

HONG KONG / JUDGMENT

CHAN KA KIT v. A.S. WATSON & CO LTD

COURT

Court of First Instance

DECIDED

4 December 2007

CASE / FILE NUMBER

HCPI554/2007

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bjbj HCPI 554/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. HCPI 554 of 2007

BETWEEN CHAN KA KIT Plaintiff A.S. WATSON & CO. LTD Defendant

Coram : Before Master B Kwan in Chambers Date of Hearing : 28 November 2007 Date of Handing
Down of Reasons for Decision: 4 December 2007

Reasons for Decision

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1. The plaintiff's solicitors took out a Summons pursuant to (a) Order 24 rule 7; (b) Practice Direction 18.1; and (c) Inherent Jurisdiction.
 2. After hearing the parties, I dismissed the Application with costs to the Defendant.
 3. Herein below are my Reasons for that Decision.

Background

4. The plaintiff worked for the defendant as a warehouse assistant. He claims that on 24 August 2005, while working in the defendant's warehouse, he sprained his back lifting a heavy box.
5. According to the Defence (inter alia): The description of the work carried out by the plaintiff is admitted, but not the other averments in paragraphs 1(c)(i), 1(c)(ii) and 1(c)(iv); No admissions are made as to the allegations of lifting over 100 boxes weighing 25 to 60 lbs in paragraph 1(c)(iii) of the Statement of Claim; No admissions are made as to constantly pushing/pulling/jerking a handcart with heavy goods in paragraph 1(c)(v) of the Statement of Claim; No admissions are made as to the allegation that the premises were under the

supervision, control or management of the defendant; There were implied terms contained in the plaintiff's contract with the defendant; No admissions are made as to any duty being owed under Cap 59 or Cap 509; No admissions are made as to any duty being owed under the common law.

6. The only reference to any machine or machinery is in paragraph 6 of the Statement of Claim, at the top of page 10, where it is alleged and intended to place and stack it on the pallet, he suddenly sprained his back.
7. The application must be considered in the light of the terms of the Application as drafted in the Summons. In the Summons dated 18 September 2007, the plaintiff sought the following:
 1. The Defendant do within 7 days from the Order to be made herein produce for inspection by the plaintiff's solicitors, Michael Pang & Co at the office of the Defendant's solicitors or at such place as the Court think (sic) fit, the documents specified in the letter of the Plaintiff's solicitors dated 5 September 2007, copy of which is annexed hereto and do permit the Plaintiff's solicitors to peruse the same and to be supplied with copies thereof on payment of proper photocopying charges;
 2. The Defendant do within 7 days from the Order to be made herein file and serve an Affidavit stating whether it has at any time had in its possession, custody or power the documents or any of them specified in the letter of the Plaintiff's solicitors dated 11 April 2007, copy of which is annexed hereto and if the said documents or any of them have been but are not now in its possession, custody or power when it parted with the same and what has become of the same; and
 3. The costs of and occasioned by this application be to the Plaintiff with the Plaintiff's own costs be taxed in accordance with Legal Aid Regulations.
8. There is no necessity for me to deal with Paragraph 1 of the Summons as the application for paragraph 1 was withdrawn during the hearing on the 28 November 2007, with costs awarded to the defendant.
9. Paragraph 2 of the Summons related to a request made by letter dated 11 April 2007, months before the Statement of Claim and the Statement of Damages were filed and served. This was an Application under Order 24 rule 7. It was not an Application under Order 24 rule 7A. The Statement of Claim was not filed until 30 June 2007, so this request was made pre-action, and made prematurely. No pleadings had been filed, no List of Documents had been filed, and yet the plaintiff's solicitors were invoking the provisions of Order 24 in the letter dated 11 April 2007.

10. The margin note of the Summons referred to PD18.1 and Inherent Jurisdiction . I know of no power to order specific discovery under the inherent jurisdiction of the Court. Nor does a Practice Direction confer power to order specific discovery of Documents. When asked, counsel who appeared for the plaintiff could think of no authority where Inherent Jurisdiction could be cited to order discovery, or why a Practice Direction could be so cited.
11. Even if the application is considered on the basis that it was made after commencement of proceedings, it would still fail for casting the net too widely. Order 24 r7 is an Order for discovery of particular documents , and discovery will only be ordered by the Court under Order 24 rule 7 if the provisions under Order 24 rule 7(3) are met.
12. As explained in *Berkeley Administration v McClelland* [1990] FRS 381, the three prerequisites for production of the documents must be established by the party applying before he can bring himself within the jurisdiction of Order 24 rule 7.
13. It was stated in the *Berkeley* case that there is no jurisdiction to make an order under O24 rule 7 for the production of documents unless:
 - (i) there is sufficient evidence that the documents exist which the other party has not disclosed;
 - (ii) the document or documents relate to matters in issue in the action;
 - (iii) there is sufficient evidence that the document is in the possession, custody or power of the other party.
14. The position in Hong Kong is no different, see *Full Range Electronics Company Ltd v General-Tech Industrial Ltd & Anor* HCA 10374 of 1995.
15. It must be borne in mind that, even when the applicant has established that the 3 prerequisites referred to in Order 24 rule 7(3), the court may still exercise its discretion not to order disclosure. This is because rule 7 is subject to rule 8, therefore, even if the applicant satisfies rule 7, discovery will not be ordered by the Court if it is shown to be unnecessary.
16. Counsel for the plaintiff tried valiantly to salvage the application, but it was fatally flawed because the application as drafted by the plaintiff s solicitor was a wide, sweeping demand, an undisguised fishing expedition. Without pleadings, Order 24 rule 7 is simply not applicable because, at the pre-action stage neither side has formally stated what their case is, and without pleadings, it is impossible to identify with precision any documents which might possibly relate to matters in issue in the action.
17. The plaintiff s solicitor had quoted a passage 24/2/10 of the White Book 2007, relying on the *Peruvian Guano* case, but the *Peruvian Guano* principles do not justify demands for documents at the far end of the spectrum of materiality which on the face of it are unrelated to the pleaded case of the plaintiff or the defendant and which were required purely for speculative investigation per Coleman J in *O Co. v M Co.* [1996] 2 Lloyd s Rep 347. In other words, the Court will not tolerate a fishing expedition under the guise of an application under *Peruvian Guano* principles.

Conclusion

18. The application for discovery under paragraph 2 of the Summons dated 18 September 2007 was dismissed for the reasons given herein.
19. Order 24 rule 7 cannot be invoked pre-action, and in any event before Lists of Documents have been filed and served. See paragraph 24/0/9 on page 429 of Hong Kong Civil Procedure 2007.
20. The Court will not tolerate a fishing expedition under the guise of an application under Peruvian Guano principles. (B. Kwan) Master of the High Court Mr Peter KC Wong of Counsel, instructed by Messrs Michael Pang & Co for the Plaintiff; Ms C Sy of Messrs Deacons for the Defendant. - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V & 6" Normal.dot setup Microsoft Word 9.0 3 H6 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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