

HONG KONG / JUDGMENT

SINGH BALWINDER v. SINO PHIL ENGINEERING SERVICES LTD AND ANOTHER

COURT
District Court

DECIDED
24 January 2007

CASE / FILE NUMBER
DCEC374/2003

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DCEC 374/2003
IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
EMPLOYEES
COMPENSATION CASE NO. 374 OF 2003

BETWEEN:

SINGH BALWINDER Applicant
and
SINO PHIL ENGINEERING
SERVICES LIMITED 1st Respondent
HYUNDAI ENGINEERING &
CONSTRCUTION COMPANY
LIMITED 2nd Respondent

Coram : HH Judge Lok in Chambers
Date of hearing and decision: 18 January 2007
Date of handing down of Reasons for Decision and Decision on Costs: 24 January
2007

REASONS FOR DECISION AND DECISION ON COSTS

This is an application by the 1st Respondent to withdraw the admissions of liability made by its former solicitors in the letter dated 10 June 2004 and in the direction hearing before myself on 9 July 2004. After the hearing, save that the 1st Respondent is still bound by the admission that it was the employer of the Applicant at the time of the accident, I allowed the 1st Respondent's application to withdraw the admissions on liability. These are my reasons. The present case concerns an application by the Applicant for employees compensation in respect of an industrial accident on 15 May 2001. It is the Applicant's case that the 1st Respondent was his direct employer and the 2nd Respondent was the principal contractor of the construction site in issue at the time of the accident. In the letter dated 10 June 2004 and in the direction hearing before myself on 9 July 2004, the 1st Respondent's former solicitors admitted liability in respect of the accident and that the 1st Respondent was the employer of the Applicant at the time of the accident, and these are the admissions that the 1st Respondent now seeks to withdraw. Before the hearing, the Applicant made an open offer to allow the 1st Respondent to withdraw the admissions on condition that the 1st Respondent would not challenge its employment relationship with the Applicant. There was some further correspondence exchanged between the parties after the offer but there was no agreement made. In the hearing, Mr. De Souza, who is a director representing the 1st Respondent, conceded for the first time after the issuance of the summons and without attaching condition, that the 1st Respondent would not withdraw the admission in respect of its employment relationship with the Applicant. However, the Applicant was not happy with such late concession and maintained its objection to the 1st Respondent's application. But no matter what is the result, the 1st Respondent is still bound by the concession made in the hearing. The admissions in the present case were not made in pleadings. However, it has been held in *Bird v. Birds Eye Walls Ltd.*, The Times, July 24 1987 (CA) that, even if an admission is made in a letter and not in the formal pleadings, leave of the court is required to reopen the issues formerly admitted by a party. Hence, it is common ground that leave is required to withdraw the admissions made by the 1st Respondent's former solicitors. Reasons for the Mistaken Admissions In his two affirmations made in August 2006, Mr. De Souza sought to explain why the admissions were made by the 1st Respondent's former solicitors. According to him, the case had all along been handled by a young clerk of the solicitors firm, who did not advise the 1st Respondent properly about the conduct of the case. The 1st Respondent was not advised about the significance of the issuance of the Indemnity Notice by the 2nd Respondent against the 1st Respondent, nor was it advised about the reasons, effects or consequences of admitting liability. Mr. De Souza was only advised that admitting liability would save costs, and it was under such circumstances that the admissions were made on the 1st Respondent's behalf. Further, the solicitors did not inform the 1st Respondent specifically that admissions were indeed made in the letter dated 10 June 2004 or in the direction hearing on 9 July 2004. As the 1st Respondent was not satisfied with the services offered by the solicitors firm, the 1st Respondent terminated its services and Mr. De Souza started to conduct the case on behalf of his company.

Mr. De Souza then went through the documents disclosed after discovery and found that there were various discrepancies in the Applicant's case. In the supporting affirmations and in the hearing itself, Mr. De Souza highlighted the following discrepancies and dubious features in the Applicant's case: the Applicant claims that there was a fracture in his finger caused by the accident, but this was inconsistent with his medical record of the Accident and Emergency Department of the Prince of Wales Hospital; the Applicant claims that there was a hole in the ceiling to dispose of the debris, which, according to Mr. De Souza who has been a qualified mechanical engineer for many years, was quite impossible as no structural engineer would have allowed such hole to exist; the Applicant claims that a worker named Ah Chung has witnessed the accident, but the time sheets show that no such person worked at the site on the day of the accident; the attendance record made by 1st Respondent gang leader at the site shows that the Applicant was on sick leave on the day of the accident; the Applicant claims that he had received first aid treatment after the accident, but that is not supported by the record kept by the safety department of the 2nd Respondent; the Applicant claims that he was injured by the falling debris, whereas the Notice by Employer commonly known as Form 2 shows that the accident was caused by a falling iron bar; the Applicant was seen running a mobile phone business during the sick leave period after the alleged accident; the 1st Respondent learnt from another worker that the Applicant was making a bogus claim; and the Applicant has amended the contents of the Application and has changed his version of events in his witness statements a number of times, thereby undermining the credibility of his case. By reason of the aforesaid discrepancies, the 1st Respondent contends that the Applicant might have fabricated the accident and it was a mistake for the 1st Respondent to admit liability in the first place. The Law There is some dispute as to the proper principles to be applied in determining whether leave should be granted for a party to withdraw an admission. Mr. Brettell, solicitor for the Applicant, refers me to the judgment of Hunter J., as he then was, in *Tse Yuk Kin v. Chee Cheung Hing* [1984] HKLR 391 and submits that leave should only be granted to withdraw an admission if the party seeking to do so can supply good reasons, in particular it expects the party to put before the court a convincing credible explanation as to why the admission was made under a mistake. In fact, similar argument has been put before Deputy Judge Lin in *Burlington Air Express Limited v Nuovo Collection Limited*, unreported, DCCJ No. 8865 of 2001 (decision on 15 August 2002). In that case, the learned deputy judge reviewed the authorities and held that the modern approach to such question should be one formulated in the case of *Gale v Superdrug Stores PLC* [1996] 1 WLR 1089, in which Millet J. said the following: In the High Court the plaintiff may be able to crystallize the position by applying under R.S.C., Ord. 27, r. 3 for judgment on admissions. But the defendant can resist the application by seeking leave to withdraw the admission and, if necessary, amending his defence. In my judgment leave should normally be granted if the application is made in good faith, raises a triable issue with a reasonable prospect of success, and will not prejudice the plaintiff in a manner which cannot be adequately compensated. (emphasis added) The principles in *Gale* were also cited with approval by the Hong Kong Court of Appeal in *Re Chung Wong Kit (a bankrupt)* [1999] 1 HKLRD 410. In that case, Rogers JA said the following about the requirement of proper explanation: [Counsel for the Appellant] relying upon the authority of *Tse Yuk Tin* argued that the respondents should not have been allowed to rely upon this affirmation as it constituted a

withdrawal of an admission which was being made without proper explanation. This however is not a rule of law in itself but just an example of the proposition that a party should not be permitted to resile from an admission unless it was just to allow it to do so having regard to the interests of both side. (p. 413J

- p. 414B) Hence, according to Deputy Judge Lin in the Burlington Air Express case, the question whether there is a proper explanation or not now goes to the issue of good faith, to which I totally agree. As these guiding principles now reflect the modern approach regarding the granting of leave to withdraw admissions, I will adopt them in considering the present application (see also Hong Kong Civil Procedure 2007, vol. 1, para. 27/3/9). The Application of the Principles
- (i) Whether the application is made in good faith? As mentioned above, the Applicant claims that it was a mistake to admit liability in the first place. The admissions were made without proper legal advice, and the sole consideration of the 1st Respondent by that time was to save costs. It was only after Mr. De Souza took up the conduct of the case that he realized the accident might be a fabrication on the part of the Applicant. On the other hand, Mr. Brettell submits that the 1st Respondent had, at the time when the admissions were made, already been in possession of some of the documents that the 1st Respondent sought to challenge the Applicant's case, and so if the 1st Respondent had properly studied these documents, the 1st Respondent should not have admitted liability by that time. Hence, Mr. Brettell says, the 1st Respondent has not provided good reason or explanation to justify the withdrawal of the admissions. Looking at the history of the case, I think that Mr. Brettell is right in saying that Mr. Souza should have had at least some of the relevant documents when the admissions were made. However, does it mean that the application is not made in good faith? In my judgment, the answer is no. The fact that Mr. Souza should have been more alert does not destroy the good faith in the making of the present application. One must bear in mind that employer like the 1st Respondent was put in a very difficult position facing a claim of this sort. The Applicant's accident was relatively a minor one, and no one informed the 1st Respondent about the accident until much later on 28 May 2001 when the Applicant sent it a written notification. As there were not many witnesses who could verify the truth of the accident, the Applicant's case depended very much on the allegation of the Applicant himself. With limited clue to challenge the Applicant's case, the 1st Respondent might have simply admitted liability with a view to save legal costs. However, if the 1st Respondent genuinely found out later that they had a good case to challenge the accident itself, the 1st Respondent should, in the interest of justice, be allowed to reopen the issue of liability. As there is nothing for me to doubt the truthfulness of Mr. Souza's explanation, I accept that the application is made in good faith. (ii) Whether there is a triable issue with reasonable prospect of success? As mentioned above, the Applicant has listed out various dubious features and discrepancies in the Applicant's case. In his submission, Mr. Brettell tries to offer different explanations for these discrepancies, in particular he says that there is documentary evidence to support that the Applicant was working on the day of accident. However, I do not think that I should embark on a mini trial to determine whether the

Applicant is telling the truth about the accident, which should be a matter to be decided in the proper trial. At this stage, suffice it for me to say that the 1st Respondent does have some justification to challenge the Applicant's account of the accident, and it would only be fair and just to allow the 1st Respondent to reopen the issue on liability. Whether the Applicant will be prejudiced in a manner which cannot be adequately compensated? I then turn to the third consideration. As I see it, the lack of prejudice is one of the main reasons why I should exercise the discretion in the 1st Respondent's favour. Obviously, if the 1st Respondent now seeks to challenge its employment relationship with the Applicant, it will cause serious prejudice to the Applicant as he will have difficulty in joining other possible employers in these proceedings by reason of the lapse of time. However, what the 1st Respondent now seeks to reopen is only whether the Applicant was injured in the accident as alleged by him on 15 May 2001. As the previous admissions are in no way binding on the 2nd Respondent, the Applicant knew from the outset that he had to prove the accident in order to establish liability on the part of the 2nd Respondent. In other words, the admissions have made no difference to the Applicant in respect of the preparation of the case, and he has not suffered any real prejudice by the withdrawal of the admissions. In my judgment, the lack of prejudice is a strong reason as to why the 1st Respondent should be allowed to withdraw the admissions conditionally. By reason of the aforesaid, I have ordered that, save the 1st Respondent be disallowed to withdraw the admission that the 1st Respondent was the employer of the Applicant at the time of the accident, leave be granted to the 1st Respondent to withdraw the admissions on liability previously given. Decision on Costs of the Application I have reserved my decision on costs. In this regard, I have no reservation that the 1st Respondent should pay the Applicant's costs of such application. Firstly, the 1st Respondent is asking for the court's indulgence to withdraw the admissions which should not have been made in the first place, and so it follows that the 1st Respondent should pay the Applicant's costs arising out of the withdrawal of the admissions. Secondly, the Applicant was quite justified to oppose the 1st Respondent's request to withdraw the admission in respect of its employment relationship with the Applicant, and it was only in the hearing itself that the 1st Respondent conceded that it was bound by such admission. Hence, the Applicant has incurred unnecessary costs for which the 1st Respondent should be responsible. However, the hearing could have been finished within an hour had the Applicant not opposed the 1st Respondent's application after the latter confirmed their stance on the employment relationship, and so I only allow the Applicant to recover one hour of costs for the hearing on 18 January 2007. The more difficult question is about the costs of the 2nd Respondent. As I see it, the present application is only one between the Applicant and the 1st Respondent. Since the 1st Respondent's admissions were not made on its behalf, the 2nd Respondent is not bound by the admissions and is free to challenge the Applicant's account of the accident in the trial itself. Hence, the 2nd Respondent has no real interest in the application, and if it chose to appear in the hearing to protect its interest, it should bear the costs of the application itself. Further, as seen from the letter of the 2nd Respondent's solicitors dated 16 January 2007, the 2nd Respondent has all along supported the 1st Respondent's application to withdraw all the admissions, including the one that the

1st Respondent was the employer of the Applicant at the time of the accident. This was partly unsuccessful in view of the concession made by the 1st Respondent in the hearing. Finally, the summons was taken out by the 1st Respondent and the 2nd Respondent's stance on the summons has not caused the Applicant to incur unnecessary costs, and so it is also not appropriate for me to order the 2nd Respondent to pay for the costs of the Applicant. In such circumstances, I think that the most appropriate costs order is that the 2nd Respondent should bear the costs of the summons itself. Hence I make the following order in respect of the costs of the 1st Respondent's summons dated 6 December 2006:

- (i) that the 2nd Respondent do bear its own costs of the summons; (ii) save that the Applicant is only entitled to recover one hour of costs for the hearing on 18 January 2007, the 1st Respondent do pay to the Applicant his costs of the summons.
20. The Applicant has also invited me to deal with the issue of costs occasioned by the adjournment of the trial before Deputy Judge A Chow on 16 August 2006. The trial was adjourned partly due to the inaccurate record of proceedings in the direction hearing before myself on 9 July 2004. However, as there was not sufficient time for me to listen to such further submissions in the hearing, I would leave the matter to be decided by the trial judge. But if the parties think that it would be more appropriate for me to hear the matter, they are at liberty to restore the application before myself. (David Lok) District Judge Mr. David Brettell of Messrs. Munros, for the Applicant Mr. De Souza Tome Jose Carlos Elvino, director of the 1st Respondent, representing the 1st Respondent Mr. Kamlesh Sadhwani, instructed by the Messrs. Krishnan & Tsang, for the 2nd Respondent PAGE PAGE H a\$ &`#\$ ca P' :):*=\$ +| { J:(bz;\rU&S xYo #}B@~ bz;\ xYo :): & 6" setup Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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