

HONG KONG / JUDGMENT

GLOCK (HK) LTD v. BRAUNER WILHELM

COURT

Court of First Instance

DECIDED

31 May 2007

CASE / FILE NUMBER

HCA2865/2004

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bjbj HCA2865/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2865 OF 2004

BETWEEN GLOCK (H.K.) LIMITED Appellant (Plaintiff) and BRAUNER WILHELM Respondent
(Defendant)

Before : Hon Saw J in Chambers Date of Hearing : 16 May 2007 Date of Judgment : 31 May 2007

JUDGMENT

AUTONUMOUT On 26 January 2007 Master Souza made the following orders :

- (i) the Statement of Claim filed herein on 16 December 2004 be struck out; (ii) costs of the suit and this application be to the defendant against the plaintiff, to be taxed if not agreed, certificate for counsel; and (iii) there be no order for costs on the consolidation application. AUTONUMOUT Glock (H.K.) Limited (the appellant) and Brauner Wilhelm (the respondent) were formerly employer and employee. There was a written contract of employment. The respondent was dismissed by the appellant on 28 August 2004. AUTONUMOUT By a writ of summons dated 16 December 2004, the appellant commenced proceedings against the respondent. In an Amended Statement of Claim dated 16 March 2005, the appellant alleged that the respondent, in breach of express and implied terms in their contract of employment, had caused loss and damage to the appellant. One of the allegations in the Amended Statement of Claim was that the respondent was in breach of an implied fiduciary duty owed by him to the appellant. Particulars of the alleged breach of fiduciary duty include, inter alia :

- (i) incurring unnecessary expenditure; (ii) conducting irresponsible and unreasonable business transactions; (iii) neglect to his responsibilities; and (iv) mismanagement of financial matters generally. AUTONUMOUT On 10 January 2005, the respondent sought orders pursuant to Order 18, rule 9 of the Rules of Supreme Court that :
- (i) the Statement of Claim filed herein on 16 December 2004 be struck out; or (ii) there be a stay of these proceedings pending the determination of HCA16/2005; or (iii) the Statement of Claim filed herein on 16 December 2004 be the plaintiff's Counterclaim in HCA16/2005; and (iv) costs. HCA16/2005 AUTONUMOUT On 3 September 2004 the respondent commenced proceedings against the appellant in the Labour Tribunal and that claim was answered by the appellant by a defence and counterclaim in that jurisdiction. AUTONUMOUT The appellant applied before the presiding officer at the Labour Tribunal on 17 December 2004 to have those proceedings transferred to the High Court pursuant to section 10 of the Labour Tribunal Ordinance, Cap. 25 (the Ordinance). That section provides in part under the heading Declining Jurisdiction
- (1) The tribunal may, at any stage of proceedings, if it is of the opinion that for any reason the claim should not be heard and determined by it, decline jurisdiction.
- (2) The tribunal may, when it declines jurisdiction under subsection (1), transfer the claim to the Court of First Instance, the District Court or the Small Claims Tribunal, in such manner as may be prescribed. The presiding officer of the Labour Tribunal acceded to that request and transferred the whole of the proceedings to this court. On 18 February 2005 pursuant to Order 79 of the Rules of High Court, Master Hui gave directions for the future conduct of the proceedings transferred from the Labour Tribunal. Those proceedings were given the number HCA16/2005. The issues AUTONUMOUT The appellant commenced proceedings in the High Court by writ of summons, the respondent commenced proceedings in the Labour Tribunal. The matters in issue in both sets of proceedings arise out of allegations and counter-allegations of breach of an employment contract. The respondent's proceedings have been removed to the High Court whereas the appellant's proceedings have been struck out by the order of the Master. The appellant now appeals the Master's orders. The Ordinance AUTONUMOUT It is the respondent's submission before me that the Master was correct in striking out the appellant's Statement of Claim. The respondent says that all proceedings which amount to a claim for a sum of money arising from alleged breaches (whether express or implied) of a contract of employment are initially within the exclusive jurisdiction of the Labour Tribunal. They remain within that jurisdiction unless and until the Tribunal declines jurisdiction pursuant to section 10 of the Ordinance. AUTONUMOUT Section 7(2) is clear and unambiguous and denies this court jurisdiction absent the Tribunal declining jurisdiction. Insofar as is relevant, section Jurisdiction of tribunal provides as follows
- (1) The tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule.

- (2) Save as is provided in this Ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong. AUTONUMOUT The Schedule provides
1. A claim for a sum of money which arises from
 - (a) the breach of a term, whether express or implied, of a contract of employment, whether for performance in Hong Kong or under a contract to which the Contracts for Employment Outside Hong Kong Ordinance (Cap. 78) applies; (a)(a) the breach of a term, whether express or implied, of a contract of apprenticeship; or
 - (b) the failure of a person to comply with the provisions of the Employment Ordinance (Cap. 57) or the Apprenticeship Ordinance (Cap. 47), other than a claim specified in the Schedule to the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).
 2. A claim for contribution under section 26(2).
 3. Notwithstanding paragraphs 1 and 2, the tribunal shall not have jurisdiction to hear and determine a claim for a sum of money, or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of a duty imposed by a rule of common law or by any enactment. Paragraphs (a)(a), (b) and 2 are irrelevant for the purposes of this appeal. AUTONUMOUT It was the appellant s position before the Master that the respondent s claim for damages resulted from a breach of a fiduciary duty and therefore came within the exception in paragraph 3 to the Schedule, as an action founded in tort. AUTONUMOUT In the proceedings before me, the appellant s counsel has resiled from that original submission. Having considered the material filed on behalf of the respondent, the appellant s counsel now accepts that the claim for damages for a breach of a fiduciary duty is not founded in tort but in contract and equity. However he submits that notwithstanding that part of the claim clearly falls within paragraph 1(a) of the Schedule nevertheless this court has jurisdiction because the proper construction of the Ordinance as a whole should be that the Labour Tribunal does not have jurisdiction where the remedies are in-equity. It is said by the appellant that by reason of the wording of paragraph 3 of the Schedule and by reason of the fact that a cause of action founded in tort is excluded from the jurisdiction of the Labour Tribunal therefore an action alleging breach of a fiduciary duty is likewise excluded. AUTONUMOUT The respondent submits that the wording of paragraph 3 of the Schedule is clear and unambiguous. The draftsman has clearly intended to exclude one and one only cause of action, namely one founded in tort. It is the respondent s submission that the appellant s proceedings in this court must fail for want of jurisdiction by reason of the fact that even if there are potential issues which come within the jurisdiction of Court of First Instance, nevertheless given that in reality this is a breach of contract of employment dispute, therefore the claim should be commenced in the Labour Tribunal and if appropriate transferred to this court by that tribunal. It is submitted by the respondent that these proceedings have a marked similarity to those before Burrell J in *Kao, Lee & Yip (a firm) v. Lau Wing and Tsui Wai Yu*, HCA1854/2005. I agree. In *Kao Lee Yip (supra)* Burrell J

said A liquidated or unliquidated claim for breach of a contract of employment should be commenced in the Labour Tribunal. AUTONUMOUT am also referred to the judgment of Deputy District Judge Wong in DCCJ5902/2005 and Citipost (Asia) Limited v. Julian Robert Holliday, CACV111/2004, in support of the respondent s assertions. AUTONUMOUT In the latter decision the Court of Appeal having noted that there was an allegation that in breach of an implied term, or perhaps a number of them, or alternatively fiduciary duty : the defendant had charged a number of items which were items of personal expenditure to the plaintiff... was apparently untroubled in their conclusion that matters were more suitable for the Labour Tribunal to decide than the Court of First Instance. AUTONUMOUT It is apparent from the cases cited to me that the Labour Tribunal is the jurisdiction in which proceedings must be commenced. In the cases cited above both at First Instance and in the Court of Appeal the approach taken was to look at the reality of the dispute stripped of the technicalities employed in the pleadings. If the reality was that the dispute was a liquidated or unliquidated claim for damages arising out of an express or implied term in a contract of employment then the dispute must be commenced in the Labour Tribunal. That is precisely what the particulars pleaded in the Amended Statement of Claim in the instant appeal amount to. AUTONUMOUT am satisfied that the respondent is correct in his submission that unless and until the Labour Tribunal declines jurisdiction pursuant to section 10 of the Ordinance, this court is, by reason of section 7(1) and (2), prohibited from entertaining the appellant s claims. AUTONUMOUT In the circumstance, the appeal is dismissed and the appellant is ordered to pay the respondent s costs of this appeal. AUTONUMOUT In addition to these proceedings there is before me pursuant to Order 20, rule 5 of the Rules of High Court a summons wherein leave to re-amend the Statement of Claim is sought. Given my decision in the appeal which confirms that the Amended Statement of Claim remains struck out there is nothing to amend and the summon is dismissed and the plaintiff in those proceedings (the appellant in these proceedings) is ordered to pay the defendant in those proceedings (the respondent in these proceedings) costs. (Darryl Saw) Judge of the Court of First Instance High Court Mr Lawrence Lau, instructed by Messrs Holman Fenwick & Willan, for the Plaintiff Mr James Sherry, instructed by Messrs Laracy Gall, for the Defendant PAGE - 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 & `#\$ XEO & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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