

HONG KONG / JUDGMENT

HKSAR v. LAU HAK SHING

COURT

Court of Appeal

DECIDED

2 August 2007

CASE / FILE NUMBER

CACC245/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj Applicant

Before : Hon Stuart-Moore VP, Stock JA and Burrell J in Court Date of Hearing : 18 July 2007 Date of Judgment 2 August 2007

J U D G M E N T

Burrell J (Giving the judgment of the Court) AUTONUMOUT At trial the applicant faced four charges under the Copyright Ordinance, Cap. 528 (the Ordinance). He was acquitted on Charge 1 (possession of an infringing copy of a copyright work, contrary to section 118(1)(d)) but was convicted on Charges 2, 3 and 4 after a 13-day trial before District Judge Yuen. Charge 2 was another section 118(1)(d) offence involving 86,007 VCDs and 13,978 DVDs. Charge 3 was an offence of making 136,603 discs for sale, contrary to section 118(1)(a) and Charge 4 was contrary to section 118(8), possession of articles intended for use in making infringing copies of copyright works, namely seven sets of optical disc production systems. SEIZURE OF THE DISCS AND ARTICLES AUTONUMOUT The evidence concerning the seizure by the officers of the Customs and Excise was largely non controversial. AUTONUMOUT In relation to Charge 1, on 15 January 2004 they had seized 81,600 discs from a vessel berthed in Chai Wan. The discs had been manufactured by a company referred to at trial as Highway of which the applicant and his wife had been the sole directors since May

2003. The judge acquitted on this charge because she found there to be insufficient evidence to prove that the applicant was in possession of the goods at the material time.

AUTONUMOUT On the next day, 16 January, the same officers carried out an inspection of premises on the 12th floor of the Hang Fung Industrial Building at 2 Hok Yuen Street in Hung Hom, Kowloon (the premises). The discs and articles referred to above were seized in the presence of a number of members of staff at the premises. The applicant attended the premises soon after having been requested to do so by telephone. This was of some

significance. The judge made specific reference to it in her Reasons for Verdict. She said, The defendant was the person whom staff of Highway notified to return to the Highway office to deal with the Customs and Excise officers enquiries. AUTONUMOUT To explain the apparent inconsistency in the numbers of discs in Charges 2 and 3 (namely possession of 86,007 VCDs and 13,978 DVDs in Charge 2 but manufacture of 136,603 VCDs in Charge 3), it is necessary to outline some details about the three companies which featured in the trial. AUTONUMOUT The applicant and his wife were directors of Highway . It had been incorporated in April 2002 (and was wound up by a court order in February 2005). They became directors in May

2003. The applicant also became the company secretary. The company s registered address was that of the premises in this case. AUTONUMOUT The same address was the registered address of Double Mind Optical . The directors were Wong Bui and Kwan Ting. Double Mind Optical had been incorporated in September

1997. Wong had been granted a licence to manufacture optical discs at the premises in February

2003. However this licence was cancelled on 4 September 2003. On the same day the applicant applied for an identical licence in his own name as director of Highway. This licence was granted on 11 September 2003 and Double Mind Optical was wound up (again by court order) on 24 September 2003. Thus in September 2003 the licensee for the operation had transferred from Wong under Double Mind Optical to the applicant under Highway. AUTONUMOUT At the time of being granted the Highway licence the applicant was already the licence holder in a third company, Topwide . Topwide had been incorporated in April 2002, the applicant became a director in July 2002 and its licence holder to manufacture optical discs in August 2002. AUTONUMOUT In Charge 2 the applicant was charged with possessing 86,007 VCDs. Of these, 55,003 had been manufactured under the Highway licence and 31,004 had been manufactured under the Double Mind Optical licence. Of the 13,978 DVDs seized in the same raid, all had been manufactured under the Double Mind Optical licence. AUTONUMOUT The 136,603 VCDs which the prosecution, in Charge 3, said that the applicant had manufactured were the 81,600 VCDs seized from the vessel in Chai Wan on 15 January 2004 (Charge

1) plus the 55,003 VCDs seized from the premises on the next day. These represented all the discs manufactured under the Highway label. THE MANUFACTURING LICENCE AUTONUMOUT Strict conditions apply upon the granting of a licence to a limited company. It can only be granted to a company director. It is granted pursuant to the Prevention of Copyright Privacy Ordinance, Cap.

544. Amongst the conditions are

(3) The licensee shall make the following records promptly and shall always retain the records at the licensed premises relating to the last 12 months:-

- (a) the quantity of polycarbonate received . the quantity of such material being used for manufacture of optical discs, the quantity of such material being disposed in other manner and the manner of disposal;
- (b) the quantity of optical discs manufactured in the licensed premises;
- (c) the manner in which the optical discs manufactured in the licensed premises are disposed of, whether by sale otherwise;
- (4) The licensee shall keep at the licensed premises all authorisations issued by copyright owners or person placing orders for the manufacture of optical discs.
- (5) Upon request by the Commissioner or an authorised officer, the licensee shall:-
 - (a) submit in a specified form a return on the optical discs manufactured .
 - (b) provide details of shipping information before the export .
 - (c) notify the Commissioner in writing within 2 weeks after the sale or removal of any optical disc mastering and replication equipment from the licensed premises. AUTONUMOUT The application itself includes a letter written by the applicant in the following terms, signed by him and chopped by the company I, LAU Hak-sing, holder of Identity Card ., am a director of Highway Technology Development Limited. I am will to take up the post of licensee to take charge of issues concerning general business and the production of optical discs as well as ensuring the authorisation letters for the optical disc production were obtained from lawful means. AUTONUMOUT The supporting letter from his fellow director (his wife) stated This company hereby appoints LAU Hak-shing . as the optical disc licensee of Highway Technology Development Limited to take charge of the purchase and sale of copyright contracts and the Business Department. It too was signed and chopped. INGREDIENTS OF THE OFFENCES AUTONUMOUT The judge correctly identified the ingredients of the offences which the prosecution had to prove beyond a reasonable doubt in order to secure a conviction. They were that (in summary) :
 - (a) Under section 118(1)(d) (Charges 1 and 2, possession) the defendant : was in possession of the discs at the material time; possessed them for the purpose of trade ; and did not have the licence of the copyright owner of the discs.
 - (b) Under section 118(1)(a) (Charge 3, manufacture) the defendant : made the discs for sale or hire; and did not have the licence of the copyright owner to do so.
 - (c) Under section 118(8) (Charge 4, possession of articles) the defendant : was in possession of an article; knowing or having reason to believe that it was intended to be used in making infringing copies; and the infringing copies were made for sale, hire or in connection with trade or business. AUTONUMOUT The judge correctly noted that offences under sections 118(1)(a) and

- (d) were strict liability offences in the sense that it was not incumbent on the prosecution to prove knowledge by the defendant that the disc was an infringing copy. Nonetheless section 118(3) of the Ordinance provides a defence to a defendant who claims to have no knowledge that the discs were infringing copies as follows
- (3) It is a defence for the person charged with an offence under subsection (1), to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work. THE DEFENCE CASE AUTONUMOUT The applicant elected to give evidence and also called his wife as a defence witness. AUTONUMOUT The main thrust of the defence case was that the applicant was no more than a front man for Highway. He was a director on paper only, he knew nothing about Highway's operations. He had been asked by Wong Bui to become a director. He was unsophisticated in business matters and in such circumstances the prosecution had failed to prove to the required standard that he was in possession of any of the seized discs, that he was a party to the manufacturing operation or that he possessed the articles in Charge 4 or that he knew what they were for. AUTONUMOUT The defence also put the prosecution to proof that neither the defendant nor Highway held the licence of the copyright owner to possess or manufacture the discs. The judge correctly stated in her written Reasons for Verdict that The defendant bears no burden of proof on the granting of licence by the copyright owner or owners. It is up to the prosecution to establish the defendant acted without licence or authority from the copyright owners when producing or possessing the discs in question. Court should consider on the evidence made available in this trial, whether prosecution has proven beyond reasonable doubt that the defendant has acted without licence, or if the evidence adduced has left this court in reasonable doubt whether the defendant did act without the licence. AUTONUMOUT Finally, the defence sought to invoke and rely upon the defence in section 118(3). GROUNDS OF APPEAL AUTONUMOUT In the perfected grounds of appeal the applicant complains : by Grounds 3 and 4 that the judge should not, on the available evidence, have made the finding that the applicant was fully aware of Highway's operations, that he was in possession of the discs (in Charge 2), that he was a party to the manufacture of the discs (in Charge
- 3) and was in possession of the articles and knew what they were for (in Charge 4); by Grounds 5 and 6 that the prosecution had not proved that the applicant/Highway did not have or may not have had a grant of licence from the copyright owners of the films depicted on the discs; and by Ground 1 that the judge was wrong to impose on the applicant a legal burden of proof when considering section 118(3). AUTONUMOUT We now deal with these issues in turn.
- (1) Finding that the applicant was fully aware of Highway's operations AUTONUMOUT This was a finding of fact that the judge dealt with in some detail. The complaint is that she drew an inference that was not the only irresistible inference capable of being drawn from the proven primary facts. The judge summarised her findings in the following terms On the evidence presented by the prosecution, I am also satisfied beyond reasonable doubt that the defendant is fully aware of the operation of Highway. I came to the irresistible inference that

the defendant is aware of the operation of Highway for the following reasons The defendant and his wife alone were the only directors of Highway. According to the defendant s own evidence the defendant had been in the retail business of selling optical disc himself prior to acting as the director and licensee for Topwide and Highway. The defendant has applied for the optical disc manufacture licence from Customs and Excise Department on behalf of Highway in September 2003. The defendant s obligations under the licence as a licensee have been fully explained to the Defendant on no less than 2 occasions, namely when the defendant was granted the licence for Topwide in August 2002 and when the defendant was granted the licence for Highway in September 2003. When the Customs and Excise officers carried out their inspection in Jan 2004, the defendant was the person whom the staff of Highway notified to return to the Highway office to deal with the Customs and Excise officers enquires. When the items were seized from the manufacturing address of Highway, the defendant signed on behalf of Highway to acknowledge the seizure of the goods of Highway AUTONUMOUT She added that the sheer number of discs seized was such that an inference that they had been made and were possessed for trade could properly be drawn. This was plainly correct and no issue is taken on this point on appeal. AUTONUMOUT The complaint made by Ms Mahinder Panesar, counsel for the applicant, is that the above matters taken on their own could not lead a court to conclude only that the applicant was fully aware of the operation. Further, that if proper consideration had been given to the applicant s own testimony, the inference would have been even less compelling. AUTONUMOUT We disagree. Firstly, Mr Hayson Tse, counsel for the respondent, points out that the above factors were not the only pieces of evidence which, looked at cumulatively, point to the inference drawn. He reminded the court of the letters signed by the applicant and his wife (which appear at page 6 of this judgment) when he applied to be the licensee. At that time he was already the licensee for Topwide. AUTONUMOUT We accept that taken individually each factor could be analysed in a manner not unfavourable to the applicant. However the judge looked at the whole picture in which some of the individual factors, even looked at in isolation, were indeed compelling; in particular, that when asked by the Customs and Excise for someone to be summoned to deal with their enquires (at 7:00 a.m.) the staff telephoned the applicant. Also, at the time of getting the licence, the applicant was fully informed of and acknowledged his responsibilities in respect of what was, as the photographs of the premises demonstrated, a substantial factory operation. AUTONUMOUT The applicant elected to give evidence and the judge disbelieved his evidence. Having reiterated where the burden of proof lay, she explained in some detail her reasons for rejecting the defence version. It is not necessary to recite that analysis. Suffice it to say we accept that she was entitled to come to the conclusions as set out in the judgment. She had the advantage of seeing and hearing the witnesses. AUTONUMOUT One matter is worthy of separate comment. Considerable emphasis was laid, both at trial and on appeal, on the fact that between September 2003 and January 2004 the applicant crossed the border at Lok Ma Chau on many occasions and had spent a large proportion of his time over the border rather than in Hong Kong. It was argued that this demonstrated he was not involved in the operation of Highway and that he was merely a front man for Mr Wong. His main role in life, according

to his testimony, was as a driver for Mr Wong. Moreover, the prosecution adduced no evidence from, for example, Highway staff members to say he was ever at the premises in Hung Hom to conduct or oversee the Highway business. AUTONUMOUT The judge described this aspect of his case as neither here nor there . She was entitled to come to such a view. Criss-crossing the border by car or train is not an unusual feature for people running businesses in Hong Kong. The important matter is that she did not overlook any part of the evidence. She took it all into account. AUTONUMOUT Thus, on the most important aspect of this application, namely whether the judge was entitled to draw the inference that the applicant was fully aware of Highway s operations, was in possession of the discs in Charge 2 and the paraphernalia in Charge 4 and was a party to the manufacture of the discs in Charge 3, we are satisfied that she was. AUTONUMOUT Before moving on to the second issue on appeal (contained in Grounds 5 and 6) and for the sake of completeness, we return to the fact that, in Charge 2, 31,004 of the 86,007 VCDs seized and all of the 13,978 DVDs seized bore the manufacturer s mark of Double Mind Optical and not Highway. The judge was alive to this and convicted the applicant of all the discs at the premises. This is not surprising. Once she had made her findings in relation to the applicant s knowledge of the operation at the premises and given her findings concerning the relationship between the applicant and Mr Wong and given the fact that the applicant simply took over the licence at the premises in September 2003 when Double Mind Optical was wound up, albeit in the name of Highway, it would have been surprising had the judge come to any other conclusion.

- (2) Had the prosecution proved that no copyright for the various films depicted in the discs had been or may have been vested in or assigned to the applicant, Highway or Double Mind Optical? AUTONUMOUT Considerable time at trial was spent on this issue. Ultimately the evidence that the applicant did not have the licence of the copyright owner was overwhelming. There is no merit in this issue on appeal. AUTONUMOUT We mention briefly the points in issue. AUTONUMOUT By affirmation evidence admitted under section 121 of the Copyright Ordinance it was proved that Kotewall Limited (Kotewall), a wholly owned subsidiary of the Golden Harvest Group was the copyright owner. Kotewall had become the copyright owner in about 1994 as a result of assignments from Win s Movie Production Limited (). There was on-going civil litigation between Kotewall and Win s (commenced by Kotewall in 2003). Issues in those proceedings included the allegation that in 1994 Win s had entered into a licence agreement concerning some or all of the films in question with a Thai company. In this trial this issue created a lengthy and fruitless diversion. None of the discs seized bore any reference to the Thai market or the Thai language. They were 100% Chinese. Moreover, the alleged agreement was never enforced because the Thai company never paid the licence fee. AUTONUMOUT Another matter, gleaned from the civil proceedings between Kotewall and Win s and relied on by the defence in the trial to create a possible doubt about the ingredient of copyright ownership was evidence purporting to show that in 1994 Win s had granted the production rights in various films, including those on the seized discs, to a company known only by its name in Chinese characters. Those characters were the same as the characters for Double Mind Optical. However, the Double Mind Optical in this trial had

only been incorporated in 1997, three years after the date on the letter evidencing the purported commission. AUTONUMOUT The specific complaint on this issue is contained in Ground 6 of the amended perfected grounds of appeal. It complains that the judge regarded a particular letter, produced by the defence, to again raise a doubt about the copyright issue, as a smokescreen document. The letter in question was produced by the staff at Highway at the time of the raid by the Customs and Excise on 16 January 2004. It was a letter by which Topwide purported to commission Highway to produce various films including those on the seized discs. Its validity period was from 1 to 31 October 2003. AUTONUMOUT The judge was right to attach no weight to it. It was a self-serving document. The whole of the evidence showed that Topwide had no authority to give and Highway had no right to receive such a commission. It had no bearing on the real issue of copyright ownership and we find the judge's description of it to be apt. AUTONUMOUT These findings must, finally, be viewed in the context of the evidence adduced by the prosecution from MPIA and MPDA. The former is the Motion Picture Industry Association, the latter the Movie Producers and Distributors Association. Both organisations seek to provide confirmation of the copyright ownership of locally produced films. AUTONUMOUT MPIA has 120 members of which Golden Harvest (Kotewall's parent company) is one. It has a register of 4,000 Hong Kong produced films. Its register shows Golden Harvest as the copyright owner of all of the films depicted on the seized discs. Highway had never approached MPIA concerning the copyright of these films. MPDA was less helpful because it only provided a service to its own members. Golden Harvest was not a member, neither was Highway or any of the other companies to which the applicant was connected. MPDA had however received notification of Golden Harvest's claim to copyright in respect of the films in issue. It had not received any other claims. AUTONUMOUT Only Golden Harvest had taken any positive steps over its copyright ownership. It had notified MPIA in 2000; it had notified MPDA in 2002 and it had placed notices to the same effect in the South China Morning Post and the Oriental Daily News in December 2002. AUTONUMOUT We repeat, the evidence was overwhelming. There is no substance in Grounds 5 and 6.

- (3) Does section 118(3) of the Ordinance provides the applicant with a defence in this case? AUTONUMOUT Again, much time was spent both at trial and in the written skeletons for this application on this issue. The issue can, however, be dealt with shortly. AUTONUMOUT The judge said in her written reasons that section 118(3) either did not arise (for Charges 3 and 4) or that there was not a shred of evidence to invoke it (for Charge 2). We agree with her conclusion but differ from her in the reason for reaching such a conclusion. AUTONUMOUT In her written reasons she refers to the fact that the applicant had made no reasonable enquiries about the films copyright. This stems from section 118(6) of the Ordinance which provides
- (6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3) and not being excluded under section 35(4), if he proves that

- (a) he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;
- (b) he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;
- (c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy, he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work. [Emphasis added] AUTONUMOUT The judge found There is no suggestion that Highway has ever made an enquiry with either the Golden Harvest Group, Kotewall Limited, Win s Production Companies, MPIA, MPDA or any reasonable enquires at all about the copyright ownership of the 19 films. There was no suggestion that Highway or the defendant has ever carried out any enquiry to satisfy themselves of copyright ownership of those films before production of the batch of the seized optical discs. There is no evidence in this case for the court can invoke the statutory defence under s.118(3) of the Copyright Ordinance Cap. 528 (namely the defendant or Highway did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work), be it just a standard of balance of probability. AUTONUMOUT This, with respect, misses the preliminary point. Section 118(3) gives the defendant an opportunity to prove he lacked knowledge that a copy was an infringing copy. In this case the applicant s case was that he could not have known because the operation of Highway was nothing to do with him. That very issue had already been found against him beyond a reasonable doubt. It is simply not open to him to say I had nothing to do with Highway but if I am found to be lying I did not know they were infringing copies. AUTONUMOUT Thus, this is not a case in which the questions of law which flow from section 118(3) fall to be addressed. AUTONUMOUT The application is dismissed. (M. Stuart-Moore) Vice-President (F. Stock) Justice of Appeal (M.P. Burrell) Judge of the Court of First Instance Mr Hayson Tse, SGC of the Department of Justice, for the Respondent Ms ludk 1udk N O P Q R S T U V & `#\$ "@AB z^5 v i\$& `G 7Bo4B w^Ba j74fJUl vZ i t(Mt ZVqxj,, w^Ba ZVqx vZ i z^5 7Bo4 j74f EvP 6K2* & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=58055

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-lau-hak-shing-2007>

Prepared on 25 October 2026 · Esheria