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Appeal & Retrial

At common law, it is fundamental that a judge must identify and record critical matters, and to give adequate reasons in making a decision. An aggrieved party may be able to seek a retrial if it can be shown that the trial judge has not discharged this duty. The jurisdiction of the Court of Appeal to hear appeals is circumscribed by the provisions of section 13 of the High Court Ordinance (Cap. 4). In *Cantab International Limited & Others v Luk Ngai Ling Irene & Others* [2019] HKCA 1002 ("***Cantab v Luk***"), the Court of Appeal decided to set aside a judgment and remit the action to the Court of First Instance for retrial by another judge.

I. Background

1. *Cantab v Luk* concerns the sale and purchase of a tutorial school by the Defendants as the seller ("**D**") to the Plaintiffs as the purchaser ("**P**"). The relevant agreement was written in Chinese with some English additions. Unfortunately, the written agreement was not drafted by lawyers, and costly and time consuming disputes were developed from it.

2. The written agreement omitted some salient components, such as the entitlements to the goodwill, brand name, intellectual property or information pertaining to students, tutors or staff, the completion date and whether or not some terms were condition or condition precedent of the agreement. The judge noted that importantly P did not wish to acquire the company, which had the contracts for services with the tutors and staffs, because of its liabilities. The parties obviously have different interpretations of the written agreement. Furthermore, P alleged that there were an oral agreement and other implied terms.

3. The action was commenced in 2012 and the trial judge gave a judgment after a 6-day trial in 2016 finding in favour of P and awarded over HK$2 million of damages with costs to P.

4. D relied on a total of 23 grounds in the appeal, but focused on two grounds, i.e., the judge's failures to properly consider and decide (1) what was the agreement between the parties, in other words, was the agreement partly written and partly oral or was it contained in the written agreement entirely, and (2) did the agreement encompass specific assets or a sale of business as a going concern?

5. The appeal was heard in 2017 and the Court of Appeal set aside the judgement and remitted the case for retrial in 2019. D was awarded costs of the appeal.

6. The Court of Appeal went into considerable detail in considering the facts and tried to resolve the issues, however, after having read the documents, transcript and submissions extensively, it found no alternative but to remit the action for retrial.

7. It is unfortunate that after substantial time and costs had been expended in the action, it is back to square one for a retrial. The costs of the first trial will be awarded at the end of the retrial, and costs will generally be awarded to the winning party.

II. Key Points

1. A judge's duty in identifying the issues that required resolution and make sufficiently clear findings on the fundamental issues was succinctly explained in *Zhu Cui Hao v Ting Fung Yee* [1999] 3 HKC 634 at 639:

> "*Generally speaking, a professional judge is under a duty to analyze in his judgment the material points in the evidence of the case and give reasons as to why he has reached a particular conclusion or decision. This is the only way to make people understand why their evidence is not accepted by the court and why they lose in a case. Only by this can*

justice be seen to be done. Furthermore, the losing party needs to be clear on whether there is any error in the reasons for the decision given by the court before he can decide whether to appeal or not, and, at a later stage, submit to the Court of Appeal his grounds of appeal in order to set aside the original decision".

2. The burden is on the party alleging that there were additional oral terms (i.e., P in this case) to rebut the presumption that a written agreement is intended to contain all the terms of their bargain[1].

3. A judge is required to examine the evidence to see what oral statements the parties had allegedly made, and the circumstances in which those statements were made, to see if P had succeeded in proving that additional oral terms had been made in contractually binding circumstances, in order to rebut the presumption that the written document contained the entire agreement.

4. A finding of one party's knowledge of the other party's desire is not equivalent to a finding of an obvious but unexpressed inference from the agreement which bound the first party to perform any obligations. It is well-established that a term will not be implied unless the court is satisfied that both parties would, as reasonable people, have agreed to it had it been suggested to them[2].

5. In passing, the Court of Appeal noted that if the agreement had been for the transfer of a business, the transferor should have published in the Gazette, a notice of transfer of the business pursuant to the Transfer of Businesses (Protection of Creditors) Ordinance (Cap. 49).

III. Findings

The Court of Appeal found that the trial judge had not discharged his duty, and found a number of errors, including the judge's incorrect focus on P's unilateral expectation and approach. He also failed to find matters of fact such as the existence of any oral terms, and if so, their legal binding effect. It was not clear whether or not he accepted some facts, if so, there was a lack of reference and

[1] *Chitty on Contracts, General Principles* (33rd ed.) §13-110, citing *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59, at 62.
[2] *Chitty on Contracts, General Principles* (33rd ed.) §14-008.

analysis of these facts. He erred in forming certain views not pleaded by P, and used some terminologies ambiguously or contrary to the facts, e.g., there could not have been any "*continuity*" of "*staff*" in the absence of an assignment by the contracting entity. Importantly, the judge did not explain the reasons why but so held that D was obliged to perform in a certain way "*as part of its bargain in the sale*". Insofar as the judge found implied terms, he did not say whether they were implied as being necessary as a matter of business efficacy, or whether they were implied as the obvious, but unexpressed, intention of the parties. It was particularly difficult for the appellate judges to see why and how a term should be implied somehow to provide P with a benefit when the parties had made a deliberate commercial decision not to include this component part into the contract. It was also difficult for the appellate judges to accept how D1 (Ms Luk) would have agreed to some unspecific obligation to assist P in their negotiations with the tutors and staff, especially when D1 had a poor relationship with the tutors and staff having made serious accusations against them.

In passing, the Court of Appeal gave a reminder to business people that it would be prudent to instruct lawyers to draw up commercial agreements, because in the drafting, amendment and approval process, the parties' minds would be brought to bear on areas of ambiguity and possible disagreements, which it would be far more beneficial for them to resolve (if possible) over a conference table with the benefit of legal consultation. If it turned out that after ambiguities were clarified, it was not possible to resolve areas of disagreements, then it would be far better for all concerned to walk away early, rather than to become ensnared in years of costly litigation.

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