HK\$40,503,237.28 and HK\$930,412.15. Thereafter the defendant amended its defence but then decided not to take further part in the proceedings and its solicitors came off the record in January 2009.

4. The plaintiff obtained an order from Stone J on 18 May 2009 to re-amend its Statement of Claim. The Judge gave directions as to the filing of defence. The defendant did not comply with the direction.

5. Stone J on 22 July 2009 directed that the defendant to show cause why judgment should not be entered against it for its default in filing any re-amended defence. On 6 August 2009, the

defendant did not appear to show cause and Stone J entered interlocutory judgment against the defendant.

6. The Master proceeded to assess damages and awarded damages of HK\$128,351,291.56 to the plaintiff. The sum is made up as follows

\$195,682,320 being the purchase price of the Bestway shares payable by the defendant (926 million shares x HK\$0.2348 per share x 90%) less

- 1) HK\$40,503,237.28 and HK\$930,412.16 previously awarded by Stone J (Note : the latter sum should be HK\$930,412.15) and
- 2) HK25,897,379 from the sale of shares not taken up.

7. The defendant now appeals to this Court. The defendant had also applied to set aside the interlocutory judgment after it had served the notice of appeal against the assessment. Stone J granted the application but imposed the condition that the defendant was required to pay into Court HK\$60 million. The defendant did not comply with the request.

Facts

8. The plaintiff owed a substantial quantity of shares in Bestway which is a Hong Kong Stock Exchange listed company.

9. On 14 February 2006 the plaintiff and the defendant entered into an Equity Line of Credit Agreement ('ELC Agreement'). Equity Line of Credit was described therein as 'a sale of shares to financial investors structured over time with each tranche or draw down made at the sole discretion of the Seller

and/or (Bestway)'. The ELC Agreement was in the nature of a put option where the defendant had the option of acquiring custody and authority to purchase/on-sell tranches of the plaintiff's 107.9 million shares in Bestway. The plaintiff had to pay a commitment fee of HK\$4,000,000 to the defendant for it to take up the option. The subject matter of the acquisition was described in the ELC Agreement as 'up to an aggregate of three hundred million Hong Kong Dollars (HK\$300,000,000) in value of shares in Bestway'.

10. Apart from the ELC Agreement, the parties also entered into a Cash Escrow Agreement dated 14 February 2006 and a Side Letter Agreement dated 27 February 2006 which allowed the defendant to accept the shares in three tranches, namely, 312 million for the first two tranches and 302 million for the third tranches.

11. The effect of the various agreements and the events leading to the litigation was summarised in the Stone J's judgment of 6 March 2007 which I will gratefully adopt and set out as follows :

'7.

- (i) the plaintiff would be entitled to deliver to the defendant a Draw Down Notice for a tranche of Bestway shares and on the same day deposit those shares into the defendant broker's CCASS account;
- (ii) pursuant to a contractual formula, the plaintiff's Draw Down Notice was to stipulate a 'floor price' below which he would not sell his shares to the defendant, the actual price being ascertained by a formula within the ELC Agreement;
- (iii) the business day following receipt of confirmation of the CCASS deposit, the defendant was to deposit into

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the Escrow Account held by an Escrow Agent an amount equal to 90% of the trading price for Bestway shares prior to the issue of the draw down notice multiplied by the number of shares deposited into the defendant broker's CCASS account;

(iv) the defendant then had 15 trading days (or longer, if a contractual formula applied) to purchase for itself or by on-selling the Bestway shares concerned, subject to various conditions concerning the volume or prices at which Bestway shares were trading during that period; and

(v) at the end of the relevant period the defendant or the Escrow Agent was to account to the plaintiff either for the sale proceeds from the sale of the shares to the defendant or, if not required by the contractual terms to purchase the shares, for the return of the unsold shares, or a combination of both.

8. On the facts it is undisputed that pursuant to the foregoing arrangements, the plaintiff delivered a Draw Down Notice dated 17 February 2006, requesting that the defendant purchase 926 million Bestway shares with a floor price of HK\$0.18 per share; the terms of this initial notice later were amended to permit the deposit into the defendant's broker's account this number of shares in 3 tranches, and in fact the plaintiff deposited 2 tranches only, the 1st tranche of 312 million shares on 27 February 2006 and the 2nd tranche of 312 million shares on 6 March 2006.

9. On 1 March 2006 the defendant deposited into the Escrow Account approximately HK\$69 million in respect of the sale of the 1st tranche of shares only; no deposit was made in respect of the 2nd tranche.

10. It appears that at some stage in early March 2006 the defendant formed the view that there was market rigging in the market for Bestway shares, and thus declined further to perform its side of the agreement.

11. On 21 March 2006 the defendant sent the plaintiff a draft Closing Notice whereunder the defendant was to return to the plaintiff 407,933,333 of the plaintiff's unsold shares, and late on the following day, that is, 22 March 2006, the plaintiff obtained from Yam J an *ex parte* Mareva injunction restraining the defendant from first, dealing in the Bestway shares transferred to it, and second, from withdrawing money from the Escrow Account.

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12. Subsequently the defendant returned to the plaintiff a total of 402,970,000 of the plaintiff's shares, leaving a shortfall of 4,963,333, which the defendant reported as having been onsold.

13. In purely mathematical terms, the cumulative result of the dealings that took place was that, in addition to returning the unsold shares, the defendant was obliged to pay the plaintiff for the 221,030,000 shares which the defendant itself had bought from the plaintiff; the purchase price for 216,066,667 of these shares bought by the defendant was HK\$40,503,237.28, which was payable to the plaintiff.

14. However, such price was not so paid.

15. On 23 March 2006 the defendant's solicitors offered, on the defendant's behalf, "to pay into court the sum of HK\$40,503,237.28 and return the unsold shares to your client in return for a discharge of the injunction."

16. This offer was accepted, and this sum paid into court, and thereafter the defendant returned 402,970,000 of the unsold shares, rather than the 407,933,333 as in fact were due.

17. The defendant initially refused to consent to the sum in court, namely, HK\$40,503,237.28, being paid out to the plaintiff, although it is unclear why this should have been the case given that, on any basis, this sum represented the proceeds of sale of the defendant's purchase of 216,066,667 shares belonging to the plaintiff.

The pleaded shape of this case

18. Against this factual background, in its Amended Statement of Claim dated 17 May 2006 (in an action which, prior to transfer to the Commercial List, originally was HCA 623 of 2006), seeks special damages in the sum of HK\$40,503,237.28, together, with an order that the defendant return all unsold shares, and if and in so far as the proceeds of sale have been paid out of the Escrow Account to the defendant, declaratory relief that such proceeds of sale are held on trust for the plaintiff by the defendant, an account of the proceeds of sale held on trust by the defendant, and an order for payment of such monies to the plaintiff.'

The relevant terms

12. The following are the relevant terms of the ELC Agreement which had not been challenged by the defendant

- 1) The Draw Down Amount is 926,000,000 shares.
- 2) Calculation of the actual selling price :
Purchase Amount set out in a Closing Notice x average of the Closing Trade Prices (as quoted by the HKSE) during the 15 Trading Days after the date of a Draw Down Notice given by the plaintiff x 90%.
- 3) The 'Floor Price' below which the plaintiff would not sell the Bestway shares to the defendant was HK\$0.18 per share.
- 4) The price below which the defendant should not dispose of the shares in the market was HK\$0.20 per share.
- 5) Time for payment and the amount to be paid by the defendant :
After the plaintiff should have deposited the subject shares into the defendant broker's CCASS account, the defendant should have made a payment into the Escrow Account on the following Business Day. The amount to be deposited (i.e. the Draw Down Initial Price) was calculated as follows:
10% discount of the Closing Trade Price of the shares as quoted by the HKSE immediately prior to the issue of the Draw Down Notice x Draw Down Amount
= 90% x Closing Trade Price x Draw Down Amount
= 90% x HK\$0.246 (Closing Trade Price on 16.02.2006) x 926,000,000 shares
= HK\$205,016,400.00
- 6) Restrictions on the defendant when it on-sells the shares :
Price restriction and also the defendant must not dispose of any number of shares over and above 1/15 of the applicable Draw Down Amount on each Trading Day during the Pricing

Period (i.e. not more than 20,800,000 Bestway shares on each Trading Day in respect of the First and Second Tranches (312,000,000 shares x 1/15 = 20,800,000 shares). This restriction was imposed so that there would not be an excessive sale of the shares in the market.

Breach by the defendant

13. The plaintiff relied on the following breaches by the defendant :

- (a) Failure to effect timely payment of HK\$69,076,800 for the first tranche of shares.
- (b) Failure to effect the same amount for the second tranche of shares.
- (c) Failure to accept the third tranche of shares.
- (d) Disposed of more than 20,800,000 shares on the trading days.
- (e) Sold the shares at below 20 cents per share.
- (f) Failure to sign a Closing Notice on or before the Closing Date (i.e. 21 March 2006).

14. The plaintiff's case is that the defendant had repudiated the ELC Agreement which it had accepted by the service of the writ on 23 March 2006.

The Re-Amended Statement of Claim

15. The Re-Amended Statement of Claim substantially increased the amount of damages claimed by the plaintiff. Apart from the special damages of HK\$40,503,237.28 and HK\$930,412.15 for which the plaintiff had already obtained

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judgment from Stone J, this is how the plaintiff pleaded its case on damages :

22. Further and/or in the alternative, as a result of the Defendant's failure and/or refusal to deliver to the Plaintiff a Closing Notice in compliance with the ELC agreement, the Defendant has thereby evinced its intention not to comply with the terms and effect of the ELC Agreement and has repudiated the Agreement. In the circumstances, the Plaintiff has accepted such repudiation.

23. To mitigate loss, the Plaintiff has sold or arranged for the sale of the 402,970,000 shares returned from the Defendant and the 3rd tranche of 302,000,000 shares rejected by the Defendant in the market during the period from 1st September 2006 to 13th September 2006. A balance of 54,000 shares remain unsold. A total of 704,916,000 shares have been sold for a total amount of HK\$25,897,379 sale proceeds. A table setting out the number of shares sold, the dates of transactions and the selling price received is annexed hereto as Annexure 1. The shares were sold within a range of HK\$0.0279/share and HK\$0.0749/share.

24. It is averred that the Plaintiff has suffered damages in the amount of HK\$128,347,247 which is calculated as follows:

Particulars for calculations

(a) The amount of Purchase Price should be calculated as follows:

Purchase Amount x the applicable Unit Price
(defined to mean a purchase price per share equal to 90% of the average of the Closing Trade Price during the Pricing Period).

The Purchase Amount is 926 million shares.

The Unit Price could not be determined as the Closing Trade Price during the Pricing Period had been artificially manipulated by the Defendant as pleaded in paragraphs 15, 16, 17 and 18 above.

(b) If the ELC Agreement had been performed, the entire 926 million shares would have been sold by the

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C	Defendant at or above HK\$0.20 per share.	C
D	Therefore, the Purchase Price payable to the Plaintiff would have been at least HK\$166,680,000.00 calculated as follows:	D
E	926,000,000 shares x HK\$0.20/share x 90% = HK\$166,680,000.00	E
F	(c) Damages should be calculated on the following basis:	F
G	It is averred that the period for calculating the Closing Trade Price should be the period before the Defendant commenced any default or manipulation,	G
H	i.e. from 09.02.2006 to 01.03.2006 inclusive, being the 15 consecutive Trading Days before the	H
I	Defendant commenced any default or manipulation.	I
J	(d) The average Closing Trade Price during the aforesaid period (09.02.2006 to 01.03.2006) is HK\$0.2348.	J
K	(e) Purchase Price payable by the Defendant	K
L	= Purchase Amount x application Unit Price x 90%	L
	= 926m shares x HK\$0.2348/share x 90%	
	= HK\$195,682,320.00	
M	(f) Damages = [Purchase Price] – [Total amount received by the Plaintiff] – [Allowance in respect of the unsold 5,400 shares]	M
N	(g) The Plaintiff has received:	N
O	(i) HK\$40,503,237.28 sum paid by Defendant	O
P	(ii) HK\$930,412.16 sum paid by Defendant	P
	(iii) HK\$25,897,379.00 sale proceeds obtained by the Plaintiff	
Q	Total: HK\$67,331,028.44	Q
R	(h) The amount allowed for the unsold 54,000 shares can be calculated by using the highest selling price of HK\$0.0749/share (see Annexure 1) = 54,000 shares x 0.0749/share = HK\$4,044.60	R
S		S
T	(i) Damages calculated on the above basis:	T
	HK\$195,682,320.00–HK\$67,331,028.44–	
U	HK\$4,044.60 = HK\$128,347,247.00	U
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25. The Plaintiff has received from the Defendant a sum of HK\$40,503,237.28 and a sum of HK\$930,412.016, which sums should be applied to set off any damages ordered to be paid by the Defendant.

26. The Plaintiff is entitled to claim interest on such sum awarded at such rate and for such period as this Court shall deem fit pursuant to sections 48 and 49 of the High Court Ordinance (Cap. 4).’

Measure of damages

16. The first ground of appeal relied upon by Mr. Westbrook SC and Mr. Maurellet, counsel for the defendant, is that the Master had not adopted the proper measure of damage.

Normal measure

17. *McGregor on Damages* (18th Ed) para 24—008 stated that,

‘The normal measure of damages is the contract price less the market price at the contractual time for acceptance. This represents what the seller must obtain to put himself in the position he would have been in had the contract been carried out, since he can sell the shares in the market. The authority for this measure is *Jamal v Moolla Dawood* in the Privy Council.’

18. In *A.K.A.S. Jamal v. Moolla Dawood, Sons & Co.* [1916] 175, the buyer defaulted in accepting shares from the seller. The seller did not dispose of the shares at the time of breach but only some time later. The plaintiff was able to obtain a higher price for the shares than if he was to sell them at the time of the breach.

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19. Lord Wrenbury at 179 stated that,

‘ In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships’ opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.’

Available market

20. The decision was clearly correct. As the normal measure is to be decided at the time of the breach, any subsequent increase in the price should be ignored. However, the normal measure of damages is only to be adopted if there is an available market. This is expressly recognized by *McGregor* at para 20—112 :

‘ The normal measure of damages, as stated in section 50(3) thereby incorporating the common law as stated in *Barrow v Arnaud*, is the contract price less the market price at the contractual time for acceptance. This represents the amount the seller must obtain to put himself in the position he would have been in had the contract been carried out, since he can sell the goods in the market. If, however, there is clearly no available market, then, consequential losses apart, the damages will be assessed at the contract price less the value of the goods to the claimant at the time of breach, which value is likely to be based, as in *Harlow and Jones v Panex (International)*, upon the price at which they are eventually sold by the claimant.’

21. Mr. Ronny Tong SC and Mr. Hingorani who appeared for the plaintiff, referred to *Thompson (W.L.) Ld v. Robinson (Gunmakers) Ld* [1955] 1 Ch. 177 which is an example of how damages are to be measured when there is no available market. Upjohn J (as he then was) at 187 held that,

‘ Had the matter been res integra I think that I should have found that an “available market” merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of.’

22. On the facts of the case, there was no available market and the plaintiff’s claim for loss of profit was allowed. Referring to section 50(3) of the *Sale of Goods Act* 1893 which set out the *prima facie* measure of damages of the difference between the contract price and market price, Upjohn J stated at 187 that,

‘even if I accepted Mr. Platts-Mills’s broad argument that one must now look at the market as being the whole conspectus of trade, organization and marketing, I have to remember that subsection (3) provides only a prima facie rule, and if on investigation of the facts one finds that it is unjust to apply that rule, in the light of the general principles mentioned above, then it is not to be applied.’

The plaintiff’s evidence on sale

23. In the present case the plaintiff at paragraph 54 of his 6th affirmation addressed the issue of the disposal of the shares,

‘ 54. After the Defendant filed and served its Defence and Counterclaim on 24th July 2006, it became clear to me that the Defendant would definitely not want to perform the ELC Agreement. I consulted my then legal advisers on what should be done and, I was advised that

I could make an application for summary judgment in respect of a special damage of HK\$40,503,237.28 (being the amount of payment into court made by the Defendant). The Bestway share price had been dropping: its closing price as quoted by HKSE on the last trading day in June 2006 was HK\$0.1700/share, that in July 2006 was HK\$0.1040/share, that in August 2006 was HK\$0.0730/share. Mr. Brown exhibited 2 charts in his affidavit filed on 7th December 2006 showing the prices of Bestway shares, true copies of which are now produced and shown to me marked "WRY-AH3". In order to mitigate my losses, from beginning of September 2006, I began to sell the Bestway shares in the market. I prepared a table at the material time showing the time and prices of shares (in Hong Kong Dollars) sold by me. There is now produced and shown to me a true copy of the contemporaneous table prepared by me together with its English translation marked "WRY-AH4". There are now also produced and shown to me marked "WRY-AH5" true copies of most of the statements generated by the various securities companies showing most of the sales together with a revised table *with a column indicating the page reference of the statements. According to my records and the aforesaid table:

- (a) A total of 705,096,000 Bestway shares were sold in the market.
- (b) The total amount of sales proceeds received was HK\$25,897,379.00.
- (c) The shares were sold within a range of HK\$0.0279 per share and HK\$0.0749 per share, with an averaged selling price of HK\$0.0367 per share.

* It should be noted that I have made a correction to the figure "6,594,000" in the first item of the table exhibited in "WRY-AH4".

24. This paragraph did not explain why the 700 million odd shares were only disposed of in September 2006 and not at the time of the plaintiff's acceptance of the defendant's repudiation on 23 March 2006 (when the plaintiff still had the third tranche of 302

million shares) or on 11 April 2006 (when the defendant returned the other shares).

25. The plaintiff's case is that it had lost a bargain as a result of the breach by the defendant and there was no available market which would cause the application of the normal rule for measuring damages. Mr. Tong supported his case by reference to the terms of the ELC Agreement and evidence concerning the market after the breach. The distinct feature of the ELC Agreement between the parties is that the plaintiff agreed to dispose of a substantial amount of shares to a financial investor instead of selling them in the market. The consideration which would have to be paid by the defendant if the agreement was performed was an extremely large sum of \$166,680,000 based on the contractual rate of 18 cents. Under the ELC Agreement, while the defendant had the right to on-sell the shares, it could not sell on each trading day more than 20.8 million of the shares in respect of the first and second tranches of shares and also could not sell them at below 20 cents per share. This restriction was clearly intended to prevent the price of the shares from being depressed which would directly affect the ultimate price to be received by the plaintiff from the defendant under the ELC Agreement.

26. The evidence before the Master also showed that the defendant had not complied with the restriction both in terms of quantity and price. This was based on the defendant's admission as evidenced by the 'Shareholding Disclosure' filed by the defendant with the Hong Kong Exchanges and Clearing Limited ('the Exchange'). There was also evidence before the Master

which showed on its face that on the day of the defendant's disposal of 54 million shares in the market on 2 March 2006, there was a drop of 2 cents of the price of the shares from the previous price of 20 cents per share. Further, according to tables prepared by the Exchange in respect of the trading volume and share price of Bestway shares between November 2005 and November 2006, after 23 and 24 March 2006 when about 185 million and 101 million shares were traded respectively, the volume became progressively reduced and at substantial amounts. About 49 million and 44 million shares were traded on 27 and 28 March 2006, then it slowly reduced to below 20 million per day on most of the trading days. The price per share also progressively slid down from over 20 cents to below 20 cents from 26 April 2006 onwards, reaching 3 cents on 13 September 2006.

27. The evidence on its face showed that the market could not sustain a massive selling off of the 302 million shares retained by the plaintiff on 23 March 2006 when it accepted the defendant's repudiation or the total of 700 odd million shares then in the hands of the plaintiff on 11 April 2006. The plaintiff had said that 352,800,000 shares represented about 6.86% of the issued share capital of Bestway. The plaintiff was then left holding over 700 million shares which was double that figure. One could well imagine the implication on the price of the shares if over 13% of the issued capital of Bestway was required to be off loaded in a market over a short period of time.

28. It is obvious that if the defendant had raised the issue of the proper measure of damages at the time of the assessment, the

plaintiff would have adduced further evidence on the issue of available market and the measure of damages. The defendant had not done so and the question now is whether the defendant is entitled to do so at this stage. In my view it is not.

Onus on the defendant to challenge to put forward a positive challenge

29. Order 18 Rule 12(1)(c) of the *Rules of High Court* provides that

‘ 12.—(1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) –

(b) –

(c) where a claim for damages is made against a party pleading, particulars of any facts on which the party relies in mitigation of, or otherwise in relation to, the amount of damages.’

30. By this Order it is incumbent on the defendant, in order to be more informative about its defence to state the grounds on which it intends to contest the amount of damages by giving particulars of all the facts on which it relies to support any such ground as, for example, in mitigation of or otherwise in relation to, the amount of damages. The burden is cast on the defendant to plead and prove the facts it relies on to support any positive case to contest the amount of the damages claimed. In accordance with the policy of openness in pleading, the rule is expressed in general terms, so that the rule will apply to a plea in mitigation, and also

apply to any ground on which it is open to the defendant to contest the amount of damages.

31. The defendant had taken a considered position not to take part in the assessment of damages. In other words it had chosen not to put forward a positive case to contest the measure or the amount of damages claimed by the plaintiff. It had also decided not to comply with the condition which would allow it to set aside the interlocutory judgment and have the issues tried afresh. There was evidence before the Master which would enable him to accept the damages claimed by the plaintiff. In the circumstances it is not open to the defendant to argue that the Master had not adopted the proper measure of damages.

Contractual price

32. The defendant also contended that the plaintiff had not relied on the contractual formula under the ELC Agreement but had instead chosen a different formula. In my view the defendant is faced with the same obstacle that I have just discussed. In the circumstances it is not necessary for me to discuss the plaintiff's reliance of the principle which precludes a wrongdoer taking advantage of his own wrong, whatever the contract may say, as affirmed by the Court of Final Appeal in *Kensland Realty Ltd v. Whale View Investment Ltd & Another* (2001) 4 HKCFAR 381.

Conclusion

33. Accordingly the appeal is dismissed with a provisional costs order against the defendant.

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Hon Fok JA :

34. I respectfully agree with Cheung JA's judgment and have nothing to add.

(Robert Tang)
Ag. Chief Judge,
High Court

(Peter Cheung)
Justice of Appeal

(Joseph Fok)
Justice of Appeal

Mr. Ronny Tong SC and Mr. Jeevan Hingorani, instructed by Messrs Alvan Liu & Partners, for the Plaintiff

Mr. Simon Westbrook SC and Mr. Jose-Antonio Maurellet, instructed by Messrs Gall, for the Defendant