DCEC 448/2021

[2024] HKDC 1510

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

EMPLOYEES' COMPENSATION CASE NO 448 OF 2021

IN THE MATTER OF AN APPLICATION BETWEEN: -

LAM KONG SO, the Administrator of the estate of LAM CHUN SING, deceased		Applicant
and		
SHUI DIAN BAO AIR CONDITIONING LIMITED		1st Respondent
冼鎮浩		2nd Respondent

Before: Deputy District Judge Kenneth KY Lam in Court

Date of Hearing: 9 April 2024

Date of Decision: 9 April 2024

Date of Reasons for Decision: 13 September 2024

REASONS FOR DECISION

Introduction

1. This matter came to me for trial. On 9 April 2024, supposedly the first day of trial, I heard two interlocutory applications, dismissed both, and indicated I would hand down my full reasons in writing. These are my full reasons.

The New Evidence Application

2. Mr Law Ka Sing (**"Mr Law"**), trial counsel for the applicant, made an oral application to insert a newly disclosed bank statement *(or just a single page of it)* into the existing trial bundle and to adduce it as part of the evidence for the trial.

3. This oral application (**"the New Evidence Application"**) was opposed by Ms Valerie Tang (**"Ms Tang"**), trial counsel for the 1st and 2nd respondents, on the ground that Mr Law's move was plainly *"an ambush"*. Ms Tang submitted to me that the document was only sent to her on 8 April 2024, the day before trial, and there was *no* affirmation explaining (1) why this was never done any earlier; and (2) why the inclusion of this document would be necessary, or otherwise beneficial. Ms Tang submitted to me that the New Evidence Application should be dismissed with costs. Moreover, Ms Tang submitted to me the underlying disclosure was also wrong.

4. I dismissed the New Evidence Application with costs, though my reasons *differed* from those being put forward by Ms Tang.

5. The starting point is that (1) the disclosure of documents; and (2) adducing documents as evidence for a trial are two completely separate steps with two completely separate tests in law. Litigants and practitioners should never mix up or conflate the two. Authorities which did mix up or conflate the two are simply wrong and should never be followed.

6. For disclosure of documents, the correct test in Hong Kong is the well-known *Peruvian Guano* test. It has 3 limbs. In gist, all documents which (1) support a party's own case or harm his opponent's case; (2) harm a party's own case or support his opponent's case; or (3) are not caught by either of the two previous limbs but may *"lead to a train of inquiry"* which may *"in turn"* lead to documents caught by either of the two previous limbs must be disclosed in a list of documents (**"LoD"**), or a supplemental list of documents (**"SLoD"**). The point of the disclosure is to enable the opposite party to verify allegations or conduct investigations. It actually has *nothing* to do with deciding what documents should be in the trial bundle.

7. In a libel action, for example, subject to what was said by the Court of Appeal in *Goodwell Property Management Limited v Lee Hung Sing* [2019] HKCA 634, a plaintiff may properly plead the factual context of the libel by asserting she occupied a high-profile public office, or ran a business, immediately prior to the defendant's publication of the words in question, so that the quantum of damages payable to her should be assessed with that in mind. From time to time, a defendant would find it impossible to admit such assertions *prior to* automatic discovery. That would usually result in a *non-admission*, rendering all documents touching on the alleged office and business discoverable under the *Peruvian Guano* test. Once the defendant has scrutinized all documents, however, he may well be willing

and able to admit all such assertions using the Order 27 *"Notice to Admit"* procedure. With the admission firmly in place, there will be *no reason* why the disclosed documents should be in the trial bundle at all. The *mere fact* that a document is in an LoD or an SLoD does *not* mean it is, or should be, or has become, evidence at or for the trial.

8. For the inclusion of documents in a trial bundle, or otherwise adducing documents as evidence for a trial, as I had said in *Kong Shu King v Zhang Weiming (張偉明)* [2024] 2 HKLRD E2 [2024] HKDC 534 (§5), the acid test is *"will this document be referred to"*. Using the example set out above, if there is an Order 27 admission firmly in place, the admission itself must be *included*, but the underlying documents should be *excluded*, because all trial counsel, and indeed the trial judge, will just be referring to the admission itself. There is *no conflict whatsoever* between disclosing a document, but excluding it from the trial bundle, because the purposes, and the legal tests, for these two litigation steps are *completely different*.

9. Whether a document should be disclosed to an opponent, and whether a document should be adduced as evidence for a trial, are unrelated questions. It is completely wrong to mix up or conflate the two.

10. The differences between (1) the disclosure of documents; and (2) adducing documents as evidence go further. Disclosure is a strict legal duty *(as opposed to a choice)*. Adducing evidence is a choice *(as opposed to a strict legal duty)*. This difference is huge, even though ultimately both steps are, just like all steps in litigation, subject to the court's control, under the court's inherent power to regulate its own process.

11. There are many authorities on the former. The starting point is always *Vernon v Bosley (No.2)* [1999] QB 18 (at 37-D, *per* Stuart-Smith LJ), where the English Court of Appeal said this: -

> "… *It is the duty of every litigant not to mislead the court or his opponent. He will obviously mislead the court if he gives evidence which he knows to be untrue. But he will also do so if, having led the court to believe a fact to be true, he fails to correct it when he discovers it to be false. This duty continues in my opinion until the judge has given judgment.*"

12. That, and what was said by the same judge in *Vernon v Bosley* from 32-D to 35-G, was the genesis of a litigant's *duty* of filing and serving SLoDs. The purpose of filing and serving SLoDs is to ensure no litigant, and no court, would be *misled* into believing no further document existed. Filing and serving SLoDs is *a legal duty*, instead of a choice. That is also the correct legal position in Hong Kong. See, e.g., *HKCP 2024*, §24/2/17, on *"continuing obligation to give discovery"*, which cited *Vernon v Bosley* with approval.

13. A lesser-known, but more important, authority, is *Re Step By Step Limited* (unrep., HCMP 838/2007, 20 February 2009), where Kwan J *(as Kwan V-P then was)* said this *(at §91)* vis-à-vis the position of solicitors on record in civil litigation: -

> "… A solicitor acting for a party in litigation bears a heavy responsibility to see to it that proper discovery is made of all relevant documents... The solicitor would need to inspect and carefully go through the documents proposed to be disclosed, to ensure there are no omissions, and that duty is owed by the solicitor to the court, as an officer of the court (*Myers v. Elman* [1940] AC 282 at 293 to 294, 322 to 323; *Woods v. Martins Bank Ltd*. [1959] 1 QB 55 at 60; *Guess? Inc. & Ors. v. Lee Seck-Mon & Ors.* [1989] 1 HKLR 399 at 404). It would be professional misconduct for a solicitor to permit his client to give discovery

> of documents which was inadequate in that the solicitor knew there were undisclosed relevant documents in the possession, custody or power of the client (*Myers v. Elman*, *supra.* at 300 to 301)…"

14. On a combined reading of these two authorities, it is clear that if a litigant, or his solicitor, discovers, at literally any point in time, that the contents of an LoD had been insufficient in that disclosable documents had been omitted, by oversight or otherwise, his duty is to immediately file and serve an SLoD so that his opponent, and the court, would not be misled.

15. Since filing and serving an SLoD is an existing and continuing legal duty *(and never just a choice)*, no leave is required at all.

16. My attention had been drawn to the case of *Kinetics Medical Health Group Company Limited v Dr Tse Ivan Cheong Yau* (unrep., HCA 1115/2010, 8 May 2013) where the court had indeed said, at its §§31 & 32, that *"out of time"* discovery required leave. With respect, that suggestion was wrong. Disclosure is the performance of an existing duty so that even if it is exceedingly late, leave is *never* required. We must always remember a disclosed document does *not* automatically become evidence at or for the trial. It is only if and when a party seeks to rely on the disclosed document *"as evidence"* that leave of the court must be sought. Ordinarily speaking, a court should *not* micro-manage the contents of an LoD or SLoD. Judicial resources should be focused on controlling the contents of *the trial bundle* instead. A document that is merely disclosed in an SLoD, but never sought to be used as evidence at the trial, is highly unlikely to have any real impact on the trial itself. Whilst the judicial power to expunge an SLoD *does* exist, the circumstances under which it should be exercised must be rare.

17. The position had always been clear in England. In *McTear v Engelhard* [2016] 4 WLR 108 [2016] EWCA Civ 487 (§38), Vos LJ of the English Court of Appeal confirmed the position that under CPR rule 31.11, what a litigant in a civil action should do, when he located new documents, was to *"immediately"* notify his opponent's solicitors by sending copies of all such new documents, and then a proper SLoD, to them. *No* leave of the court would be required at all. The control of the court was to be exercised at the point of a party seeking permission to *use* the documents as evidence, *never* at the point of *inter partes* correspondence, and certainly *never* at the point of filing and serving SLoDs.

18. What was said by Vos LJ in *McTear* was sensible. It was also the correct position in Hong Kong.

19. Applying the above to the facts before me, the applicant's late disclosure did *not* require my permission and was proper. I did, however, exercise my control of the evidence and *refuse* to let Mr Law use the bank document at the trial, because the bank document had *no* probative value.

20. To provide context to what I have just said, this trial was about compensation under the Employees' Compensation Ordinance (Cap 282), and what Mr Law was attempting to do was to show me an entry in a bank statement and say that figure proved the correct *"monthly earnings"* of the injured person. In an ordinary civil trial, where the recipient of the money can come forward, give live oral evidence under oath, and tell me what the figure represented, it could be useful to admit a bank statement. However, in this particular matter, the injured person passed away and could *not* give live oral evidence under oath. Mr Law was in *no* position to call either the

payor or the payee as a factual witness. In the absence of live oral evidence on the *nature* of the figure, the bank statement had *no* meaning. A transfer of money from one person to another can be a (1) gift; (2) loan; (3) mistake; (4) payment; or (5) repayment. Unless a live witness could come forward to explain the *nature* of the figure under oath, the transfer record itself did *not* and would *not* tell us anything useful. Indeed, even if the transfer was earnings, the transfer record did *not* tell us whether it represented a person's daily, monthly, annual, or one-off income, or whether the sum was meant to be shared by multiple employees. Since neither the payor nor the payee would be giving live oral evidence at the trial, the document would *not* be referred to in cross-examination. In such circumstances, what Mr Law was trying to do would *not* be of assistance in the fair and efficient adjudication of this dispute, and I dismissed the New Evidence Application, with costs, on that basis.

The Time Extension Application

21. On 9 April 2024, *ie* the first day of trial, Ms Tang, trial counsel for the 1st and 2nd respondents, argued an application, made by a summons dated 25 March 2024, for extension of time to appeal against an assessment made by the Employees' Compensation (Ordinary Assessment) Board that the injured person (1) suffered a 1.5% permanent loss of earning capacity; and (2) had to be absent from work during the period from 25 August 2019 to 17 March 2021 (**"the Time Extension Application"**).

22. Mr Law, trial counsel for the applicant, opposed it on the basis of (1) delay; (2) prejudice; and (3) the unmeritorious nature of the intended appeal. I dismissed the Time Extension Application with costs for *each* of

the reasons put forward by Mr Law, all of which in my view correct. For the avoidance of doubt, I would have reached the same conclusion *even if* I were to consider just any one of the many reasons put forward. The need to dismiss the Time Extension Application was obvious when these reasons were added up and considered cumulatively.

23. There was *no dispute* as to what the law said in relation to this. Section 18(2) of the Employees' Compensation Ordinance (Cap 282) was self-explanatory. It was helpfully addressed by the Court of Appeal in the well-known case of *Chung Sau Ling v Million Join Ltd* [2003] 4 HKC 561. Ms Tang and Mr Law drew my attention to other authorities, such as *Tsang Loi Fat v Sun Fook Kong* [2011] 4 HKLRD 336 [2011] 4 HKLRD 344, all of which I had read and carefully considered.

24. On the issue of delay, there was *no dispute* the 2nd respondent became a party to this action on 8 November 2022. Having read all papers, I could see *no objectively acceptable reason* why the 2nd respondent had to wait until 25 March 2024 to take out the summons in question. I did accept the 2nd respondent was acting in person, but that was *his own choice*. As I had mentioned in *Pacific Ace Finance Ltd v Delay & Anor* [2023] 4 HKC 424 [2023] HKDC 611 (§18), there were plenty of fully qualified litigation lawyers who would be willing to take up cases on a *pro bono* basis, and the Duty Lawyer Service had a *"Free Legal Advice Scheme"* which any person could use without having to pay anything. Since the 2nd respondent made his own choices, he must accept the consequences of those choices. It was of course wholly unwise for the 2nd respondent to have acted in person, but there was no unfairness in holding him to the choices he made.

25. On the issue of prejudice, it was common ground the injured person was alive when the original assessment took place, but passed away before the summons was taken out. The summons was taken out so late in time it was made returnable on the first day of trial so that the parties would have no time to consult experts or adduce expert evidence without derailing the trial. Physical examination or assessment of the injured person became impossible, given the fact that he passed away. The prejudice which could be suffered by the applicant was *evidential*, and could *not* be compensated by costs, adequately or at all.

26. On the issue of lack of merits, there was *no dispute* the injured person was seen by Pok Oi Hospital on 25 August 2019, and found to have a *"deformed"* right shoulder, *"anterior dislocation"*, and *"fracture"*. The assessment in question seemed to me to be within reasons, and the intended appeal appeared to me to be quite unmeritorious.

27. For *any* of the above reasons, the Time Extension Application should be dismissed.

Final Remarks

28. I thank both counsel for their most able assistance.

(Kenneth KY Lam)
Deputy District Judge

Mr Law Ka Sing, instructed by B Mak & Co, for the applicant

Ms Valerie Tang, instructed by Ng, Au Yeung & Partners, for the 1st and 2nd respondents