HCA 105/2021
[2022] HKCFI 3477

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

ACTION NO 105 OF 2021

BETWEEN

EVERGLORY ENERGY LIMITED (COMPANY REGISTRATION NO. 1794202) (IN LIQUIDATION)	1st Plaintiff
REMEDY ASIA LIMITED	2nd Plaintiff

and

SHIH-HUA INVESTMENT CO., LIMITED	Defendant

Before: Deputy High Court Judge Le Pichon in Chambers (by paper disposal)

Date of Plaintiffs' Written Submissions: 1 November 2022

Date of Defendant's Written Submissions: 4 November 2022

Date of Plaintiffs' Written Reply Submissions: 7 November 2022

Date of Decision: 15 November 2022

D E C I S I O N

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1. These are applications by the plaintiffs and the defendant to vary the costs order *nisi* made in paragraph 61 of my Decision dated 19 October 2022 ("the Decision") following the defendant's successful appeal from the order of Master Lam dated 31 May 2022. The order *nisi* made was of costs in favour of the defendant with certificate for counsel,

such costs to be summarily assessed and payable forthwith ("the costs order").

Background

2. The full background is set out in the Decision to which reference should be made.

3. In summary, on the plaintiffs' application by summons dated for judgment dated 4 February 2022 ("the February summons")

(A) on admissions, pursuant to O.27, r 3 in respect of both claims; and

(B) under RHC O.14 r 1, in respect of their claim for (i) US $2,973,187.36 for unpaid share capital ("the share capital claim"); and (ii) a loan of US $3 million ("the loan claim"),

Master Lam (A) dismissed the plaintiffs' claim made pursuant to O.27; and (B) on the O.14 application granted (i) summary judgment for the share capital claim; and (ii) conditional leave to the defendant to defend the loan claim.

4. The defendant's appeal on the O.14 application was allowed, the court granting the defendant unconditional leave to defend the share capital claim and varying the Master's order on the loan claim by making the leave granted unconditional. The Master's dismissal of the claim under O.27 was left undisturbed.

5. The plaintiffs' variation summons dated 27 October 2022 ("the plaintiffs' summons") seeks an order that the costs order be varied to

> "*Cost in the cause with a certificate for two counsel".*

6. The defendant's variation summons dated 31 October 2022 ("the defendant's summons") seeks an order that the costs order made be varied to

> *"Costs of the Plaintiffs' Summons filed on 4 February 2022 be to the Defendant with certificate for two counsel up to and including 19 May 2022 and certificate for one counsel thereafter, such costs to be summarily assessed on paper and payable forthwith".*

The plaintiffs' summons

7. The plaintiffs submitted that where the party resisting the O.14 application showed that it had a good defence on the merits or that there was a triable dispute on the facts (which is the effect of the appeal), the normal costs order was for costs to be in the cause, citing *Greater China Capital Inc v GBtimes* [2018] 1 HKLRD 210 at §§12.1- 12.2.

8. That case concerned an appeal from the costs order made by DHCJ Cooney in HCA 1455/2015. The judge, in a case similar to the present, varied his costs order *nisi* and ordered (at §9) that the costs of the plaintiffs' O.14 application be costs in the cause, with certificate for counsel. As regards the costs on the appeal, he considered that those costs

should be in the event of the appeal and therefore did not vary his costs order *nisi* set out in §62 of his judgment.

9. Mr Robert GM Chan, counsel for the defendant, invited attention to the fact that the Court of Appeal in the *Greater China Capital* case left undisturbed the judge's order relating to the costs of the appeal.

10. In the present case, the defendant succeeded in his appeal in obtaining unconditional leave to defend the share capital claim. He was also successful in varying the conditional leave granted in relation to the loan claim. In those circumstances I can see no reason why the defendant should not have the costs of the appeal with certificate for counsel.

11. Mr Toby Brown, counsel for the plaintiffs cited *Lee Sau Yee Shirley v Rybinski Mariusz* [2021] HKDC 296 at §33 by way of example of how the *Greater China Capital* decision has been applied. But the authority cited has nothing to do with the costs of an appeal reversing and/or varying an order made below.

12. So far as the costs in respect of the appeal are concerned, I agree with the defendant that there is no conceivable basis for costs to be in the cause.

13. Although the plaintiffs did not cross-appeal on O.27, their stance was that as the hearing on appeal is on a *de novo* basis, a party to such an appeal is entitled to raise entirely new points in submissions and no notice need to be given that the plaintiffs were going to continue with existing points raised in the summons and already argued before the Master. That is evident from the plaintiffs' written submissions resisting the defendant's appeal and oral submissions.

14. For those reasons, the costs in relation to the appeal must be paid by the plaintiffs to the defendant with certificate for counsel.

The defendant's summons

15. The costs order does not deal with the costs of the plaintiffs' applications, namely the February summons filed before the appeal.

16. The defendant submits that either it should be entitled to 100% of its costs of the February summons including those costs up to and including 19 May 2022 with certificate for 2 counsel or, alternatively, it should be entitled to 50% of such costs with the remaining 50% being costs in the cause.

17. The defendant acknowledges that while costs in the cause is the usual order, Hong Kong Civil Procedure 2023 ("HKCP") §14/7/13 also states that

> "… where unconditional leave to defend is given, rather than dismissing the summons … the court may make any order it could make on dismissing the summons in respect of costs. As an example of a case in which the plaintiff was ordered to bear some part of the costs even where unconditional leave to defend was given, see *Alviero Martini SpA v Bubble Retail Management Limited* (HCA1937/2008, [2009] HKEC 1635."

18. That approach was endorsed by the Court of Appeal in *Greater China Capital* at §12.4[1].

19. In that case, the Court of Appeal also held that an order to dismiss should be made where the case was not within O.14 or where the

[1] "12.4. There may however be situations where the court in the exercise of its discretion may order the plaintiff to bear part of the costs: paragraph 14/7/13, e.g. a failure to communicate in [the *Alviero Martini* case]."

O.14 applicant knew, before issuing its summons, that the opposite party was relying on an arguable defence. On dismissal, the O.14 applicant would normally be ordered to pay costs in any event or forthwith.

20. The plaintiffs submitted that in the present case there was no "abuse" of procedure as the plaintiffs were of the view that there was no arguable defence to the plaintiffs' claims. It was said that many of the arguments and 'defences' raised by the defendant in these proceedings (in particular the alleged oral agreement) were asserted for the first time in the defendant's affidavit evidence and were not mentioned in the BVI proceedings.

21. In *Greater China Capital*, DHCJ Cooney remarked (at §7) that

> "[m]isuse is not to be equated with abuse and although the circumstances in which Order 14, rule 7 should be applied cannot be defined, the authorities cited to me indicated that Order 14 rule 7 has been applied to applications described as "hopeless" or applications in which it is abundantly clear that there was a question in dispute which ought to be tried."

22. The plaintiffs' summons sought judgment on admissions (under O.27) as well as summary judgment (under O.14) on both the share capital claim and the loan claim with the application under O.27 being the principal application and the O.14 application being in the alternative[2].

23. The O.27 application was by no means a subsidiary or an alternative plank of the plaintiffs' application before the Master. It was pursued on appeal as is apparent for their written submissions opposing

[2] See the February summons and the affidavit of Bruno Arboit at §§3 and 29.

the appeal, causing the defendant to address the plaintiffs' written submissions on their O.27 application in reply submissions.

24. It was not until the end of his oral submissions that Mr Sussex informed the court that the plaintiffs were not "pushing" the O.27 application. By then the defendant had incurred time and costs on the appeal on the plaintiffs' O.27 application. In those circumstances, the defendant is entitled to and should be awarded the costs for the O.27 application both before the Master and on appeal.

25. Turning to the O.14 application, it is clear from §§15-16 (absence of any plea of an oral agreement and evidence in support of such an agreement), §§37-38 (proper construction of section 170 of the CO being an open question) and §46 of the Decision that the plaintiffs failed to show a clear case for summary judgment on the share capital claim. For the loan claim, I held that what was agreed could not be determined in the absence of *viva voce* evidence (§51).

26. The defendant submitted that in view of the correspondence from its solicitors addressing the share capital claim and the loan claim prior to the O.14 application, it should not have been made and, in any event, upon receiving Zhong Jie's affidavit dated 27 July 2022, it should have been obvious to the plaintiffs that they would not be able to obtain judgment.

27. Having reviewed the correspondence[3], it is clear that the defendant had set out most of its case in response to the share capital claim as well as the loan claim. It should have been obvious to the

[3] See the letters from the defendant's solicitors dated 27 March 2020 (B4/61/1046), 14 September 2020 (B4/61/1059) and 26 September 2020 (B4/61/1063).

plaintiffs that they raise triable issues and the prospects of obtaining summary judgment on those claims were virtually zero.

28. The plaintiffs' probity in seeking summary judgment in those circumstances is highly questionable and in my view it amounts to a "misuse" of the summary judgment procedure.

Conclusion

29. For the reasons set out above, it would be appropriate to make an order in terms of the defendant's summons with the variation as proposed in §18 of the defendant's written submissions dated 4 November 2022.

30. In relation to the plaintiffs' summons dated 8 November 2022, time for the plaintiffs to lodge their objections to the defendant's statement of costs dated 25 October 2022 be extended for 14 days from 8 November 2022, and the defendant do lodge its reply (if any) within 7 days thereafter.

(Doreen Le Pichon)
Deputy High Court Judge

Mr Toby Brown, instructed by Lau, Horton & Wise LLP, for the 1st – 2nd plaintiffs

Mr Robert G. M. Chan, instructed by Alvan Liu & Partners, for the defendant