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HCA 1508/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO. 1508 OF 2004

BETWEEN

BRILLIANT (MAN SAU) ENGINEERING LIMITED Plaintiff

and

WONG CHAT CHOR, SAMUEL 1st Defendant

CHINA TOP CONSULTANTS LIMITED 2nd Defendant

Before: Deputy High Court Judge Carlson in Chambers
Date of Hearing: 12 April 2006
Date of Judgment (Handed Down): 3 May 2006

J U D G M E N T

Introduction

1. This is an appeal by the Plaintiff from two orders made by Master Au-Yeung on 10 February 2006. She had before her an Order 14 application by the Plaintiff for judgment to be entered against both

Defendants with damages to be assessed. She dismissed that application with costs. In order to make that strong order she must have been satisfied that the application had no merit and should not have been brought. She also had before her a summons by the Defendants' under section 357, Companies Ordinance for security for costs against the Plaintiff which she acceded to, directing the Plaintiff to bring into court the sum of $488,000, which has now been paid. Dissatisfied with these orders the Plaintiff now appeals contending that the Defendants have no defence on liability. If it were to obtain judgment outright or, if the Defendants were only to obtain conditional leave to defend, it is submitted on its behalf that the application for security by the Defendants would, of necessity, fail. With a judgment on liability there would be no question of it being ordered to provide security for costs. And even if it were only to put the Defendants on terms, it will have shown their defence to be shadowy which would mean that the merits of its case are so compelling that it should not have to provide security. Nevertheless, the grant of unconditional leave to defend must, I would have thought, place the Plaintiff in a difficult position where it has not sought to contest the application for security on the ground that it is, in any event, in a position to pay the Defendants' costs if it were to lose the action. I would need to attend to this more fully once I have decided the appeal on the Order 14 summons. This therefore is how the matter lies.

2. It is helpful to start by setting out the main characters in this dispute. The Plaintiff (the Appellant before me) is a building contractor. Its principal is a Mr Benny Chu who is also one of its directors. The central figure in the action is Mr Samuel Wong. He is a practising member of the Bar. Although he is of relatively recent call (2002) he was at the

times that are material to this action a highly experienced arbitrator and the then President of the Chartered Institute of Arbitrators in Hong Kong. I have not troubled to ask his age but I presume that he was called to the Bar as a mature person first having enjoyed a successful career as an arbitrator. He is the 1st Defendant in the action. The 2nd Defendant has been, I believe, correctly described by Mr Grossman SC, who appears for the Plaintiff, as the 1st Defendant's *alter ego*. It is a company that provides professional dispute resolution services. It is beneficially owned by the 1st Defendant and his wife, a lady called Sylvia Siu. The way this works is that any company, organisation or individual wishing to engage the 1st Defendant as arbitrator and/or mediator would do so by contractual arrangement with the 2nd Defendant. Payment for the 1st Defendant's professional services would be made to the 2nd Defendant. The 1st Defendant specialises in dispute resolution in the construction industry.

How this action has come about

3. Of necessity in an action such as this, the Statement of Claim is a substantial document running to 21 pages. It sets out the essential factual averments upon which the action is brought. Before I traverse much of the detail, which I must, it would be helpful to very briefly describe the action and how it has come about.

4. In or about Feburary 2003, Mr Benny Chu of the Plaintiff was introduced to the 1st Defendant through a mutual acquaintance. At the time the 1st Defendant was still a pupil barrister, without any right of audience before the court. The introduction was with a view to the 1st Defendant being instructed to represent the Plaintiff in an action that it had brought

[HCA 3837/2002] against another construction company called Prosperity Construction and Decoration Limited [formerly known as OLS International Limited ("OLS")] claiming $6.749 million for refurbishment works that it had done on behalf of OLS.

5. In the course of discussion of that action, the 1st Defendant had passed to him important documentation relating to it by Mr Chu. It does not matter precisely when the 1st Defendant was formally instructed to act for the Plaintiff but there is no doubt that at the latest this was done on 30 May 2003 when he received formal instructions from a firm of solicitors called Norman M K Yeung & Co. ("NMKY") who the 1st Defendant had previously suggested to Mr Chu should replace the Plaintiff's original solicitors, Alvan Liu & Partners ("ALP"). This suggestion was accepted by Mr Chu. The 1st Defendant was then instructed to advise the Plaintiff on its claim in conference at NMKY's offices. By now the 1st Defendant had started limited practice at the Bar meaning that he had entered the second six months of his pupillage and could accept instructions in his name. Those instructions came with substantial documentation relating to this action to enable the 1st Defendant to advise the Plaintiff on the merits of its claim and how best to proceed with a view to obtaining judgment against OLS.

6. Pausing here, it is essential at this stage to refer to another action, HCA 6903/2000 which pre-dated the Plaintiff's action against OLS. In that action, the 2nd Defendant was suing OLS for unpaid fees of over $3.2 million plus accrued interest of $652,397. This related to arbitration services provided to OLS by the 1st Defendant [Mr Wong]. This action

had started in July 2000 and, in July 2003 OLS admitted liability, leaving over a dispute as to quantum. That issue was tried on 4 August 2003 by Chu J when the 1st Defendant appeared before her and gave evidence in support of the claim. On 29 August she delivered her judgment awarding the 2nd Defendant a judgment in excess of $3 million. The 2nd Defendant then set about trying to enforce its judgment against OLS. The 1st Defendant, who was by now well and truly instructed on behalf of the Plaintiff in HCA 3837/2002 against OLS is said by the Plaintiff not to have informed it of the 2nd Defendant's success against OLS before Chu J. Nor of its attempts to enforce that judgment by applying for a charging order on 11 August 2003 against a debenture that OLS had at Discovery Bay Golf Club worth $800,000 nor, that it had obtained a garnishee order absolute on 26 September 2003 for a small sum held at HSBC.

7. The next matter of significance was that on 9 October 2003, the 1st Defendant wrote to NMKY to say that he felt unable to continue to act for the Plaintiff in HCA 3837/2002 against OLS because of a conflict of interest relating to the 2nd Defendant's action against OLS in HCA 6903/2000. On the same day, the 2nd Defendant applied for a garnishee order against Paul.Y as garnishee. The affirmation in support of that application alleged that OLS was owed $3 million being the balance owed by Paul.Y to OLS for renovation works done by OLS on Paul.Y's behalf.

8. The clear picture that emerges from this therefore is that both the 2nd Defendant and the Plaintiff were owed substantial amounts by OLS. Whilst this was going on the 1st Defendant [the beneficial owner of the

2nd Defendant] was advising the Plaintiff in its action against the same debtor [OLS]. OLS's indebtedness to the 2nd Defendant pre-dated OLS's indebtedness to the Plaintiff by some margin. The 1st Defendant did not inform the Plaintiff of this until after the 2nd Defendant had obtained judgment against OLS and had already started the process of enforcing its judgment against it. This fact is central to this action, the significance of which I will need to analyse in more detail presently.

9. On 14 October 2003, a garnishee order *nisi* was made in favour of the 2nd Defendant against Paul.Y. NMKY then advised the Plaintiff to intervene in these garnishee proceedings. That application failed before the Master on the basis that there had been no assignment by Paul.Y to the Plaintiff. In such circumstances, Paul.Y could not be liable to the Plaintiff for sums that it owed to OLS. The Plaintiff's case had been that it was entitled to the amount held by Paul.Y which it owed to OLS because of its contractual relationship with Paul.Y in the renovation works. It had been submitted that OLS had by means of an assignment transferred to the Plaintiff the amount that it was owed by Paul.Y. This argument failed before the Master. It then appealed but, on finding out that the garnisheed amount had been paid by Paul.Y to the 2nd Defendant under the Master's order, it withdrew its appeal which would by then have served no purpose.

10. The next significant matter was that on 29 December 2003 HCA 3873/2002, in which the 1st Defendant had been instructed for the Plaintiff, was transferred to the construction list re-numbered HCCT 38/2004 and Paul.Y was added as a defendant together with OLS.

Paul.Y then sought to have part of the Statement of Claim against it struck out. The question of whether OLS had assigned Paul.Y's debt to it under the renovation works to the Plaintiff was the issue which called for decision. Reyes J, who heard the summons, held that the Plaintiff's claim based on the assignment was *res judicata* having regard to the Master's finding in the garnishee proceedings. There has been no appeal from Reyes J's decision.

11. This therefore is the factual background which has brought about this action by the Plaintiff.

The Causes of Action

12. Mr Grossman S.C. (Mr Hylas Chung with him) has set out the nature of the case in a very comprehensive and therefore helpful written submission. Three causes of action are pleaded although now only two are relied on. These are breach of confidence and breach of fiduciary duties. Each will need to be considered in turn. The overall nature of the action is encapsulated in three paragraphs of Mr Grossman's written case which I should set out. They are these [paras 106-108] :

> "*106. By taking or allowing himself to accept a brief and take instructions for and on behalf of Brilliant [the Plaintiff], he knowingly placed himself in a conflict of interest situation. Both Brilliant and China Top [the 2nd Defendant] were competitors in the sense that they both sought compensation from OLS at the material times. Obviously the first one to pursue its compensation would be in a superior position because of the benefits of priority. There was a plain and obvious conflict between Wong's own interests and the interests of Brilliant.*
>
> *107. From the admission made by Wong [the 1st Defendant] in his fax message to Jimmy Chan on 9 October 2003, it is obvious that he recognized at least a potential conflict of interest.*

> *Further, since that was the same day the affirmation of Ms Hung Wai Fung was made for the garnishee proceedings, Wong knew that there was already a conflict of interest rather than a potential one.*
>
> *108. Thus, Wong was in breach of his fiduciary duties in that there was a potential conflict of interest when he accepted the brief and instructions from Brilliant. And he was in breach of his fiduciary duties in that there was an actual breach some time before he withdrew as counsel for Brilliant (i.e. when China Top decided to initiate the garnishee proceedings). More importantly, Wong's active and expedient execution against OLS after China Top had obtained judgment has put Wong into an undeniable position that his interests conflicted head-on with those of Brilliant.*"

Breach of Confidence

13. Once counsel is instructed by a client, he is placed in a position of confidence between himself and his client not to communicate to a third party nor to use to his clients detriment or to his advantage information acquired by him as counsel. That duty continues to subsist after the relationship of counsel and client has ceased to exist [see *Halsbury's Law of Hong Kong*, Vol. 17, para. 240.297]. The way that the duty of confidence arises out of such a relationship was analysed by Megarry V C in *Malone v Metropolitan Police Commissioner* (1997) CH 344 at 375 and adopted in Hong Kong by Sears J in *China Light & Power Co. Ltd v Ford* [1995] 1 HKLR 1. The Vice-Chancellor said this :

> "*The right of confidentiality accordingly falls to be considered apart from any contractual right. In such a case, it has been said that three elements are normally required first, the information must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of that information to the detriment of the party communicating it.*"

Mr Grossman submits that between counsel and his client the first two elements are inter-related or indeed, merge into one another. Unsurprisingly, this duty is reproduced in a very full way in the Bar's own Code of Conduct. Rule 54 states that the papers in a brief or instructions to counsel are normally the property of his client and that he has no right, without the clients' consent to lend them or reveal them to any person otherwise than as may be necessary for the proper discharge of his duties. Rule 116 is to the same effect as the reference in *Halsbury* which I have noted concerning counsel's duty not to communicate information entrusted to him nor to use it to a client's detriment or to his advantage. This having been said, a breach of the Code in this respect will not of itself give rise to a cause of action. Nevertheless, as Sears J observed in the *Ford* case (supra) :

> "*... when a breach of confidentiality claims are being examined. It is right for the court to look at the appropriate standard of professional conduct ... in this case, the Bar ...*"

He then went on to observe that the confidentiality pertained not so much in the documents (which it undoubtedly would do) but in the information contained in the documents.

14. Drawing all of this together, Mr Grossman says that the documents provided to the 1st Defendant by the Plaintiff were confidential in nature and had the necessary quality of confidence in them and were imparted in circumstances importing an obligation of confidence, thereby possessing all the features identified by Sir Robert Megarry in *Malone (supra)*.

15. As to the facts, there is no dispute on the 1st Defendant's behalf that he received 17 of the 24 documents exhibited as CYF-5 in Mr Benny Chu's affidavit of 24 October 2005 [see Bundle B, 195-312] which he would have needed in order to advise the Plaintiff. The same applies to the papers at CYF-6 [Bundle B, 313-407]. The briefest perusal of these documents will indicate that these are just the sort of papers that are caught by counsel's duty of confidence, both as to their content and as to the circumstances in which they were handed over to him.

16. A helpful summary of the 1st Defendant's coming into possession of the papers and the purpose of their having been given to him is at para. 67 of Mr Grossman's written argument :

> "*Wong [the 1st Defendant] in his Defence admits that he attended meeting(s) and conferences and was given information and instructions. More specifically and importantly, Wong admits :*
>
> *(a) That he was instructed that Brilliant had claims against OLS or Paul-Y;*
>
> *(b) That he had a copy of the letter dated 30 April 1997 showing the contractual relationship between Brilliant, OLS and Paul-Y;*
>
> *(c) That he was instructed to advise on the strategy of advancing its potential claim against Paul-Y based on the relationship mentioned above in (a) and (b);*
>
> *(d) That he was instructed that a sum of HK$2.5 million and a sum of around HK$1 million had been paid by Paul-Y to OLS; and*
>
> *(e) That he was instructed that there was a further sum of HK$3,248,935.47 due from Paul-Y to OLS.*"

17. The next element of the Plaintiff's case is to try and show whether there was unauthorised use of the confidential information to the

Plaintiff's detriment. This is put in two ways. Firstly, in a general way that any information coming to the 1st Defendant through his instructions is also to be imputed to the 2nd Defendant as his *alter ego*, to the Plaintiff's detriment. The second, more specific, basis is that the 2nd Defendant was thereby able to come into possession of information concerning the relationship between Paul.Y, OLS and the Plaintiff concerning their contractual rights and obligations and what was owed by each to the other and *vice versa* which could and was then used by the 2nd Defendant when it issued its garnishee proceedings, to the detriment of the Plaintiff whom it found itself to be in an "enforcement race" against OLS. The detriment complained of by Mr Grossman is the Plaintiff's loss of opportunity to get in first and claim its monies due from OLS and/or Paul.Y and thereafter the consequent wasted costs in the garnishee proceedings. As a result, where OLS is now in liquidation it has at best a very limited prospect of getting anything meaningful from the liquidators.

18. The burden of proof in such a case rests fairly and squarely on the Plaintiff. Mr Grossman submits that this burden has been amply discharged by the Plaintiff. Mr Grossman has identified three pleaded defences. Firstly, no unauthorised use by the 1st Defendant because the 2nd Defendant's case in HCA 6903/2000 was conducted by his brother-in-law Mr Alfred Siu, secondly that the Plaintiff provided an informed consent to this information coming into the 1st Defendant's possession when it instructed him and lastly, that an independent source, Mr Eric Chung, a director of Paul.Y had provided the information that went to support the 2nd Defendant's case in the garnishee proceedings against Paul.Y.

19. As to the position of Mr Alfred Siu, it is said that his position was merely *qua* witness on behalf of the 2nd Defendant in HCA 6903/2000 and that it was the 1st Defendant and not Mr Siu who swore the affidavit on the 2nd Defendant's behalf. On the question of whether the Plaintiff already knew that the 2nd Defendant was in litigation with OLS when the 1st Defendant accepted instructions to act for it, which is really both Defendants' main plank in their defence, Mr Grossman submits that the Plaintiff was never fully in the picture and that there is no evidence to show that it released the 1st Defendant in the sense of allowing him to use information that his instructions would have imparted to him about the relationship of Paul.Y, OLS and the Plaintiff. As Mr Grossman puts it at para. 90 of his argument :

> "*It is not remotely conceivable that Brilliant would act against its own self-interest so as to give Wong a release to enable China Top to claim in priority the sum of monies that Brilliant was at all time claiming …*"

Finally, it is submitted that even if it can be shown that the 2nd Defendant had obtained its information from somebody else, such as Mr Eric Chung (see above) this would not release the 1st Defendant from being liable for its unauthorised use.

Breach of Fiduciary Duty

20. It seems to me that there is considerable overlap between this pleaded cause of action and that which I have just been considering. This duty arises from the relationship between counsel and his client. Further reference is made to the Bar's Code of Conduct which is said to bear on this part of the case. Rule 57 says this :

> "*No barrister is obliged to accept a brief if he has previously advised or drawn pleadings or appeared for another person on or in connection with the same matter; and he ought not to accept a brief or advise or draft pleadings if he would be embarrassed in the discharge of his duties and, if he has received any such brief or instructions inadvertently, he should return the same. A barrister will be so embarrassed if, for example, he has material information which has entrusted to him in confidence by or on behalf of his previous client.*
>
> *If, after the delivery of a brief or instructions on behalf of more than one client, there appears to be a conflict of interest between them, a barrister may not continue to act for any such client unless all such clients consent to his so acting and he is liable to do so without embarrassment.*"

Rule 60 is also referred to :

> "*A barrister may not appear as Counsel :*
>
> *(a) in a matter which he himself is a party or has a significant pecuniary interest.*
>
> *(b) either for or against any company of which he is an officer or in which he is directly or indirectly a significant pecuniary interest.*"

Lastly Rule 110, which is in these terms :

> "*A barrister has a duty to uphold the interests of his client without regard to his own interests or to any consequences to himself or to any other person.*"

21. All of this stems from the obligation of loyality that is recognised in the relationship of counsel and client. In the leading case of *Bristol & West Building Society v Mothew* (1998) Ch. 1, Millett LJ describes the obligation of a fiduciary in this way :

> "*A fiduciary must act in good faith; he must not profit out of his trust, he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.*"

Although Mr Grossman has taken this more comprehensively, what it really boils down to is the complaint that the 1st Defendant, by accepting instructions from the Plaintiff knowingly placed himself in a situation where his own personal interest (through the 2nd Defendant) conflicted with that of his client. They were both at the time "competing" with each other to be compensated by OLS. Whoever got to the winning post first, in terms of executing its judgment, achieved an enormous advantage, as in fact happened for the 2nd Defendant.

22. In terms of relief, the Plaintiff submits that it has now lost the opportunity of entering a meaningful judgment and it now seeks to be compensated for that loss of opportunity. Given the difficulty in assessing this as a figure in dollar and cents without a full and detailed hearing, the Plaintiff accepts that it must limit itself only to a judgment on liability.

The Defences

23. Mr Kenneth Chow, for the Defendant, is content to take a more general approach to the allegations made against his clients, certainly at this Order 14 stage. The general thrust of his case, before I refer to the particular points that he seeks to make, is that Order 14 is not appropriate in a case such as this where allegations akin to fraud, for which Order 14 should not be applied, are being made. Whilst fraud as such is not being alleged, this amounts to serious professional misconduct by a senior arbitrator, he was after all the President of the Institute at the time, as well as being a member of the Bar and it is in this capacity that his conduct is being called into question.

24. As to this general point, I recognize the force of that observation and so I would have thought that the court would not wish to drive a defendant such as the 1st Defendant from the judgment seat unless there is the clearest case against him for which there can be no arguable response. It is not that a different test is to be applied in Order 14 but that the graver the allegation the more convincing the evidence should be, before judgment of this type can be entered. I certainly must and will bear in mind this consideration.

25. The essence of the defence is that the Plaintiff gave its informed consent. This, according to Mr Chow, is very much a question of fact which can only be resolved in the course of a conventional trial. The defence is pleaded at paragraph 8(c), (d) and (e) of the amended Defence [Bundle A26-27] and more importantly in the affirmation of the 1st Defendant at A94-96, paragraphs 27-31. He has gone into the matter in considerable detail and it seems to me that, at this stage, I cannot, even taking his evidence at its highest, say that there is simply no issue of fact to be determined by the trial judge. What Mr Grossman would have to show is that the evidence is all one way and that it is manifestly the case that the Plaintiff did not give its informed consent. He has not been able to discharge that very difficult burden on the basis of this affirmation evidence. The 1st Defendant has given his explanations and these will have to be tested and I am sure that they will be tested most rigorously in the course of the trial.

26. This being my view of the affirmation evidence on this fundamental issue the rest of the Plaintiff's case as a viable Order 14

application must fall away. Where there is a real evidential contest to be resolved at the trial on this basic issue, the questions of breach of confidence, conflict of interest and breach of fiduciary duty which have been so carefully set out by Mr Grossman must, of necessity, await the resolution of the evidential contest on whether the Plaintiff really was sufficiently and fully in the picture as to the 1st Defendant's two hats as counsel for the Plaintiff and as litigant against the same defendant as the Plaintiff and whether having been sufficiently informed about this the Plaintiff consented to this state of affairs. Once that is resolved one way or the other, everything else must fall into place having regard to the way in which the judge decides this fundamental issue.

27. If he holds against the 1st Defendant, I daresay all the legal principles which Mr Grossman has deployed will have their full impact against both defendants. If the judge holds for the 1st Defendant on the question of informed consent then the Plaintiff's case must, I would have thought, be in some difficulty. All of this cannot be for me to decide on the evidence in its present state.

The Outcome

28. Mr Chow has in particular drawn attention to some of the well-known cases which describe the court's approach when faced with an application for summary judgment. I do not propose to repeat these here. It is sufficient for me to say that the Defendants, by virtue of the affirmation evidence filed on their behalf, have raised a triable issue in the way that I have already described. The question that I now need to resolve is how to dispose of the summons. The Master dismissed it outright.

These matters are apt to strike people in different ways. For my part I do not consider that this application is so devoid of merit that it should not have been brought. The 1st Defendant's conduct throughout calls for serious examination and explanation. I am content to say that the Defendants should have unconditional leave to defend. Mr Grossman has suggested that the Defendants should, as a last resort, only be given conditional leave and be put on terms of a payment in, but, for my part, I am unable to say that their defence is "shadowy" which is what would need to be shown before I made that sort of order. Whilst there is no doubt that the Plaintiff's case is an impressive one, the defence is one that clearly establishes the need for a trial. There are genuine factual disputes and arguments that will call for careful consideration by the trial judge. The matter remains very much in the air.

29. This being my view I do not think it right to condemn the Plaintiff in costs as the Master did. The costs should be in the cause both here and below. This was a proper Order 14 summons which has in the event failed. Serious allegations will need to be tried and resolved and it is only after a trial of these allegations that will it be known whether the 1st Defendant has been guilty of serious misconduct. The costs of these interlocutory proceedings will then follow that outcome. Accordingly, I propose to vary the Master's order by giving unconditional leave to defend and to vary her order for costs in the way that I have just indicated.

Security for Costs

30. In view of the fact that I have given the Defendants' unconditional leave to defend, the Plaintiff must find itself in difficulty on

this part of the case. I am unable to say that the merits of its case are so compelling at this stage so as to be taken into account on the application for security. The merits remain in the balance to be contested over. The Plaintiff has not sought to argue that an order for security will stifle a genuine claim nor has Mr Grossman addressed me on the basis that the quantum ordered is unreasonable or more fundamentally that it is able to pay costs if it loses the action. I am satisfied that the Master's order on security was the correct one. Whilst I appreciate that she made the order on the basis that Order 14 should never have been applied for and my view of the merits of the Plaintiff's case is somewhat more generous because I have disposed of that summons by giving unconditional leave to defend rather than dismissing the summons outright, the fact remains that the merits of the Plaintiff's case cannot affect the application for security in this instance, which is really the only way in which Mr Grossman has sought to argue this summons. Accordingly, the Master's order on this summons will remain in place and the appeal must therefore stand dismissed with costs here and below.

31. Because I have not heard argument on costs, the orders for costs will be orders *nisi*.

(Ian Carlson)
Deputy High Court Judge

Clive Grossman S.C. and Hylas Chung, instructed by Messrs Gary Lau & Partners, for the Plaintiff

Kenneth C K Chow, instructed by Messrs Charles Yeung, Clement Lam Liu & Yip, for the 1st and 2nd Defendants