

HCA000919/2002

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IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 919 OF 2002

BETWEEN

SECRETARY FOR JUSTICE

Plaintiff

AND

CHUN KAM CHIU

Defendant

Coram: Deputy High Court Judge A Cheung in Chambers

Date of Hearing: 13 November 2002

Date of Ruling: 13 November 2002

R U L I N G

1. This is the hearing of an Order 14 appeal. The Defendant lost before Master June Wee in respect of an application for summary judgment. The summons for summary judgment was taken out on 8 August 2002, whereas the writ was issued back in March 2002 and the defence was filed in mid-May 2002.

2. The notice of appeal was filed within time on 28 October 2002. Today is 13 November 2002. On Monday, i.e. 11 November 2002, the Defendant filed and served a 2nd affirmation of a Ms Tsang Siu Lan Jones dealing with the subject matter of this claim. The Plaintiff opposed the late filing of evidence particularly at this appeal stage. To their credit, the Plaintiff managed to put together a short affirmation by a Madam To Yee Man in response to the 2nd affirmation of Ms Tsang. The Defendant through Ms Tsang prepared a 3rd affirmation in reply yesterday.

3. At today's hearing, Mr Chau appearing for the Plaintiff, strenuously opposes the application of Ms Wong, appearing for the Defendant, for leave to rely on the two latest affirmations of Ms Tsang for the purpose of her appeal. It should be noted that Ms Wong is new to this case in the sense that she did not appear for the Defendant before the learned Master and another counsel was instructed to represent the Defendant.

4. Mr Chau urges me to adopt the same approach adopted by the Court of Appeal in this type of situation, i.e. the **Ladd v. Marshall** test. The test is of course applicable to an appeal to the Court of Appeal in relation to a summary judgment granted under Order 14: see *Hong Kong Civil Procedure 2002* Vol.1 para. 59/10/9. However, in relation to an appeal from an order or judgment of a master to a judge in chambers of the Court of First Instance of the High Court, in my judgment, the test is not the same: see *Hong Kong Civil Procedure 2002* Vol. 1 para. 58/1/2. Indeed prior to Kaplan J's judgment in **Core Resources Far East Limited v. Sky Founders Limited** [1992] 1 HKLR 193, it was the common practice of the profession to put in further or additional evidence by affidavit or affirmation in an appeal of this sort almost as a

matter of course. Whilst the judgment of Kaplan J pointed out that the Court does retain a discretion in this type of matter relating to the admission of further evidence, the previous practice of the profession is understandable. After all, an appeal from a judgment or order of a master to a judge in chambers is by way of a *de novo* hearing. Unless the further or additional evidence raises a totally different or new defence or matter that had not been argued below before the master, one would have thought that given the nature of the appeal, the admission of further or additional evidence should not be too objectionable.

5. Moreover, precisely because of the practice of the Court of Appeal relating to the admission of further evidence, it is of paramount importance to all parties to an appeal before a judge in chambers that they have put in all the evidence that they think they require in relation to the appeal. In other words, given the stringent requirements relating to admission of further evidence before the Court of Appeal, the appeal before the judge in chambers represents to the parties, in practice, their last chance of putting their respective houses in order. That, in my judgment, explains the latitude that the Court has been extending to parties in this type of appeals relating to the admission of further evidence, whether before or after the very learned judgment of Kaplan J in **Core Resources Far East Limited**.

6. As I said, if the new evidence sought to be adduced raises a totally different matter or if a party has taken his stand on the evidence as it stood before the master, the judge in chambers may, in his discretion, by analogy with the practice in the Court of Appeal, refuse to allow him to adduce further evidence. In other circumstances, the Court would usually adopt a more relaxed attitude and as I have tried to explain above, that is supported by good sense.

7. Turning to the present case, having read the latest additional or further evidence, I am of the view that the matters raised in the latest affirmations of Ms Tsang only serve to supplement what has already been said by her as well as other deponents on behalf of the Defendant at the hearing below. What she says in her two latest affirmations is indeed quite consistent with the defence that has been filed by the Defendant. In fact, as I said, the defence was filed in May. So I can really see no real objection to the admission of the latest affirmations of Ms Tsang in this appeal.

8. Now, Mr Chau very understandably tells me that in any event, his side would need a decent opportunity to consider its response to the latest evidence, notwithstanding that the Plaintiff has managed to prepare a short affirmation in response to the 2nd affirmation of Ms Tsang. Mr Chau points out to me that if I should grant leave to

admit the further evidence, the Plaintiff would be obliged to ask for an adjournment of today's hearing. Although he is not prepared to go so far as to suggest that the late filing of evidence or the filing of further evidence at this stage of the proceedings is a deliberate tactic employed by the Defendant to delay the hearing of the present appeal, he does submit that I should take into account the potential delay to the hearing of the appeal in considering how my discretion should be exercised.

9. Ms Wong has very helpfully referred me to the chronology of the proceedings. In my judgment, the Plaintiff has taken her time in deciding whether to take out the Order 14 summons. Once the summons was taken out, the application was heard within a very short period of time; and after judgment was given against the Defendant, the Defendant lodged an appeal on 28 October and was given today's hearing date which is approximately two weeks from the date of the notice of appeal.

10. Moreover, as I mentioned above, Ms Wong is new to this case; it is very understandable that Ms Wong, after having sight of the papers, might take a different view regarding the sufficiency of the evidence required to support this appeal.

11. So in my judgment, first, I do not believe that this is a deliberate delaying tactic employed by the Defendant to force upon everyone involved an adjournment of today's hearing. Secondly, given the chronology in question, I do not think that any adjournment of today's hearing, assuming that one is applied for in the event that I give leave to admit the evidence, would cause any real or substantial prejudice to the parties relating to the expeditious resolution of the present appeal.

12. So, bearing in mind all the above matters as well as the general circumstances of the case, in the exercise of my discretion, I give leave to the Defendant to file and serve as well as to rely on in this appeal, the 2nd affirmation of Tsang Siu Lan Jones. I give leave to the Plaintiff to file and serve and rely on in this appeal, the 1st affirmation of To Yee Man which, as I said, was prepared in response to the 2nd affirmation of Ms Tsang. For the same reason, I give leave to the Defendant to file and serve and rely on in this appeal, the 3rd affirmation of Tsang Siu Lan Jones.

13. I will now hear the parties in relation to the further hearing of this appeal.

[Submissions by counsel]

14. Having heard the parties further, I order that the costs of and occasioned by the Defendant's application to put in further evidence be paid by the Defendant to the Plaintiff in any event, to be taxed if not agreed.

(Andrew Cheung)
Deputy Judge of the Court of First
Instance
High Court

Representation:

Mr Anthony Chau, Government Counsel of the Department of Justice, for the Plaintiff

Ms Lisa K Y Wong, instructed by Messrs Alvan Liu & Partners, for the Defendant