DCPI 534/2017

[2023] HKDC 940

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 534 OF 2017

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BETWEEN

AMJAD-UL-MAHMOOD Plaintiff

and

PROFIT HILL INTERNATIONAL 1st Defendant

HOLDINGS LIMITED

THE INCORPORATED OWNERS 2nd Defendant

OF DAILY HOUSE

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Before: Deputy District Judge Rebecca Lee in Chambers

Date of Hearing: 26 June 2023

Date of Decision : 14 July 2023

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DECISION

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*Background*

1. Judgment was handed down on 21 March 2023 (“the Judgment”). I shall adopt the same abbreviations and nomenclatures in the Judgment.
2. This court has, in the Judgment, dismissed P’s claims against D1 and D2, with a costs order *nisi* against P that P do pay costs of D1 and D2, with Certificate of Counsel, to be taxed if not agreed.
3. On 3 April 2023, P took out summons seeking leave to appeal against the Judgment.

*Leave to Appeal-Legal Principles*

1. Under Section 63A (2) of the District Court Ordinance, Cap 336 (“DCO”), leave to appeal shall not be granted unless the court is satisfied that:
   1. The appeal has a reasonable prospect of success; or
   2. There is some other reason in the interests of justice why the appeal should be heard.
2. As stated by Le Pichon JA in ***SMSE v KL*** [2009] 4 HKLRD 125 at §17:

“reasonable prospects of success involve the notion that the prospects of succeeding must be reasonable and therefore more than fanciful, without having to be probable”

1. As noted by both Mr Gidwani and Mr Tsui, P’s Purported Grounds of Appeal deal with finding of facts.
2. In respect of challenge against finding of facts by a trial judge, Mr Gidwani and Mr Tsui referred to the following cases.
3. As held by His Honour Judge Andrew Li in ***Mak Rachel Wing Nam v Chan Kai Chung*** [2023] HKDC 581:

“6. However, as Mr Simon Wong for the defendant has submitted, the plaintiff has conveniently overlooked the important principle that, in respect of a challenge against factual findings made by a trial judge, the appellant has to overcome a very high threshold in order to succeed. The Court of Appeal would only intervene if, despite the fact that it does not enjoy the advantages available to the judge who received the evidence at first-hand, it is nevertheless satisfied that his or her conclusion on the facts is wrong: *Ting Kwok Keung v Tam Dick Yuen & others* (2002) 5 HKCFAR 336, §42. It has been said that an appeal is not a forum for the appellant to repeat the submissions which are (or should be) submissions advanced by way of closing submissions at the trial. The appellant must have to identify “palpable errors” in the judgment below sufficiently material to warrant the intervention by the Court of Appeal: *China Gold Finance Ltd v CIL Holdings Ltd and Others* (unreported, CACV 11/2015, 27/11/2015), §§14 to 15.

7. Mr Wong further submits that the trial court is the primary tribunal for assessment of the evidence and making relevant findings of fact. The appeal court should defer to the trial judge’s conclusion even if in some doubt as to its correctness, because it is unlikely to gain as much insight to the facts from seeing how the evidence unfolded, or be as familiar with the evidence as the primary judge, who has lived with the trial from beginning to end: *Shine Grace Investment Ltd v Citibank NA & another* [2022] HKCA 1341 at §60(2).”

(emphasis added)

1. In ***Yeung Cheung Chun v Wing Shing Caisson & Foundation Ltd and Anor***, unrep, CACV 39/2015, 25 April 2016, the Court of Appeal stated:

“35. The starting point must be the proper approach of an appeal court in challenging a finding of fact. It is sufficient to refer to the recent decision of *China Gold Finance Limited v CIL Holdings Limited & Ors*, CACV 11/2015, 27 November 2015, §§11 to 24 for these pertinent propositions:

(1) It is not appropriate for the Court of Appeal to take over the role of the trial judge as the primary assessor of the evidence. The appeal court does not and should not embark on the role of re-assessment of the evidence in the way Mr Wong has invited us to do.

(2) It is incumbent on the appellant to identify palpable errors in the judge’s assessment of the evidence that are sufficiently material to undermine his conclusions. The assertions that the finding of the judge is against the weight of the evidence or that the judge should have reached another conclusion because of points advanced in the closing submissions below or that the judge had overlooked certain evidence because it was not mentioned in the judgment are not errors that come within that category. Unless there is compelling evidence to the contrary, an appeal court is bound to assume that the trial judge has taken the whole of the evidence into his consideration.

(3) In making findings of fact, judges can reasonably reach different conclusions from one another. The appeal court can only intervene when it is satisfied that the finding of the primary judge is “plainly wrong”. This phrase “plainly wrong” directs the appeal court to consider whether it was permissible for the trial judge to make the findings of fact he did in the face of the evidence as a whole, in the knowledge that the appeal court only has the printed record of the evidence and whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence.

(4) A finding of fact made by the trial judge is an inherently incomplete statement of the impression upon him of the evidence.

(5) There is a greater appreciation of the need to exercise restraint in respect of findings of secondary fact based on inferences drawn from findings of primary fact.”

(emphasis added)

1. In ***Yu Man Fung Alice v Chiau Sing Chi Stephen*** [2021] HKCA 1456, it is said that:

“8. In exercising their appeal as of right to challenge findings of fact of the primary judge, litigants should bear in mind that the trial before the judge would be “the main event” and not a “tryout on the road”. As stated by Lam VP (as he then was) in *To Pui Kui v Ng Kwok Piu & Ors*, CACV 281/2012, 21 August 2014 at §§12 to 16, and in *China Gold Finance Ltd v CIL Holdings Ltd*, CACV 11/2015, 27 November 2015 at §24, institutionally it is not appropriate for the Court of Appeal to take over the role of the trial judge as the primary assessor of the evidence.” (emphasis added)

1. Detailed analysis was set out in ***ZJW v SY*** [2017] HKCA 614 by the Court of Appeal:

“27. Where the judgment on appeal turns on an issue of fact, as is the question if a party had a substantial connection with Hong Kong under section 3(c) of the MCO, the Court of Appeal must have regard to the nature of that issue of fact: *Ting Kwok Keung v Tam Dick Yuen & Others*, *supra*, per Bokhary PJ at [42]. For the purpose of considering appeals against findings of fact, findings of fact may be categorised as (1) findings of primary fact; (2) findings based on evaluation of facts; and (3) findings based on inferences.

*D1.1 Findings of primary fact*

28. Where the finding is of primary facts, the occasions where the Court of Appeal interferes would be rare. It has often been said that the Court of Appeal must be satisfied that the trial judge has gone “plainly wrong” in his findings of fact: *Ting Kwok Keung*, *ibid*. In *Beacon Insurance Company Limited v Maharaj Bookstore Limited*, *supra*, Lord Hodge at [12] explained the plainly wrong test thus:

“This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts… Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge’s evaluation of the evidence that is sufficiently material to undermine his conclusions.”

29. Under the “plainly wrong” test, the Court of Appeal must be satisfied that the first instance judge had fallen into palpable error in his findings of primary fact under appeal: *China Gold Finance Ltd v CIL Holdings Ltd*, *supra*, per Lam VP at [15] and [16]. Such palpable errors which would warrant the Court’s interference are described by Lord Neuberger in *In re B (A Child) (Care Proceedings: Threshold Criteria)*, *supra*, at [53] in these terms:

“… such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached…”

30. There are different bases upon which a first instance judge made findings of primary fact as he did. It is well put by Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*, *supra*, thus:

“[14] … In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.”

31. The different bases upon which the first instance judge made the findings of primary fact give him different advantages over the Court of Appeal in terms of fact-finding. And it is such advantages which determine the appellate approach to reviewing the findings on appeal. As Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*, *supra*, went on to explain:

“[15] In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should interfere. As I see it, that was the approach of the Court of Appeal on a “rehearing” under the Rules of the Supreme Court…”

In a similar vein, Lord Bridge in *Whitehouse v Jordan* [1981] 1 WLR 246, at pp 269-270 observed:

“[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.”

See also *In re B (A Child) (Care Proceedings: Threshold Criteria)*, per Lord Neuberger, *ibid*.

32. Recognising that the advantages the trial judge has over the Court of Appeal (and hence the degree of reluctance with which the latter would interfere with his findings) may vary from case to case, generally speaking:

(1) In cases where oral evidence is determinative of the case, the trial judge makes the findings based on assessment of demeanour, credibility and reliability after seeing and hearing the witnesses. The advantages that he has in terms of seeing and hearing the witnesses are not available to the appellate court. That being the case, the Court of Appeal will be extremely slow to disturb the findings, which can be said to be “virtually unassailable”: *Benmax v Austin Motor Co Ltd* [1955] AC 370; *Biogen Inc v Medeva plc* [1997] RPC 1, per Lord Hoffmann at p 45; quoted in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*, *supra*, at [19]; *Beacon Insurance Company Limited v Maharaj Bookstore Limited*, *supra*, at [17]. This applies to cases where only oral evidence is involved or where although both oral and documentary evidence is involved, the oral evidence plays a more significant part in determining the issue.

(2) In cases where the trial judge makes the findings entirely or almost entirely on undisputed documents, no question of credibility of witnesses is involved. The Court of Appeal has the same advantages as the judge did in terms of analysing the documents in its context. In this respect, the Court of Appeal would be in the same position as the judge. However, it does not mean that on an appeal against such findings, the Court of Appeal would embark on a de novo exercise of fact-finding on its own: cf *Biogen Inc v Medeva plc* [1997] RPC 1, per Lord Hoffmann at p 45; quoted in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*, supra, at [19]. The appellant still needs to show that the judge’s finding is plainly wrong: cf *Pang Ketian Sally v Tam Yuk Hung Annie*, CACV 147/2013, *supra*, per Cheung CJHC at [29] - [30].

*D1.2 Findings based on evaluation of facts*

33. In *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*, *supra*, Clarke LJ explained what findings based on evaluation of facts mean and what the corresponding appellate approach to appeals against such findings is, as follows:

“[16] Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.”

*D1.3 Inferences*

34. Facts are commonly found on inferences. An inference can be made from primary facts or after a process of evaluation: *Bessant’s case* [2002] EWCA Civ 763, per Walker LJ at [24]. If the former, the Court of Appeal approaches them in the same way as discussed in Part D1.1: *Beacon Insurance Company Limited v Maharaj Bookstore Limited*, *supra*, Lord Hodge at [17]; *China Gold Finance Ltd v CIL Holdings Ltd*, *supra*, per Lam VP at [22]; *DBS Bank (Hong Kong) Limited v Sit Pan Jit*, *supra*, per Poon JA at [111] - [117]. If the latter, the Court of Appeal adopts the same approach as per Part D1.2 above.”

(emphasis added)

1. The above principles are well settled. In short, it is not the function of the appellate court to re-assess the evidence. “Palpable errors” have to be identified before the appellate court would intervene.

*P’s Purported Grounds*

1. Ps’ Purported Grounds of Appeal as attached to his summons are as follows:

“A. He relies on the assessment by MAB under Form 7, which assessed loss of earning capacity at 4% for “neck and back sprain resulting in neck pain and stiffness and back pain and stiffness.

B. Lift and building CCTV footage was main evidence of the accident. Without of this evidence court give judgment.

C. The court also ignore MRI report of 22nd April 2015. Medical report issued of the MRI in 2019. That indicate that L4, L5 is damage.

D. I request to court please consider all these facts. Because these issued from government hospital. When accident was happened I was only 39 years old. I was too young that time.

E. I was delivered company goods at accident time. And was on my job.

F. I was awaiting for justice After too long time that is court judgment. Please consider all these facts.”

*Grounds A, C & D*

1. I agree with Mr Tsui’s observation that these grounds relate to quantum, and it would be logical to deal these grounds together.
2. P is effectively asking the court to re-evaluate Form 7, the MRI report and the medical notes and reports of the Government Hospitals.
3. This court has considered the above fully in the Judgment.
4. Further, they were also examined by Dr Fu in his report, which was also considered by this court.
5. The court has evaluated all of the above and come to a conclusion which was detailed under §§64-77 of the Judgment.
6. In any event, P failed to point to “palpable errors” in the Judgment or how the findings were “plainly wrong” in these regards.
7. I do not see that P has any reasonable prospect of success for Grounds A, C & D.

*Ground B*

1. P insisted that D1 and D2 should provide CCTV footage of Daily House and the Lift for the court to consider and without such evidence, the Judgment “would not be complete”.
2. During the course of Trial, it is clear that the alleged CCTV footage did not or no longer exists. There is no point to ask the court to consider something which was not in existence.
3. As noted by Mr Tsui, the lack of the CCTV footage of the material time did not prevent P from testifying as to how the Accident occurred. The court did fully consider P’s evidence and did evaluate his evidence against the objective evidence (§§46-51; §§64-90 of the Judgment).
4. Mr Gidwani submits that CCTV footage and the Accident has no causative connection. The CCTV footage plays no role in the happening or prevention of the Accident.
5. I agree with the observation by both Counsel. P is merely trying to re-argue the same point in his application for leave to appeal. There is no valid argument put forward by P that the court has erred in assessing the evidence.
6. P has no reasonable prospects of success for Ground B.

*Grounds E & F*

1. For Ground E, P repeated that the Accident occurred while he was in the course of employment with D1.
2. This is simply another attempt for P to say that D1 should be held liable for his injuries and loss and damages, which was considered and determined by this court. P did not point to any error in the Judgment in this respect.
3. For Ground F, as noted by Mr Gidwani, Judgment was handed down within 3 months after Trial. P cannot complain that there is any delay.
4. There is no reasonable prospects of success for Grounds E & F.

*Conclusion*

1. P is not able to pinpoint any errors in the Judgment which would satisfy the threshold in challenging factual findings made by this court.
2. All the Purported Grounds are unmeritorious. I also do not see any other reason in the interests of justice that appeal should be heard.
3. P’s Summons is therefore dismissed.
4. I order that P do pay costs of D1 and D2, with certificates for Counsel, to be taxed if not agreed. The costs order shall become absolute unless parties apply to vary in writing within 14 days of handing down.
5. I am grateful for Counsel’s assistance.

( Rebecca Lee )

Deputy District Judge

The plaintiff appeared in person

Mr Victor Gidwani and Mr Conan Shek, instructed by John Lam, Law & Co, for the 1st defendant

Mr Brian Tsui, instructed by CW Chan & Co, for the 2nd defendant