

HONG KONG / JUDGMENT

RE WING FAI CONSTRUCTION CO LTD

COURT

Court of Appeal

DECIDED

12 October 2007

CASE / FILE NUMBER

CACV244/2004

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bjbj SEQ CHAPTER \h \r 1 CACV 244/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 244 OF 2004 (ON APPEAL FROM HCCW 735 OF 2002)

IN THE MATTER of the Companies Ordinance (Chapter 32) and IN THE MATTER of Wing Fai Construction Company Limited and IN THE MATTER of an Application on behalf of Kelly Cheng Kit Yin (1st Applicant) and Robert Yip Kwong (2nd Applicant) for an Order of Committal against DAVID JOHN KENNEDY ("Respondent") Before: Hon. Tang V-P, Yeung and Yuen JJA in Court Date of hearing: 3 October 2007 Date of Judgment: 12 October 2007

JUDGMENT

Hon. Tang V-P: I agree with Yuen JA s judgment and have nothing to add. Hon Yeung JA: I agree with Yuen JA s judgment. Hon Yuen JA: This is an application by the Applicants for this Court to vary the order set out in its judgment handed down on 18 August 2006. The order has not been sealed. Variation of order before sealing It is common ground that before an order is sealed, a court has jurisdiction to vary its order. However, strong reasons are required before the court would do so and this power would only be exercised in exceptional cases. I believe the present to be an exceptional case for the reasons appearing below. The proceedings The history of these proceedings can be seen in the judgment. In it I have endeavoured to explain why I considered (contrary to Kwan J s judgment from which this was an appeal) that as a matter of law, liquidators were obliged to obtain the approval of the Court first before supplying the police with transcripts of examinees depositions given in private examinations ordered by the Court under s.221 of the Companies Ordinance Cap. 32. Liquidator s supply of private examination depositions to CCB In the present case the Liquidator had not sought the Court s approval before providing to the Commercial Crime Bureau (CCB) in January and March 2004 transcripts of the Applicants depositions given in private examinations in July 2003. This was despite the fact that the

Liquidator had in correspondence with the 1st Applicant in November and December 2003 indicated that he would be making a report to the Court. Examinees motion for committal of Liquidator On the basis that the Liquidator was obliged at law to obtain the Court s approval first and that the supply of the transcripts to the CCB was an interference with the administration of justice, the Applicants sought leave to apply for an order of committal against the Liquidator for criminal contempt. On 20 April 2004 Kwan J gave leave (under Order 52 rule 2 of the Rules of the High Court) to the Applicants on their ex parte application. Before Kwan J. The motion was heard in July 2004. At the conclusion of the Applicants case, Mr Yu SC (then counsel for the Liquidator) made a submission of no case to answer for one or more of the reasons set out in paragraph 4 of the judge s judgment handed down on 23 July 2004. Apart from the submission that in law, leave of the Court was not required for the Liquidator to supply transcripts of private examination depositions to the police, it was also argued on behalf of the Liquidator that:

- (4) there is no basis on which the court may be satisfied beyond reasonable doubt as to the actus reus and mens rea of interference with the administration of justice, which is necessary in a criminal contempt . According to the judge s judgment (para. 5), the submission of no case to answer was primarily based on the contention that as a matter of law, no case for contempt had been made out . The judge first held as a matter of construction of the statute that leave of the Court was not required for the disclosures of the transcripts to the CCB (para. 80). The judge also went on in paras. 93-102 to discuss the Liquidator s submission relating to the actus reus and mens rea of criminal contempt. As far as actus reus was concerned, the judge stated that no evidence had been led by the applicants to demonstrate any significant and adverse impact on the administration of justice as a result of the acts complained of (para. 98). As far as mens rea was concerned, the judge concluded that there was no evidence of any intention on the part of the Liquidator to circumvent any statutory procedure, the evidence only showing that he had changed his mind about proceeding under s.277(1). In the result the judge was not satisfied that mens rea would have been established (para. 102). Before this Court The Applicants appealed to this court. The appeal was heard in June 2005. For the reasons set out in my judgment, I took the view that the Liquidator was obliged at law to obtain the Court s leave before disclosing transcripts of private examinations to prosecuting authorities. The Court s leave was a means of protecting individuals who are compelled to attend examinations if they are capable of giving information about the company , who cannot claim privilege against self-incrimination and whose evidence is admissible against them in civil and criminal proceedings. This Court s understanding of the Barma Order However having arrived at that conclusion as a matter of law, I held that the judge was nevertheless right in finding that there was no case to answer. This was because I thought that ex post facto, in June 2004 the Liquidator had obtained leave ex parte from the Court (Barma J) to make the same (or at least a similar) statement to the CCB as he had done in March 2004 which had enclosed the transcripts of the private examinations. Had that been the case, there would have been no significant and adverse effect on the administration of justice which is needed for the actus reus of contempt of court. In *Attorney-General v Newspaper Publishing Plc* [1997] 1 WLR

926, it was held that conduct which was inconsistent with a court order (or in the present case, a statutory provision) in only a trivial or technical way was insufficient to constitute the actus reus of contempt (p.936). If Barma J had - just 2 months after the non-approved disclosures - given leave to the Liquidator to submit the same (or similar) statements to the CCB, then any interference with the administration of justice in making the non-approved disclosures would have been only technical or trivial. The situation which gave rise to this understanding on the part of the Court was as follows. In the course of arguments, counsel for the Liquidator referred to the Barma Order in the following way (Appeal Bundle J, p.2355): MR YU: But my Lady, I will come back to the filter argument, but it is really, with respect, a separate argument because, if I may just put the point that if the court can do it, in other words if the court can make a direction that the matter be reported to the CCB as in fact in this case, I will show your Ladyship and your Lordships that Justice Barma actually made an order to direct that the matter be reported to CCB. That was done by the application of my client on the basis without prejudice to there being a need to do so but because there was the complaint that what you are doing is a contempt of court. So he actually did proceed to apply for leave and he got leave from Justice Barma . (Emphasis added). The Barma Order was further referred to in the following way (Appeal Bundle J, pp.2375-6): MR YU: ... I mentioned that in the course of these proceedings, there has been an order made by Justice Barma. Your Ladyship and Lordships will find it in bundle A at page 1. And this was an order dated 8th June 2004. And it was an application made ex parte pursuant to section 200(3), not under section 277. And it was ordered that the liquidators be granted leave and are directed to submit the revised statement to the Commercial Crime Bureau. Now if my learned friend be right, even that could not happen. And it also shows how technical the argument is in this case because this order was made in June 2004 and the judgment of Madam Justice Kwan was in July 2004. MR JARVIS: My learned friend refers to this, I think he needs to do so in the context that when this was revealed to us recently, we wrote to his solicitors and said would they please indicate the base upon which the order was made, please provide indication of what disclosure was made because all this was going to be highly material to know whether for example, disclosure was made to Mr Justice Barma that when granting the order for further examination, the safeguards have been put forward. And we've had a blank refusal to provide information in relation to this so we have no idea on what basis this order was in fact obtained. MR YU: That's not an issue in this appeal. All I'm saying is that one can see how technical this so-called contention is. (Emphasis added). The Barma Order gave leave to the Liquidator and directed him to submit a revised statement to the Commercial Crime Bureau, but it was also ordered that the statements and a letter from the Liquidator be sealed so there was no right of inspection by any party without leave of the court. As the documents remained under seal, only the Liquidator knew what exhibits had been attached. I, for one, understood from Mr Yu's reference to the proximity of the dates (between the Barma Order and the hearing of the motion for committal before Kwan J) that in effect no harm had been done from the initial failure to obtain the Court's leave for the non-approved disclosures. Otherwise it would be difficult to see why the Barma order and its proximity in time to the committal proceedings

would render the Applicants case for contempt technical . That understanding was reinforced by the first passage of Mr Yu s submissions reproduced in para. 17 above (that Justice Barma actually made an order to direct that the matter be reported to CCB) and also by his final submissions that there cannot be a technical contempt (Appeal Bundle J, p.2449). The understanding was further reinforced by the fact that when the Barma Order was referred to by the Court on the mistaken assumption that it covered the same subject-matter as the non-approved disclosures, nothing was done on behalf of the Liquidator to disabuse the Court of that belief. This can be seen from the following discussion between the Court and leading counsel for the Applicants, which did not meet with any clarifications or rectifications on behalf of the Liquidator (Appeal Bundle J, p.2516): JUSTICE TANG: The fact that they could and did obtain an order from Mr Justice Barma, would that have any bearing on your submission on significant and adverse impact on the administration of justice? MR JARVIS: My Lord, no, because this is after the event. The application had been made. We had made our contempt application. And I think my learned friend said to the court JUSTICE TANG: I appreciate it took place afterwards but the question that I have in mind is, what was the harm done as it were? If it is something that they thought it was necessary, they could have applied even before the report was made. MR JARVIS: My answer to that very simply is, we would have liked some frankness now. If that is what they are now saying is, look, there s no harm done, this is what happened. We ve asked them to show us what was given to the judge, what happened and there was a refusal. I ve raised it here. So we have no idea what was presented to the judge at that stage JUSTICE TANG: Alright, thank you. MR JARVIS: s been kept totally secret. That raises more questions than it answers. And so we would simply say that that really can t answer the point about damage to the administration of justice . (Emphasis added). Although the Applicants asserted that on their side they believed that the Barma Order did not involve the disclosure of transcripts, that could not have been other than a hypothesis as the Liquidator s application was made ex parte and the documents remained under seal. The Liquidator was the only party who knew for a fact that the Barma Order did not cover the same subject-matter of the committal proceedings and no transcripts had been disclosed. It is unfortunate that even though the Court articulated its no harm done impression at the hearing, the Liquidator did not disabuse the Court of that impression. In reply counsel for the Liquidator reiterated the confidentiality of the Barma Order, but the Liquidator would not have been breaching any confidentiality by telling this Court what it did not cover, he would only have been breaching it by disclosing what it did cover. The end result was that the Court s misconception that the Barma Order gave leave to the Liquidator to make a statement to the CCB enclosing the transcripts was perpetuated by the Liquidator s silence. The matters set out above led the Court to take a mistaken view of the facts which for my part had a significant bearing on my judgment that the judge was correct to find that the Liquidator had no case to answer. This was reflected in the original order nisi for costs which was that the Liquidator bear the Applicants costs and the Official Receiver s costs of the application for the period before Barma J s order and that the Liquidator s and the Official Receiver s costs thereafter be paid by the Applicants. Case to answer It was on that mistaken assumption that the Barma Order covered the same (or

similar) subject-matter as the non-approved disclosures that I took the view that no substantial harm had been done to the administration of justice, which was necessary to constitute the actus reus for contempt. Had I not been labouring under that mistaken premise, I for one would have found that the judge was in error in finding that there was no case to answer. In my view the actus reus comprised of the supply by the Liquidator of the transcripts of the private examinations to the CCB without first obtaining leave of the Court, contrary to rule 62 of the Winding Up Rules (which has effect as if enacted by the Ordinance). The integrity of the Court's process under s.221 and rule 62 was compromised by that conduct. That was sufficient evidence of a substantial interference with the administration of justice, there having been no mitigation of its effect because (as we now know) no leave was obtained at any stage and the Liquidator did not attempt to argue that leave would have been obtained if sought. As for the mens rea, there is at least prima facie evidence in that the Liquidator had twice referred to his intention to approach the Court but eventually failed to do so. An intention to interfere with the administration of justice (to be distinguished from a motive or desire to do so) can be inferred from all the circumstances including the foreseeability of the consequences of the conduct (*Attorney General v Newspaper Publishing Plc* [1988] Ch 333, 374H-375A). In supplying the transcripts to the CCB, the Liquidator must have known that he was destroying the confidentiality of the depositions which rule 62 was intended to prevent (*Attorney-General v Punch Ltd* [2003] 1 AC 1046 para. 52). It is inappropriate to comment any further at this stage. Variation of Court's order I would propose that the following order be made in place of the order which was made on 18 August 2006 but which has not been sealed:

- (1) the Applicants appeal be allowed,
- (2) the judge's order that there be no case to answer be set aside,
- (3) the motion be remitted to the Court of First Instance for resumption of the hearing before Kwan J. and
- (4) there be an order nisi that the Respondent pay the costs of the appeal of the Applicants and the Official Receiver including the costs of the hearing before us in December 2006 and of the application for variation. After the hearing before this Court on 3 October 2007, the parties have by way of correspondence made submissions to the Court as to whether the motion should be remitted to another judge for re-trial or whether it should be remitted to Kwan J for resumption of the hearing before her. There is no allegation of actual bias and as a professional judge, Kwan J is well able to re-consider relevant issues as to actus reus and mens rea in accordance with the views expressed by this Court in its judgment. I am also conscious of the question of costs that would be wasted should there be a re-trial, and of the risk that at a re-trial, the parties may seek to supplement the evidence originally presented. Finally as a matter of completeness I would record that Miss Chan for the Official Receiver also sought to take the opportunity to re-argue some other parts of the judgment handed down in August 2006. We declined to hear her application as we did not think that strong reasons existed for us to do so. (ROBERT TANG) (W. YEUNG) (MARIA YUEN) Vice-President

Justice of Appeal Justice of Appeal Mr John Jarvis QC and Mr Eugene Yim instructed by Barlow Lyde & Gilbert for the Appellants (Applicants) Mr Jonathan Harris SC instructed by Clifford Chance for the Respondent (Respondent) Miss Linda Chan instructed by the Official Receiver - PAGE - - PAGE - - PAGE - @\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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