CACV294 /2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL No. 294 of 2003

(ON APPEAL FROM HCCW 920/2002)

IN THE MATTER of HI-TECH PRECISION PRODUCTS LIMITED

and

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

BETWEEN:

HI-TECH PRECISION PRODUCTS LIMITED Appellant

and

SOUNDWELL FAR EAST LIMITED Respondent

Before: Hon. Woo V-P and Yuen JA in Court

Date of hearing: 16 January 2004

Date of Judgment: 25 May 2005

JUDGMENT

Hon. Woo V-P:

1. I agree with the judgment of Yuen JA. The appeal is therefore dismissed with an order nisi that the appellant bears the respondent's costs of this appeal.

Hon. Yuen JA:

2. This is an appeal from a decision of Hon. Kwan J in respect of the costs of winding-up proceedings which were eventually discontinued. This being a costs appeal, leave was required and leave was granted by Hon. Le Pichon JA on 29 September 2003.

Background

3. Soundwell Far East Limited ("the Petitioner") had presented a petition to wind up Hi-Tech Precision Products Ltd ("the Company") on 14 August 2002. The Company filed an affirmation in opposition on 5 November 2002, the Petitioner then filed an affirmation in reply on 11 December 2002, and on 3 January 2003, the Company filed another affirmation in answer to the Petitioner's affirmation in reply.

4. On the same day, 3 January 2003, the Company applied to strike out the petition on the ground that it was scandalous, frivolous or vexatious or was otherwise an abuse of the process of the court, as there was a bona fide disputed debt. The summons was due to be heard on 25 June 2003.

5. Two days before the strike-out summons was due to be heard, the Petitioner sought leave to discontinue the petition. This was not

opposed by the Company and obviously, the strike-out summons also became unnecessary. The only issue left between the parties, which was decided by the judge on 25 June 2003, was the question of the costs of the discontinued proceedings.

Kwan J's order

6. The judge

   (a) made no order as to costs from the presentation of the Petition up to 3 January 2003 (the date of the Company's 2nd affirmation), and

   (b) ordered the Company to pay the Petitioner's costs after 27 January 2003 (the date of a Calderbank letter), with the exception of the costs of issuing the summons for discontinuance and the costs of an affirmation.

   There were presumably no costs incurred between 3 January 2003 and 27 January 2003.

7. On appeal, the Company seeks an order that the Petitioner bear all its costs.

Principles

8. It is well-established that appellate courts are reluctant to interfere with costs orders made at the discretion of the judge. It matters not whether the appellate court would have made a different order had it been dealing with the matter at first instance. The appellate court would not interfere with the judge's costs order unless it was shown that the judge had failed to exercise the court's discretion, or

exercised it upon a false principle, or did not exercise it judicially (*Choy Yee Chun v Bond Star Development Ltd* [1997] HKLRD 1327) or the exercise of discretion was demonstrably flawed (*China Venturetechno International Co Ltd v New Century Chain Development Co Ltd* [1996] 2 HKLR 18). Having carefully considered the submissions made on behalf of the Company, I do not think that those high thresholds have been crossed.

9. There was no challenge in principle by Counsel for the Company to the judge's order regarding the post-*Calderbank* costs (save as discussed in para.29 below). The costs order was attacked globally.

Discussion

10. The judge considered rightly that the test was whether the Petitioner should reasonably have known (until the date of the Company's 2nd affirmation) that the Company had a bona fide dispute on substantial grounds.

11. It is clear from the judge's decision, which went into some detail, that in her view the Petitioner could not reasonably be expected to accept that the Company had a bona fide dispute on substantial grounds until 3 January 2003, when the 2nd affirmation of Maisy Lui was filed on behalf of the Company in which she said that a confirmation of an agreement she had made was a mistake.

12. At the heart of the dispute was Debit Note No.001201 ("the Debit Note") and the dispute centred on the appropriate calculations for goods and services charged in the Debit Note.

13. The Petitioner had a "trump card" - a letter dated 6 March 2001 signed by Miss Lui, the Operations General Manager of the Company, in which she confirmed that a specific payment ($755,000 odd) would be settled in full. That payment included the Debit Note which was charged applying the Petitioner's calculation.

14. The trump card letter (if I may call it that for short) followed Miss Lui's agreement on the telephone on 12 February 2001 to pay the $755,000 figure, an agreement which was recorded in writing in a letter dated 26 February 2001 sent by the Petitioner to the Company, which the Company did not challenge.

15. The trump card letter, sent to the Petitioner some 3 weeks after the telephone agreement, was prima facie evidence that the Company had accepted the Petitioner's calculation. The admission of liability to pay that sum could not be more clear or unequivocal.

16. Subsequently in a letter dated 28 March 2001 in reply to the Petitioner's solicitors' letter of demand, the Company did indicate that the $755,000 figure in the letter of demand "appears to be incorrect according to our [the Company's] books". The Company said that it would do a "detailed checking" and revert by 6 April 2001. But the trump card letter was not disclaimed or explained away.

17. The Company did not revert to the Petitioner by early May 2001, so the Petitioner commenced High Court proceedings for payment of the

$755,000 figure. Before the Company filed a Defence, the proceedings were settled by its payment of part of the sum, with two outstanding sums (including the one on the Debit Note) left to be "negotiated as separate issues", the Company having asked for time to investigate.

18. However the Company did not revert to the Petitioner, so the Petitioner served a statutory demand. The Company then sent a cheque for one debit note less about $1,000, leaving the Debit Note unpaid. The Petition was then presented.

19. The Company's 1st affirmation in opposition to the Petition (which was also made by Miss Lui) disputed the debt on the ground that the Petitioner was "attempting to unilaterally vary the prices". Although Miss Lui said in this affirmation that she had told the Petitioner's representative that there was "no evidence" that the sum claimed by the Petitioner was payable, *at no stage did she explain why then she had made the unequivocal admission of liability* in the February conversation or followed it up in writing in the trump card letter, which, as noted above, were prima facie evidence that the Company had accepted the price as calculated by the Petitioner.

20. Denials of liability, however much repeated, do not assist a company facing a winding-up petition as the test is whether objectively it had a bona fide dispute *on substantial grounds.* In the present case, until the trump card letter was credibly disclaimed or explained away, it was open to the judge to hold that the Company had no bona fide

dispute on substantial grounds and was simply delaying the evil day.

21. It was not until Miss Lui made a 2nd affirmation on 3 January 2003 that she said that "due to the constant pressure from the Petitioner's repeated demands/requests for payment, I made the mistake of saying that the Company would settle their claim for HK$755,209.72 based on the Company's only available records at that time which were invoices and debit notes all issued by the Petitioner".

22. The judge considered that it was not until this juncture that the Petitioner should reasonably have accepted that there was a bona fide disputed debt on substantial grounds. Although the language of that statement - referring to "the mistake of *saying*" that the Company would pay the $755,000 figure - did not even explain why Miss Lui *wrote* the trump card letter more than 3 weeks after the telephone agreement and more than 1 week after the Petitioner's letter recording it, the judge was prepared to take a robust view and held this affirmation to be the cut-off date after which the Petitioner should have known that the Company had a bona fide disputed debt on substantial grounds. In my opinion, the judge was entitled to take this view.

23. On appeal, Counsel for the Company submitted that the judge should have found that the trump card letter was not an admission of liability. With respect, the judge was entitled to find (and in my view was clearly right in finding) that it was a clear and unequivocal admission of liability to pay the $755,000 figure.

24. Counsel also submitted that in any event the admission in the trump card letter had been retracted, first by subsequent denials of liability by the Company, and secondly when the High Court proceedings were settled in the way they were.

25. The judge was entitled to look at the quality of the denials of liability. The Company's denials of liability (at least initially) were hardly confident. In September 2001, Miss Lui told the Petitioner's director that "*possibly*" the Petitioner's calculations were wrong. The Company was "*unable to ascertain if* the amounts claimed by [the Petitioner] in their [outstanding two debit notes] were *in fact due and payable*".

26. But in any event, denials of liability, even couched in stronger language later, were not enough. The Company had to deal with the force of the trump card letter head-on. The trump card letter was emphasised in the Petition itself as an admission of the debt (para. 6), although the Petitioner also had other evidence in support of its claim. But until there was anything from the Company which credibly explained away the trump card letter, the Petitioner was entitled to hold onto it as prima facie evidence of the Company's debt, or to put it another way, that there were really no substantial grounds to back up the Company's dispute of indebtedness. The Company did not deal with this until Miss Lui's affirmation on 3 January 2003 deposing to her "mistake".

27. Counsel for the Company also placed reliance on the settlement of the High Court proceedings as indicating that the Petitioner must have known that the Company had a bona fide disputed debt on substantial grounds.

28. In my view, the judge could not be faulted for rejecting this contention. There was nothing expressed or necessarily implied in the correspondence surrounding the withdrawal of the High Court action in which the Petitioner had accepted that there was a bona fide disputed debt on substantial grounds on the Debit Note. A party may decide to withdraw costly High Court proceedings for a variety of reasons. The Company had paid part of the sums claimed and had asked for time to look into the two outstanding debit notes. In fact, it later paid one of the two debit notes less $1,000. That left the Debit Note, in respect of which the Petitioner could confidently have relied on the trump card letter if the Company were to dispute the calculations should negotiations break down. That was in effect what Chow Chun Man, a director of the Petitioner, said in para. 10(b) of his affirmation of 11 December 2002, when he explained why the Petitioner discontinued the High Court proceedings to allow the Company to verify its records.

29. Finally, Counsel for the Company submitted that the judge had erred in failing to apportion costs as the Petitioner was eventually prepared to accept $1,000 less on the other debit note. The judge was aware of the initial squabble over this small difference and in my view, she was entitled to ignore this paltry sum in her overall assessment of the

situation (para. 31 of the judgment).

30. In the particular circumstances of this case as discussed above, I cannot see how it can be said that the judge had failed to exercise the court's discretion, or exercised it upon a false principle, or did not exercise it judicially, or that the exercise of discretion was demonstrably flawed, such as to justify an appellate court interfering with her discretion over costs.

Order

31. In my view, the appeal should be dismissed with an order nisi that the appellant (the Company) bear the respondent's (the Petitioner's) costs.

(K.H. WOO) (MARIA YUEN)

Vice-President Justice of Appeal

Mr Jeevan Hingorani instructed by Alvan Liu & Partners for the Petitioner (Respondent)

Mr William M F Wong instructed by Angela Wang & Co for the Company (Appellant)