

HONG KONG / JUDGMENT

SMARTEK E & M ENGINEERING (HK) LTD v. WIN WIN WAY CONSTRUCTION CO., LTD

[2020] HKDC 1005

COURT

District Court

DECIDED

4 November 2020

CASE / FILE NUMBER

DCCJ5104/2017

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DCCJ 5104/2017

[2020] HKDC 1005

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO 5104 OF 2017

BETWEEN

SMARTEK E & M ENGINEERING (HK) LIMITED

Plaintiff

and

WIN WIN WAY CONSTRUCTION CO., LIMITED

Defendant

Coram: His Honour Judge Andrew Li in Court

Date of hearing: 3 & 4 November 2020

Date of Decision: 4 November 2020

DECISION

INTRODUCTION

This is yet another case in recent weeks I have to deal with of solicitors not paying any regard to the Practice Directions (“PD”) when preparing the trial bundles for a trial or hearing.

In each case, it had led to an adjournment of the trial and/or the hearing, some of which are “milestone dates” as defined under Order 25, rule 1B of the Rules of the District Court, Cap 336H. They cannot be varied unless the parties who applies to do so can demonstrate to the court “exceptional circumstances” justifying the variation: See §25/1B/1 of The Hong Kong Civil Procedure 2021, Vol 1 at 716.

BACKGROUND

This case was originally fixed on the fixture list for trial before a bilingual judge commencing on 9 March 2020, with an estimated length of 5 days (with 10 to 13 March 2020 reserved).

The case was adjourned due to the general adjournment of court proceedings (“GAP”) announced by the Judiciary owing to the public health considerations as a result of the pandemic. The case was re-fixed to 3 November 2020 with the agreement of the parties, also with 5 days reserved.

However, the plaintiff, instead of submitting a new set of trial bundles or tried to update or revise its old bundles, relied on the same set of trial bundles submitted to the court for the original trial dates scheduled in March 2020 which was adjourned due to GAP.

DISCUSSION

Problems found in the trial bundles originally submitted

When this court tried to read into the case in preparation of the trial in the week before it commences, the following problems were found with the trial bundles lodged with the court (“Original Trial Bundles”).

First, the plaintiff had simply made use of the Pre-trial Review (“PTR”) bundles which were prepared for the purpose of the PTR before Deputy Judge Jonathan Wong on 21 November 2019 as the trial bundles in the case with no attempts to update the bundles for the trial at all. Hence, all the updated amended pleadings and orders of the court had not been included in the Original Trial Bundles.

Second, where there were amendments in the pleadings contained in the Original Trial Bundles, for example, those which can be found in the amended statement of claim dated 17 December 2018, the amended parts were not highlighted in colour at all, in breach of PD 5.4 §4(1)(e).

Third, outdated pleadings, for example the defence filed by the defendant on 10 April 2018 and the reply filed by the plaintiff on 18 May 2018 had been included in the Original Trial Bundles. The amended defence which was filed on 17 December 2019 and the amended reply which was filed on 13 January 2020 after the PTR hearing were not included. This fails to comply with PD 5.4 §4(1)(d) where it states that “(O)nly the latest version of each pleading should be included.”

Fourth, the 2 latest court orders ie the Order dated 21 November 2019 of Deputy Judge Jonathan Wong and the Order dated 17 December 2019 of Her Honour Judge Phoebe Man to allow the defendant to amend its defence had not been included in the Original Trial Bundles.

Fifth, the documents contained in the Original Trial Bundles had not been paged consecutively, ie each of the 3 different bundles, namely, (A) Bundle of Pleadings and Other Court Documents; (B) Bundle of Witness Statements; and (C) Bundle of Documents, re-sets the pagination from page 1, that was in breach of PD 5.6 §4(1)(3). This is particularly confusing when Bundle (A) and Bundle (B) above had been placed in the same lever-arch file, separated by one thin sheet of paper which acts as a divider.

Sixth, no attempts had been made to separate the witness statements and the “exhibited” documents attached to them. For example, almost 200 pages of documents were attached to the plaintiff’s witness statement under 8 separate “attachments” and they were just blindly placed in the same bundle without thinking of the fact that most if not all of those documents had been produced in Bundle (C) already. This is not only an unnecessary waste of papers but cost both the parties and the court precious time in sorting out what are the original and what are the duplicated documents and whether there are any differences between the two.

Seventh, no page reference had been marked on the margins of the witness statements or the indexes of the bundles in order to reflect which documents they are referring to in the Bundle of Documents, ie Bundle (C), thus making cross-referencing impossible.

Eighth, the Original Trial Bundles (which are contained in 2 separate lever-arch files) also failed to comply with PD 5.6 §5 ie where it states that such “(L)ever-arch files and ring-binders must not be over-filled (and should never include more than 250 pages)”. In this case, the 2 lever-arch files consisted of 310 and 395 pages respectively.

Ninth, no labels had been stuck to the spine of the Original Trial Bundles in breach of PD 5.6 §5 where it states that:

“...Where each set of bundles consists of more than one file, the spines should be prominently labeled (eg. Bundle A, Bundle B, etc) ...”

Actions taken by the court

Upon finding the above problems with the Original Trial Bundles, this court had instructed its clerk to contact the plaintiff’s solicitors on 28 October 2020 to inform them some of the problems found by the court as summarized above and to remind them to comply with the relevant PD. Sadly, the plaintiff’s solicitors responded in a lukewarm manner with a legal clerk/executive, who

did not seem to know what was happening, expressed the view that he thought they had already complied with the PD when preparing the trial bundles. Unfortunately, the handling solicitor of the plaintiff did not bother to contact the clerk of the court to find out what were the issues troubling the court concerning the Original Trial Bundles at all.

In view of this, this court had issued the following written directions to the plaintiff's solicitors in late afternoon on 28 October 2020:

“The plaintiff’s solicitors are to double check the trial bundles they had lodged with the court for the purpose of the trial commencing on Tuesday, 3 November 2020 at 9:30 a.m. in Court no. 8 to see if they have complied with §4 of Practice Directions (‘PD’) 5.4 and §4 of PD 5.6.

The plaintiff's solicitors are reminded to ensure that the trial bundles lodged contained all the updated pleadings/orders and documents (without duplications) and are compiled in accordance with the PDs. Any non-compliance of the PD above may result in an adjournment and/or delay in the trial of which the plaintiff's solicitors may be made personally liable for any wasted costs.”

Problems found in the trial bundles submitted on 30 October 2020

Then, without as much as the courtesy of a cover letter, let alone an apology, a clerk from the plaintiff's solicitors with 10 minutes' notice telephoned the clerk of this court, informing her that they would be re-lodging a new set of trial bundles in the afternoon on Friday, 30 October 2020. They lodged them exactly 10 minutes before the close of business of the court at 4:50 pm which was of course just left one clear day before the commencement of the trial for the court to read the documents in the new set of trial bundles. This was in breach of PD 5.6 §8:-

“Agreed bundles must be lodged with the Court at least 72 hours before the date fixed for the hearing (excluding Saturdays, Sundays and general holidays).”

But the new set of updated and revised trial bundles (“Updated Trial Bundles”) while having included the updated pleadings and court orders and having taken out all the duplicated documents from the Bundle of Documents, they still have not “cured” the other defects which I had identified above.

In particular, the main concern that the court had was why it should be forced into a position to read the 2 new set of bundles in less than the time specified in the PD, namely, 72 hours prior to the commencement of the trial, just because an officer of the court, of whom the handling solicitor in charge of the plaintiff's case in this action is, chose not to follow the well-established PD.

Events took place at the trial

At the beginning of the first day of trial on 3 November 2020, Mr Paul Wong for the plaintiff when asked by the court as to why his instructing solicitors could make such a big blunder in compiling the Original Trial Bundles, he could not offer any “valid explanations”. He accepted that there was no good excuse for the complete botch-up in the preparations of the bundles. Further, the

handling solicitor, who was the senior partner of the firm (now a consultant) is out of the jurisdiction and not in Hong Kong. This was on the first day of this trial which had been set down for 5 days for trial some time ago and adjourned in March this year due to GAP. Therefore, Mr Wong could not take any instructions from her. However, to Mr Wong's credit, he admitted that the fault in messing up the trial bundles were completely theirs and not anybody else's involved in this case.

After the court has pointed out the glaring non-compliances of the PD in the preparation of the Original Trial Bundles, Mr Wong, on behalf of his solicitors, proposed to adjourn the trial to the afternoon of the same day in order to "enable the parties to carry out negotiations" and to see if they can resolve the matter in an amicable manner. Such application was rejected by the court outright as the trial itself is a "milestone date" which cannot be varied or postponed unless there are "exceptional circumstances". Allowing the parties to carry out last minute "without prejudice" negotiations during the trial is not in my view one of them. The parties after all had almost 10 years to talk about this matter as the alleged outstanding fees and charges arising out of the works done by the plaintiff dated back to 2011 if not earlier. Therefore, the application was outright rejected by the court.

Mr Wong then, on his solicitors' behalf, offered to re-compile the entire set of trial bundles so as to make sure that they will be in compliance with all the relevant provisions of the PD.

An application to adjourn the case for that purpose to 9:30 am to Day 2 of the trial on 4 November 2020 was granted by the court.

On Day 2 of the trial, 3 completely new trial bundles have been submitted to the court just before the resumption of the hearing. Subject to further checking, they appear now to be in compliance with the requirements under the various PD. However, as Mr Cheng for the defendant has pointed out, some cross references of page numbers in the plaintiff's witness statements are still wrong. Mr Wong accepted that his solicitors had failed to check them and had relied on the pages on the provisional indexes instead which led to those mistakes. These cross references needed to be further amended and those pages in the plaintiff's witness statements have to be replaced and substituted by new pages in the bundles. Mr Wong undertakes on behalf of his solicitors to do that within the next 3 days. The court has given leave for them to do so.

However, it is clear that the trial which has been fixed for 5 days will now have to be adjourned as the court has to re-read the trial bundles and to tag all the documents in their new order.

For the above reasons, both Mr Wong and Mr Cheng agreed that the trial has to be re-fixed to another date so that it will not be split into 2 parts, which will not be ideal for everybody concerned in the case. Mr Wong therefore applied to the court to adjourn the matter to be tried before me with a date to be fixed. Mr Cheng agreed to that proposal. The court is willing to do so as it seems it is the only sensible course to take given the circumstances.

This leaves the issue of costs wasted as a result of the failure on the part of the plaintiff's solicitors to observe the requirements of the PD.

I was rather taken by surprise when I heard Mr Wong informed the court that they had advised their client and their client, namely, the director/shareholder of Plaintiff Mr Hui Tsz Hong, has agreed to pay the costs wasted as a result of the adjournment.

I do not agree or accept that this is the right thing to do.

It is clear that this whole unnecessary saga was caused by the sloppiness and lack of diligence on the part of the plaintiff's solicitors and had nothing to do with the plaintiff itself. The only mistake, if it can be called that at all, that the plaintiff had made, with greatest respect, was to place its case in the wrong hands and relied on a firm of solicitors who paid scant attention to the requirements of the PD.

I have explained in Chinese to Mr Hui of the plaintiff who was in court today of what had happened both yesterday and today and why an adjournment for the trial is now necessary.

However, I would not allow a lay person or a limited company to pay for the mistakes of his qualified legal representatives. That is not right. It is not fair. It is not just. I have explained that to Mr Hui why that is so.

CONCLUSION

I therefore will make an order and I hereby do that all costs thrown away as a result of the adjournment of today's trial and the time the court and the parties spent in the last 2 days in sorting out the completely botched-up trial bundles to be borne by the plaintiff's solicitors. As per the usual practice, I will give an opportunity for the plaintiff's solicitors to show cause within 14 days from today as to why they should not be personally made liable for paying all those costs thrown away with certificate for counsel and why such costs should not be paid on an indemnity basis and to the defendant forthwith. Subject to the plaintiff's solicitors in showing cause as set out above, such costs will be summarily assessed by this court by way of paper disposal.

As to the trial itself, I have, after consulting counsel's diaries at the hearing, adjourned that to Monday, 22 March 2021 at 9:30 am in court No.8 (with 23 to 26 March 2021 reserved) to be heard before me.

Finally, I would like to take this opportunity to remind all solicitors who prepare trial bundles in a civil trial to do so diligently and to strictly comply with the relevant provisions of PD. Otherwise, like in this case, the handling solicitor responsible for the failure in observing the requirements of the PD may be made personally liable to pay for any wasted costs resulting from the adjournment of the case.

(Andrew SY Li)

District Judge

Mr Paul Wong instructed by Cheng, Chan & Co., Solicitors for the plaintiff

Mr Bosco Cheng instructed by K.M. Lai & Li for the defendant

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Prepared on 27 October 2026 · Esheria