CACV 138/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF APPEAL

CIVIL APPEAL NO 138 OF 2015

(ON APPEAL FROM HCB NO 1128 OF 2015)

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BETWEEN

LEE CHICK CHOI Appellant

and

BEST SPIRITS COMPANY LIMITED Respondent

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before : Hon Yuen, Hon Kwan and Hon Poon JJA in Court

Date of Hearing : 14 February 2017

Date of Judgment : 24 February 2017

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| J U D G M E N T |

Hon Poon JA (giving the Judgment of the Court) :

A. Introduction

By a notice of appeal dated 15 June 2015, the appellant sought to appeal against the bankruptcy order made against him by L Chan J on 18 May 2015 (“the Bankruptcy Order”). By a summons dated 1 February 2017 (“the Summons”), the appellant applied for :

1. a discharge of the Bankruptcy Order or leave to commence fresh proceedings to claim injury to feelings in the sum of HK$14,475,849.00 under section 66 of the Personal Data (Privacy) Ordinance, Cap 486 and service fee in the sum of HK$143,548.00 in DCCJ 4962/2014 (“Discharge Application”);
2. leave to adduce new evidence on appeal (“New Evidence Application”); and
3. to disqualify Kwan JA from hearing this appeal (“Recusal Application”).

At the hearing on 14 February 2017, after hearing the appellant, we dismissed the Recusal Application for reasons to be given in our written judgment to be handed down on the appeal proper. We indicated that we would receive the new evidence *de bene esse*. We then reserved judgment on the appeal, the Discharge Application and the New Evidence Application. We now hand down our judgment on them.

B. Background

B1. The Statutory Demand

The appellant was previously employed by the respondent as a general manager under a contract of employment dated 4 July 2006. After the termination of the employment, the appellant commenced proceedings in the Labour Tribunal under LBTC 588/2011, claiming against the respondent for, among other things, unfair dismissal. On 10 October 2011, the Deputy Presiding Officer dismissed all the appellant’s claims. She further ordered the appellant to pay the respondent costs in the sum of HK$130,353.00 forthwith (“the Costs Order”).

On 28 October 2011, the Deputy Presiding Officer handed down the Reasons for Decision and refused the appellant’s application for stay of execution of the Costs Order.

When the appellant failed to pay the respondent its costs pursuant to the Costs Order, it served a statutory demand on the appellant on 7 November 2011. On 11 November 2011, the appellant applied to set aside the statutory demand in HCSD 38/2011.

However, the hearing and determination of HCSD 38/2011 was derailed by the numerous steps taken by the appellant at various levels of the court.

B2. In respect of the Costs Order

The appellant first applied for leave to appeal against the decision of the Deputy Presiding Officer in HCLA 29/2011. Leave was however refused by Mimmie Chan J on 6 June 2013.

On 6 August 2013, the appellant applied to the Labour Tribunal for review of the Costs Order out of time. The application was refused on 16 August 2013. On 28 August 2013, he applied to the High Court for leave to vary the Costs Order out of time. The master granted him time extension to file an application for leave to appeal against the order of refusal made by the Labour Tribunal in August 2013, which he subsequently did. But that leave application was eventually dismissed on 18 November 2014 by Deputy High Court Judge B Chu in HCLA 19/2013.

On 15 January 2014, the appellant applied to the High Court in HCLA 19/2013 for stay of the Costs Order. The application was dismissed by Deputy High Court Judge B Chu on 21 October 2014. The appellant then applied for leave to appeal against her order, which was refused by the judge on 11 February 2015 and the Court of Appeal (Lam VP and Barma JA with Lam VP giving the judgment) in HCMP 401/2015 on 10 April 2015 respectively. On 14 April 2015, the appellant filed a notice of motion asking for leave to appeal to the Court of Final Appeal, which was dismissed on 24 July 2015.

B3. HCA 2045/2012

On 2 November 2012, the appellant commenced HCA 2045/2012 against the respondent claiming, among other things, compensation for loss of income by reason of unreasonable and unlawful dismissal in the sum of HK$14,475,849.00.

On 1 December 2014, Deputy High Court Judge Yee struck out the appellant’s statement of claim in HCA 2045/2012 and dismissed the action with costs. On 12 February 2015, the appellant applied in HCMP 371/2015 for leave to appeal against the Deputy Judge’s order out of time. On 21 May 2015, the Court of Appeal (Kwan and Chu JJA with Kwan JA giving the judgment of the Court) dismissed the application.

B4. DCCJ 4962/2014

On 22 December 2014, the appellant commenced DCCJ 4962/2014 against the respondent, claiming for service fee in the sum of HK$143,548.00 between 5 November and 23 December 2010. That action was subsequently adjourned sine die with liberty to restore because of the appellant’s bankruptcy.

B5. Determination in HCSD 38/2011

Eventually the appellant’s setting aside application was heard by Anthony Chan J on 7 January 2015. The judge handed down judgment on 21 January 2015, dismissing the setting aside application and granting the respondent leave to issue and serve the bankruptcy petition.

On 2 February 2015, the appellant filed a notice of appeal in CACV 25/2015 against the judge’s judgment. The appeal was however stayed as a result of the appellant’s bankruptcy.

C. HCB 1128/2015

On 9 February 2015, the respondent commenced HCB 1128/2015 based on the outstanding indebtedness with interest under the Costs Order. The bankruptcy petition was heard by L Chan J (“the Judge”) on 18 May 2015.

The appellant opposed the bankruptcy petition on the ground that he was claiming against the respondent for HK$143,548.00 in DCCJ 4962/2014. The Judge however noted that the same claim had already been dismissed by the Labour Tribunal in LBTC 588/2011 and the appellant’s application for leave to appeal was also dismissed by Mimmie Chan J in HCLA 29/2011 on 6 June 2013. The Judge further pointed out that the appellant made the same claim in HCA 2045/2012 but that action had already been struck out by Deputy Judge Yee on 1 December 2014. The Judge then referred to the judgment of Anthony Chan J in dismissing the appellant’s application to set aside the statutory demand. Like Anthony Chan J, the Judge found the appellant’s ground of opposition based on that claim unmeritorious. He accordingly made the Bankruptcy Order against the appellant.

We now turn to the Summons.

D. The Summons

As said, the Summons contained the Discharge Application, the New Evidence Application and the Recusal Application.

D1. The Recusal Application

At the hearing we first disposed of the Recusal Application as it might impact on the rest of the matters before us. We dismissed the Recusal Application for this simple reason. The appellant complained that Kwan JA had maliciously and intentionally delayed in delivering judgment in HCMP 371/2015 on 21 May 2015. There is no substance whatsoever in this entirely groundless allegation. And there existed no actual or apparent bias on Kwan JA’s part which would disqualify her from hearing the appeal.

D2. The New Evidence Application

It is trite that further evidence is admissible on appeal only where the applicant satisfies the Court of Appeal that such evidence :

1. could not have been obtained at the proceedings below with reasonable diligence;
2. would or might, if believed, have a very important effect on the mind of the tribunal; and
3. is of a sort which inherently is not improbable.

See *Ladd v Marshall* [1954] 1 WLR 1489.

We need not go into detail of the new documents that the appellant sought to adduce before us. Such documents include those which are in connection with HCMP 401/2015, HCMP 371/2015 and CACV 25/2015; correspondence between 28 May and 11 August 2015; pleadings in DCCJ 4962/2014; the statement of affairs filed in HCB 1128/2015; and correspondence between the appellant and the respondent’s solicitors, Messrs Hobson & Ma dated 12 January 2016 and the Law Society dated 25 January 2016.

For those documents which pre-dated the hearing before the Judge on 18 May 2015, the appellant could have with reasonable diligence produced them to the Judge. And in any event, all the documents are irrelevant to this appeal. The appellant has therefore failed to satisfy conditions (1) and (2) of *Ladd v Marshall* for leave to be granted to allow him to adduce the new evidence on appeal. We accordingly dismiss the New Evidence Application.

D3. The Discharge Application

We dismiss the Discharge Application because the Court of Appeal is simply not the proper forum for the appellant to bring such application. Even if we were to be seized of the matter, we would have dismissed it anyway as it is wholly unmeritorious.

D4. Dismissing the Summons

For the above reasons, we dismiss the Summons in its entirety.

We now come to the appeal proper.

E. Appeal

The appellant raised two grounds of appeal in the notice of appeal.

First, he complained that Lam VP, Kwan JA, and Chu JA and the Judge were involved in an offence of perverting the course of justice with the respondent’s solicitors. This complaint is entirely groundless and must be firmly rejected.

Second, the appellant complained that there were errors committed by the respondent and the Judge. He took a number of points.

He said that by a letter dated 15 May 2015, the Judge requested a set of the pleadings filed in DCCJ 4962/2014. But he only received the letter in the evening of 18 May 2015. However, when he actually received the letter is beside the point. For the respondents’ solicitors did provide a copy of the pleadings to the Judge on 15 May 2015. And the Judge was fully aware of the nature and amount of the appellant’s claim in DCCJ 4962/2014 when he heard the parties on 18 May 2015.

The appellant then complained that the Judge had ignored “the grace period of 7 days” for the payment of the petitioning debt, which was said to have been granted by the respondent. However, this is entirely misconceived. For when the respondent appeared before the Judge, it sought as an alternative to a bankruptcy order an unless order for the payment of the petitioning debt. It had not granted any grace period as contended.

The appellant further complained that the respondent had the malicious intention to exclude certain exhibits of his attached to his affirmation in opposition from the hearing bundle for the hearing before the Judge. It is true that those exhibits were not included in the hearing bundle below. However, on 15 May 2015, the respondent’s solicitors wrote to the clerk to the Judge, stating that those exhibits were voluminous and would not be included in the hearing but if necessary reference could be made to the court file and the respondent’s solicitors would bring along the exhibits to the court. And at the hearing below, neither party found it necessary to refer to those exhibits. In the circumstances, this complaint does not take the appellant’s case any further.

The appellant next complained that the Judge had not read his skeleton argument lodged with the court on 16 May 2015 (Saturday) as according to the Judge, it had not arrived at his desk before the hearing on 18 May 2015 (Monday). However, the Judge was fully aware of the appellant’s case and had in fact given him the full opportunity to address the court before making the Bankruptcy Order. There is no substance in this complaint.

The appellant asked that he should be given additional time to make payment of the petitioning debt. However, this point was not raised before the Judge. In any event, as rightly pointed out by its counsel, Mr Kok, the respondent is not obliged to accept it. Indeed, we could see no reason why the respondent should accept it. Having regard to the history of the proceedings and the appellant’s conduct, it is but a hollow promise which, if accepted, would only lead to further delay and obstruction to the effective enforcement of the Costs Order and recovery of the petitioning debt.

Lastly, the appellant raised some other minor points. We have considered them all and find them to be wholly irrelevant to this appeal. In order not to over-burden this judgment, we do not propose to discuss them.

For the above reasons, we dismiss the appeal.

F. Costs

The parties agreed that costs should follow the event. Mr Kok asked for indemnity costs. The appellant opposed the request. In our view, this appeal is wholly unmeritorious. It is an abuse of process, deployed by the appellant to defy the Costs Order and to resist payment of the costs. He should be visited with indemnity costs. We therefore order the appellant to pay the respondent costs of the appeal on an indemnity basis to be summarily assessed on paper. We further direct the respondent to file and serve a statement of costs (limited to 2 pages with no exhibits or attachments) within 14 days from the date of this judgment, and the appellant to file and serve a statement of objection (limited to 2 pages with no exhibits or attachments) within 14 days thereafter. We will then assess the respondent’s costs on paper.

(Maria Yuen) (Susan Kwan) (Jeremy Poon)

Justice of Appeal Justice of Appeal Justice of Appeal

The Appellant appeared in person

Mr Martin Kok, instructed by Messrs Hobson & Ma, for the Respondent