

HONG KONG / JUDGMENT

HEADWIN ENGINEERING LTD v. UNITED SOUNDFAIR ENGINEERING CO LTD

COURT
District Court

DECIDED
26 November 2007

CASE / FILE NUMBER
DCCJ5034/2006

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bjbj z gP z gP and served a third supplemental list of documents disclosing a copy email between the defendant and the main contractor, enclosing a draft warranty form dated 21 July 2005. This morning, Mr Wu, counsel for the defendant, sought leave for late discovery and to rely on such document at the trial. Mr Liu, counsel for the plaintiff, opposed the application, contending that the document is irrelevant. Alternatively, should the court exercise its discretion in favour of the application by the defendant, Mr Liu sought leave to (a) discover and rely on a further document, namely, the form of warranty dated 29 June 2006 issued and executed by the plaintiff; and (b) lead evidence from the plaintiff's witnesses as to the circumstances in which the new documents came into existence. Mr Wu did not oppose Mr's proposal on his alternative stance. Mr Wu also made clear that the defendant would not be adducing supplemental witness statement in respect of the circumstances giving rise to the new documents and would limit himself to cross-examination of the plaintiff's witnesses. I refer to the guidelines by Deputy High Court Judge Lam, as he then was, in *Hong Lok School Limited & Another v Chow Sai Yiu & Another* HCA17139 and 19001 of 1999 (unreported, 2 July 2003) that said: .. it behoves the litigant giving discovery at the eleventh hour to provide the court and the other side with full and accurate information at least as to the following to enable the court to exercise its discretion properly in dealing with possible objections from his opponents,

- (a) the reasons why these documents were not disclosed earlier;
- (b) the provenance and the makers of these documents;
- (c) the relevance of these documents to the issues before the court; and
- (d) the availability or non-availability of the makers to attend trial for cross-examination in case his opponents made an application under section 48 [of the Evidence Ordinance]. In that case, counsel was unable to deal with the above matters fully and the court directed that the plaintiffs to produce an affidavit to account for the late discovery. The need for an affidavit to account for lateness was accepted in *Guangzhou Green-Enhan Bio-Engineering Company Limited & Another v Green Power Health Products International Co. Ltd & Others* HCA 4651

of 2002, HCA 2802 of 2003 and HCMP 74 of 2004, Lam J (unreported, 22 July 2004). In that case, the plaintiffs applied on the eleventh day of the trial to adduce new witness statements and documents. Counsel for the defendants objected to the new evidence at such a late stage and complained that the application should not be entertained in the absence of proper explanation by way of affirmation. In the wake of that objection, the case was stood down and affirmations accounting for the application were produced. No affidavit to account for the lateness was produced by the defendant today, but Mr Wu gave an explanation from the Bar table. He admitted that the email and enclosures were all along in the defendant's computer files, and despite having been advised of the purpose of discovery in the course of these proceedings, the defendant had not extracted such email and enclosures until a few days ago. Bearing in mind that it was the defendant's and not the plaintiff's case that the plaintiff was contractually obliged to give a warranty in relation to the subject works, I am not persuaded that the defendant's explanation was satisfactory. Let me say as a general observation that the court is generally unhappy with last-minute applications just shortly before or at the commencement of trial for further evidence to be filed or further discovery to be made. It is the duty of the handling solicitor to ensure that his client's case is properly prepared for trial and that careful consideration and attention should be given to the completion of the checklist with counsel's advice, if necessary, before the case is set down for trial. As Lam J said at paragraph 19 of *Wong Sui Yeung v Chiu Kwong Wing & Others* HCA 5249 of 1999 (unreported, 20 May 2005): The court should be able to rely on the diligent conduct of solicitors in the preparation of his client's case for trial. Otherwise, it would make a mockery of our case management system. Given my view on the explanation offered to the court for the lateness of the application, I see no reason for the parties to incur further time and costs to reduce the reasons for the lateness in a supporting affirmation. However, that is not to say that litigants should not adhere to good practice in similar future applications. However, lack of a good reason for the lateness of the application to adduce and rely on further documents is only one factor to be considered. Likewise, lack of specific prejudice to the plaintiff is also not necessarily determinative or conclusive. The discretion in determining whether leave to amend should be granted is a general one in which all the circumstances have to be taken into account. Ultimately, it is a balancing exercise and the court must exercise the discretion in a fair manner, having regard to all the circumstances and the explanation given. At issue here is the relevance of the intended further discovery to the issues of the substantive trial. In the present case, one of the main issues is the formation of the subcontract between the parties. It was the defendant's case that this was an express contract comprising:

- (a) bill number 16/18 with discounted unit rates as shown in appendix B of the Amended Defence and Counterclaim;
- (b) drawings numbers 23506/A/N/18/W/601 and 23506/A/N/18/W/604;
- (c) the plaintiff's quotation dated 18 May 2005 being amended, signed and returned via fax by the defendant on or about 22 April 2005; and

- (d) the particular specifications issued by Ove Arup & Partners Hong Kong Limited for the subject works. The defendant averred that the plaintiff was in breach of the subcontract by failing to provide formal warranties as to the subject works upon completion. The plaintiff, on the other hand, argued that it was not part of the subcontract for the plaintiff to provide such warranties. The particular specifications issued by Ove Arup & Partners Hong Kong Limited contained various provisions in respect of the warranties. For example, clause P.1.13 and P.6.6 at pages 90 and 97 of the trial bundle provided that the contractor shall provide a written warranty in the terms as set out therein. It is common ground that contractor in such provisions did not refer to the plaintiff although it was not clear from the particular specifications disclosed in the trial bundle who was the contractor. Mr Wu suggested it should be the main contractor, Gammon Constructions. It was the defendant's case, according to Mr's submission from the Bar table, that since the particular specifications were part and parcel of the subcontract between the plaintiff and the defendant, it was incumbent on the defendant or it was contractually obliged to provide the forms of warranties specified therein to the plaintiff so that the plaintiff could give the appropriate warranties to the main contractor and/or employer. The email enclosures disclosed by the defendant showed communications between the plaintiff and the main contractor in July 2005 (i.e. before the completion of the subcontract works) with the main contractor requesting submission of the warranty form and K C Lam of the plaintiff giving a reply that attached the draft warranty covering the scope of works. The draft warranty form on its face covered metal cladding works in respect of which the defendant was the direct subcontractor of the main contractor and also the subject works. Mr Wu submitted that this would be relevant to the plaintiff's understanding of the contractual obligations under the subcontract as to the provision of warranties which did not sit well with the defendant's denial of any obligation to provide warranties. Mr Liu said that this was only a draft unsigned form which should be placed in context in the discussions between the plaintiff and the main contractors. He pointed out that it was plain from the final version of the form of warranty disclosed by the plaintiff that the plaintiff was only prepared to give and actually gave a warranty to the main contractor in respect of the metal cladding works only. He submitted that it was therefore irrelevant to the subject contract, i.e. the works in respect of the window and glazing, steelwork and sun-shading blades. In my view, I cannot say that at this stage, before evidence, that the email and enclosures disclosed by the plaintiff are wholly irrelevant to the matters in issue in the present case. Discovery is not limited to documents that are directly relevant. Under the Peruvian Guano test, discovery is also required in respect of documents which may fairly lead to a chain of inquiry. I am of the view that the documents fall within this category. Further, I do not see any irreparable prejudice that may be suffered by the plaintiff that cannot be remedied by costs. Mr K C Lam, who was the recipient and the sender of the emails in question, was a witness in these proceedings and Mr Wu had no objection to the plaintiff deal with matters arising from the emails and enclosure by eliciting evidence from its witnesses in the box. In the circumstances, I grant leave to the defendant to rely on the documents as disclosed in the third supplemental list of documents. Leave is also granted to the plaintiff to file and serve a

supplemental list of documents disclosing the signed form of warranty dated 29 June 2006 within 3 days. (Discussion re costs) As Mr Liu pointed out the application was late, and as I have found there was no good reason for the lateness of the application, I order that the defendant do pay the plaintiff costs of the application for the late discovery, to be taxed if not agreed, with certificate for counsel. I apportion one hour of the trial hearing today for this application to assist the taxing master. (Marlene Ng) District Court Judge Mr Liu Chin-yu, instructed by Wong Poon Chan Law & Co., for the Plaintiff Mr Bernard Wu, instructed by Messrs Fung Wong Ng & Lam, for the Defendant PAGE - PAGE CRT9/26.11.2007/SC DCCJ5034/2006/Ruling 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 Title Microsoft Word Document MSWordDoc Word.Document.8

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