律政司
民事法律科
民事訴訟組
香港金鐘道66號
金鐘道政府合署高座2樓
圖文傳真：852-2869 0062

DEPARTMENT OF JUSTICE
Civil Division
Civil Litigation Unit
2/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong
Fax: 852-2869 0062

圖文傳真
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發件人 From	Department of Justice	收件人 To	Mr. Lin Zhen Man
日期 Date	- 9 OCT 2007		
本司檔號 Our Ref	CACV 174/06	收件人檔號 Your Ref	
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訊息:
Message:

本圖文傳真附上以下文件：

1). 被告人的陳詞大綱，及

2) 典據列表

DJ-C12

為 2007 年 10 月 12 日上午 9 時 30 分
於張澤佑及袁家寧上訴法庭法官席前的聆訊

CACV 174/2006

香港特別行政區

高等法院

上訴法庭

民事上訴 2006 年第 174 宗

（原本案件編號：高等法院民事訴訟 2005 年第 2260 宗）

林哲民經營之日昌電業公司 原告人

與

曾蔭權（香港特別行政區行政長官） 被告人

被告人的陳詞大綱

1. 剔除申請的命令只屬非正審命令，不屬最終判決，《香港終審法院條例》（第 484 章）的第 22(1)(a)條並不適用（見 Sam Woo Bore Pile Foundation Limited v China Overseas Foundation Engineering Limited 上訴法庭於 CACV 113/2006 的判詞的第 6 段；以及終審法院上訴委員會於 FAMV 21/2007 維持上訴法庭判決的判案書的第 4 段）。

2. 再者，本訴訟所涉的損害賠償屬未經算定的損害賠償（"unliquidated damages"），故未受第 22(1)(a)條所賦予的上訴權利所涵蓋（引用 Chao Keh Lung v Don Xia (2004) 7 HKCFAR 260，第 262 頁 H 至 I 及第 263 頁 E 至 F）。

3. 本訴訟所涉及的問題，只與本案的個別事實有關（正如 FAMV 21/2007 的第 14 段所指，屬 "case-specific"），並不具有重大廣泛的或關乎公眾的重要性，所以，第 22(1)(b)條亦不適用。

4. 故此，原告人上訴許可的申請應予以拒絕，而原告人並須支付與本申請有關的訟費。

日期：2007 年 10 月 9 日。

被告人的代表律師

高級政府律師黃健民

#918905/xl

為2007年10月12日上午9時30分
於張澤佑及袁家寧上訴法庭法官席前的聆訊

CACV 174/2006

香港特別行政區

高等法院

上訴法庭

民事上訴2006年第174宗

（原本案件編號：高等法院民事訴訟2005年第2260宗）

林哲民經營之日昌電業公司	原告人
與	
曾蔭權（香港特別行政區行政長官）	被告人

典據列表

法例

1. 《香港終審法院條例》（第484章）第22條

案例

2. *Sam Woo Bore Pile Foundation Limited v China Overseas Foundation Engineering Limited*，CACV 113/2006

3. *Sam Woo Bore Pile Foundation Limited v China Overseas Foundation Engineering Limited*，FAMV 21/2007

4. *Chao Keh Lung v Don Xia* (2004) 7 HKCFAR 260

律政司
被告人的代表律師

#918916/xl

"紀錄" (record) 指與某一上訴有關而積存的文件 (包括申訴答辯書、證供及判決書)，而該等文件是在終審法院聆訊上訴時適宜呈堂者。

20. 適用範圍

本部適用於就任何民事訟案或事項提出的上訴。

21. 民事司法管轄權

終審法院的民事司法管轄權包含處理根據本部及根據任何其他法律提出的上訴。

第 2 分部——源自上訴法庭的上訴提交終審法院；與行政長官選舉有關的上訴

(由 2002 年第 11 號第 3 條增補)

22. 民事上訴

(1) 在以下情況下，可向終審法院提出上訴—— *(由 2001 年第 21 號第 52 條修訂)*

(*a*) 如上訴是就上訴法庭就任何民事訟案或事項所作的最終判決而提出的，而上訴爭議的事項所涉及的款額或價值達 $1,000,000 或以上，或上訴是直接或間接涉及對財產的申索或有關財產的問題，或直接或間接涉及民事權利，而所涉及的款額或價值達 $1,000,000 或以上，則終審法院須視提出該上訴為一項當然權利而受理該上訴； *(由 2001 年第 21 號第 52 條修訂)*

(*b*) 如該上訴是就上訴法庭就任何民事訟案或事項所作的其他判決而提出的，不論是最終判決或非正審判決，而上訴法庭或終審法院 (視屬何情況而定) 認為上訴所涉及的問題具有重大廣泛的或關乎公眾的重要性，或因其他理由，以致應交由終審法院裁決，則上訴法庭或終審法院須酌情決定終審法院是否受理該上訴；及 *(由 2001 年第 21 號第 52 條修訂)*

(c) 如上訴是就原訟法庭——

(i) 根據《行政長官選舉條例》(第 569 章) 第 37(1) 條所作的裁定而提出的；或

(ii) 就——

(A) 根據《高等法院條例》(第 4 章) 第 21K 條提出的司法覆核申請；或

(B) 根據該條例的任何其他法律程序，

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"record" (紀錄) means the aggregate of papers relating to an appeal (including the pleadings, evidence and judgments) proper to be laid before the Court on the hearing of the appeal.

20. Application

This Part applies to appeals in any civil cause or matter.

21. Civil jurisdiction

The civil jurisdiction of the Court shall consist of appeals under this Part and under any other law.

Division 2—Appeal from Court of Appeal to Court; Appeal relating to Chief Executive Election

(Added 11 of 2002 s. 3)

22. Civil appeals

(1) An appeal shall lie to the Court— *(Amended 21 of 2001 s. 52)*

(*a*) as of right, from any final judgment of the Court of Appeal in any civil cause or matter, where the matter in dispute on the appeal amounts to or is of the value of $1,000,000 or more, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $1,000,000 or more; *(Amended 21 of 2001 s. 52)*

(*b*) at the discretion of the Court of Appeal or the Court, from any other judgment of the Court of Appeal in any civil cause or matter, whether final or interlocutory, if, in the opinion of the Court of Appeal or the Court, as the case may be, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision; and *(Amended 21 of 2001 s. 52)*

(*c*) at the discretion of the Court, from—

(i) a determination of the Court of First Instance under section 37(1) of the Chief Executive Election Ordinance (Cap. 569); or

(ii) a judgment or order of the Court of First Instance in—

(A) an application for judicial review under section 21K of the High Court Ordinance (Cap. 4); or

(B) any other proceedings under that Ordinance.

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所作的判決或命令而提出的，而該司法覆核或法律程序是以候選人是否被妥為裁定為根據《行政長官選舉條例》(第 569 章) 第 26A(4) 條屬在選舉中不獲選出或根據該條例第 28 條獲宣布在選舉中當選的候選人能否合法地就任為行政長官作為爭論點的， *(由 2006 年第 10 號第 19 條修訂)*

則終審法院須酌情決定是否受理該上訴。 *(由 2001 年第 21 號第 52 條增補)*

(2) 行政長官會同行政會議可在憲報刊登命令，修訂第 (1) 款以更改其內所指明的款額。

(由 1997 年第 120 號第 4 條修訂)

23. 上訴許可

(1) 終審法院不得受理任何上訴，除非——

(*a*) 上訴法庭已給予上訴許可；或

(*b*) 終審法院已給予上訴許可 (如上訴法庭未給予此項許可)。 *(由 1997 年第 120 號第 4 條修訂)*

(2) 如提出某一上訴是一項當然的權利，則有關法院不得拒絕給予上訴許可，而須首先按照第 25 條給予有條件的許可。

24. 申請上訴許可

(1) 向上訴法庭或終審法院提出上訴許可申請，須以動議形式提出。

(2) 第 (1) 款所指的動議的通知，須在上訴所針對的判決作出當日起計 28 日內提交，而申請人亦須給予該案中的對方 7 日時間通知，知會其意欲提出該申請，而此項通知可在上述的 28 日內任何時間發出。

(3) 如上訴許可申請遭上訴法庭拒絕，或如就第 22(1)(*c*) 條所提述的原訟法庭的裁定、判決或命令提出上訴，則申請人可向終審法院申請許可，而此項申請須以動議形式提出。 *(由 2001 年第 21 號第 53 條修訂)*

(4) 第 (3) 款所指的動議的通知，須在自申請遭上訴法庭拒絕當日起計 28 日內提交，而申請人亦須給予該案中的對方 7 日時間通知，知會其意欲提出該申請，而此項通知可在上述的 28 日內任何時間發出。

(5) 上訴法庭或終審法院 (視屬何情況而定) 可作出命令，以其認為適當的條件，延長就申請人在第 (2) 或 (4) 款規定下所須或獲准辦理之事的指定辦理期限。

which put in issue whether the candidate is duly determined to be not returned at an election under section 26A(4) of the Chief Executive Election Ordinance (Cap. 569) or whether the candidate declared under section 28 of that Ordinance as elected at an election can lawfully assume the office of the Chief Executive. *(Added 21 of 2001 s. 52. Amended 10 of 2006 s. 19)*

(2) The Chief Executive in Council may by order published in the Gazette amend subsection (1) to vary the amounts specified. *(Amended 120 of 1997 s. 4)*

23. Leave to appeal

(1) No appeal shall be admitted unless either—

(*a*) leave to appeal has been granted by the Court of Appeal; or

(*b*) in the absence of such leave, leave has been granted by the Court.

(2) Where an appeal lies of right, leave to appeal shall not be refused but shall, in the first instance, be granted as conditional leave in accordance with section 25.

24. Applications for leave to appeal

(1) Applications to the Court of Appeal or the Court for leave to appeal shall be made by motion.

(2) Notice of a motion for the purpose of subsection (1) shall be filed within 28 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party 7 days notice of his intended application and such notice may be given at any time during the period of 28 days.

(3) If an application for leave is refused by the Court of Appeal or in the case of an appeal from a determination, judgment or order of the Court of First Instance referred to in section 22(1)(*c*), an application may be made to the Court for leave and such application shall be made by motion. *(Amended 21 of 2001 s. 53)*

(4) Notice of a motion for the purpose of subsection (3) shall be filed within 28 days from the date on which the application for leave is refused by the Court of Appeal, and the applicant shall give the opposite party 7 days notice of his intended application and that notice may be given at any time during the period of 28 days.

(5) The Court of Appeal or the Court, as the case may be, may, on such terms as it considers appropriate, by order extend the period within which the applicant is required or authorized by subsection (2) or (4) to do any act.

CACV 113/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 113 OF 2006
(ON APPEAL FROM HCCT NO. 76 OF 1996)

BETWEEN

SAM WOO BORE PILE FOUNDATION LIMITED — Plaintiff

and

CHINA OVERSEAS FOUNDATION ENGINEERING LIMITED — Defendant

Before: Hon Rogers VP, Le Pichon JA and Chu J in Court

Date of Hearing: 15 March 2007

Date of Judgment: 15 March 2007

Date of Handing Down Reasons for Judgment: 21 March 2007

REASONS FOR JUDGMENT

Hon Rogers VP:

1. I agree with the reasons given by Le Pichon JA.

Hon Le Pichon JA:

2. This was an application by the plaintiff for leave to appeal to the Court of Final Appeal from the order of this court dated 24 October 2006 dismissing the plaintiff's appeal from the order of Reyes J striking out parts of

the plaintiff's claim relating to "extra over for toeing-in of piles" into bedrock. Leave was refused for reasons to be given in writing later which we now do.

3. The background facts sufficiently appear from the judgment of this court and I do not propose to repeat them here.

As of right

4. This was the first ground relied on by the plaintiff and turned on whether the order below (confirmed by this court) made on the strikeout application of the defendant was interlocutory or final. The first matter to note is that the order made below and confirmed by this court was to strike out part of the plaintiff's claim. It was not an order made under Order 14A.

5. The two tests which historically have been propounded for deciding whether a judgment is final or interlocutory, namely 'the application test' and 'the order test', are well known. The former involves an examination of the nature of the application to say whether the order would, whether it failed or succeeded, determine the whole action. The latter looks at the nature of the order made by the court below rather than the nature of the application and if the order finally disposes of the rights of the parties it is final. It is evident that it is important that there be clarity and certainty as to which of the tests is applicable from the perspective of litigants as well as the public interest in the efficient deployment of judicial resources.

6. It is well settled that in Hong Kong as in England the 'application test' applies and that an order for the striking out of an action for disclosing no reasonable cause of action under Order 18 rule 19 has always been regarded as interlocutory. See the determination of the Appeal Committee of the Court of Final Appeal (Litton ACJ, Ching and Bokhary PJJ) in *Wai Hung Stationary Co & others v HKSAR & others* [1998] 2 HKC 229 at 231F-G and (Li CJ, Bokhary

and Chan PJJ) in *B+B Construction Ltd v Sun Alliance and London Insurance PLC* [2001] 1 HKLRD 1 at 4E-F where it was explained that the reason why a striking out order was interlocutory was because such an order would not have the effect of finally disposing of the cause or matter if the outcome was in favour of one party and not the other. I do not read the later decision of the Court of Final Appeal in *Shell Hong Kong Ltd v Yeung Wai Man* [2003] 3 HKLRD 62 (which concerned Order 14A) as in any way departing from or jettisoning the 'application approach', at any rate, so far as summary judgment and strikeout applications are concerned.

7. For these reasons, I consider that the plaintiff is not entitled to appeal to the Court of Final Appeal under section 22(1)(a) of the Court of Final Appeal Ordinance.

Questions of great general or public importance

8. Two such questions are said to arise:

> "1. Whether in every re-measurement construction contract the description of items in the Bills of Quantities is, by its inherent nature, subject to the provisions of the Standard Method of Measurement ("the SMM") and/or the "Special Method of Measurement" commonly called "the Particular Preamble to the Bills of Quantities" ("the Particular Preamble") such that description of any item in the Bills of Quantities is not capable of 'overriding' the provisions of the SMM and/or the Particular Preamble.
>
> 2 What is the proper meaning to be attributed to the use of the word "min" (being short for "minimum") as widely used in commercial contracts and/or documents in particular in the construction industry such as in the drawings and/or in the present case in a description of work in the Bills of Quantities, for example as in the current relevant contract in the descriptive phrase "extra over 1500mm diameter vertical pile shaft for toeing-in to bedrock, 1.5m in depth (min.)":
>
> (1) does it mean that the risk, and the attendant expense, of the work identified as goes beyond the minimum specified has been placed upon the contractor or other performing

party, such that contractors or other performing parties shall have to consider the risk introduced by the used word "min" (which meaning, it will be submitted, is not the proper construction of the contractual provisions as a whole, is contrary to the current practice of the construction industry, and lacks commercial sense)?; or

(2) does it mean (in such a context) a description of one of the requirements of the work to be performed in that work performed to anything less than the stated "min" or minimum would not be acceptable, such that the contractor has the obligation to demonstrate that it has achieved the "min", such as here (by way of example only) the minimum toeing-in required, but that work required to be performed beyond the stated minimum will fall to be accounted for and/or recompensed in accordance with the re-measurement provisions of the contract?; or

(3) does it mean that the word "min" is nothing more than a mere description of one of the requirements of the work to be performed by the contractor or other performing party?"

BQ descriptions, SMM and Particular Preamble

9. So far as the first question is concerned, Mr Coleman SC who appeared for the plaintiffs submitted that the effect of the judgment is that in a re-measurement construction contract a [Bill of Quantities ("BQ")] description can override provisions of the SMM and/or the Particular Preamble and whenever a BQ description does not follow the SMM, the BQ description can override SMM.

10. The premise of the submission was that the judgment of this court laid down general principles of construction involving the interrelationship of BQ descriptions, SMM and Particular Preamble. On any fair reading of the judgment, I do not consider that one could reasonably arrive at that conclusion. This court was construing a particular contract relating to the project in question. Special condition 1(j) was of central importance in the interpretation of the subcontract entered into by the parties. I cannot see that the proper interpretation of this subcontract can be said to be of general application to

other contracts unless they be identical in all material respects. The subcontract in question was tailor-made and it is misleading and simply wrong to suggest that it was in any way 'standard form'.

11. It would appear that Mr Coleman also considered that the judgment supported the following propositions:

> "If there is any item in the BQs not drafted or prepared in accordance with the SMM and, unless there is any specific provision dealing with the same in the Particular Preamble of the relevant contract, the BQ item is said to have an error or omission. Whenever there is error or omission contained in any BQ item, it shall be corrected in accordance with the relevant provisions of the SMM (or any overriding provisions in the Particular Preamble of that contract)."

12. Again, that submission has no valid basis. In the subcontract under consideration, the effect of special condition 1(j) when read together with item 4 in BQs 5 and 10 is that the SMM provisions are not followed with regard to extra over for toeing-in into bedrock. That was not dependent on there being any Particular Preamble. Mr Coleman's first proposition is accordingly incorrect. As to his second proposition, quite simply, whether and, if so, how any "error or omission" is to be addressed must again depend on the terms of the particular contract.

Interpretation of 'min'

13. This court dealt with the significance of the drawings provided to all tenderers before the tenders were submitted and, in particular, of notes 6 to 8 in paragraphs 8 to 9 of its judgment. It is against that factual matrix and the terms of the subcontract that the expression "1.5m in depth (min)" was construed.

14. The plaintiff relies, *inter alia*, on an article appearing in the Surveyor's Times by JB Molloy of James R. Knowles (Hong Kong) Limited.

Ironically, it transpires that in 1995, Mr Molloy had rendered advice on the effect of the subcontract to the defendant and came to a view that is entirely consistent with what this court has held, namely, that the phrase "1.5m in depth (min)" in the BQs meant that the risk of a greater depth of toeing-in fell on the subcontractor. This necessarily undermines his more recent views as expressed in the Surveyor's Times which, in any event, were based on the Government Standard Form of Civil Engineering Contract rather than the subcontract.

15. I do not doubt that the manner in which the subcontract has been construed by this court is of a matter of importance to the plaintiff but that cannot be transmuted into a matter of great general or public importance.

Hon Chu J:

16. I agree.

(Anthony Rogers) Vice-President	(Doreen Le Pichon) Justice of Appeal	(Carlye Chu) Judge of the Court of First Instance

Mr Russell Coleman SC & Ms Queenie W S Ng, instructed by Messrs Hau, Lau, Li & Yeung, for the Plaintiff/Applicant

Mr Peter Clayton SC, instructed by Messrs Ho & Ip, for the Defendant/Respondent

FAMV No. 21 of 2007

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS NO. 21 OF 2007 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM
CACV NO. 113 OF 2006)

Between:

SAM WOO BORE PILE FOUNDATION LIMITED **Applicant**

- and -

CHINA OVERSEAS FOUNDATION ENGINEERING LIMITED **Respondent**

Appeal Committee:	Mr Justice Bokhary PJ, Mr Justice Chan PJ and Mr Justice Ribeiro PJ
Date of Hearing and Determination:	31 May 2007
Date of Handing Down Reasons:	8 June 2007

DETERMINATION

Mr Justice Ribeiro PJ:

1. On 31 May 2007, we dismissed the application for leave to appeal with costs. We now hand down our reasons.

2. Leave was sought to appeal to the Court from the decisions of Reyes J[1] and the Court of Appeal[2] striking out the applicant's claim for payment under a civil engineering sub-contract.

3. Mr Russell Coleman SC, appearing with Ms Queenie Ng for the applicant, submits in the first place that an appeal is as of right since, in striking out the claim, the courts below necessarily finally decided the issue of construction said to arise. That submission must be rejected.

4. To come within section 22(1)(a) of the Court's statute, the appeal must be from a final judgment of the Court of Appeal. The test for finality is the "applications test", namely, that determination of the application leading to the judgment to be appealed from must finally dispose of the action or finally determine the relevant issue, whichever party succeeds on the application. A striking-out application fails that test. Its dismissal leaves everything in contention. That approach was consistently adopted for leave to appeal to the Privy Council.[3] It has remained the approach to leave to appeal to this Court.[4] It is unusual for a final appellate court to entertain appeals as of right and, as has previously been pointed out,[5] the Court is not in favour of enlarging that jurisdiction.

5. Alternatively, the applicant submits that points of law of great general or public importance arise in the appeal, being points relating to the

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1 HCCT 76/1996; 21 February 2006.

2 Rogers VP, Le Pichon JA and Chu J, CACV 113/2006; 24 October 2006.

3 *First Pacific Bank Ltd v Robert H P Fung* [1990] 1 HKLR 527 at 529.

4 *Wai Hung Stationery Co v HKSAR* [1998] 2 HKC 229 at 231; *B+B Construction Ltd v Sun Alliance and London Insurance Plc* [2001] 1 HKLRD 1 at 4; and *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd* (2003) 6 HKCFAR 222 at 231, §26.

5 *Chao Keh Lung v Dong Xia* (2004) 7 HKCFAR 260 at 263.

true construction of the Hong Kong Government Standard Method of Measurement ("SMM") for Civil Engineering Works which are in widespread use in Hong Kong.[6]

6. The applicant contracted with the respondent to drive a total of 64 pile shafts and to install cast-in-situ concrete piles in the seabed as part of the Lantau Expressway project. Each pile shaft had to be properly secured or "toed-in" into the bedrock at a certain depth depending upon site investigations and the Engineer's requirements.

7. It was a re-measurement contract and the parties expressly agreed that the method of re-measurement should be in accordance with the SMM, save expressly stated otherwise. Particular Preambles to the Bills of Quantities set out the SMM method of re-measurement to be used in relation to the toeing-in of cast-in-situ concrete piles. Two such provisions are important. First, §9.09 prescribes that the units of measurement for extra over for toeing-in should be "number", that is, the number of piles concerned. Secondly, §9.14 (Group IX), dealing with "Itemisation", prescribes as follows:

> Separate items shall be provided for cast-in-situ concrete piles in accordance with General Principles paragraphs 3 and 4[7] and the following:
>
> 1. Extra over for toeing-in not exceeding 0.50m in depth.
> 2. Extra over for toeing-in exceeding 0.50m but not exceeding 1.00m in depth and so on in steps of 0.50m.

8. If the parties had carried out their indicated intention of adopting the SMM approach to re-measurement by adopting those provisions, this

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6 Reference was made to the 1988 and the 1992 editions which, for the purposes of this case, were materially identical. We refer to provisions in the 1992 edition in this Determination.

7 These General Principles are not presently relevant.

dispute would not have arisen. Separate Bills of Quantities ("BQ") items would have provided for the extra over amount payable for the number of pile shafts which had to be toed-in at a depth deeper than the specified minimum in steps of 0.50m of such additional depth.

9. Bedrock conditions over stretches of seabed may obviously vary. A hypothetical example of what might have been required of the 64 piles in the present case (taking the specified minimum depth into the bedrock as 1.50m), may be as follows:

(a) Of 64 piles: 4 might be satisfactory at the minimum depth of 1.50m, but 60 might need to be driven up to 0.50m beyond the minimum of 1.50m;

(b) Of those 60 piles, 30 might need to go to up to 0.50m deeper than 2.0m;

(c) Of those 30, 10 might need to go up to 0.50m beyond 2.50m;

(d) Of those 10, 2 might need to go up to 0.50m beyond 3.0m; and

(e) None might need to go any deeper.

With BQ items drawn up in accordance with §§9.09 and 9.14, there would be no difficulty. For each itemised depth band, one would multiply the number of piles concerned by the dollar rate and thereby value the additional work done at each depth.

10. However, that is not how the BQ items were drawn up in the present case, which is why the present dispute arises. There was no separate itemisation for each 0.50m step or depth band. And there was no specification of a dollar rate for each such depth band. There was only a single BQ item in the following terms:

Description	Quantity	Unit	Rate $	Amount $
Extra over 1500 mm diameter vertical pile shaft for toeing-in to bedrock 1.50 m in depth (min.)" [8]	48	nr	36,000	1,728,000.00

11. The "description" column stipulates that the minimum depth of toeing-in required is a depth of 1.50m into the bedrock. "Minimum" has its ordinary meaning so that, for instance, where a sloping bedrock surface is encountered, the pile must be driven into not less than 1.50m of bedrock at the lower end of the downward slope. This would mean that more than 1.50m of bedrock will have to be penetrated at the upper end of the slope.

12. Since the BQ item describes itself as dealing with "extra over" in relation to a stipulated minimum depth and specifies a $36,000 rate for the same without suggesting that this is limited to additional work to any particular depth, the courts below correctly construed this as a provision (perhaps unusual in a re-measurement contract) which fixed the extent of additional payments available for this item of work.

13. Mr Coleman did not seek to argue for rectification of the contract or that there was some basis for implying a term which would somehow convert the BQ items in question into graduated, separately itemised extra over provisions dealing with additional work done in steps of 0.50m of depth. Instead, he boldly submitted that the Court could somehow arrive at that result by a simple process of contractual interpretation by giving prominence to the fact that the contract was a re-measurement contract. The Court should, he argued, treat the $36,000 figure in the BQ item as laying down a rate of payment for each 1.50m of depth into the bedrock, and so by extrapolation, a

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8 The other BQ item, relating to 16 pile shafts, was in otherwise identical terms.

dollar rate of $12,000 for each step of 0.50m of depth to make it compatible with §9.14 of the Particular Preamble. But that is not what the BQ item says on any reading and such a result would require a wholesale re-writing of the BQ terms agreed.

14. It follows that this is a one-off case. Standard provisions were available to be adopted and were indeed referred to in the Particular Preamble to the parties' own Bills of Quantities, but were not in fact used. Such provisions are in general circulation and there is no difficulty about their operation. The present case therefore raises a case-specific problem and not any point of law of great general or public importance. Secondly, the applicant was able to point to no viable legal mechanism whereby the Court might arrive at the result it desires. There are therefore no reasonable prospects of success on appeal.

(Kemal Bokhary) Permanent Judge	(Patrick Chan) Permanent Judge	(R A V Ribeiro) Permanent Judge

Mr Russell Coleman SC and Ms Queenie WS Ng (instructed by Messrs Hau, Lau, Li & Yeung) for the applicant

Mr Chua Guan Hock SC (instructed by Messrs Ho & Ip) for the respondent

Chao Keh Lung
and
Don Xia

A

B

Bokhary, Chan and Ribeiro PJJ
Miscellaneous Proceedings No 6 of 2004 (Civil)
15 June 2004

Civil procedure — Court of Final Appeal — leave to appeal — appeal as of right under s.22(1)(a) — did not extend to claims for unliquidated damages even if such claims had been assessed and award exceeded $1 million — appeal under "or otherwise" limb under s.22(1)(b) — granting leave was exceptional course — Hong Kong Court of Final Appeal Ordinance (Cap.484) s.22(1)(a), 22(1)(b)

C

D

[Hong Kong Court of Final Appeal Ordinance (Cap.484) s.22(1)(a), 22(1)(b)]

P alleged a breach of contract to sell shares in a private company by D. The claim was for unliquidated damages. The Court of First Instance gave judgment for P, and damages were assessed in the sum of US$500,000. The Court of Appeal overturned that decision. P applied to the Court of Final Appeal for leave to appeal under: the s.22(1)(a) "appeal as of right" limb of the Hong Kong Court of Final Appeal Ordinance (Cap.484) (the Ordinance), arguing that the sum assessed by the Trial Judge should be treated as the "matter in dispute"; or under the s.22(1)(b) "or otherwise" limb, arguing that leave should normally be granted unless the grounds of appeal had no realistic prospects of success.

E

F

Held, refusing leave to appeal, that:

G

(1) The right of appeal conferred by s.22(1)(a) did not extend to claims for unliquidated damages. This applied equally where such claims had been assessed, resulting in an award exceeding HK$1 million. The Court's approach was settled and there was no reason to depart from it (*Zuliani v Veira* [1994] 1 WLR 1149, *Cheng Lai Kwan v Nan Fung Textiles Ltd* (1997–98) 1 HKCFAR 204, *Shum Kam Fai v Lam Chi Wai & Another* (unrep., FAMV No 38 of 2002, [2002] HKEC 1573) applied). (See pp.262H–I, 263E–F.)

H

(2) The granting of leave to appeal under the "or otherwise" limb in s.22(1)(b) was an exceptional course. The words "or otherwise" were in the context of the Ordinance laying down as the usual condition of granting discretionary leave, the high-threshold requirement that the appeal should involve a question of great general or public importance. The construction contended for would wholly subvert that requirement. Here, there was no basis

I

J

A for granting discretionary leave under s.22(1)(b) (*Smith v Cosworth Casting Processes Ltd (Practice Note)* [1997] 1 WLR 1538 distinguished; *Hui Yiu Wing v Regional Council* (unrep., FAMV No 16 of 2002, [2002] HKEC 1223) applied). (See pp.263G–264B.)

B **[Chinese translation of headnote.]**

*民事訴訟程序——終審法院——上訴許可——第22(1)(a)條下的上訴當然權利——並不涵蓋未經算定損害賠償申索，即使此等申索已經評估而獲判給的賠償額超逾100萬元——依據第22(1)(b)條下的"或因其他理由"而提出上訴——*C *給予許可乃屬例外的做法——《香港終審法院條例》(第484章) 第22(1)(a)、22(1)(b)條*

[《香港終審法院條例》(第484章) 第22(1)(a)、22(1)(b)條]

D 原告人入稟法院，指被告人違反一份私人公司股份出售合約，並向被告人追討未經算定損害賠償。原訟法庭裁定原告人勝訴，而損害賠償額評定為50萬美元。該裁決隨後遭上訴法庭推翻。原告人倚賴《香港終審法院條例》(第484章) 的以下兩項條文，申請許可上訴至終審法院：(一) 第22(1)(a)條下的"上訴當然權利"部份，理由為原審法官所評定的損害賠償額應被視 E 為"爭議的事項"；及 (二) 第22(1)(b)條下的"或因其他理由"部份，理由為，通常來說，除非上訴沒有真正的成功機會，否則法院應給予上訴許可。

裁決——拒絕給予上訴許可：

(1) 第22(1)(a)條所賦予的上訴權利，並不涵蓋未經算定損害賠償申索。 F 即使這類申索已經評估，而法庭判給的賠償額評定為超逾100萬元，情況也沒有分別。法院的做法確立已久，本案亦沒有理由支持偏離該做法 (引用 *Zuliani v Veira* [1994] 1 WLR 1149，*Cheng Lai Kwan v Nan Fung Textiles Ltd* (1997–98) 1 HKCFAR 204，*Shum Kam Fai v Lam Chi Wai & Another* (unrep., FAMV No 38 of 2002，[2002] HKEC G 1573))。(見第262頁H至I，第263頁E至F)

(2) 法院只會在例外情況下根據第22(1)(b)條下的"或因其他理由"部份給予上訴許可。"或因其他理由"一詞所屬的文意是：法院可酌情給予上訴許可，但條件是上訴必須涉及具有重大廣泛的或關乎公眾的重要性的問題，而這是相當嚴格的要求。本案原告人所提出的詮釋方 H 法若然成立，將令上述規定形同虛設。本案不存在着理由以支持法院按第22(1)(b)條酌情給予上訴許可 (引用 *Hui Yiu Wing v Regional Council* (unrep., FAMV No 16 of 2002，[2002] HKEC 1223)；*Smith v Cosworth Casting Processes Ltd (Practice Note)* [1997] 1 WLR 1538 予以區別)。(見第263頁G至第264頁B)

I

Mr John Scott SC and Mr Paul Carolan, instructed by Robertsons, for the applicant.

Mr Liu Man Kin, instructed by F Zimmern & Co, for the respondent.

J **Legislation mentioned in the judgment**

Hong Kong Court of Final Appeal Ordinance (Cap.484) s.22(1)(a), 22(1)(b)

Cases cited in the judgment

Chao Keh Lung v Don Xia (unrep., HCA No 9289 of 2000, [2002] HKEC 1016)
Chao Keh Lung v Don Xia (unrep., HCA No 9289 of 2000, [2002] HKLRD (Yrbk) 111, [2002] HKEC 1262)
Chao Keh Lung v Don Xia [2004] 2 HKLRD 11
Cheng Lai Kwan v Nan Fung Textiles Ltd (1997–98) 1 HKCFAR 204
Hui Yiu Wing v Regional Council (unrep., FAMV No 16 of 2002, [2002] HKEC 1223)
Shum Kam Fai v Lam Chi Wai & Another (unrep., FAMV No 38 of 2002, [2002] HKEC 1573)
Smith v Cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538, [1997] 4 All ER 840, [1997] PIQR P227
Zuliani v Veira [1994] 1 WLR 1149

Cases in List of Authorities not cited in the judgment

Allan & Others v Pratt (1888) 13 App Cas 780
Born Chief Co v George Tsai & Another [1996] 2 HKLR 188
Kar Ho Development v Axis [2001] 1 HKC 86
Ki Ping Ki & Another v Oriental Daily Publisher Ltd & Others (unrep., FAMV No 25 of 2000, [2000] HKEC 994)
Macfarlane v Leclaire (1862) 15 Moo PC 181
Ting Kwok Keung v Tam Dick Yuen & Others (2002) 5 HKCFAR 336, [2002] 3 HKLRD 1, [2002] 1 HKC 601
Vitol SA v Norelf Ltd [1996] AC 800, [1996] 3 WLR 105, [1996] 3 All ER 193, [1996] 2 Lloyd's Rep 225

Ribeiro PJ

1. Section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance (Cap.484), so far as material, provides that an appeal shall lie to the Court of Final Appeal:

> … as of right, from any final judgment of the Court of Appeal in any civil cause or matter, where the matter in dispute on the appeal amounts to or is of the value of $1,000,000 or more …

2. In *Cheng Lai Kwan v Nan Fung Textiles Ltd* (1997–98) 1 HKCFAR 204, the Appeal Committee adopted the approach of the Privy Council in *Zuliani v Veira* [1994] 1 WLR 1149, and held that the right of appeal which that section confers does not extend to claims for unliquidated damages.

3. In *Shum Kam Fai v Lam Chi Wai & Another* (unrep., FAMV No 38 of 2002, [2002] HKEC 1573), it was held that this applies equally to cases where a claim for unliquidated damages had been assessed, resulting in the award of a sum exceeding $1 million.

4. Section 22(1)(b) provides a discretion to grant leave which, as pointed out in *Cheng Lai Kwan v Nan Fung Textiles Ltd* (1997–98) 1 HKCFAR 204, the Appeal Committee may exercise if it can be said

A as a matter of the utmost probability, or even of virtual certainty, that the damages ultimately awarded will be in excess of the threshold amount. This is, however, subject always to the grant of leave being justified by the apparent merits of the appeal.

5. The action to which the present application relates was brought B by the plaintiff alleging a breach by the defendant of a contract to sell a parcel of shares in a private company. The claim was for unliquidated damages. Deputy High Court Judge Carlson (HCA No 9289 of 2000, 8 August 2002 and 3 October 2002) gave judgment for the plaintiff and awarded him damages assessed in the sum in excess of US$500,000. C The Court of Appeal (Cheung JA, Ma JA, and Waung J; [2004] 2 HKLRD 11) reversed the judge's decision and gave judgment for the defendant. It also refused leave to appeal (on 19 March 2004).

6. Mr John Scott SC, appearing with Mr Paul Carolan for the plaintiff, invites the Appeal Committee to depart from its usual approach D to the grant of leave to appeal. The sum assessed by the trial judge obviously exceeds the HK$1 million threshold and it is submitted that we should construe s.22(1)(a) so as to treat the assessed amount as the "matter in dispute". He prays in aid what is said to be earlier Privy Council practice, referring to several cases which are dealt with in the E Court of Appeal's decision refusing leave to appeal.

7. We do not accept this submission. Whatever may have been the earlier practice in relation to Privy Council appeals, the modern *Zuliani* approach was applied in Hong Kong before 1997 in relation to Privy Council appeals, and has, since reunification, continued to F be applied in relation to the Court of Final Appeal.

8. The Court's approach is settled and we see no reason for departing from it. It is exceptional for courts of final appeal to entertain appeals as of right and we do not consider that there should be any enlargement to the existing classes of cases falling within that category.

G 9. It is not submitted that any point of great general or public importance arises. Mr Scott's alternative argument is that the Court's discretion to grant leave on the "or otherwise" ground should be approached on the footing that leave should normally be granted unless the grounds of appeal have no realistic prospects of success. He H cites *Smith v Cosworth Casting Processes Ltd (Practice Note)* [1997] 1 WLR 1538 in support. We reject that submission. The words "or otherwise" are found in s.22(1)(b) in the context of the Ordinance laying down, as the usual condition of granting discretionary leave, the high-threshold requirement that the appeal should involve a question of I great general or public importance. The construction contended for would wholly subvert that requirement. *Smith v Cosworth Casting Processes Ltd (Practice Note)* concerns the grant of leave to appeal to the English Court of Appeal in an entirely different and inapplicable context. As Bokhary PJ pointed out in *Hui Yiu Wing v Regional Council* J (unrep., FAMV No 16 of 2002, [2002] HKEC 1223), the granting of leave to appeal under the "or otherwise" limb is an exceptional course.

10. The Court of Appeal unanimously overturned the trial judge on the grounds that the evidence did not disclose either a repudiation of the contract by the defendant or, if there was a repudiation, that it had unequivocally been accepted. On the evidence, that was a course open to the Court of Appeal and we see no basis for exercising the discretion conferred by the words "or otherwise" in the section. Leave to appeal is accordingly refused with costs.