DCPI870/2004

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 870 OF 2004

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| BETWEEN | Fongwang Development Limited | Plaintiff |
|  | and |  |
|  | Sunlink Assets Limited | Defendant |

Coram: H H Judge H C Wong in Court

Date of Hearing: 5 November 2004

Date of Delivery of Judgment: 5 November 2004

Present: Mr Kenneth Y F Wong, instructed by Messrs Yung, Yu, Yuen & Co., for the Plaintiff

Defendant, in person, absent

REASONS FOR JUDGMENT

The assessment of damages

1. The plaintiff claimed against the defendant for breach of contract under an agreement dated 6 March 2002 to build a 16‑ton ram hydraulic hammer, hereinafter called “the hammer,” for the defendant. The defendant would supply a sample hammer for the plaintiff to copy.
2. Interlocutory judgment was entered in default in the plaintiff’s favour on 22 April 2004 with damages to be assessed. The defendant had been absent throughout these proceedings and the defendant is absent today in the assessment.
3. At today’s hearing, the plaintiff called its vice general manager, Mr Au Chi-min, to give evidence. He claimed that because the defendant failed to comply with the contractual terms and pay a deposit of 10 per cent of the contract price 10 days prior to the plaintiff’s returning to the defendant the sample hammer, the plaintiff regarded the defendant to have repudiated the contract.
4. Mr Au further claimed that because the defendant failed to pay the deposit, the contract fell through. However, the plaintiff had already incurred many items of expenditure and therefore they have suffered loss and damages. These losses were:

1. cross-border transportation costs of $30,000;

2. clearance and hoisting fee of $18,000;

3. inspection costs at $8,000 per person visit, totalling $128,000;

4. drawing sketch plan fees at $130,000;

5. technical development cost includes:

(i) hydraulic testing at $110,000;

(ii) electrical testing at $80,000;

(iii) framework testing at $103,000; and

6. storage in the plaintiff’s factory in China at $400 a day, 175 days totalling $17,000.

1. In view of the defendant’s absence, there was no evidence from the defendant to contradict the plaintiff’s claim of expenditure. However, Mr Au admitted that the storage of the sample hammer in Hong Kong is also one of the items being claimed in these proceedings at $4,000 per month from the date of its return up to the present and continues until the sample hammer is auctioned off to satisfy payment of the judgment.
2. According to the agreement and the supplemental agreement on 18 April 2002, the parties agreed that the costs of the transportation of the sample hammer, sketch drawing, testing, etc. should be borne by the defendant and the expected time for the rent-free lending of the sample hammer to the plaintiff by the defendant to be 80 days.
3. The invoice that the plaintiff exhibited in the bundle from Guangzhou Shipyard International Company Limited dated 3 December 2003 clearly showed that the plaintiff had to pay for the storage of the sample hammer for a period of 175 days, more than double the contract time of 80 days. From the solicitors’ letter dated 28 September 2002, the plaintiff demanded payment from the defendant which the defendant failed to respond. It was not until 16 January 2004 that the second letter of demand from the solicitor was sent to the defendant although of course Mr Au did send a letter in longhand presumably in Mr Au’s handwriting to the defendant on 11 October 2002.
4. It is not known why the plaintiff took so long before issuing a writ of summons against the defendant for the return of the loss and damages compensation. The writ was issued in fact on 18 February this year. All this time, the sample hammer had been left in storage. The plaintiff claims that it had put the hammer in the warehouse at $2,000 per month, and it was pleaded in paragraph 8 of the statement of claim.
5. Mr Au admitted that the sample hammer was not returned to the defendant because the plaintiff had wanted a lien, the sample hammer, for the unpaid charges. The plaintiff, however, I would consider, has a duty to mitigate its loss. It is not reasonable for a plaintiff to delay taking out legal action for recovery for over one year before a writ was taken out. The writ was taken out on 18 February this year. Something should have been done at least at the end of 2002 if it was quite clear that by September 2002 that the defendant had not honoured its contract terms of payment of 10 per cent of the contract price.
6. I am satisfied that the plaintiff’s expenditures were incurred in the sum of $669,000 and they should be borne by the defendant. I therefore allow the items claimed under paragraph 7 of the statement of claim which has been set out in the order of the Master read out earlier under paragraph 5 of my assessment. I am, however, not satisfied that the plaintiff had been diligent in pursuing this matter in the courts or pursuing against the defendant as there were no receipts or invoices produced on the actual storage charges in the warehouse in Hong Kong, I shall only allow half of the storage claimed under paragraph 8 of the statement of claim up to the date of the judgment. From my calculations, from October 2002 up to November 2004, there should be a period of 26 months. So half of that period is 13 months at $2,000 per month.
7. I shall, however, allow the storage fee at $2,000 per month from the date of judgment until the sale of the sample hammer.

Interest

1. I shall allow interest at half interest judgment rate from the date of writ to the date of judgment, and thereafter at full judgment rate. The costs of assessment be to the plaintiff, if not agreed, to be taxed.

H H Judge H C Wong

District Court Judge