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HCA 1410/2004

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IN THE HIGH COURT OF THE

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HONG KONG SPECIAL ADMINISTRATIVE REGION

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COURT OF FIRST INSTANCE

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ACTION NO. 1410 OF 2004

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BETWEEN

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LING SIU LAM PAUL trading as
DOTMEON CONSULTING GROUP

Plaintiff

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and

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AMD FAR EAST LIMITED carrying on business
in Hong Kong as ADVANCED MICRO
DEVICES FAR EAST LIMITED

Defendant

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Before : Hon Sakhrani J in Chambers

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Date of Hearing : 2 August 2005

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Date of Judgment : 2 August 2005

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1. This is an appeal against the orders of Master de Souza made on 25 April 2005. There were three orders made by him, two of which have been drawn up. The first order was an order whereby he allowed the

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defendant to rely on the 2nd affidavit of Mr Lui Kwan Pok at the hearing before him on 25 April 2005. The second order was an order dismissing the plaintiff's action by reason of his failure to comply with an unless order. The third order was an order dismissing the plaintiff's application for an extension of time to provide answers to outstanding requests for further and better particulars of the statement of claim.

2. The plaintiff's claim in this action is for breach of two agreements made between the plaintiff and the defendant in or about February 2003 whereby the plaintiff was engaged by the defendant to promote the defendant's business in the Mainland. The defendant denies that there were binding legal agreements reached between the parties. The defendant also counterclaims for sums that it has paid to the plaintiff.

3. On 6 August 2004 the defendant served a request for further and better particulars of the statement of claim. However, the plaintiff failed to answer the request. This led to the defendant issuing a summons dated 5 October 2004 for an order that the plaintiff do provide the further and better particulars of the statement of claim as requested.

4. On 14 October 2004 a consent order was made by Master Lung that the plaintiff do within 7 days of the order provide the further and better particulars requested. This was not complied with. The defendant took out an application for an unless order by a summons dated 25 October 2004.

5. On 1 November 2004 an unless order was made by consent. By consent, it was ordered that :

“Unless the Plaintiff do within 14 days from the date hereof answer and provide Further and Better Particulars of the Statement of Claim in reply to the Request for Further and Better Particulars of the Statement of Claim served by the Defendant on the Plaintiff on 6th August 2004 in compliance with the Order made by Master Lung herein on 14th October 2004, the action be dismissed with costs, including the costs of this application, to be taxed and paid by the Plaintiff to the Defendant.”

6. Subsequent to that order, the plaintiff filed and served the answers to the request for further and better particulars on 15 November 2004. The plaintiff did not give answers to all the requests. In particular, no answers were provided to requests 4, 5, 6(c), 7(b), 8(b), 9(b), 12(b), 14, 17(b), 18(b), 19(b) and 22(b). Those requests were not answered on the ground that the defendant was not entitled to the answers as the requests were for evidence or opinion. That was the view held by Mr Wong Chi Kau, the plaintiff’s solicitor, who appears before me today for the plaintiff. In his affidavit, Mr Wong states candidly that when preparing the answers he advised the plaintiff that the outstanding requests amounted to a request for evidence or opinion and that the plaintiff was not required to provide the defendant with the answers to the outstanding requests.

7. In my view, it is plain that the view then held by the plaintiff’s solicitor was a mistaken view. The plaintiff consented to the order for particulars made on 14 October 2004. He also consented to the unless order made on 1 November 2004. That being so, he was obliged to give all the particulars to which the consent order referred. It was not open to him to contend that the plaintiff need not answer some of the requests (para 18/12/57 *Hong Kong Civil Procedure 2004*).

8. That there was a failure to comply with the unless order cannot be doubted. That is not really in dispute. It is, therefore, necessary to consider whether to enforce the sanction provided for in the unless order namely, to dismiss the action with costs. That depends on whether the failure was intentional and contumelious conduct on the part of the plaintiff.

9. The applicable principles are to be found *In Re Jokai Tea Holdings Limited* [1992] 1 WLR 1196 as applied in *PT Bank Pembangunan Indonesia (Persero) v. Tan Eddy Tansil* [1997] HKLRD 57 and *CTB Australia Limited v. Kuo Kin Ling, Betty* HCA 5435/2000, my judgment dated 20 May 2004.

10. *In Re Jokai Tea Holdings Limited*, Sir Nicholas Browne-Wilkinson, VC said at p. 1023 B that :

“In my judgement, in cases in which the court has to decide what are the consequences of a failure to comply with an “unless” order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.”

11. It is for the defaulting party to show that the failure was not intentional and contumelious but was due to extraneous circumstances. The Court of Appeal in *PT Bank Pembangunan Indonesia (Persero)* also held that a client would not be allowed to suffer for the mistake of his legal advisers if

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the situation can be rectified without injustice to the other parties subject to the question of costs.

12. Was the failure to comply with the unless order intentional and contumelious conduct on the part of the plaintiff? Mr Wong submitted that it was not as his failure was caused by the mistake of his legal advisers and due to extraneous circumstances. It seems to me that the first mistake made by the plaintiff's solicitor was to advise him not to provide all the answers which resulted in his failure to comply with the unless order. That was the mistake of his solicitor and not the plaintiff's fault.

13. Mr Coleman, for the defendant, submitted that the failure to comply was intentional and contumelious conduct on the part of the plaintiff. He referred me to the correspondence between the solicitors. I accept that the correspondence shows clearly that the plaintiff was given numerous opportunities and extensions of time by the defendant to serve the answers to the outstanding requests. However, that was not done as the plaintiff's solicitor took the view that a reasonable offer had been made to the defendant to agree to a consent order for an extension of time to provide the outstanding answers within 7 days. From the submissions made to me by Mr Wong it seems that the answers to the outstanding requests have been ready since December 2004. These, however, have not been provided to the defendant even up to today as Mr Wong has taken the view that they should only be provided after an order has been made for an extension of time to provide the same.

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14. Mr Coleman submitted that on the correspondence which he took me through, the course of conduct that has been shown is intentional and contumelious conduct on the part of the plaintiff in failing to provide the answers to the outstanding request.

15. In my view, the failure to supply the outstanding answers even up to today is the fault not of the plaintiff himself but of Mr Wong. This is another mistake on his part. There is no good reason why he did not simply supply the answers to the outstanding requests. They have been ready since December 2004 and even up to today they have not been provided to the defendant. I am satisfied that this is entirely the fault of the plaintiff's solicitors and not the plaintiff's fault. I do not think that the mistake of his solicitor should be visited on him.

16. Mr Coleman also submitted that a misconception as to the law does not prevent a default from being intentional and contumelious and he relied on *Premiere Agri Technologies Asia Inc v. Wong Siu Hung John & others* CACV 246/2003, 10 October 2003, judgment of the Court of Appeal. That case, however, in my view, is distinguishable on its facts and provides no assistance to the defendant. The court there was satisfied that the discovery made in purported compliance of the unless orders in that case were illusory. The answers that have been supplied in this case did not comply with the unless order but it cannot be said that the document containing the answers was an illusory document.

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17. Le Pichon JA in her judgment at para. 23 was not prepared to accept that the litigant's solicitors could have been labouring under a misapprehension of the law. She said this at para. 23 :

“Given the terms of the lists served on behalf of the 3rd defendant by her solicitors and the explicit terms of the three discovery orders made against the 3rd defendant, it stretches one's credulity to believe that the 3rd defendant's solicitors could have been labouring under a misapprehension of the law. What happened in this case appears to have gone well beyond a mistake or even negligence: it would appear to bring into question the professional competence of the practitioners concerned.”

18. The court was also satisfied there that the litigant had flouted the unless order. Here, I am satisfied that the course of conduct that was adopted on behalf of the plaintiff as shown in the correspondence was because of the mistaken views of the solicitor for the plaintiff. It does not, in my view, show intentional and contumelious conduct on the part of the plaintiff himself.

19. As I have said, the case of *Premiere Agri Technologies Asia Inc* is distinguishable on its facts and does not assist the defendant.

20. In my view, the situation can be rectified by granting a final indulgence to the plaintiff without injustice to the defendant provided an order for costs is made in its favour. It would be just, in my view, to give the plaintiff a final indulgence to allow him to comply with the unless order. I would also observe that the defendant's counterclaim is still on foot and the plaintiff is entitled to defend the same in any event.

21. I would allow the appeal against the orders dismissing the plaintiff's claim and refusing an extension of time to file the particulars. I

set aside those orders. I make an order that unless within 3 days of service of this order the plaintiff does provide further and better particulars of the statement of claim in reply to the request of further and better particulars of the statement of claim served by the defendant on the plaintiff on 6 August 2004 in compliance with the order made by Master Lung on 14 October 2004 the action be dismissed with costs.

22. I dismiss the appeal against the order of the Master whereby he allowed the defendant to rely on the evidence of the 2nd affirmation of Mr Lui Kwan Pok at the hearing. The Master was, in my view, perfectly entitled to allow that evidence to be adduced as that simply exhibited the correspondence between the solicitors.

(Arjan H. Sakhrani)
Judge of the Court of First Instance,
High Court

Mr C K Wong of Messrs Charles Yeung Clement Lam Liu & Yip, for the plaintiff

Mr Russell Coleman, instructed by Messrs Haldanes, for the defendant