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HCCT 6/2021
[2021] HKCFI 3206

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 6 OF 2021**

BETWEEN

L Plaintiff

and

M 1st Defendant

N 2nd Defendant

Before: Hon Mimmie Chan J in Chambers

Dates of Written Submissions: 12, 19 and 22 October 2021

Date of Decision: 27 October 2021

DECISION

1. A costs order nisi was made in the Decision handed down on 21 September 2021, whereby the costs of the application for stay of the

action to arbitration were to be paid by the Plaintiff to the 2nd Defendant as the successful applicant.

2. The abbreviations used in the Decision are adopted below.

3. Since the stay was made not only in respect of the Plaintiff's claims against the 2nd Defendant pursuant to the arbitration agreement contained in their Contract, but also in respect of the Plaintiff's claims against the 1st Defendant under the Bond which contains no arbitration clause, the order nisi did not provide for costs on indemnity basis as would normally be ordered in respect of an unsuccessful challenge of an arbitration agreement.

4. The Plaintiff seeks variation of the costs order, that there be no order as to costs. The 2nd Defendant also seeks variation, for the costs to be on indemnity basis.

5. Having considered the parties' submissions, I will vary the order nisi, to allow to the 2nd Defendant only 50% of the costs of and incidental to the Summons, with the balance of the costs to be in the cause. The following are my reasons.

6. As the Plaintiff has highlighted, the application for stay was made by the 2nd Defendant, for effectively a case management stay of the action against the 1st Defendant as well as a stay of the action against itself pursuant to the arbitration agreement. In the absence of an arbitration agreement between the Plaintiff and the 1st Defendant, there

are no special circumstances or other basis for costs to be ordered against the Plaintiff on indemnity basis in respect of the case management stay sought. It was only on the day before the hearing of the Summons that the 2nd Defendant produced the undertaking by the 1st Defendant, to abide by any award made in the Arbitration as to the 2nd Defendant's liability under the Contract, and this was an important consideration in the Court's grant of the case management stay. I accept the Plaintiff's submissions, that its costs in preparation for the stay application had been incurred on the basis that no such undertaking was provided, and that the associated costs should not be awarded to the 2nd Defendant. Without the application under section 20 of the Ordinance, the case management stay, even if granted, would in all probability have been granted with costs in the cause.

7. As for the stay under section 20 of the Ordinance, the authorities have made it clear that a party takes the risks of an indemnity costs order against it in the event of an unsuccessful challenge of an arbitration agreement or an arbitral award made pursuant to such agreement. The principles for the grant of a stay have been clearly set out in the authorities, and it is sufficient if a prima facie case of the existence of an arbitration agreement is established. I agree with the Plaintiff that it was unnecessary for the 2nd Defendant to file evidence on the details of the underlying disputes, and much of the evidence was totally ignored at the hearing of the Summons.

8. Bearing in mind that the Plaintiff should not be penalized by an order to pay for the 2nd Defendant's costs which were unnecessarily

incurred for the application made under section 20 of the Ordinance, and the unexplained delay in the 2nd Defendant's production of the 1st Defendant's undertaking in support of its application for the case management stay, a broadbrush approach warrants an order that the 2nd Defendant should only be allowed 50% of the costs of the Summons, with certificate for Counsel, on party and party basis.

9. The costs of the applications for variation follow the above order.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Jose Maurellet SC and Mr Brian Fan, instructed by Hogen Lovells,
for the plaintiff

Mr Peter Clayton SC, instructed by MinterEllison LLP,
for the 2nd Defendant