

HONG KONG / JUDGMENT

VINSON ENGINEERING LTD v. KIN SHING ENGINEERING (HK) CO LTD

COURT

District Court

DECIDED

8 February 2007

CASE / FILE NUMBER

DCCJ2844/2006

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DCCJ 2844/2006 & DCCJ 2990/2006

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 2844 OF 2006

BETWEEN:

VINSON ENGINEERING LTD. Plaintiff
and
KIN SHING ENGINEERING
(H.K.) CO. LTD. Defendant

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 2990 OF 2006

BETWEEN:

VINSON ENGINEERING LTD. Plaintiff
and
KIN SHING ENGINEERING
(H.K.) CO. LTD. Defendant

Coram : HH Judge Lok in Chambers
Date of hearing: 30 January 2007
Date of decision: 30 January 2007
Date of handing down of Reasons for Decision: 8 February 2007

REASONS FOR DECISION

This is an application by the Defendant, Kin Shing Engineering (H.K.) Ltd. (), to strike out the present two actions commenced by the same Plaintiff, Vinson Engineering Ltd. (Vinson), or alternatively for security for costs. In the hearing on 30 January 2007, I allowed KS s application and struck out the Statements of the Claim. I now give my reasons. The present two actions relate to the Ma On Shan Area 77 Project of the Hong Kong Housing Authority (the Project). Under the Project, Vinson was a sub-contractor of one Pyrofoe Engineering Ltd. (Pyrofoe), who was the nominated sub-contractor for the fire services and water pumps works at the Project. Vinson in turn sub-contracted part of the works to KS. The Project was divided into 3 phases: DCCJ No. 2844 of 2006 relates to the works under Phases 1 and 3, whereas DCCJ No. 2990 of 2006 relates to the works under Phase 2. In a nutshell, Vinson s claims in the present actions can be divided into 3 parts. Firstly, in order for Vinson to receive payment for the works from Pyrofoe, Vinson claims that there was an implied term in the sub-contracts between Vinson and KS that the latter would supply all necessary documents to Vinson for the assessment and certification of the works by the Consultant Engineer and Surveyor of the Project (the Surveyor) within a reasonable period of time. As KS had failed to supply such documents, the Surveyor was unable to assess or certify the works of KS on an accurate basis, thereby reducing Vinson s entitlement to the payment of works from Pyrofoe. Hence, Vinson claims for such damages in the respective sums of \$433,409.20 in DCCJ No. 2844 of 2006 and \$966,230.87 in DCCJ No. 2990 of 2006. Secondly, Vinson claims that KS had failed to provide maintenance and inspection works during the defects liability period, and as a result Vinson had to engage another contractor to carry out such works. In this regard, Vinson claims for damages in the sum of \$82,090.63 in DCCJ No. 2844 of 2006. Thirdly, Vinson alleges that KS had failed to provide a supervising foreman for the works in breach of the term of the sub-contracts, and Vinson therefore claims damages in the sum of \$75,100 in DCCJ No. 2844 of 2006. My first observation is that Vinson could have consolidated all its claims in one action and commenced proceedings in the Court of First Instance, and it was certainly a tactical decision to split the claim into two parts in order to make them within the jurisdiction of the District Court. However, as the works under each phases of the Project were governed by different sub-contracts, I cannot criticize Vinson for doing so. In this application, KS seeks to strike out the claims on the ground that the dispute between the parties in respect of the works of the Project has already been litigated in another action, HCCT No. 108 of 2002, in the Court of First Instance (the High Court Action). In that case, KS claimed against Vinson for the unpaid works under the sub-contracts. By way of defence, Vinson sought to set-off the claim with various amounts of damages that Vinson claimed were caused by KS s breach of the sub-contracts. The case was tried before Reyes J. in April 2005, and the learned judge decided the case in favour of KS. As Vinson now seeks to relitigate the same matter, KS claims that it is an abuse of the process of the court. In the hearing, Madam Chong, a director and the authorized representative of Vinson, conceded that the claim for maintenance and inspection works and the claim regarding the provision of foreman had already been litigated in the High Court Action,

and so Vinson would not pursue these claims in the present two actions. With such concession, the only remaining issue is whether the claims in respect of the failure to supply sufficient documents for the assessment of the works by the Surveyor are abuse of process. In this regard, we need to examine the pleadings and the judgment of the High Court Action. Pleadings and Judgment of the High Court Action As I have mentioned above, KS claimed for the unpaid works of the Project from Vinson in the High Court Action. In the Amended Defence filed in that case, it was pleaded that KS was obliged to submit all relevant documents to Vinson for final verification and certification of the variation works by Vinson and the Surveyor. As KS had failed to supply the documents, Vinson and the Surveyor were unable to assess or value the variation works on an accurate basis (see paragraphs 8(i) to 8(q), 20(f) to 20(n) and 35(f) to 35(n) of the Amended Defence). Hence, Vinson reserved the right to set-off any amount in the event that Vinson had overpaid KS or had made payments on behalf of KS to third parties (see paragraphs 11, 23 and 38 of the Amended Defence). As noted by Reyes J. in this judgment, there had yet been final certification of the extra works under Phrases 1 and 3 at the time of the trial, and Vinson claimed that such delay was caused by the failure on the part of KS in providing the supporting documents. Further, Vinson claimed that there was an implied term in the sub-contracts that KS was only entitled to payment for the additional works after certification of the works by the Surveyor. As KS had failed to provide the documents and there had yet been certification, KS was not entitled to payment. On the other hand, the works under Phase 2 had been certified before the trial. However, Vinson had received less than the sum claimed by KS for the extra works, and this, according to Vinson, was caused by KS's failure to provide the supporting documents. In his judgment, Reyes J. held the following:

- (i) there was no implied term that KS was only entitled to payment from Vinson after certification of the works by the Surveyor; the basis for assessing the extra works was different in the sub-contracts between Pyrofoe and Vinson on the one hand and between Vinson and KS on the other: the former was assessed based on the measurement of the works (referred to in the judgment as measurement rate), whilst the latter was assessed based on the items of work completed (referred to in the judgment as point rate); KS had provided all supporting documents that it could for Vinson to assess the validity of the claims for the extra works; and Vinson was not entitled to deduct from the contract sum due to KS any amount of damages allegedly caused by the breach of the sub-contracts on the part of KS. The Law I then turn to the law. As I see it, the best summary of the law in this area can be found in the judgment of Ma J., as he then was, in *Ray Chen v Anita Wan & anr.*, unreported, HCA 4582 of 2001 (decision on 9 May 2002), in which the learned judge said the following:

22. I begin with a statement of the general principles:

- (1) *Res judicata* in its narrow sense simply means that a party will not be permitted to relitigate in subsequent proceedings issues which have already been adjudicated upon in previous proceedings by a court of competent jurisdiction. This form of abuse of process is often known as a *res judicata* proper or *res judicata* in its classic or narrow sense.

- (2) Res judicata in its so-called wider sense is the principle that the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permits the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case : see *Henderson v Henderson* [1843] 3 Hare 100, at 115 per Sir James Wigram VC. In *Yat Tung Investment Company Limited v Dao Heng Bank Limited* [1975] AC 581, Lord Kilbrandon said at 590A-B, But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings (emphasis added) Ma J. then went on and noted that since *Yat Tung* was decided, there had been numerous cases in which the width of the principles stated in that case had been questioned. For example, in *Bradford & Bingley Building Society v. Seddon Hancock & Others* [1999] 1 WLR 1482, which was a decision of the English Court of Appeal, it was held that maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process, but that some additional element is required, such as collateral attack on a previous decision, some dishonesty or successive actions amounting to unjust harassment. In England, the matter was finally considered by the House of Lords in *Johnson v Gore Wood & Co. (a firm)* [2001] 2 WLR 72, and Ma J. had succinctly summarized the points arising from *Johnson* in his judgment:
26. The following important points arise from *Johnson*: First, it rejects as too dogmatic what has been one of the criticisms of *Yat Tung*, namely, the statement in Lord Kilbrandon's speech that an abuse of process occurs to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings (emphasis added): see *Johnson* at 90D per Lord Bingham of Cornhill; at 118G-119A per Lord Millet. The test of whether there is abuse should be an objective, merits-based judgment which takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before : see *Johnson* at 90D. I note that in one Court of Appeal judgment in Hong Kong, it seems to have been assumed that merely because a point could or might have been taken in previous proceedings did not automatically mean that it should have been taken: see *Tsang Yu v Tai Sang Container Cold Storage and Wharf Limited* [2001] 1 HKLR 780 at 784A-I. Secondly as to what constitutes an abuse of process, while it is obviously undesirable to set out an exhaustive list (see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, at 536 per Lord Diplock), chief among the factors that the court should consider is whether the bringing of new proceedings constitutes an unjust harassment of the other party: see *Johnson* at 90C-D. Hence, we have two different approaches to this question: the *Yat Tung* principles and arguably the less rigid principles as laid down in the subsequent decisions including *Johnson*. In *Ray Chen*, Ma J. considered that he was bound by the *Yat Tung* principles as they came from a Privy Council's decision which is binding on

the Hong Kong courts apart from the Court of Final Appeal. However, Ma J. was of the view that, no matter what principles to be applied, the claim should be struck out in that particular case. In my judgment, the same should happen here. Reasons for striking out the Plaintiff's claims Like the case before Ma J., not matter that the court is applying the Yat Tung principles or the less rigid principles, Vinson's claims in the present two actions should be struck out. From the pleadings filed in the High Court Action, it is clear that Vinson tried to establish the following contentions in that case: (i) there was an implied term in the sub-contracts between Vinson and KS that the latter had to supply all relevant documents to Vinson for the purpose of the certification of works by the Surveyor; and (ii) as a matter of fact, KS had not supplied such documents. In his judgment, Reyes J. rejected both contentions. In the new claims, Vinson is seeking to establish the same implied term and that KS had failed to supply the relevant documents. Insofar as this part of the claims is concerned, it is caught by the principle of res judicata in the narrow sense and Vinson is not entitled to relitigate the matters again in the present two actions. In her submission, Madam Chong points out that the new claims are different. Although there was an express finding in the High Court Action that KS had supplied all the relevant documents, Vinson's new complaint is that these documents had not been supplied within a reasonable period of time after the completion of the works. However, such complaint was not raised in the High Court Action and there are no particulars in the present two Statements of Claim to substantiate the complaint about the delay, and so I doubt very much whether the so-called delay claims are in any way different from the one in the High Court Action. Even assuming that the claims are different, it is clear that such claim should have been raised in the High Court Action itself. I understand that KS's costs of the High Court Action have been taxed in the amount of about \$2.2 million. Having incurred such substantial costs, it would constitute an unjust harassment of KS if it is required to litigate again on substantially the same matter. Further, revisit of the same dispute would mean that the court would have to investigate once again as to what documents were supplied by KS at the time, which involves the calling of the same witnesses. In my judgment, this amounts to a collateral attack on the findings by Reyes J. as to the sufficiency of the documents supplied. Finally, as I see it, one of the main reasons why Reyes J. rejected Vinson's argument about the implied term was that the basis for calculating payment of works were different in the sub-contracts between Pyrofoe and Vinson on the one hand and between Vinson and KS on the other. If Vinson is allowed to pursue the new claims, Vinson is free to challenge such finding made by Reyes J. which, in my judgment, certainly constitutes an abuse of process. Hence, as the new claims could and should have been raised in the High Court Action, and the commencement of the new claims constitutes an unjust harassment of KS and involves a collateral attack on the previous findings, the present claims should be struck out no matter applying the Yat Tung principles or the less rigid principles laid down in subsequent decisions including Johnson. In view of such decision, it is not necessary for me to deal with KS's application for security for costs. As costs should follow the event, I have also ordered that the costs of the two actions, including the costs of KS's summonses dated 22 September 2006, be to KS. Mr. Lui, solicitor for KS, asks for such costs to be paid on an indemnity basis. However, I am of the

view that the commencement of these actions was the result of the misunderstanding of the law on the part of Vinson, and I do not find that the conduct of the present two cases was so unreasonable so as to justify the court to order a higher basis for taxation. I therefore refuse KS s application in this regard. (David Lok) District Judge Madam Chong Lee-ling, director and authorized representative, for the Plaintiff Mr. P. C. Lui, of Messrs. Peter Lau & Co., for the Defendant PAGE PAGE H a\$ H a\$ &`#\$ ca P' :):*= \$+| { J:(bz;\ \rU&S xYo #}B@~ bz;\ xYo :): & 6" Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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