

HONG KONG / JUDGMENT

PANG HONG v. PRO-CENTRIC GROUP LTD

COURT

Court of First Instance

DECIDED

20 September 2006

CASE / FILE NUMBER

HCLA85/2005

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bjbj HCLA85/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE LABOUR TRIBUNAL APPEAL NO.85 OF 2005 (ON APPEAL FROM LBTC 2754 OF 2005)

BETWEEN PANG HONG Respondent (Claimant) and PRO-CENTRIC GROUP LIMITED Appellant (Defendant)

Before : Deputy High Court Judge Poon in Court Date of Hearing : 4 August 2006 Date of Judgment : 20 September 2006

J U D G M E N T

INTRODUCTION

AUTONUMOUT In June 2006, the claimant lodged a claim with the Labour Tribunal for six months wages in lieu of notice in the sum of HK\$623,700. After trial, the Presiding Officer allowed his claim in full. Upon the defendant's application for review, the Presiding Officer reduced the award to HK\$311,850, representing three months wages in lieu of notice. The defendant now appeals. AUTONUMOUT The background circumstances leading to this appeal may be summarized as follows.

BACKGROUND

A. Employment AUTONUMOUT The claimant began his employment with Pacific Capital Limited, now known as PCL Holdings Limited (PCLH), on 2 March 1992 as special assistant to managing director. He was promoted to associate director in 1994. AUTONUMOUT PCLH, through one of its associated companies, Pillion Investment Limited (Pillion), participated in a

joint venture company called Beijing Taifeng Hui Zhong Mansion Company Limited (the JV Company). Pillion owned 55% of the shares. The balance of 45% was owned by one its joint venture partner in the Mainland. AUTONUMOUT In about 1994, the claimant became a director of Pillion and the JV Company. The claimant later became the legal representative of Pillion and deputy chairman and general manager of the JV Company. Since 2000, the claimant had been stationed in Beijing for most of the time, taking care of the daily operation of the JV Company. AUTONUMOUT On 1 April 2003, the claimant was transferred to the defendant, another associated company of PCLH. The claimant s position in Pillion and the JV Company remained the same. He continued to take care of the investment by PCLH and the defendant in the Mainland. AUTONUMOUT At all material times, the directors of the defendant included Mr Hung Chiu (*m]N) B. The Settlement Agreement AUTONUMOUT In 1997 and 1998, Pillion lent a total sum of US\$1,900,000 to the JV Company. The loan was to be repaid in 2001 but the JV Company defaulted. On 20 April 2004, Pillion commenced proceedings in the Mainland against the JV Company claiming for repayment. Pillion and the JV Company then entered into a settlement agreement dated 29 October 2004 (the Settlement Agreement). Pursuant to the Settlement Agreement, the JV Company should repay the loan to Pillion US\$900,000 plus interest on 24 November 2004 and the balance of US\$1,000,000 plus interest on 15 March 2005. C. Claims by PEWC AUTONUMOUT In the latter part of 2004, Pacific Electric Wire & Cable Co. Ltd (PEWC), a Taiwan Company, commenced proceedings in Hong Kong against PCLH and others, including the claimant and Mr Yip alleging that the assets held by PCLH and some of its associated companies belonged to it. Pillion and the defendant were not joined as parties to those proceedings. D. Terminating the employment AUTONUMOUT By letter dated 22 December 2004, the defendant summarily dismissed the claimant. AUTONUMOUT It is not in dispute that the termination letter was given to the claimant on 22 December 2004 before he left for Beijing. The claimant, however, alleged that he did not read the letter before departure and was therefore not aware of the dismissal at the time. The Presiding Officer rejected his assertion and found that he had read the letter and was aware of his dismissal before departure. This finding is not challenged before me. Thus for present purposes, the claimant was summarily dismissed on 22 December 2004 before he left for Beijing. As will be seen in a moment, this has a bearing on one of the grounds of dismissal. GROUNDS FOR SUMMARY DISMISSAL AUTONUMOUT The defendant relied on the following grounds in dismissing the claimant summarily. AUTONUMOUT First, he had taken up directorship with other companies without the defendant s consent. He had further failed to account for the emoluments received such directorship (Ground). AUTONUMOUT Second, he had purportedly acted on behalf of Pillion to sign an agreement dated 20 December 2004 (the Extension Agreement), extending the time for the JV Company to repay the sum of US\$900,000 under the Settlement Agreement and waiving the interest incurred since 20 December 2004. He did not have the authority from Pillion to sign the Extension Agreement, which severely prejudiced the defendant s interest (Ground 2). AUTONUMOUT Third, he had refused to obey a lawful and reasonable order given to him in mid December 2004 for remitting US\$900,000 received by Pillion under the Settlement Agreement from its account to the defendant s account (Ground). (This was in fact the only ground stated in the termination letter but for this appeal nothing turns on it.) AUTONUMOUT I will consider these grounds in turn. GROUND OUTSIDE

DIRECTORSHIP A. Undisputed facts AUTONUMOUT It is not in dispute that the claimant did take up independent non executive directorship in the following companies : Company Date of appointment Golden Dragon Group (Holdings) Limited (Golden Dragon 17 January 2001 Channel Corporation Limited (Channel 30 April 2002 SMI Corporation Limited (29 September 2004 AUTONUMOUT The claimant informed PCLH of his directorship with Golden Dragon and M Channel by letter dated 5 November 2002. PCLH raised no objection. The defendant was also aware of the same and did not object to it either. Its complaint is that the claimant had agreed to pay 75% of the emoluments that he received from those companies but he had only paid 75% of the emolument received from Golden Dragon for 2001 (HK\$75,000) in April

2002. The total amount that he had failed to account for as calculated up to 2004 stood at HK\$348,750. AUTONUMOUT As to his directorship with SMI, the claimant s case is that Golden Dragon, M Channel and SMI all belonged to the same group of companies. When that group of companies discussed with him about appointing him as independent non executive director to the group s companies, he had informed Mr Hu of the same. But he admitted that he had not informed the defendant or Mr Hu of SMI s appointment. The defendant s case is that the claimant had not informed the defendant of or obtained its prior consent for the SMI directorship. He had therefore acted in breach of his employment. B. Findings by the Presiding Officer AUTONUMOUT The Presiding Officer found that the employment contract with the defendant did not prohibit the claimant from taking up outside directorship; that accordingly the claimant did not commit any breach thereof by taking up directorship with SMI; and that even if it were to constitute a breach, it did not justify summary dismissal. AUTONUMOUT On emoluments, the Presiding Officer found that there existed no agreement between the parties that the claimant had to pay 75% of the emoluments that he received from the outside directorship. The past payment of HK\$75,000 in April 2002 was a mere voluntary act on the claimant s part which did not amount to any agreement at all. The Presiding Officer also seemed to have found that even if such an agreement existed, the claimant s failure to account did not justify summary dismissal. C. Directorship with SMI AUTONUMOUT I first look at the claimant s directorship with SMI. The following issues are pertinent :

- (1) What was the relevant term of the employment contract on this matter?
- (2) Did the claimant commit any breach of the relevant term by taking up the directorship with SMI?
- (3) Even if the employment contract did not prohibit the claimant from taking up the directorship with SMI, did he violate his duty as employee at common law? The first two issues relate to the claimant s contractual duty. I will deal with them together in paragraphs 23 to 32 below. AUTONUMOUT The claimant was first employed by PCLH pursuant to an employment letter dated 28 January 1992 (the 28/1/92 Letter). His employment with the defendant was offered in a letter dated 28 March 2003 (the 28/3/03 Letter). The 28/3/03 Letter stipulated that his employment with the defendant would commence on 1 April 2003. Further, [his] employment terms and conditions as well as other benefits with PCLH will

also remain unchanged; details of which are specified in the separate employment contract . An employment contract was attached (the Employment Contract). AUTONUMOUT The claimant did not sign the 28/3/03 Letter or the Employment Contract. He nevertheless began his employment with the defendant on 1 April 2003. The parties then engaged in correspondence on certain terms of the Employment Contract. Eventually by letter dated 6 May 2004 (the 6/5/04 Letter), the defendant advised the claimant that it would not consider amending the terms of the Employment Contract, which would probably be referred to if so required by any government department. During the entire course of employment up to termination, the claimant had signed neither the 28/3/03 Letter nor the Employment Contract. AUTONUMOUT In the circumstances, the Presiding Officer found that the parties had by conduct entered in an employment relationship since the transfer on 1 April 2003. This finding cannot be flawed. AUTONUMOUT The Presiding Officer went on to find that as the parties had not reached any agreement on the terms of employment after the transfer, the terms of employment with PCLH would continue to apply. However, it is beyond dispute that the defendant had along insisted that the Employment Contract should apply despite the claimant s concerns. The defendant s position was explicitly made known to the claimant by the 6/5/034 Letter. Despite the 6/5/04 Letter, the claimant simply continued to work for the defendant. The obvious question then arose is whether the parties had then by conduct adopted the Employment Contract. The answer necessarily depends on all the relevant circumstances. Matters such as whether the parties conducted themselves pursuant to any of the terms of the Employment Contract, and whether the claimant, despite the 6/5/04 Letter, remained adamant about his position regarding the Employment Contract, are material. In my view, the Presiding Officer ought to have directed his mind to this question and conducted investigation accordingly before concluding that the terms of the previous employment with PCLH applied. Had he done so, he might well have reached the same finding. But absent such exercise, this finding cannot stand. AUTONUMOUT It follows that there are two possible scenarios. First, the Employment Contract applied. The relevant term would be Clause 2.3.7 which provided that if the claimant undertook any employment or accept any office other than with a group company without the previous written consent of the defendant s board of directors, he was liable to be dismissed summarily. Taking up the SMI directorship without the requisite consent would prima facie be a breach thereof. Because of his failure to consider the question if the Employment Contract had been adopted by the parties conduct, the Presiding Officer had not addressed his mind to this possible breach of Clause 2.3.7 either. In this omission, the Presiding Officer had erred. AUTONUMOUT The second scenario is that the terms of PCLH s employment applied. This was how the Presiding Officer approached the matter. He found that Clause (f)(3) of the 28/1/92 Letter applied, which provided that the claimant should not undertake any part time employment after office hours without the previous written consent of the Directors . The Presiding Officer found that the Clause did not prohibit the claimant from taking up independent non executive directorship with other companies. He had not acted in breach by taking up directorship with SMI. AUTONUMOUT The Presiding Officer s findings above are questionable. At the review hearing, the defendant produced and relied on the PCLH s

Employee Handbook 1997 (the Handbook). Under Clause 13.11 of the Handbook, no employee should take up any employment or part time commercial duties outside PCLH except with the company s approval in writing. The Presiding Officer seemed to have accepted that the Handbook governed the employment between the claimant and PCLH. But he found that the claimant was no longer bound by the Handbook because he had ceased to be PCLH s employee since 1 April 2003. But, with respect, this is contrary to his earlier finding that the terms of the employment with PCLH still applied. If the Handbook formed part of the terms of PCLH s employment, the fact that the claimant had already ceased to be PCLH s employee is irrelevant. Clause 13.11 of the Handbook would still be applicable to his employment with the defendant. The Presiding Officer then went on to say that Clause 13.11 of the Handbook had to be read together with Clause (f)(3) of the 28/1/92 Letter. And Clause (f)(3) did not prohibit the claimant from taking up independent non-executive directorship with SMI. In so ruling, the Presiding Officer seemed to have proceeded on the basis that Clause (f)(3) took precedence over Clause 13.11. However, it should be noted that the Handbook post dated the 28/1/92 Letter. The question is : even if Clause (f)(3) were to be interpreted in the way as the Presiding Officer did, had it been replaced by Clause 13.11 when the Handbook was introduced in 1997? If yes, Clause 13.11, instead of Clause (f)(e), would apply. The next question then is whether taking up the SMI directorship constituted a breach of Clause 13.11. The answer is arguably yes as directorship with SMI may well fall within the meaning of part time commercial duty under Clause 13.11. The Presiding Officer had erred in not directing his mind to these questions. In the circumstances, the ruling that the claimant s taking up the SMI directorship did not constitute a breach of employment contract, even if the terms of PCLH s employment were to apply, cannot stand.

AUTONUMOUT There is a further finding by the Presiding Officer that I need to deal with. He found that the claimant s failure to formally inform the defendant of the SMI directorship did not constitute a breach of his employment. This must be wrong. For whether it is (a) under the terms of the previous employment with PCLH, be it Clause (f)(3) of the 28/1/92 Letter or Clause 13.11 of the Handbook, or (b) under Clause 2.3.7 of the Employment Contract, the claimant had to obtain the defendant s written consent. Whether he had informed the defendant of the SMI directorship is irrelevant, unless there is evidence, of which apparently there is none, to suggest that it would constitute consent or acquiescence on the part of the defendant. The Presiding Officer also seemed to have accepted that it would be sufficient if the claimant had informed Mr Hu of his directorship with SMI. If that is his finding, it cannot be right in the absence of any evidence that the defendant or its board acted through Mr Hu on this matter and that informing Mr Hu would constitute the requisite consent by the defendant or its board. AUTONUMOUT The Presiding Officer found that even if taking up of SMI directorship would constitute a breach, it did not justify summary dismissal. However, he had not given the reasons why he thought so. Nor had he made the necessary investigation on the consequences of the breach in order to ascertain if they went to the root of the contract so as to justify summary dismissal. In the circumstances, this finding cannot stand. For completeness, I just wish to point out that if Clause 2.3.7 of the Employment Contract applied and the claimant committed a breach

thereof, that Clause entitled the defendant to terminate his employment forthwith.

AUTONUMOUT To recap, the Presiding Officer should have approached the SMI directorship thus :

- (1) Whether the Employment had been adopted by the parties conduct or the terms of the PCLH s employment applied.
 - (2) If it is the former case, whether the claimant had acted in breach of Clause 2.3.7 of the Employment Contract and if so, whether it justified summary dismissal.
 - (3) If it is the latter case, whether Clause (f)(3) of the 28/1/92 Letter of Clause 13.11 of the Handbook applied, whether the claimant had acted in breach thereof and if so, whether the breach justified summary dismissal. The Presiding Officer had erred in failing to go through the above issues before concluding that Clause (f)(3) of the 28/1/92 Letter applied and that the claimant s taking up the SMI directorship did not constitute a breach of his employment contract with the defendant. AUTONUMOUT For the above reasons, a retrial is necessary on the question whether the taking up of SMI directorship justified summary dismissal so that all the issues that I have identified above can be fully canvassed. Since there will be a retrial, I will not proceed to deal with the claimant s duty at common law, to which the Presiding Officer made no reference. If need be, that can be addressed at the retrial. (D) Emoluments AUTONUMOUT I next turn to the emoluments that the defendant received from Golden Dragon and M Channel. The Presiding Officer found that there was no agreement between the claimant and PCLH that the claimant should pay 75% of the emoluments that he received from those companies. AUTONUMOUT Ms Siu, giving evidence for the defendant, said that the claimant had agreed to pay 75% of the emoluments to the defendant. She relied on a letter written by the claimant dated 18 April 2002 addressed to Mr Hu (Exh
- 9) (the 18/4/02 Let YUOU N@b6e b\Ohs c?e b \lQ YIY{s s Siu. First, it was written before the claimant joined the defendant. Any agreement that it might give rise to is between the claimant and PCLH, the claimant s then employer. Second, on a proper reading, the 18/4/02 Letter did not amount to an agreement to pay 75% of the emoluments. The claimant regarded the payment as an additional contribution to PCLH and nothing more. There is no evidence to suggest that PCLH accepted the payment as a consideration or condition for the claimant to continue his directorship with Golden Dragon and/or M Channel. I agree with the Presiding Officer that the payment of the 75% of the emoluments to PCLH in April 2002 was merely a voluntary act on the part of the claimant. It did not give rise to an agreement at all. The defendant cannot rely on it to summarily dismiss the claimant. GROUND PREJUDICIAL CONDUCT RELATING TO THE EXTENSION AGREEMENT AUTONUMOUT I now come to the second ground for summary dismissal, which relates to the Extension Agreement. The Presiding Officer found that the claimant was dismissed on 22 December 2002 before he left for Beijing. He then went to Beijing on the same day and signed the Extension Agreement. In other word, he signed the Extension Agreement after he had been dismissed by the defendant. This finding is not challenged before me. Thus the Presiding Officer was right in concluding that the signing of the Extension Agreement itself did not

constitute a ground for summary dismissal. AUTONUMOUT Wong, counsel for the defendant, argued that the Presiding Officer had failed to consider whether by engaging in the negotiations leading to the signing of the Extension Agreement and committing Pillion to that Agreement is in itself prejudicial to the defendant's interest. AUTONUMOUT Po, counsel for the claimant, submitted that the claimant was not appointed to Pillion or the JV Company by the defendant or acted in these positions as the defendant's representatives. Thus he was not under a duty to report or obtain the approval of the defendant's board in negotiating or agreeing to conclude the Extension Agreement. His failure to report to Pillion may render him liable to Pillion but did not constitute a breach of duty vis-à-vis the defendant. AUTONUMOUT In my view, whether the claimant's act in negotiating and agreeing to commit Pillion to sign the Extension Agreement caused any prejudice to the defendant must be considered in context. Looking at the claimant's employment history and his scope of duty (paragraphs 3 to 6 above), it is arguably artificial to view the matter as Ms Po did. I think the point raised by Mr Wong is relevant and ought to be investigated by the Presiding Officer. He had erred in failing to do so. GROUND DISOBEDIENCE OF A LAWFUL AND REASONABLE ORDER AUTONUMOUT I finally come to the third ground for summary dismissal. It is not in dispute that in mid December 2004, Mr Yip requested the claimant to remit the sum of US\$900,000 from Pillion to the defendant. He refused and justified his refusal by two reasons. First, he did not know that Mr Yip was a director of the defendant and that he only regarded Mr Hu as the defendant's director and would listen to his directions only. Second, there was a claim by PEWC against PCLH. AUTONUMOUT The Presiding Officer found that Mr's order was not reasonable because at that time the JV Company had not paid Pillion the money. The Presiding Officer went on to find that it was improper for the claimant not to inform the defendant that the JV Company had not made the payment to Pillion and he was therefore unable to effect the remittance. The Presiding Officer did not accept the claimant's assertion that he did not know that Mr Yip was a director or that the proceedings commenced by PEWC against PCLH an excuse for not fulfilling his duty. But the Presiding Officer did not find the failure to report justified summary dismissal. AUTONUMOUT In my view, when the Presiding Officer made the above findings, he had failed to take into account the fact the claimant was at the time either negotiating or had already agreed with the JV Company to extend the time to make the payment of US\$900,000. Arguably, by so conducting himself, the claimant was partly responsible for the JV Company's not honouring the Settlement Agreement by paying the US\$900,000. He was thus arguably responsible for the non-availability of the US\$900,000. If he was really responsible, I do not think it lies in his mouth to say that Mr Yip's order was unreasonable because the money was not available. Further, if it is arguable that his conduct in negotiating with the JV Company seriously prejudiced the defendant's interest, it is also arguable that such conduct might aggravate his failure to report thus rendering it serious enough to justify summary dismissal. AUTONUMOUT For those reasons, the Presiding Officer's findings above cannot stand. A retrial to canvass the matters that I have identified is necessary to determine if summary dismissal on this ground is justified.

CONCLUSION

AUTONUMOUT For the above reasons, I will allow the appeal and direct that case be remitted to the Labour Tribunal for a retrial before another Presiding Officer to determine if the summary dismissal was justified on Ground 1 (relating to the SMI directorship only), Ground 2 (as modified by counsel s submissions) and Ground 3. AUTONUMOUT On costs, I will make an order nisi that the defendant shall have the costs of this appeal, to be taxed if not agreed. (J. Poon) Deputy High Court Judge Mr William Wong, instructed by Messrs Chan, Wong & Lam, for the Appellant (Defendant) Ms Po Wing Kay, instructed by Messrs Ng, Lie, Lai & Chan, for the Respondent (Claimant) 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 \!t" (#p# (#p# &`#\$ "(#@ABB "@AB "(#@ABB XoFQ aN8P Gnnh & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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