

For hearing before Master Cheung in Chambers at 9:00am on 20 October, 2007

RE: HCA NO. 9876 OF 2007

PLAINTIFF (RESPONDENT) SKELETON SUBMISSIONS

Introduction

1. This is P's response to an application brought by the applicant ("D") for specific discovery under O.24 r.7 for the disclosure of the following:
 - A. Records of performances by P as a musician for the 5 years preceding the accident (the "**Performance Records**");
 - B. records containing the number of service staff colleagues at the Hard Knocks Café during each performance for the 5 years preceding the accident (the "**Staff Records**");
 - C. copies of P's passbooks or statements of P's joint bank account with her mother respectively for the 5 years preceding the accident (the "**Joint Records**"); and
 - D. a copy of medical notes prepared by Dr. Yee Wai Yan dated 1 May 2007 (the "**Medical Reports**").

Collectively, the "**Four Records**".

Plaintiff's Arguments

2. General Principle
 - 2.1. In this application for specific discovery, D must, by affidavit, show a prima facie case that the requested documents: (i) exist; (ii) are in the possession, custody or power of P; (iii) are relevant to the matter in question; and (iv) are necessary to dispose of the matter fairly or to save costs.

Deak & Co (Far East) Ltd v NM Rothschild 7 Sons Ltd [1981] HKC 78, 80H-81A (CA) cited with approval in Full Range Electronics Ltd v General Tech Industries [1997] 1 HKC 541, 544C-E.

O.24 r.8

3. Paragraph 1 of the Summons

- 3.1. P argues that ¶1 of the Summons dated 1 September 2007 has already been complied with. P's solicitors have given the required information in their letter dated 22 June 2007, and that letter has been verified by P in her affirmation.

See P's affirmation, p.26 ¶4

See LMK-4, p.45

4. Regarding the Performance Records

- 4.1. P argues that she is not obligated to disclose the records of her performances 5 years preceding the accident because:

A. Those records, being only marginally relevant, are not necessary to fairly dispose of the present proceedings.

- i. Documents ordered for discovery ought to have at least a demonstrable evidential materiality.

O Company v M Company [1996] 2 Lloyd's Rep. 347, 351

- ii. In determining loss of earnings for quantum, the relevant earnings are those at the time or immediately prior to the accident. P has already provided Exhibit LMK-3 (the "**Timesheet**"), which clearly shows that P performed an average of 10 times per month from May 2004 until April 2006. Documents containing even earlier performance records are not a relevant indicator for lost earnings.

- iii. Those records are therefore not necessary for disposing fairly of the matter as required under O.24 r.8.

B. P has not kept any records of musical performances performed by either her band or herself, or has discarded them. In any case, Such records are properly created and kept by the employer and are not accessible by employees, let alone ex-employees.

See LMK-4, p.45 ¶1(2)

C. D has not shown that such records exist. On balance, reasonable people / businesses do not keep records extending 5 years back in time.

5. Records of number of service staff

5.1. Further to ¶4.1A above, P argues that she is not obligated to disclose records of the number of service staff present at her performances because:

- A. D has not shown that such records exist. On balance, reasonable people / businesses do not keep records extending 5 years back in time.
- B. D has not shown that P was likely in the possession, custody or power over such records.
 - i. P does not have a legally enforceable right to obtain from her ex-employer the requested records for inspection. A legally enforceable right excludes the right that P may have to request those documents for inspection under the Personal Data (Privacy) Ordinance (Cap 486).

Lonrho Ltd v Shell Petroleum Ltd [1980] 1 WLR 627, 635

Gotland Enterprises Ltd v Kwok Chi Yau [2007] 1 HKLRD 226, 230

- ii. Such records are properly created and kept by the employer and are not accessible by employees, let alone ex-employees.

6. Regarding the Joint Records

6.1. P argues that she is not obligated to disclose the confidential Joint Records because:

- A. They are not necessary at this stage of the matter. According to O.24 r.8, if the court is satisfied that discovery is not necessary at a particular stage of the matter, it may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.
- B. Discovery relating to damages should be deferred until after the issue of liability had been decided. In this case, the relevant documents are relevant purely to quantum and liability has yet to be established.

Auto-Treasure Ltd. v Noble Diamond Ltd. [1992] 1 HKC 117, cited with approval in Lau Tak Wah Andy v Hang Seng Bank Ltd (No.2) [2001] 2 HKC 548, 553D-E.

B. There is nothing contradictory shown in P's affidavit and exhibits produced and solicitors had already been retained for litigation.

See P's affirmation, p.27 ¶11

See LMK-4, p.46

Given the foregoing, P is not obligated to disclose the Medical Reports.

Conclusion

8. Accordingly, even if it is not accepted that the documents relating to quantum should not be disclosed at this stage, P has shown that D has no cause to apply for specific inspection of any of the Four Records.

Dated this 16th day of October, 2007



Counsel for the Plaintiffs
(Respondents)

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PLAINTIFF (RESPONDENT) LIST OF AUTHORITIES

1. *Deak & Co (Far East) Ltd v NM Rothschild 7 Sons Ltd [1981] HKC 78*
2. *Full Range Electronics Ltd v General Tech Industries [1997] 1 HKC 541.*
3. *Auto-Treasure Ltd v Noble Diamond Ltd [1992] 1 HKC 117*
4. *Lau Tak Wah Andy v Hang Seng Bank Ltd (No.2) [2001] 2 HKC 548, 553D-E*
5. *O Company v M Company [1996] 2 Lloyd's Rep. 347, 351*
6. *Lonrho Ltd v Shell Petroleum Ltd [1980] 1 WLR 627, 635*
7. *Gotland Enterprises Ltd v Kwok Chi Yau [2007] 1 HKLRD 226*
8. *Lui Yiu Nga v Hospital Authority [2002] 4 HKC 204*

Dated this 16th day of October, 2007

Cliff Lui

Counsel for the Plaintiffs
(Respondents)