

HCA 2640/2014
[2018] HKCFI [2584]

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION No 2640 OF 2014**

BETWEEN

GRUPO PACIFICA INCORPORADA Plaintiff

and

WORLDWIDE MARINE 1st Defendant
PRODUCT LIMITED

EMINENT VANTAGE LIMITED 2nd Defendant
(Discontinued)

THE HONGKONG AND SHANGHAI 3rd Defendant
BANKING CORPORATION LIMITED (Discontinued)

AUSTRALIA AND NEW ZEALAND 4th Defendant
BANKING GROUP LIMITED (Discontinued)

FULL HONOUR INTERNATIONAL 5th Defendant
TRADE LIMITED

Before: Hon Au-Yeung J in Chambers

Date of Hearing: 20 November 2018

Date of Decision: 20 November 2018

Date of Reasons for Decision: 22 November 2018

REASONS FOR DECISION

Introduction

1. The plaintiff was the victim of D1's fraud. After trial, Recorder Houghton SC gave judgment on 24 September 2018 in favour of the plaintiff together with costs, on a *nisi* basis.

2. The plaintiff has taken out 2 summonses:

(1) To seek to vary the costs order *nisi* on the ground that it had done better than its sanctioned offer and that D1's litigation conduct was unreasonable. The plaintiff sought indemnity costs, and enhanced interest of 10% above judgment rate ("**enhanced rate**") on the judgment sum and indemnity costs.

(2) To seek costs for its application for the *Mareva* injunction against D1.

3. D1's solicitors have come off the record on 8 November 2018. I was satisfied that D1 had been served with the summonses and that it had made no objections.

4. For the 1st summons, I made that the orders sought with some adjustments:

(a) On the judgment sum of US\$449,963.60, D1 shall pay interest from the date of the writ to 2 March 2016 at the rate of P+1% (as ordered by Recorder Houghton SC) but interest thereafter be at an enhanced interest rate of 10% above judgment rate from 3 March 2016 until full payment (as varied);

(b) D1 shall pay costs of the plaintiff in the action on party and party basis (as ordered by Recorder Houghton SC) up to and including 2 March 2016 and thereafter on indemnity basis (as varied); this provision shall apply to all costs reserved;

(c) D1 shall pay interest on such indemnity costs at an enhanced interest rate of 10% above judgment rate until full payment.

5. For the 2nd summons, I ordered all costs reserved under the orders dated 23 December 2014, 2 January 2015 and 16 January 2015 be to the plaintiff to be borne by D1, including certificates for counsel, to be taxed on party and party basis. For the avoidance of doubt, interest shall be on the usual judgment rate.

6. Here are my reasons.

Indemnity costs and enhanced interest rate

7. Order 22, rule 24 of the Rules of the High Court provides that where a plaintiff does better than its proposed sanctioned offer, the court may grant it costs on indemnity basis and enhanced interest rate on the judgment sum after the latest date on which the sanctioned offer could have been accepted without leave of the court. The court will make such orders unless it is unjust to do so.

8. In considering whether it is unjust to do so, the court is required to take into account all the circumstances of the case, including the terms of the sanctioned offer, the stage in the proceedings in which the sanctioned offer was made, the information available to the parties at the time the sanctioned offer was made and the conduct of the parties with regard to the

giving or refusing to give information for the purposes of enabling the offer to be made or evaluated: Order 24, r 24(5).

9. The court should also consider the factors set out in Order 62, rule 5(1) when exercising its discretion as to costs, including the underlying objectives and the conduct of the parties.

10. The plaintiff made a sanctioned offer on 3 February 2016 to accept US\$440,000 in settlement of the case. This was made after:

- (a) the pleadings have been closed;
- (b) the plaintiff has filed affirmation evidence in support of its application for the *Mareva* injunction; and
- (c) the Court of Appeal has overturned Chung J's discharge of the *Mareva* injunction and restored the *Mareva* injunction.

The last day for acceptance without leave of the court was 2 March 2016.

11. The rest of the information D1 had was about its defence, which was exclusively within D1's possession.

12. Regrettably, D1 (through its solicitors) rejected the sanctioned offer in a hostile and dismissive manner, describing the plaintiff's offer as "not genuine" and that it was "an attempt to try and seek higher interest rate and costs on indemnity basis at the conclusion of the case". D1 never came back with another offer.

13. The plaintiff plainly did better than the sanctioned offer, as Recorder Houghton SC awarded damages in the sum of US\$449,963.60

plus pre-judgment interest at P+1% from the date of the writ to judgment and thereafter at judgment rate. The plaintiff also got costs.

14. Had D1 accepted the offer, the case would have been disposed of without a trial 31 months earlier.

15. Since D1 had sufficient information to make an informed decision on whether or not to accept the sanctioned offer, its refusal of the sanctioned offer was totally unreasonable. An order for indemnity costs and enhanced interest rate would not be unjust.

D1's unreasonable defence

16. D1's rejection of the sanctioned offer was objectionable in the light of its unreasonable defence. The unreasonable defence was recognized by the Court of Appeal at an early stage of the proceedings when the plaintiff appealed against Chung J's discharge of the *Mareva* injunction. Cheung JA commented that the transaction relied on by D1 for its defence was "extremely unusual" and that the payment instructions were "most unusual" (CACV 217/2015, 28 January 2016, §§5.6 and 5.8).

17. The judgment of Recorder Houghton SC held that the defence of change of position was devoid of merits (§47) for lack of documents. The other defence of ministerial receipt was only faintly argued (§49).

18. Recorder Houghton SC also found that D1 had, in the illegitimate transaction, failed to act in a commercially acceptable way (§50). D1 had chosen to act as a money exchange service with no consideration

as to why it had been asked to do so, and no enquiry as to the source of funds and the basis of the underlying transaction (§47).

19. These proceedings should never have been defended. Damages, costs and statutory interest would not compensate the successful plaintiff for the inconvenience, anxiety and distress of having to resort to and pursue proceedings which he had sought to avoid by the sanctioned offer: *McPhilemy v Times Newspaper Ltd (No 2)* [2002] 1 WLR 934, at §21. Indemnity costs and enhanced interest rate were not unjust.

Other litigation conduct

20. D1 had failed to comply with the 2 orders for disclosure of assets, one made together with the *Mareva* injunction before the sanctioned offer and one made after.

21. D1 failed to answer a Notice to Admit Facts filed on 13 September 2016, and gave an unusual number of Notices of Non-Admission to challenge the documents disclosed by the plaintiff. In the end, D1 did not challenge the facts relied on by the plaintiff to establish its case of unjust enrichment or constructive trust in its closing submission.

22. There was other derogatory conduct of D1's solicitors in the course of this litigation which had been set out in the 8th affidavit of Mr Adam Clermont. I do not see the need to repeat them.

23. In summary, taking into account D1's unreasonable rejection of the sanctioned offer despite having sufficient documents to make an informed consent, its unreasonable defence, and its litigation conduct, it

would not be unjust to make an order for indemnity costs and enhanced interest rate for the period after 2 March 2016. I therefore varied the costs order nisi on costs accordingly. That included all costs reserved.

Costs of the Mareva injunction applications

24. The *Mareva* injunction was made on interim basis on 23 December 2014 and continued until it was discharged by Chung J on 18 June 2015. The Court of Appeal, however, restored it on 19 January 2016, including the provision for costs to be reserved.

25. The outcome of the trial plainly justified the application for the interim *Mareva* injunction. Costs of the *Mareva* injunction should follow the cause. The *Mareva* injunction was ordered before the sanctioned offer was made and so costs should be on party and party basis.

Costs of these 2 summonses

26. I ordered that costs of both summonses be to the plaintiff to be taxed on indemnity basis, at the enhanced interest rate until full payment. This is because if the sanctioned offer had been accepted, these 2 summonses would have been unnecessary.

27. I thank Ms Athena Wong for her assistance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

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Ms Athena Wong, instructed by Payne Clermont Velasco, for the plaintiff
The 1st defendant was not represented and did not appear

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