HONG KONG / JUDGMENT

TING KAM YUEN v. VIATECH ENGINEERING LTD AND ANOTHER

COURT
District Court

DECIDED
6 August 2007

CASE / FILE NUMBER
DCEC244/2004

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bjbj DCEC 153-4 & 241-6/2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 153 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN LI YUEN YAU acting for herself Applicant and other members of the family, namely, TSO HON YING and TSO CHING YI, of TSO PAK KUEN, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 154 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN LEE CHIU LAN acting for herself Applicant and other members of the family, namely, CHAN LORRAINE, CHAN KING FAI CHAN WAI YING, of CHAN SHING TONG, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 241 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN TING KAM YUEN, the lawful attorney of Applicant IGNATOVA LYUDMILA MIKHALOVNA acting herself and other members of the family of IGNATOV ALEKSANDR GRIGOREVICH, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 242 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN TING KAM YUEN, the lawful attorney of Applicant MIKHAYLISHINA OLESYA IGOREVNA acting herself and other members of the family of MIKHAYLISHIN ANATOLIY BOGDANOVICH, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 243 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN TING KAM YUEN, the lawful attorney of Applicant SHERSTYUK IRINA SERGEEVNA acting herself and other members of the family of SHERSTYUK PAVEL YURIVICH, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 244 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN TING KAM YUEN, the lawful attorney of Applicant STEPANOVA VALENTINA KONSTANTINOVNA acting herself and other members of the family of KUZNETSOV YURIY ANATOLEVICH, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 245 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN TING KAM YUEN, the lawful attorney of Applicant POZDNYAK OLGA LVOVNA acting herself and other members of the family of POZDNYAK NIKOLAY IVANOVICH, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 246 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN TING KAM YUEN, the lawful attorney of Applicant TROFIMOVA OKSANA VLADIMIROVNA acting herself and other members of the family of TROFIMOV GERMAN EVGENEVICH, deceased and VIATECH ENGINEERING LIMITED 1st Respondent ZEN PACIFIC CIVIL CONTRACTORS 2nd Respondent LIMITED

Coram: Deputy District Judge A. Kwok in Chambers Date of Hearing: 27 June 2007 Date of Delivery of Judgment: 6 August 2007 DECISION

Background

Following a hearing on the assessment of the applications of compensation by the above 8 Applicants against the 1st and 2nd Respondents (respectively as and) under the Employment Compensation Ordinance, Cap.282. (the Ordinance), I made an order dated 20 March 2007 in favour of all the Applicants and granted their applications for the statutory awards with interest and costs. The Applicants herein are the widows or the lawful attorneys of the widows and/or family members of those 8 Deceased Persons who were members of the crew on board a Dredger which collided with a container ship during an accident in Hong Kong waters on 12 March, 2002. All the 8 Deceased Persons were killed in the accident and they were all, as I found, crew members or employees employed by R1 to work on board the Dredger. The clear and unequivocal evidence as I found was that at all material times, R1 was the direct employer of those 8 Deceased Persons and also the sub-contractor to the principal contractor, namely R2. Under s. 24 of the Ordinance, R2 (as principal contractor) is also liable to pay the same compensation to the Deceased Persons as employees or their family members as in fatal cases as if R2 were the direct employer of 8 Deceased Persons. At the close of submission in the hearing, Mr. Lin, counsel for R2 orally informed this court that it was the intention of R2 to claim an indemnity against R1 for the claims by the Applicants under s.24 (2) of the Ordinance in the event that judgments were entered in favour of the Applicants. Indeed, Mr. Lin have developed his arguments citing statues and authorities in support thereof. Mr. Kwok, counsel for R1 however opposed the application and said he was not prepared to argue the point at the time and he sought to have this argument adjourned until the judgment on liability and quantum of the compensation was handed down by

the court. In the end, I acceded to Mr. Kwok s request and I allowed his application and made an order that the arguments shall be revisited by both parties once the judgment was handed down and as soon as counsels could be heard. As this is a matter between the two Respondents alone and does not concern the Applicants, on the application of the counsel for the Applicants, I excused his attendance from the ensuing arguments. Before the parties came back for further submissions on 27 June, 2007, R1 took out 2 Sumonses. The first Summons, filed on 11 June, 2007, asked for a stay of the indemnity under s.24 of the Ordinance to be made by the court whereas the second Summons, filed on 25 June, 2007, only one clear day before the hearing, asked for a stay of R2 s application for indemnity. Despite the fact that there was before me 2 Summonses, Mr. Kwok had made it clear in his submission that the evidence and arguments was the same for both summonses. R2 s claim for s. 24 Indemnity In support of the application for indemnity, Mr. Lin relied on Hip Hing Construction Co Ltd v. Wong Leung Tak & Anor [1990] 2 HKC 119 which held that an employee was given an additional remedy under s. 24 of the Ordinance which did not restrict his remedy under s. 5 and the combined effect of ss. 5 and 24 was that both the employer and the principal contractor were severally liable to pay compensation to the employee for the same injury. Under s. 24(2), however, the principal contractor is given the right to be indemnified by the employer. The case further held that the principal contractor s entitlement to indemnity from the employer under s. 24(2) of the Ordinance was unqualified and not defeasible by any defence of negligence or breach of statutory duty by the principle contractor. The Court of Appeal held also that the principal contractor was entitled to an order for indemnity even though it was an oral, rather than written, application. Although in Hip Hing Construction Co Ltd (supra.), the Court of Appeal first held that in the absence of an express provision in s 24 and any English authority, the principal contractors could not claim costs incurred in the compensation proceedings as part of his indemnity, later in Mak Wing Fai v. Chevalier (HK) Ltd [1999] 3 HKC 677, the Court of Appeal has apparently reconsidered the point and finally held that the principal contractor, if sued, can recover under s. 24(2) not only the compensation he pays to the applicant but also his costs. R1 did not take issue over the conflicting decisions on whether the indemnity also covers costs and I accept Mr. Lin s submission that the right of indemnity under s. 24(2) of the Ordinance extends to the costs incurred by the principal contractor in the compensation proceedings.

7. Based on the above authorities, Mr. Lin submitted that under s. 24(2) of the Ordinance, R2 has an indefeasible entitlement to a full indemnity from R1 and thus is entitled to an order for full indemnity. In reply, Mr. Kwok did not seek to argue against the weight of the authorities. Rather, he focused on the grounds for stay applications which he said were justified in the circumstances. To these grounds I shall later refer in due course. In the meantime, I have no difficulty to hold that R2 is entitled to claim for full indemnity under s 24(2) in the present proceedings. Stay of Execution On behalf of R1, Mr. Kwok prefaced his submission by pointing out that this court, like High Court, has jurisdiction to stay proceedings and the execution of a judgment and order. The order is made generally in the exercise of the court s discretionary inherent jurisdiction. In reply, Mr. Lin said he was prepared to assume (but without conceding) that the court retains an inherent jurisdiction,

in suitable cases, to make orders staying executions. In the course of the arguments, I was also referred to by both parties to a number of District Court decisions where clearly indicated that there were instances where the court has in the past exercised its inherent jurisdiction in granting or refusing to stay the execution of a judgment and order. I therefore decided to approach the question of stay on the basis that this court has the requisite inherent jurisdiction.

9. In Credit Lyonnais v SK Global Hong Kong Ltd. (CACV 167/2003) Ma CJHC held that: the court retains an inherent jurisdiction, in suitable cases, to make orders staying executions quite apart from those situations expressly permitted under the Rules of the High Court By the term suitable cases are meant those situations in which the inherent jurisdiction of the court is required to be exercised so as to avoid injustice, prevent abuse, preserve the dignity of the court or to facilitate the administration of justice. The question still remains whether R1 can successfully argue that this is one of those suitable cases. In Credit Lyonnais (supra.), Ma CJHC also pointed out that the existence of an inherent jurisdiction to stay execution must not be confused with the exercise of it. The starting point is that normally the successful party should be able to take all legitimate measures to enforce that judgment and it is only in exceptionally circumstances when the court would deprive a successful party of the fruits of the judgment he has obtained except on good grounds being shown. It follows that the discretion to stay ought to be exercised sparingly. It is R1 s case that R2 entered into a contract for dredging work with Hong Kong International Terminal Ltd ( ) in 2001 and through its sister company Leader Marine Contractors Ltd (Leader Marine), R2 then subcontracted the dredging work wholly to R1. Under the Main Contract with HIT, R2 had to procure insurance for the purpose of the Ordinance as specified in the Special Conditions of Contract Clause 13 in the joint names of HIT, R2 and all of its Sub-Contractors i.e. including R1 whereas under the Sub-Contract, R1 had to procure its own marine insurance in the joint names of HIT, R2 and itself against all risk of loss and damage, together with protection and indemnity liabilities including, among other items, personal injury and loss of life in respect of marine vessels operated during the Sub-Contract works. As a result, R2 had procured employees compensation insurance policy from the Ming An Insurance Company (Hong Kong) Ltd (Ming An policy) and R1 had procured Marine Hull Policy from Ming An and Protection and Indemnity Insurance from Shipowners Mutual Protection and Indemnity Association(policy). After the accident, there has been a series of correspondence between R1 and its solicitors, R2, Ming An s solicitors and SOP s solicitors. I do not need to go into the details suffice it to say that Ming An relied on an other insurance clause and informed R1 that they should go to claim SOP instead and would take over conduct of defence on behalf of R2 only. On the other hand, SOP s solicitors takes the view that the SOP policy does not cover the statutory liability under the Ordinance but common law liability in respect of the vessel insured. The reality is R1 is at the moment left without any cover under both policies as a named insured after judgment was entered against it.

13. As can be seen from the arguments between the two insurers, R1 s claim against Ming An is hotly disputed. The question of liability of Ming An towards R1 revolves around the final and proper interpretation of the other insurance clause under its policy and the ambit of the coverage under the SOP policy which is certainly not the function of this court and which is certainly difficult to assess or even predict without the benefit of hearing the full arguments. Only one thing is certain: if SOP s interpretation of the policy is held to be correct and its policy covers common law liabilities only, Ming An can no longer rely on the other insurance clause to refuse the claim by R1. In this connection, looking at the plain wordings of the SOP policy, it seems to be the case that the marine insurance only covers common law liabilities and not any statutory liabilities under the Ordinance. It states that cover, in relation to crew claims, extends to include common law crew claims. It specifically does not mention or refer to ant statutory liability or liability under the Ordinance. R1 thus appears to have, on the face of it, a claim of substance against Ming An for an indemnity against its liability in the present proceedings.

15. Circumstances to stay the execution of a judgment or order vary and are non-exhaustive but include the existence of cross claims between the parties. (see Credit Lyonnais (supra.) para. 5 of the Judgment) Mr. Lin contended that Ming An is not a party to this action. It would not be a correct exercise of discretion to take into account a potential claim by R1 against a non-party at the expense of the judgment creditor. However, as Mr. Kwok rightly pointed out, in the present proceedings, Ming An have already taken over the conduct of proceedings on behalf of R2 under the terms of the Ming An policy. The s. 24 indemnity to R2 is in effect an indemnity to Ming An. Based on the special relations between R2 and Ming An, I hold that Ming An is not a non-party as such but is, for all intent and purposes, a de facto party of the proceedings. The decision in Canada Enterprises v. MacNab Ltd. [1976] 1 WLR 813 is the authority that the court could exercise its power to stay on proof of a relationship between parties. In another case Orri v. Moundreas, [1981] Com LR 168, an unreported decision of Mustill J. from the Queen s Bench Division (Commercial Court), it was held that there can be cases where the court will look behind the corporate structure, piercing the corporate veil as it were, at one or both parties to find the person truly at interest, and then exercise its power to grant a stay, as the justice of their mutual relations may demand. (also cited with approval in Credit Lyonnais (supra.) per Ma CJHC at para. 5(2) of the Judgment) In Burnet v. Francis Industries Plc [1987] 1 WLR 802 (a case dealing with the UK equivalent RHC O.47, r.1), Bingham LJ spoke of a number of factors that the court has to take into account in deciding whether the special circumstances do exist in order to stay execution. The present situation may be described schematically this way. A sues B and obtain judgment. B is associated with C. C has an unresolved claim against A. B seeks a stay of execution of A s judgment to await the outcome of C s claim against A. First, it is relevant to consider the nature of A s claim . Second, it is relevant to consider the extent of the identity between C and B. The more closely they are identified, the more like a true counterclaim C s independent claim against A becomes. Third, it is relevant to consider the interrelationship of the respective claims by A against B and by C against A, for the same reason. Fourth, it is relevant to consider the

strength of C s claim. The more obvious it appears that A will have to pay C eventually, the less likely it is that he will be prejudiced by a denial of the fruits of his judgment against B in the short term. Fifth, it is relevant to consider the size of C s claim relative to A Sixth, it is relevant to consider the likely delay before the merits of C s claim against A will be the subject of adjudication. Seventh (and including various factors that I have already mentioned), it is relevant to consider the extent of prejudice to A if he is denied the fruit of his judgment until C s claim is determined. Lastly, it is relevant to consider the risk of prejudice to C if B makes payment to A under the judgment. That will be particularly relevant if it is shown that there is a risk of the fruits of the judgment being removed from the jurisdiction, or dissipated within the jurisdiction. It is of obvious relevance if A is a British resident with ample means to satisfy any judgment C may recover against him. Although in this case, the parties are not schematically the same as described in the above analysis, the principles which are fallen to be applied are highly relevant for my consideration. When I come to review the factors that have been mentioned in the context of this case, I am of the view that they are mostly resolved in favour of granting the stay of execution. I have already expressed my view over the strength of R1 s claim against the insurer, Ming An. It is common ground that Ming An was behind R2 and in effect had the conduct of proceedings. The kind of close and special relationship between R2 and Ming An in this case has rendered the separate and independent claim by R1 against Ming An more like a counterclaim scenario between the same parties in an action. The size of R1 s claim would be exactly the same as the indemnity ordered in this case (excluding costs and interest). On the other hand, I agree with Mr. Lin that the risk of prejudice to R1 is relatively small if it were to indemnify R2 or for that matter, Ming An, first under the judgment. Ming An is a large insurance company with ample means and there is simply no basis to suggest that the fruits of the judgment would be removed out of the jurisdiction or dissipated within the jurisdiction. On the contrary, Mr. Lin criticized R1 for failing to show any evidence of any financial hardship that would be caused to their business if the application to stay were to be refused. As I understand from the affirmation of Shirley Leung, the director of R1, filed on 4 June, 2007, the prejudice to R1 is not financial. She believed that the s. 24 indemnity is not in truth an indemnity to R2 but rather it is a premature benefit to Ming An which must in effect be offset by the R1 s claims for indemnity for employee s compensation and common law liability. There is no prejudice to R2, one way or another. In my judgment, applying all the factors into consideration, I am of the view that this is one of those exceptional cases where it is just and convenient to stay the execution of the s. 24 indemnity in the circumstances. By reason of this decision, I do not think its is necessary for me to go further and deal with the another Summons for stay of application for s. 24 indemnity. R2 to be indemnified by R1 for all the compensations paid to any Applicant pursuant to the order dated 20 March, 2007; Order In summary,

(1) R2 to be fully indemnified by R1 for all the compensations paid to any Applicant together with all the costs and interests incurred pursuant to the order dated 20 March, 2007;

(2) R1 do file a claim against Ming An under the contract of employees compensation insurance within 42 days;

(3) the indemnity order in paragraph 22(1) hereinabove be stayed until determination of the pending claim or further order and R1 do pay interest for the amount to be indemnified at half judgment rate until determination of the pending claim or payment in full as the case may be;

(4) Costs to R1 for the hearing of both Summonses on 27 June, 2007 with certificate to counsel, to be taxed, if not agreed. (Signed) Anthony Kwok Deputy District Judge Representation: Mr. Tim Kwok instructed by Messrs. Christine F.L. Ip & Young for R1 Mr. Kenny Lin instructed by Messrs. Dibb Lupton Alsop for R2 PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#$ .br/ />rg Y_6}& Y_6} />rg .br/ Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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