

HONG KONG / JUDGMENT

MANSION E & M ENGINEERING CO LTD v. MANSION TECHNOLOGY LTD AND ANOTHER

COURT

Court of First Instance

DECIDED

27 November 2003

CASE / FILE NUMBER

HCA1957/2003

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bjbj HCA1957/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO.1957 OF 2003

BETWEEN MANSION E & M ENGINEERING CO. LTD Plaintiff and MANSION TECHNOLOGY LTD
1st Defendant LI KAI YUEN DENNIS (Ng_U J U D G M E N T

AUTONUMOUT The plaintiff obtained leave by way of ex parte application to join two causes of action prior to the issue of the Writ, under Order 15 of the Rules of the High Court. The defendants object to the joinder and took out a summons under Order 15, rule 5 to sever the causes of action. This was dismissed by Master Woolley. The defendants appealed against that dismissal. I dismissed the appeal, with costs to the plaintiff in any event. I now give reasons for that decision. AUTONUMOUT In brief the plaintiff's case is that since its incorporation the 2nd defendant, who was its director, managed its business and represented the plaintiff in dealing with its customers and others, until he left the plaintiff on 7 January 2002. In so doing, he did not express to the customers and others that he was in fact representing the plaintiff. As a director of the plaintiff, he committed breaches of fiduciary duty in that he diverted a business opportunity to third parties, damaged the interests of the plaintiff and made a secret profit. After he had left the plaintiff, the 1st defendant was incorporated on 15 February 2002, and he was its director. He and the 1st defendant in dealing with a customer with whom he had dealt on the plaintiff's behalf passed off the 1st defendant as a subsidiary of the plaintiff so that the customer entered into a contract with the 1st defendant believing it to be such. There are also allegations as to the use of the plaintiff's trade mark. AUTONUMOUT The defendants seek to have the two causes of action severed because it will be unjust for the 2nd defendant to be involved and tried with the 1st defendant, when the 2nd defendant is a separate entity in law. It is said that :

- (a) the 2nd cause of action, i.e. breach of fiduciary duty, is entirely unconnected with the 1st defendant and indeed came about before the 1st defendant was incorporated, so the 1st defendant should not have to bear the costs of involvement in it;
- (b) the breach of fiduciary duty trial may take a year and a half before it can come on; and
- (c) the 2nd defendant will be prejudiced or embarrassed by evidence on the two causes of action being heard together. AUTONUMOUT In support the 2nd defendant deposes that the main disputed areas in the passing-off action will be whether the plaintiff is the only one who used the trade mark in the field, whether the plaintiff's asserted job references are accurate and whether the plaintiff's and the 1st defendant's trade marks are so alike as to substantiate the plaintiff's claim. The 2nd defendant says that the 1st defendant will take out a summons under rules 3 and 4 of Order 33 of the Rules of the High Court to decide the first and second of those issues and this may dispose of the first cause of action. He also says that the third issue may well be a jury matter. AUTONUMOUT In fact no summons under Order 33 has been taken out. What will be applied for is not clear. No defence has been filed. The framing of preliminary issues is obviously premature. In any event even if issues are framed it is difficult to see how this will dispose of the first cause of action. AUTONUMOUT As to the question of jury trial, neither passing-off nor breach of fiduciary duty are matters for which jury trial is provided under section 33A of the High Court Ordinance and they are commonly tried by a judge alone. There do not seem to be any exceptional circumstances which would require the court as a matter of discretion to order a jury trial. The 2nd defendant is concerned that both causes of action involve allegations of dishonesty on his part but dishonesty need not be proved for either of them. AUTONUMOUT The plaintiff argues that there are common questions of fact which form the background of both causes of action, and they are of sufficient importance in proportion to the rest of the action to render it desirable that all matters should be disposed of at the same time. Counsel relies on dicta of the Court of Appeal in *BBMB Finance (Hong Kong) Ltd v. Lorrain Esme Osman*, CACV 87 of 1993 in support. He also says that joinder would have the benefit of preventing the substantial risk of conflicting and different results if the two causes of action were heard separately and by different judges. AUTONUMOUT I think this must be right. It is true that the two causes of action arose at different times. But both causes relate directly to the actions of the 2nd defendant and his relationship with the 1st defendant. It is obvious from the Statement of Claim that there are common questions of fact in the background of both, and that these are highly important in proportion to the rest of the action. AUTONUMOUT The general rule is that all the issues are to be tried at the same time, and that departure from this rule is only ordered if it is just and convenient. See *Telford Development Ltd v. Shui On Construction Ltd* [1990] 2 HKC
110. The defendants have not shown that it would be just and convenient to sever the two causes of action. AUTONUMOUT For these reasons the appeal was dismissed. (G.P. Muttrie) Deputy High Court Judge Mr I. Wong, instructed by Messrs Fung, Wong, Ng & Lam, for the Plaintiff Mrs H. Ki, instructed by Messrs Andy Choi & Co., for the Defendants PAGE - PAGE A B C D E

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Prepared on 26 October 2026 · Esheria