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HCCL 16/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

COMMERCIAL ACTION NO. 16 OF 2006

BETWEEN

WANG RUIYUN Plaintiff

and

GEM GLOBAL YIELD FUND LIMITED Defendant

Before: Hon Stone J in Chambers (Open to Public)
Date of Hearing: 14 September 2010
Date of Judgment: 27 October 2010

J U D G M E N T

This application

1. There is before the court a summons dated 26 August 2010 issued by the defendant to set aside interlocutory default judgment, dated 6 August 2009 against the defendant as to liability, together with a consequential order that damages be assessed, with costs to be taxed if not agreed.

2. Damages subsequently were so assessed by Master de Souza, wherein by Order dated and entered 9 June 2010, it was adjudged that the defendant do pay to the plaintiff the sum of HK$128,351,291.56, together with costs of the assessment on a full indemnity basis, to be taxed if not agreed.

3. The factual background to this dispute is detailed in a judgment of this court dated 6 March 2007 pursuant to the plaintiff's application for summary judgment, wherein it was ordered that the sum of HK$40,503,237.28 (as then had been paid into court by the defendant), together with accrued interest thereon, be paid out to the plaintiff, and is recited once more in the judgment as to the assessment of damages by the learned Master.

4. In outline, the plaintiff in this action, Mr Wang Ruiyun, a mainland investor and resident of the PRC, was in dispute with the defendant, Gem Global Yield Fund Ltd, a company incorporated in the West Indies and a member of the Global Emerging Markets Group, on the basis that the defendant fund had been in breach of its contractual obligations under a 'put option', whereunder the defendant had had the option of acquiring custody and authority to purchase/onsell tranches of the plaintiff's shareholding in a company known as Bestway International Holdings Ltd, but, so alleged the plaintiff, had failed to perform its side of the bargain; in response the defendant fund was alleging, *inter alia*, 'market rigging' to which the plaintiff was alleged to have been privy: see the details outlined in paragraphs 5-17 of the Order 14 judgment dated 6 March 2007, resulting in the court ordering that the sum of HK$40.5 million odd as paid into court by the defendant to be paid out to

the plaintiff; upon this summary judgment application the court further ordered that an additional sum of HK$930,412.15 (see paragraphs 77-81 of the judgment) be paid by the defendant to the plaintiff, which sum I am informed also now has been paid by the defendant.

5. However, these amounts did not represent the entirety of Mr Wang's claim against this defendant fund.

6. By re-amendment of his pleaded claim (at paragraphs 21- 24 thereof), such re-amendment being dated 18 May 2009, Mr Wang averred that the fund also owed him in damages the sum of HK$128,347,247.00, and by paragraph 25 thereof accepted that the respective sums of HK$40,503,237.28 and HK$930,412,016 - namely, the fruits of the summary judgment application - should be set-off against this sum as thus claimed by re-amendment.

7. The fact of this re-amendment, and the date thereof, had significant bearing on the argument in this application, the parties being represented by Mr Simon Westbrook for the plaintiff, and Mr Ronny Tong, leading Mr Jeevan Hingorani, for the defendant.

Procedure prior to the entry of default interlocutory judgment

8. Procedurally this case was complicated by the fact that, prior to the re-amendment of the plaintiff's Statement of Claim, by Order of this court dated 13 January 2009, Messrs Lovells, the solicitors hitherto acting for the defendant, had obtained the permission of the court to cease to act.

9. The Certificate of Service of Order for the Withdrawal of Solicitor Ceasing to Act was served on the defendant fund, whose offices are situate in Charlestown, Nevis, West Indies, by prepaid ordinary airmail, and on Messrs Alvan Liu & Partners, solicitors for the plaintiff, at their offices in Hong Kong. Thereafter, all communications to the defendant fund purportedly were 'served' by those acting for the plaintiff in like manner, namely by airmail to the defendant's Charlestown address.

10. Prior to Messrs Lovells ceasing to act, by Order of the same day, that is, 13 January 2009, this court had heard an application *inter partes* for specific discovery by the plaintiff, and had made an order that within 14 days, the defendant serve on the plaintiff a supplemental list of documents specified in the Schedule attached to the summons, and that this supplemental list was to be verified by affidavit, with inspection to follow within 7 days of service of such supplemental list; at that hearing the representative of Lovells who was present indicated that he had no instructions on the substance of the plaintiff's specific discovery application.

11. Immediately *after* making that order this court entertained Lovells' application to come off the record, and ultimately it was the non-compliance by the defendant with the specific discovery order as then made that was to result in the default judgment which now is sought by the defendant to be set aside.

12. A summons dated 30th April 2009 by the defendant seeking such judgment in default was adjourned for 14 days by order dated 22 July 2009, it being ordered that the matter be relisted for hearing at

9.30 am on 6 August 2009, and that at such hearing the defendant do appear and show cause why judgment should not be entered in favour of the plaintiff in terms of the Re-Amended Statement of Claim.

13. At this stage the court was concerned that, with the departure of its Hong Kong solicitors, that the defendant should be afforded an additional opportunity to make such representations as it wished.

14. No such appearance by or on behalf of the defendant materialized, and thus, on 6 August 2009 Interlocutory Judgment formally was entered against the defendant, the Order of that date pronouncing that the defendant having failed to appear to show cause why judgment should not be entered against it, judgment on liability was to be entered against the defendant in favour of the plaintiff, with damages to be assessed by a Master at a date and time to be fixed, together with costs of the application.

15. As earlier indicated, Master de Souza proceeded formally to assess such damages, and thereafter the defendant issued its application of 26 August 2010 to set aside this interlocutory default judgment on the basis that the plaintiff failed to obtain an order pursuant to Order 11, rule 9(4), RHC, for service out of the jurisdiction of any summons, notice or order issued, given or made in these proceedings.

16. In addition to the application so to set aside, if such be successful the defendant further sought an extension of time to comply with the hitherto extant Order for specific discovery.

17. I further record, for the sake of completeness, that the defendant has issued a Notice of Appeal dated 7 July 2010, wherein if and in so far as this application to set aside the default judgment be unsuccessful, the defendant intends to appeal against the assessment of damages of Master de Souza of 9 June 2010, and therein to seek an order that this judgment be set aside, and that damages be re-assessed.

18. For present purposes there is no necessity to elaborate upon the grounds contained in that Notice of Appeal, save to note that the gravamen of the appeal as now mounted is that within such assessment errors of law had occurred, in particular that the learned Master had failed to apply the basic principle that damages are to be assessed at the date of breach, and had failed properly to consider the issue of mitigation of loss.

19. It follows that *if* and in so far as the defendant now is successful in its present application to set aside the default judgment underpinning that assessment, the necessity for such appeal against the damages assessment falls away, and no doubt would be withdrawn by consent.

Evidence in support of the present application

20. This application to set aside such default judgment, in the monetary terms as now assessed, is backed by the 3rd Affidavit of one Mr Chris F Brown, sworn in New York on 7 August 2010, his earlier affidavits having been primarily concerned with the defences available to his client in opposition to the plaintiff's Order 14 application; in addition, a

4th affidavit of Mr Brown, sworn on 13 September 2010, was handed up to the court the following day at the time of argument.

21. Mr Brown's 3rd affidavit is of some 15 pages. It outlines the background of the GEM Group and that of the defendant company, summarises the claims as made against the defendant, provides a potted procedural history, with specific reference to the defendant commencing to act in person, the fact of the specific discovery application and the plaintiff's application for a consequent 'unless' order and the plaintiff's order to re-amend the existing Statement of Claim; thereafter it rehearses the grant of interlocutory judgment on liability and the assessment of damages as occurred, and at Section E thereof deposes to the factual reasons for default of the Orders as made by the court, which default in itself led to the default judgment of which complaint presently is made.

22. This affidavit further asserts the fact that this was an 'irregular' judgment, given the plaintiff's failure to comply with Order 11, rule 9(4), in that absent leave so to do the default application was *not* properly served on the defendant after Messrs Lovells' departure from the record, and at Section G goes on to depose to the residual merits of the defendant's case.

23. Within the context of the present application to set aside that which is accepted by Mr Tong SC to be an 'irregular' judgment, undoubtedly the most significant part of this lengthy affidavit by Mr Brown is Section E, at paragraphs 29-38 thereof, which deposes to the reasons why default judgment was permitted to be entered.

24. This affidavit speaks for itself.

25. The thrust of the reason as put forward is contained within paragraphs 32-35, which I quote in terms:

> "32. After the return of the onsold shares, and the satisfaction of the Plaintiff's claims for special damages (representing the proceeds of the shares sold), the background circumstances surrounding and leading to the present proceedings led me to believe that the Plaintiff would not proceed to take this matter to trial as the plaintiff did not appear to have any other damages suffered at all (see details at Section G below).
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> 33. Solely due to the mistaken belief on the part of the Defendant, and the ignorance of the seriousness of the outcome of such a mistake, the Defendant inadvertently chose not to participate in the proceedings after 15 January 2009 and verily believed that the Plaintiff would 'walk away' because the Plaintiff already had been paid the proceeds of the Transaction [ie. the proceeds of the plaintiff's shares as actually had been sold by the defendant] and had returned to him the unsold shares. Accordingly, the Defendant did not see how the Plaintiff could be entitled to anything further. Given the fact that the Defendant paid no heed to any Court documents after 15 January 2009, it has all along been unaware of the contents of the Court documents in particular the Plaintiff's application for an Unless Order, the Order of 22 July 2009 and the Judgment subsequently entered, until June 2010. It turned out that the Plaintiff did not walk away but in fact subsequently obtained an Interlocutory Judgment on Liability, and thereafter a Final Judgment on Damages.
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> 34. GEM, as an international investment group with worldwide investments, and the Defendant within the GEM group, are both serious and committed companies. We fully appreciate that orders made by this Honourable Court must be obeyed, and obedience to Court orders is the foundation on which its authority is founded. The Defendant should not have ignored or disobeyed any Court order and will not do so in future.

> 35. Upon realizing it was wrong in its belief that the Plaintiff would not seriously proceed with the matter, the Defendant sought urgent legal advice to see how the Defendant could immediately remedy the situation as soon as it was notified of the judgment dated 9 June 2010 on 11 June 2010. For the avoidance of doubt, a Notice of Appeal against the Judgment dated 9 June 2010 was also issued on 7 July 2010 under the case no. CACV 147 of 2010…" (Interpolation added)
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> ……..

26. Thereafter the affidavit asserts Mr Brown's belief that all relevant documents have been disclosed, and that further inquiries are taking place from third party brokers to ensure that this is indeed the case. The point also is made that any injustice or prejudice to the plaintiff can be cured by costs, and paragraph 38 of this Section offers "an unreserved apology" to the court for what has occurred, and a request for leave to comply out of time with the court's orders.

The argument

27. The parameters of the argument were predictable, albeit expertly presented by senior counsel on either side of the adversarial fence.

28. For the defendant/applicant, Mr Westbrook SC stressed that there was and had been no intention whatever to "ignore or flout" the 'unless order', and hence that such failure to comply therewith should not be regarded as "contumelious"; thus, if the court were to accept that proposition, the action should be permitted to proceed, citing Keith J (as he then was) in *Chow Kai Sang v Toi Samuel* [1996] 4 HKC 330, at 337F. He

further noted that no leave had been obtained to serve the summonses out of the jurisdiction, and that accordingly the judgment was irregular.

29. Mr Westbrook submitted that it was significant in the present case that the plaintiff's allegation of loss in terms of the figure of HK$128 million odd had only been added to the claim by re-amendment in May 2009 *after* the defendant's solicitors had ceased to act and the defendant was unrepresented, and that prior to 15 January 2009 the defendant actively had defended this action at a stage when there was "no hint of any other claim by the plaintiff".

30. He accepted that it was unfortunate that the plaintiff had adopted the stance that undoubtedly it had taken towards this litigation, namely that in the erroneous belief that "the litigation was worthless" the plaintiff had taken a view and had decided to ignore the proceedings in the belief that they would simply go away and die a natural death; what clearly had not been anticipated, he said, was that after the departure from the record of Messrs Lovells, that the plaintiff belatedly would re-amend the Statement of Claim to "conjure up" an entirely fresh claim for HK$128 million, and that subsequent documents as had been sent to the plaintiff "simply went unread, even if delivered to the West Indies' address".

31. Counsel further accepted that these explanations did not entirely excuse the defendant's inaction, but suggested that such was at the least understandable in the particular circumstances, and that in no sense was any disrespect intended to be shown to the court or had there been any intention to "flout" court orders.

32. Mr Westbrook also complained about the content of the judgment whereby damages of HK$128 million odd had been assessed, maintaining that crystallization of any loss on the plaintiff's unsold shares should have been on the basis of the price at the date of the defendant's alleged breach of its contractual obligations, namely March 2006, and that as a consequence the figure now awarded in default damages against his client was "wildly inflated".

33. After reviewing the service "irregularities", the rules of court and relevant English case law, usefully cited in the judgment of Kwan J (as she then was) in *BOC v Chow Tat Wah*, unrep., judgment dated 26 February 2002, wherein her ladyship had been keen to emphasise that the judicial discretion to cure an irregularity "should be exercised with caution where service out of the jurisdiction is concerned", Mr Westwood invited this court to set aside the existing default judgment, and to extend the time for complying with the 'unless order' in order that the action should proceed as if the default had not taken place.

34. His parting shot was to suggest that in order to mitigate the effects of the defendant's own failings, the defendant proposed and would submit to orders from the court as to wasted costs, and to adhere to a strict timetable for the fixing of trial dates wherein "the thorny issues" of liability and quantum would be able to be properly ventilated.

35. Unsurprisingly, Mr Tong SC was unreceptive to Mr Westwood's placatory submissions.

36. He expressed indignation at the gall of the plaintiff in the application as now made and the content of the affidavit in support, made it abundantly clear that his position was that the plaintiff "intentionally and contumeliously" had ignored the court's process, in this case the Order dated `13 January 2009, and that the defendant had intimated "scant regard" for its legal obligations in this litigation, and submitted that the court should not exercise its discretion in favour of the defendant's application on the basis of the evidence now put forward.

37. Alternatively, if and in so far as the court were to consider allowing the defendant back into litigation upon which it already had turned its back by ignoring the letters as sent to, and received at, the defendant's office in the West Indies, then Mr Tong requested that stringent conditions be imposed as a basis on which to set aside the default judgment, and in giving time to the defendant to comply with the proper future conduct of these proceedings, including the extant order for specific discovery.

38. In his written skeleton argument leading counsel pointed out that the defendant and Mr Chris Brown had in the past evidenced "scant regard for court process", that in addition to non-compliance with the order for specific discovery, earlier there had been breach of an injunction granted on 23 March 2006, non-compliance with an order dated 6 March 2007 to file and serve an Amended Defiance, this failure in itself leading to issuance of an 'unless order' dated 3 March 2008, and in addition there had been non-compliance of a Consent Order dated 11 June 2008 directing the exchange of witness statements.

39. He also attacked Mr Brown's credibility and *bona fides* in his affidavit evidence, noting that Mr Brown admitted that he had thought that the plaintiff's claim would "go away" and so deliberately had left court documents "unread", he criticized the assertion that the defendant had a good defence in terms of 'market rigging' and forgery, given that this court by its judgment of 6 March 2007 already had struck out the 'market rigging' defence, from which decision there had been no appeal, also pointing out that the so-called 'forgery' allegation itself never had found its way into the pleadings, and emphasised that in any event the defendant was entitled to pursue its extant appeal against the assessment of damages as handed down by Master de Souza.

40. Mr Tong also stressed that whilst the defendant sought to set aside the judgment and consequent Order on the ground of irregularity pursuant to the provisions of Order 2, rule 2 RHC, the irregularity being the plaintiff's failure to obtain leave to serve out under Order 11, rule 9, the law was that such an irregularity did *not* nullify the proceedings, nor any step, document, judgment or order therein, although they may be set aside.

41. In this context he pointed to the fact that, the 'irregularity' apart, it was clear (and indeed was not disputed) that the defendant had had notice of the documents for which leave to serve out had not formally been obtained, and that in the commentary in the White Book (at para 2/1/2), the following commentary appears:

> "Defective service of proceedings, however gross the defect and even a total failure to serve, where the existence of proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the exercise of discretion under O.2 r.1"

In this connection, Mr Tong relied also on the authority of *Boocock v Hilton International [1993] 1 WLR 1065*, and in particular the observations of Neill LJ, who therein had referred to the decision in *Benson Ltd v Barbrak Bank Ltd [1987] AC 597*, in order to counterbalance the defendant's reliance on *Leal v Dunlop Bio-Processes International Ltd. [1984] 1 WLR 874.*

42. Mr Tong concluded his submission by observing that the history of this case indicated that the defendant consistently had ignored orders of the court, culminating in the Order of 13 January 2009, and the subsequent Notice of Hearing dated 1 June 2009 requiring the defendant to attend court. He also observed that letters from the plaintiff's solicitors to the defendant dated 20 May 2009 and 9 July 2009 in themselves did not require leave, and suggested that in the circumstances it was "inconceivable" that the defendant truly had believed that the court documents of which it admitted it had had notice simply (and safely) could be ignored, and thus that its conduct demonstrably had been both "intentional" and "contumelious".

43. Mr Tong accordingly maintained that the defendant singularly had failed to discharge the burden that lay upon it to convince the court to set aside the judgment and to exercise its discretion in the defendant's favour.

Decision

44. I confess that the more that I looked at this case, the more I was discomfited by the apparently wholly cavalier attitude of the

defendant - in his brief and belated 4th affidavit Mr Brown refers in particular to paragraphs 33 and 35 of his 3rd affidavit, and again confirms "that the Defendant paid no heed to any Court documents after 15 January 2009" - which documents undoubtedly it had received, and correspondingly the more difficult I found the exercise of fairly weighing the balance and in effecting an appropriate exercise of the court's discretion.

45. In the circumstances I have to say that this was a pretty close-run thing, and I wish to observe that Mr Brown's statement (at paragraph 33 of his 3rd affidavit) that the defendant "inadvertently chose" not to participate in the proceedings after 15 January 2009 manifestly failed to strike a sympathetic chord; to the contrary, the decision to 'walk away' demonstrably was entirely '*ad*vertent', since at bottom what effectively he is saying is that this was a forensic miscalculation because the defendant simply had failed to appreciate the seriousness of its actions, and deliberately had remained unaware of the contents of the court documents as sent to it after January 2009 until, says Mr Brown, June 2010.

46. However, difficulties of evaluation apart a decision one way or another there must be, and after carefully weighing everything in the balance, and not least because in principle I am unenamoured by default judgments, and because the plaintiff's significant re-amendment indeed *did* come relatively late in the day, I have decided to exercise my discretion in the plaintiff's favour, but at the same time to impose a term with which the plaintiff must comply if it is to have this judgment - and the consequential damages assessment - formally set aside.

47. In this connection I note that this was Mr Tong's 'fall-back' position (skeleton argument, para 24) as an alternative to his preferred option of outright dismissal of the defendant's application, and that on behalf of the defendant Mr Westbrook also had trailed his coat as to a possible imposition of conditions (skeleton argument, para 47(5)) if ultimately that was what would be required to get his client home.

Order

48. It follows from the foregoing that the Order of this court on this application will be in these terms:

(i) That the default judgment dated 6 August 2009, and the assessment of damages consequential thereon dated 9 June 2010, be set aside upon compliance by the defendant herein on condition that the defendant do pay into court within 28 days from the date hereof the sum of HK$60 million (being approximately 70% of the plaintiff's *net* residual claim), such sum to be held in an interest-bearing account, alternatively that such sum as aforesaid be furnished by means of a first class bank guarantee in terms acceptable to the plaintiff;

(ii) Absent compliance with such condition as aforesaid (or compliance pursuant to judicial extension of the time limit as aforesaid) the default judgment entered by Order dated 6 August 2009, and the assessment of damages consequent thereon, entered by Order dated 9 June 2009, do stand;

(iii) That in the event of compliance with this Order, and with the payment into court as aforesaid, application be made by the plaintiff within 14 days of the date of such compliance for directions for the further conduct of this litigation, including an extension of time with which to comply with the extant specific discovery order;

(iv) There be liberty to apply as to the terms of this Order.

Costs

49. This has been an unedifying application which has been necessitated solely by the defendant's wholly advertent inaction.

50. In the circumstances, therefore, it seems appropriate that the defendant be subjected to a stringent costs' order as follows:

That the defendant do pay to the plaintiff the costs of and occasioned by and otherwise arising from this application, including the costs of the hearing on 14 September 2010 (which is certified as fit for two counsel), such costs (unless agreed) to be quantified on a gross sum assessment by a Master upon a common fund basis, the payment of such costs as thus assessed to be made to the plaintiff (or his solicitors) within 21 days of the date of such assessment.

(William Stone)
Judge of the Court of First Instance
High Court

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

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