

HONG KONG / JUDGMENT

BAM GANESH v. HUSSAIN MAROOF

COURT

District Court

DECIDED

9 February 2007

CASE / FILE NUMBER

DCCJ3125/2005

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bjbj DCCJ3125/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 3125 OF 2005 BETWEEN BAM GANESH Plaintiff and HUSSAIN MAROOF Defendant Coram: H H Judge H.C. Wong in Chambers (Open to Public) Date of Hearing: 9 February 2007 Date of Delivery of Decision: 9 February 2007 D E C I S I O N The plaintiff applies for leave to appeal my judgment in this action delivered on 12 December 2006. The plaintiff's grounds of appeal are that I have failed to take proper advantage of having seen and heard witnesses at the trial in that DW2, Mr Mohammad Yasin, was a witness for the defendant but I have accepted his evidence without taking any or any proper account of the fact that (1) Mr Yasin stated he did not understand English; and (2) his witness statement in English stood as his evidence-in-chief and the defendant's witness statement also stood as his evidence-in-chief was stated as having been interpreted by Mr Yasin. Therefore, I have deprived myself of the advantage of seeing and hearing how the defendant and his witness responded to oral examination-in-chief. Mr Clough, counsel for the plaintiff referred me to the judgment of Godfrey JA in the case of *So Amy v Au Leslie* [1995] 2 HKC 113 at page 118. I refer to the passage of Godfrey JA's judgment, page 118G-I: Leslie's evidence-in-chief, and Goldie's evidence-in-chief was given by way of witness statement ordered by the judge at the trial to stand as the witness's evidence in chief. (The same course was adopted for the evidence in chief of Tony, Simon and Amy). This is a course which a judge is entitled in his discretion to take. But the most important factor for a judge to consider in deciding whether or not to take it is the extent to which the evidence of a particular witness is likely to be controversial, and his credibility put in issue. In these circumstances, the way in which the witness responds to the oral examination in chief may be of great importance; and, that being so, it is wrong in principle to make orders applying to all witness statements without regard to the extent to which the witness's evidence is likely to be controversial and go to the heart of the dispute. The defendant was unrepresented at the trial, the plaintiff was represented by a solicitor, Mr Henry Wong, at the trial. Both the defendant and his witness, Mr Yasin, were cross-examined vigorously on their evidence. The defendant gave lengthy and extensive evidence-in-chief. He gave his evidence from the beginning of his first encounter with the plaintiff and the assistance he received from the plaintiff as his interpreter. This evidence was given orally in court before he was cross-examined. The defendant's witness, Mr Yasin, his evidence was on one to two incidents concerning the defendant. He confirmed the truth of the

contents of his evidence when he gave his evidence-in-chief. In cross-examination, he admitted that he understood Cantonese and that the contents of his witness statement was explained in Cantonese to him, the contents of the witness statement of the defendant was also explained to him and he in turn explained it to the defendant. He claimed he was at the lawyer s office at the time. The defendant at one time was represented by Messrs Tang & Tang, Solicitors. This firm of solicitors was responsible for filing the witness statements of the defendant and Mr Yasin into court in December 2005. As the trial judge, I have seen and heard the defendant and his witness, Mr Yasin, giving evidence in court, during which time they were both extensively cross-examined. I have no doubt whose evidence is more credible after hearing, seeing and observing the demeanour of the plaintiff, the defendant and his witness. As Mr Clough referred to Godfrey JA s judgment in So Amy, which is a binding authority on this court, I will grant leave to appeal to the plaintiff, even though I am not convinced of the plaintiff s prospect of success in the appeal. I cannot say, however, given the authority of the judgment of Godfrey J, as he then was, that the plaintiff s prospects of appeal is fanciful. I order costs of this application in the cause of the appeal. (H C Wong) District Court Judge Mr Neal Clough, instructed by Messrs Henry H.C. Wong & Co., for the Plaintiff Defendant, in person, present PAGE - PAGE CRT8/9.2.2007/JJP DCCJ3125/2005/Decision A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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