

HONG KONG / JUDGMENT

RE LESLIE GORDON KOSMIN

COURT

Court of First Instance

DECIDED

26 November 2007

CASE / FILE NUMBER

HCMP2291/2007

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bjbj HCMP 2291/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 2291 of 2007

IN THE MATTER of Leslie Gordon Kosmin, one of her Majesty s Counsel, Barrister of the Middle
Temple, England, United Kingdom IN THE MATTER of Section 27 of the Legal Practitioners
Ordinance, (Cap.

159) of the Laws of Hong Kong

Before : Hon Ma CJHC in Court Date of Hearing : 26 November 2007 Date of Judgment : 26
November 2007

J U D G M E N T

The Applicant seeks to be admitted for the purposes of representing the liquidators of Akai
Holdings Limited (the Plaintiff in HCCL 29/2004) at the hearing of a number of interlocutory
applications due to take place before Stone J between 10 to 12 December

2007. There are altogether five summonses which have been issued by the Defendant in that
action (Ernst & Young). Though each summons relates broadly to discovery and requests
for Further and Better Particulars of the Points of Claim, the issues which the court is asked
to deal with are extremely complicated, and important and difficult legal issues arise.
Perhaps an indication of this complexity and difficulty can be seen by the fact that, as
submitted by Mr Rimsky Yuen SC (who appears for the Applicant) today, fundamental
issues arise affecting the future conduct and preparation of the trial of the action. Indeed,
the main summons (which was taken out on 2 November

- 2007) states the following as the intention behind the Defendant seeking various orders A. to improve the cost effectiveness, reduce the complexity and lessen the delay which would otherwise be encountered in this action; and B. to achieve the proper identification of and the proper narrowing of the actual areas of dispute between the parties; and C. to achieve the proper identification of the alleged causal connection between any alleged negligence by EYHK and any loss and damage claimed by the Plaintiff (Akai); and D. hence, to bring the parties closer to a resolution of their dispute, whether by reaching settlement or arriving at a final adjudication; and E. in any event, to enable the Court in this case best to deploy its judicial management and specialist list autonomy with a view to the underlying objective also of facilitating its own ability to adjudicate at a trial, if matters are not otherwise resolved without a trial, and to provide that any such trial be conducted on the most effective justifiable basis. In this context, the following background is also relevant The claims by the liquidators of Akai Holding Limited in HCCL 29/2004 is for damages in the region of US\$500 million in respect of the negligence and breach of duty on the part of the former auditors of the company in the audits carried out for the years ending 31 January 1997, 1998 and 1999. The litigation is a huge one. The pleadings run to over 1,000 pages. The present discovery amounts to over 1,200 lever arch files. The trial of the action is estimated to run between 9 and 12 months. From time to time, there are massive pieces of litigation that are dealt with by the courts and the action with which we are concerned is a good example of this type of heavy litigation. It is in some way on a par with the Carrian and Paladin litigations, amongst others. This already makes it as an exceptional situation and cannot be said to be a normal piece of litigation. Mr Yuen has provided the court with a short summary of the issues in the case. This summary was used at a directions hearing before Stone J in August
2007. It can be confirmed from that summary and from the materials I have read in this case and also in the previous application (involving the same Applicant) that the issues in the case are indeed extremely complicated, both factually and legally. Given this background, it comes then as no surprise that the liquidators of the company have chosen, as far as counsel are concerned, a team of three, comprising two leading counsel and junior counsel (the Applicant, Mr Yuen and Ms Linda Chan). From what I have seen, this is entirely justified. The Applicant has already been admitted for the purposes of the trial of the action. There was no opposition to this admission. It is clear in my view, given the nature and content of the interlocutory applications that will be dealt with by the court in December, that instructing leading counsel must be reasonable. It is not really suggested by Mr Lo (for the Hong Kong Bar Association) that these are applications in which it would be reasonable only to retain junior counsel. Admittedly, in Mr s written submissions, it was contended that the applications before Stone J in December do not involve unusually difficult or complex matters but this was before he had sight of the written submissions from counsel for the Applicant. In Mostyn QC, unreported, HCMP 3552/2003, 17 September 2003, the court dealt with an application for admission for interlocutory matters. In paragraph 10 of the judgment, it said The court s basic approach to admissions as set out in

cases like *Re Flesch QC* applies to all hearings, irrespective whether the hearings are final or interlocutory. It is true that there are fewer applications for admission in relation to interlocutory hearings compared to final hearings. However, the reason for this is that interlocutory hearings (which cover a very wide spectrum of types of hearings) are less likely to involve very complicated issues or important points of principle than final ones. This is not always true of course because sometimes interlocutory matters do involve weighty issues, particularly when the outcome may dispose of or significantly affect the action as a whole. Each case has to be looked at individually and no real assistance can be derived from the label final or interlocutory. As I remarked in *Re Pannick QC*, unreported, HCMP 2374 of 2003, 9 June 2003, at paragraph 18, However, the court must always look at the nature of the application and the issues that arise from it. The application was refused in that case largely because the issues involved in the interlocutory applications were not of unusual difficulty or complexity. The same cannot be said for the present case. As I have stated earlier, it is reasonable that leading counsel should be instructed. Mr Lo makes the point that if leading counsel were required, then a local senior counsel ought to be instructed. The fact that none has been was either the result of delay on the part of the Applicant's solicitors or indicative that no efforts have really been made to instruct local leading counsel. These are usual objections that face an applicant wishing to be admitted in Hong Kong. Their significance in any case, however, depends of course on the circumstances. In the present case, even assuming that there has been delay (which, as we shall see, I do not accept), this is not a powerful factor militating against the application. As for the objection to make enquiries as to the availability of local senior counsel, this is not relevant in the present application either. As I have noted earlier, the team of counsel consists of two leading counsel and junior counsel. For a new senior counsel to be instructed in the case, particularly at this late stage, is simply impractical and would not make much sense. Mr Yuen is not available for the whole of the three days before Stone : he is instructed by the liquidators to appear in the Court of Final Appeal on 11 December 2007 on an application for leave to appeal by an examinee against an order made by Kwan J under section 221 of the Companies Ordinance. Mr Lo submits that the absence of Mr Yuen for an afternoon is not a relevant factor. He says that an alternative senior counsel can be instructed or accommodation from Stone can be sought and expected. Neither point is, with respect, realistic. I have already dealt with the sense in instructing a new leader at this stage in these proceedings. As for seeking the indulgence of the court, this is an exceptional course : the court's diary and what is suitable in the administration of justice is not dependent on counsel's diary and convenience. As it is, Mr Yuen says that the three days in December are barely enough. A point was made at one stage as to the availability of Mr Paul Shieh SC who had earlier been instructed by the liquidators. It was suggested that he must be a logical replacement for Mr Yuen. However, Mr Shieh has not been involved in the Ernst & Young action at all. His involvement has been in another action and even then his involvement has been somewhat limited owing to his other commitments. It seems to me that (given Mr Yuen's unavailability for the whole of the three days hearing in December) the Applicant will be the logical choice of senior counsel to be instructed for the

December hearing and he should be admitted on this ground alone. It is therefore unnecessary to consider whether, given the importance of the interlocutory applications in December and their undoubted complexity and difficulty, the Applicant should in any event be admitted, although I must say, if necessary, I would have been of the view that there are strong grounds to support this conclusion. This leaves the argument from Mr Lo that there has been delay. The point here is that as long ago as 16 October 2007 when solicitors for Ernst & Young set out in detail in a letter the nature and extent of the interlocutory applications to be made, it must have been clear to the liquidators that leading counsel may be required. Three of the five summonses were issued on 22 October 2007, another was issued on 2 November 2007 and the last summons was issued on 13 November

2007. On 7 November 2007, the Court of Final Appeal hearing on 11 December 2007 was fixed. The Applicant's solicitors wrote to the Hong Kong Bar Association on 12 November 2007 (the letter was 8 pages). There was no reply to that letter. The present Notice of Motion seeking admission was made on 20 November 2007. In my view, there has been no unacceptable delay on the Applicant's part here. It is correct that the court is being asked to deal with an application some two weeks before the relevant hearing, but it was not until 7 November 2007 that it became clear that Mr Yuen would be unavailable for the whole of the December 10 to 12 period. His unavailability is, as I have already held, a significant factor in favour of admission. For the above reasons, I would make an order that the Applicant be approved, admitted and enrolled to practice as a barrister of this Honourable Court for the purposes of advising and appearing on behalf of the Plaintiff, Akai Holdings Limited (In Compulsory Liquidation) in HCCL 29/2004 at the hearing of the various interlocutory applications (particulars of which are set out in the Schedule attached to the Notice of Motion) taken out by the Defendant, Ernst & Young in HCCL 29/2004, including at any adjournment thereof, as well as advising the Plaintiff generally in respect of the applications in consultation and/or in writing. No order is made in relation to any possible appeals from the matters before Stone J. Until the court becomes aware of the issues that will arise if there is going to be an appeal, it would be wrong as a matter of principle to make an omnibus order for admission. (Geoffrey Ma) Chief Judge, High Court Mr Rimsy K K Yuen SC and Ms Linda Chan, instructed by Messrs Johnson Stokes & Master for the Applicant Mr P Y Lo, instructed by Messrs Cheung, Tong & Rosa for the Hong Kong Bar
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