

HONG KONG / JUDGMENT

RE ROGER EDUARD LOUND ter HAAR Q.C.

COURT

Court of First Instance

DECIDED

16 February 2007

CASE / FILE NUMBER

HCMP287/2007

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bjbj HCMP 287/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 287 OF 2007

IN THE MATTER of an application of ROGER EDUARD LOUND ter HAAR Q.C. to be admitted and enrolled as a Barrister of the High Court of the Hong Kong Special Administrative Region under Section 27(4) of the Legal Practitioners Ordinance, Cap. IN THE MATTER of the Barristers (Admission) Rules, Cap.159AA of the Laws of Hong Kong

Before: Hon Tang VP (sitting as an additional Judge of the Court of First Instance) in Court Date of Hearing: 16 February 2007 Date of Judgment: 16 February 2007

J U D G M E N T

Introduction

By a Notice of Motion dated 8 February 2007, the defendant, Mr Ho, applies for the admission of Mr ter Haar QC, to conduct his appeal in the Court of Final Appeal. The hearing of the appeal has been fixed for 14 and 15 March 2007. Mr Mak's claim against Mr Ho arose out of two payments totalling \$50 million made by him to Mr Ho in early 1997. In May and July 1998, \$18 million was repaid. So the net claim was \$32 million. The trial lasted 23 days and ended on 2 May 2002. The judgment was not given until 12 November 2004. In the Case for the Appellant, it was said, with justification, that: The delay must on any standards be considered excessive and inordinate. The gist of the respective pleaded cases can be found in the Case for the Appellant. The plaintiff's pleaded case is that he paid \$50 million to purchase Mr Ho's shares in Greater Beijing Region Expressways Limited (GBRE) in anticipation of the listing of GBRE's holding company on the Hong Kong Stock Exchange. And that on the listing Mr Ho would either deliver GBRE shares at a

discount or pay him one month after the listing a sum calculated in accordance with a set formula. He also alleged that Mr Ho agreed to refund him in full if there was no listing by the end of July 1997 (the Oral Buy-Back Guarantee) . There was no listing and he wanted his money back. Mr Ho s pleaded case was that Mr Mak agreed to an indirect investment in GBRE shares through the subscription of redeemable preference shares in PRC Expressways Fund Limited (the Fund), which was the vehicle set up by Mr Ho for small investors who could not afford the minimum subscription for direct investment in GBRE which was US\$10 million. It was also agreed that Mr Mak would be entitled to the Fund shares representing Mr Mak s investment (which was intended to be redeemed by the distribution of GBRE shares in specie), and that if there was a listing but the Fund failed to redeem the preference shares attributable to Mr Mak s investment within one month after the listing, Mr Ho would pay Mr Mak a sum calculated in accordance with an agreed formula. I believe it was Mr Ho s case that the redemption was to get round the so-called 6-month lockup. I should add that according to Mr Ho, the \$18 million which was repaid to Mr Mak was made on an ex gratia basis to help Mr Mak out of financial difficulties as a result of 1997 economic turmoil. However, the Recorder gave her judgment in favour of Mr Mak on what has been called the unpleaded agreement. The unpleaded agreement was based on the letter of 17 February. According to the Recorder, the agreement was merely a money transaction which enabled Mr Mak to benefit from the rise in the price of the listed company s shares without owning them, and never involved any investment either directly in the GBRE shares or indirectly in the Fund. She went on to hold that since Mr Ho was bound to pay Mr Mak, within one month after the listing of GBRE or its corporate listing vehicle (LISTCO), an amount calculated in accordance with the formula set out in the February 17 letter, the unpleaded agreement was premised on there being a listing of GBRE or LISTCO, without which it would not be workable. For that reason, she held that there was an implied term that the listing would take place within a reasonable time of the conclusion of their agreement. As a reasonable time had expired, Mr Ho was bound to repay the balance of Mr Mak s investment of HK\$32 million. Alternatively, the unpleaded agreement was frustrated for the reason that the listing was substantially delayed if not impossible, so that Mr Ho was bound to repay HK HK\$32 million. Mr Ho s appeal principally revolves around the unpleaded agreement and delay. On the unpleaded agreement, the principal issues are in turn:

- (1) whether the Recorder was entitled to hold against Mr Ho on the basis of a case not pleaded by either party at trial (this is the pleading issue);
- (2) whether, on the evidence, the Recorder was correct to find that there was the unpleaded agreement (which, I think, has been called the interpretation issue). The guidance for the admission of overseas counsel are too well known to need repetition. Mr ter Haar, is well known to our courts. The only question is whether this is a suitable case for admission. Moreover, this application is supported by a certificate from Mr Jat, which I have considered. But the decision is one for the court to make in accordance with the guidance that can be found in its decisions, even when the application is not opposed, the court retains the discretion to refuse admission. CFA factor This is an admission for the Court of Final Appeal and that is an important consideration. The court would be more ready to

admit overseas counsel for a hearing before the Court of Final Appeal. But as Mr Whitehead accepts that the matter must be one which is substantial, in the sense that its determination might have a substantial or significant impact on Hong Kong jurisprudence, and in which overseas counsel is able to contribute significantly by reason of his expertise. I turn to consider the principal issues raised by Mr Whitehead. The Pleading Issue On the pleading issue, the applicable principles can be found in the judgment of Ma JA (as he then was) in *Poon Hau Kei v Hsin Chong Construction Co Ltd & Others* [2003] 2 HKLRD 56, which was approved by the Court of Final Appeal in [2004] 7 HKCFAR 148. Mr Whitehead submits that this is distinguishable. But the observation by Ma JA which was approved by the Court of Final Appeal was made on the basis that the case found by the trial judge was unpleaded. Those principles were not disturbed by the Court of Final Appeal. The Court of Final Appeal, however, allowed the appeal because the case had been pleaded in the defence, and the defendant had had the full opportunity of dealing with it. So the point remains whether the losing party had the full opportunity to deal with an unpleaded point. Mr Whitehead went on to submit that Mr Ho's case raises the following issues:

- (a) to what extent a new version is to be regarded as a radical departure from, rather than merely a variation, modification or development of, a pleaded case which is already before the court;
 - (b) whether it is sufficient that the new version has been, or could be, canvassed at trial without the losing party being given a full opportunity to argue against it.
- (2) Such issues in (2)(a) & (b) are not simply a question of facts-analysis, but are definitely capable and in need of clarification in terms of principles. The issue to be clarified is not whether on the facts of a particular case the losing party has been given a full opportunity to deal with the new version, but whether anything less than a full opportunity afforded to the losing party to do so is sufficient under the principles propounded by Ma JA (as he then was). I understand the point that the losing party should have been given a full opportunity to deal with the new version or unpleaded case, but I see little or no difference between whether the losing party has been given a full opportunity to deal with the new version, and whether he had been afforded anything less than a full opportunity to do so. I believe this is essentially a question of factual analysis. It does not involve any principle requiring clarification, still less one which might have a substantial or significant impact on Hong Kong jurisprudence. The delay issue Mr Whitehead accepts and the authorities are clear that delay in itself, even if grossly inordinate, will not automatically entitle a litigant to succeed on appeal. The appellant must demonstrate that the judgment appealed against contained errors that are probably, or even possibly, attributable to the delay so that it is not safe and to allow it to stand would be unfair to the appellant. But it is said that there is one area of controversy, namely, to what extent is an appellate court entitled to justify the findings and reasoning of the trial judge by reference to the judge's notes. It is said that there appears to be a divergence of judicial opinion, between English and Australian courts, on the weight that ought to be given to the judge's notes and transcript. I have been referred to the

decision of the Privy Council in *Cobham v Frett* [2001] 1 WLR 1775, and the case of *Nais v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 223 ALR 171. I have no doubt that in determining the impact of the delay, the Appellate Court is entitled to have regard to all the circumstances. These must necessarily include what material was available to the trial judge including, for example, whether the court had the transcripts of the evidence and in a suitable case, the quality of the judge's own notes. *Nais* was not concerned with appellate scrutiny, but with judicial review of administration decision for jurisdictional error. There the question was one of fairness of procedure. In para. 109, in the judgment of Kirby J, he said: Re-reading transcript years after oral evidence is given, and even listening to sound recorded evidence (assuming that this occurred) cannot substitute for contemporaneous experience and evaluation. No doubt that is true, and it may be a denial of procedural fairness to substitute one for the other with important consequence in judicial review proceedings. But there are important differences in terms of the consequence of delay between appellate scrutiny and judicial review. In a civil dispute, both the winning and the losing parties are victims of the court's delay. It will only compound their loss if the court were to set aside a correct decision simply because the losing party had suffered from procedural unfairness. It is not suggested the court could give judgment in favour of the losing party as compensation for the delay. To order a retrial when the outcome of the original trial, despite the delay, must be regarded as correct and safe can serve no sensible purpose, so the object of the court's vigilant scrutiny in civil appeals in the case of gross delay must be primarily directed to the correctness of the decision. On the question of what evidence might be consulted and what weight ought be placed on them, I believe the so-called controversy is more apparent than real. It is said the Court of Final Appeal might wish to provide guidance. I rather think that the Court of Final Appeal will prefer to leave such practical matters to the intermediate Court of Appeal which has to deal with factual appeals on a regular basis. What evidence should be considered and what weight should be given to them must depend on all the circumstances. The most obvious are the length of delay itself, the nature of the proceedings, the nature and the quality of the evidence. All will come under vigilant scrutiny on appeal, including what the judge might say about the impact of the delay on his decision. Interpretation Issue I have read the paragraphs in the appellant's Supplemental Case contributed by Mr ter Haar. The principles of interpretation are not in doubt, what one has to consider in all the circumstances of this case, is whether the unpleaded agreement has been established on the evidence. The point has already been forcefully made in the Appellant's Case. The point raised in the Supplemental Case is not new, substantial or significant. As for the admissibility of post-contract material, there are, principally the two receipts. But their relevance is not so much on the interpretation of the 17 February letter but whether there was the unpleaded agreement. That point has already been carefully made in the Appellant's Case. With respect, I do not believe these paragraphs raise any substantial point, or any point on which overseas counsel is able to contribute significantly by reason of his expertise. Here, the Recorder was entitled to and indeed bound to take into consideration all the evidence in order to conclude whether or not there was indeed the unpleaded agreement. She might

have got it wrong, I do not know, but that is not a matter on which any expertise is required. I do not think I will deal with other minor submissions made by Mr Whitehead. However, I am grateful to Mr Whitehead, Mr Andrew Mak for the Hong Kong Bar Association, and Mr Wesley Wong for the Secretary for Justice for their full and helpful written submissions. Delay in Applying However, I wish to say a few words about delay. That is, delay in making the application for admission. The explanation for the delay is in the affidavit of Mr Andrew Jeffries on 9 February 2007 in particular para. 15.

15. This application is made urgently because the Appellant has only recently become aware of the relevance of Mr. ter Haar Q.C. s expertise and possible contribution to his case. I have been informed by the Appellant and verily believe that receipt of the Respondent s Case in December 2006 prompted the Appellant, who is a solicitor himself, to consider afresh the legal issues in dispute in light of the Respondent s case, and in the course of this to become aware of Mr. ter Haar Q.C. s experience in commercial contracts. Without delay, the Appellant sent the relevant documents to Mr. ter Haar Q.C. for his review. After several discussions with Mr. ter Haar Q.C., the Appellant formed the view that Mr. ter Haar Q.C. is key to assisting in his case. It should be emphasized that the Appellant has expedited, despite the Christmas and New Year holidays, all the steps taken to confirm the relevant of Mr. ter Haar Q.C. s expertise, Mr. ter Haar Q.C. s availability and the decision to retain Mr. ter Haar Q.C. Delay is an important consideration. As Ma JA made clear in *Re McGregor QC*:
- (6) By now, it should be abundantly clear to any applicant for admission that the application should be made in a timely manner. In that particular case, the learned judge would have dismissed that application were it not for what he regarded as the overwhelming desirability of having specialist and experienced overseas counsel in that case. This is not such a case. Moreover, in considering delay, one should not ignore the dynamics of litigation. If overseas counsel is admitted on behalf of one party on the basis that the matter is one which is substantial and in which overseas counsel is able to contribute significantly by reason of his expertise, the other party is likely to wish to consider whether or not he should also avail himself of the service of overseas counsel with similar expertise. A late application means the other party is put in a highly invidious position. He is likely to have to decide between forgoing the service of specialist counsel and seeking an adjournment which may or may not be granted. If an adjournment is applied for and is granted, the Court of Final Appeal s valuable time would have been wasted. Indeed, if overseas counsel of specialist skill is thought to be desirable for one party, the court might well think that it would be desirable to have counsel of similar specialist skill representing the other side. Equality of arms is desirable for the proper administration of justice. So they underline the importance of a timely application. Mr Ho was an experienced solicitor. The Court of Appeal s judgment was delivered on 14 February 2006, and he was entitled to leave to appeal as of right, I do not accept his explanation as a sufficient reason for me to overlook the delay. For this reason also, indeed, I think for this reason alone, I would refuse the application. (Robert Tang) Vice-President Mr Robert Whitehead, SC and Mr Mike Lui, instructed by Messrs Allen & Overy, for the Applicant Mr Andrew Y S Mak and Mr Simon Leung, instructed by Anthony Chiang &

Partners, for the Hong Kong Bar Association Mr Wesley W C Wong, Deputy Principal
Government Counsel of the Department of Justice, for the Secretary for Justice. PAGE - A B C
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