## DCCJ 5144/2018

[2023] HKDC 60

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO 5144 OF 2018

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BETWEEN

HUI HEON MING HERMAN Plaintiff

trading as HERMAN H. M. HUI & CO.

and

HO SHUN MIU (何舜苗), also known as Defendant

HO SHUN MIU MELODY, and also

known as HO SHUN MIU MELODIE

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Before: His Honour Judge Jonathan Wong in Court

Dates of Hearing: 2, 5-6 & 8 September 2022

Date of Judgment: 11 January 2023

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JUDGMENT

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1. Introduction
2. By a letter dated 30 June 2014, Radio Television Hong Kong (“**RTHK**”) made an offer to the defendant to appoint her as Programme Officer in Media Management for a fixed period of three years subject to the completion of certain recruitment formalities (“**Appointment Letter**”). The Appointment Letter expressly stated that any offer of further appointment was at the discretion of the Government.
3. The defendant, pursuant to the Appointment Letter, commenced working for RTHK on 1 September 2014. She made an admirable start and was given a glowing assessment in her first performance appraisal. However, the results of her subsequent performance appraisals were less flattering. The defendant did not agree with such subsequent appraisals and mounted various challenges but was unsuccessful in overturning them. Towards the end of the three-year term, by April 2017, RTHK indicated that it would consider not offering any further appointment to the defendant upon completion of the three-year term on 31 August 2017[[1]](#footnote-1).
4. On 13 June 2017, through the introduction of a former colleague Mr Sze Wing Yuen (“**Mr Sze**”), the defendant attended a meeting with Mr Cheung Ka Poon Peter (“**Mr Cheung**”), a consultant of the plaintiff firm of solicitors. Thereafter, on 15 June 2017, the defendant signed an agreement to retain the plaintiff (“**Retainer**”). The Retainer, issued under the letterhead of the plaintiff, expressly provides, *inter alia*, as follows:

*“... We understand that you wish to retain us for consultation, advice and other services (collectively “the services”) relating to the following:*

*A (1) to object to or appeal against appraisal reports, special reports, and related or incidental proceedings and documents in connection with your employment as Programme Officer in Media Management of RTHK;*

*(2) your further appointment and*

*B the above services shall include but not limited to giving or providing advice, consultation, the drafting or preparation of documents or papers and such other services as agreed between you and us from time to time.”*

1. It is common ground that the defendant dealt with Mr Cheung throughout the subsistence of the Retainer.
2. By an email dated 27 July 2018, the defendant indicated to Mr Cheung that she could no longer afford the plaintiff’s professional services as she had already exhausted the lump sum she was prepared to spend. An agreement was reached between Mr Cheung and the defendant over the subsequent two days that the plaintiff would thereafter provide services only to the extent of passing to the defendant correspondence received from RTHK and other relevant parties. At the time of the termination of the Retainer, the defendant was not offered any re-appointment by RTHK and the defendant’s previous appraisals remained unaltered.
3. During the course of the Retainer, the plaintiff issued the following five interim bills and two debit notes (in respect of counsel’s fees) which were all settled by the defendant:

|  |  |  |  |
| --- | --- | --- | --- |
| Date | Number | Period Covered / Disbursements | Amount |
| 19 July 2017  (“**1st Bill**”) | 7886 | 13 June to 3 July 2017 | $100,000 |
| 19 July 2017  (“**2nd Bill**”) | 7887 | 4 July to 14 July 2017 | $143,950 |
| 23 October 2017  (“**3rd Bill**”) | 7972 | 15 July to  15 September 2017 | $146,000 |
| 4 December 2017 (“**4th Bill**”) | 8032 | 16 September to  4 December 2017[[2]](#footnote-2) | $157,800 |
| 4 December 2017 | 8033 | Counsel’s Fee | $60,000 |
| 5 May 2018 | 8304 | Counsel’s Fee | $17,000 |
| 20 June 2018 (“**5th Bill**”) | 8363 | 5 December 2017 to  4 April 2018[[3]](#footnote-3) | $185,800 |
|  |  | Total | $810,550 |

1. Following the termination of the retainer, on 9 August 2018, the plaintiff issued a bill numbered 8363A in the sum of $218,700 which included $15,300 for counsel’s fees and a concession requested by the defendant in the sum of $28,000 (“**Outstanding Bill**”). As the defendant refused to settle the Outstanding Bill, the plaintiff commenced these proceedings in November 2018 to recover the sum due under it.
2. The defendant, until shortly before the pre-trial review, acted in person. Her pleaded case is that Mr Cheung had failed to discharge his professional duties in respect of the services provided. Not only does she say that she is not required to pay the Outstanding Bill, she also ambitiously makes a counterclaim for (1) all fees previously paid (ie $810,550) which included counsel’s fees paid and (2) loss of income on the basis that her employment with RTHK was not extended or renewed.
3. At the trial, the plaintiff was represented by Mr William Tse[[4]](#footnote-4) and the defendant by Ms Lilian Ip, all of counsel. Due to the nature of the issues raised by the parties, upon my query, counsel agreed that, pursuant to RDC Order 35 rule 7(6), it was more appropriate for the defendant to begin the trial by opening her case.
4. Issues for determination
5. During the course of the trial, Ms Ip informed me that the defendant no longer pursues her defence and counterclaim in respect of counsel’s fees and loss of income. She also retracted from the initial position that the defendant is entitled to be repaid all sums previously paid and confined the defendant’s case on negligence to the period from 22 November 2017 onwards (“**Impugned Period**”). In other words, the defendant accepts that she is under an obligation to pay counsel’s fees in the sum of HK$15,300 under the Outstanding Bill and the defendant’s counterclaim (and set-off) is confined to only the 5th Bill[[5]](#footnote-5).
6. The defendant’s case pursued in closing is that during the Impugned Period, Mr Cheung was negligent (1) in failing to advise the defendant on her rights to make data access requests and data correction requests under the Personal Data (Privacy) Ordinance Cap 486 (“**PDPO**”) and (2) in advising instead that discovery should be sought by way of a Norwich Pharmacal Order (“**NPO**”).
7. Shortly before the termination of the Retainer, on 14 June 2018, the plaintiff issued three demand letters to, respectively, RTHK, the Public Service Commission (“**PSC**”) and the Civil Service Bureau (“**CSB**”) (collectively “**Demand Letters**”). The work done in relation to the Demand Letters comprised a lion’s share of the 5th Bill and the Outstanding Bill.
8. The Agreed List of Issues set out the following issues for the court’s determination:
9. Whether, in view circumstances from 22 November 2017 to 14 June 2018 (ie the date of the Demand Letters), the issue of discovery of evidence against RTHK’s decision of not offering further appointment to the defendant (“**Discovery Issue**”) was relevant and thus reasonably incidental to the Retainer? (“**Issue 1**”)
10. If the answer to (1) is in the affirmative, whether in pursuing the Discovery Issue, no reasonably competent practitioner in the position of the plaintiff would have failed to advise the defendant on the data access requests and/or data correction requests under the PDPO? (“**Issue 2**”)
11. If the answer to (2) is in the affirmative, whether the advising, preparing, drafting of, and services incidental to, the Demand Letters were unnecessary or useless for the Discovery Issue? (“**Issue 3**”)
12. Whether, in view of the circumstances from 22 November 2017 onwards, no reasonably competent practitioner in the position of the plaintiff would have advised the defendant to achieve the Discovery Issue by NPO. (“**Issue 4**”)
13. If the answers to (2) to (4) are in the affirmative, whether the defendant has suffered loss and damage as a result, and if so, the *quantum* thereof. (“**Issue 5**”)
14. In order to provide a backdrop to a proper understanding of the issues and the evidence, I should first provide a synopsis of some overarching features of the case pursed by the parties in closing.
15. In relation to Issue 1, despite initially arguing to the contrary, Mr Tse eventually accepted that it should be answered in the affirmative. As will be seen below, during the Impugned Period, in January 2018, Mr Cheung emailed to the defendant materials on NPO and the Demand Letters each contained a demand for discovery against RTHK, PSC and CSB. It is therefore plain that that the issue of discovery was relevant and thus reasonably incidental to the Retainer.
16. However, what Mr Tse contended was that by the time Mr Cheung started working on the Demand Letters, the defendant had shifted her focus away from discovery and instructed the plaintiff to prepare to commence a full legal action, and the Demand Letters were prepared on that basis and should be viewed and assessed in that light.
17. On the other hand, whilst Ms Ip accepted that one of the Demand Letters (ie the one issued to RTHK)[[6]](#footnote-6) was a letter before action for a full-scale action, she contended that the defendant had only agreed to pursue an application for NPO.
18. There is further a factual dispute as to whether Mr Cheung had, at the same time when NPO was discussed, also brought to the defendant’s attention her rights under the PDPO. Mr Tse accepted that, unlike the discussion on NPO, there is no documentary evidence to support Mr Cheung’s assertion that he did so.
19. The matters set out in the preceding three subparagraphs are the main factual disputes between the parties.
20. It is common ground that following the termination of the Retainer, the defendant, on her own initiative, obtained a number of documents from PSC pursuant to a data access request made under the PDPO which the defendant was not able to do so during the subsistence of the Retainer. It is a further common ground that no PDPO request was made to PSC during the subsistence of the Retainer. It is the defendant’s contention that had the data access request been made before the Demand Letters, the defendant would have been in possession of more information such that, in Ms Ip’s submissions, “*more constructive allegations*” could have been made against RTHK. As a result of the alleged failure to advise on the PDPO, the defendant contended the costs claimed in the 5th Bill and the Outstanding Bill were wasted since the defendant would not have issued the Demand Letters, or at least not in the form in which they were issued.
21. Chronology of relevant events
22. In this section, I will endeavour to set out chronologically the salient events by reference to the contemporaneous documents and the evidence of the witnesses. The defendant herself gave evidence and the plaintiff called Mr Cheung and his secretary Ms Tang Kit Ming (“**Ms Tang**”). In doing so, I will make a number of findings on disputed factual issues.
23. The chronology will deal with a number of distinct phases: (1) the pre-Retainer period, (2) the period between signing of the Retainer and 21 November 2017 (ie the pre-Impugned Period), (3) the Impugned Period, and (4) the period after the termination of the Retainer.
24. The pre-Retainer period
25. As stated at §1.2 above, following her first glowing performance appraisal, the defendant was dissatisfied with her subsequent less flattering assessments. Between August 2015 and March 2017, the following reports on her work performance were compiled:
26. 2nd Full Report in August 2015 for the period from 1 March to 31 August 2015,
27. 3rd Full Report in March 2016 for the period from 1 August 2015 to 29 February 2016,
28. 4th Full Report in September 2016 for the period from 1 March to 31 August 2016,
29. 1st Special Report in December 2016 for the period from 1 September to 30 November 2016,
30. 2nd Special Report in March 2017 for the period from 1 December 2016 to 28 February 2017.
31. Although the defendant signed the 2nd Full Report, shortly after its issuance, the defendant by an email dated 20 September 2015 lodged a complaint to the Complaints Unit of CSB as she was in her view “*unreasonably under-assessed*” and sought a rectification to reflect her genuine overall performance.
32. CSB referred the complaint back to RTHK on 14 October 2015, as the Director of Broadcasting (“**DB**”) was the final authority in judging whether the performance assessments specific to a staff member were justified.
33. By an eight-page letter dated 31 December 2015, RTHK disagreed with the defendant’s complaints including that her supervisors lacked understanding of her work and workload, that the assessment officer was biased, that the assessment standards were inappropriate, that disproportionate reliance was placed on recent complaints, that insufficient guidance was given by her supervisors, that the appraisal interview was conducted unfairly and that her representation on the appraisal report was not considered in reasonable detail. RTHK informed the defendant that the ratings given in the 2nd Full Report were considered justified and fair.
34. Apart from signing the 2nd Full Report, the defendant did not sign any of the subsequent reports set out at §3.3 above. As pointed out by Mr Tse, the defendant, by her email dated 19 December 2016, lodged a complaint to RTHK in respect of the 4th Full Report. The defendant’s email made detailed submissions and references to various guidelines. A number of serious allegations were advanced, including allegations that the report “*contained false allegations, distorted statements, and biased reporting*”.
35. Incidentally, by an email dated 12 December 2016, the defendant intimated that she would file a formal complaint in respect of the 1st Special Report as it was not based on substantial evidence and relevant guidelines were not adhered to. The formal complaint was lodged by way of the defendant’s email dated 15 February 2017 and the complaint was similarly detailed and wide-ranging.
36. Following the issuance of the 2nd Special Report, as mentioned at §1.2 above, RTHK by a letter dated 11 April 2017 informed the defendant that it would consider not offering her further appointment upon the completion of her three-year term. She was invited to submit representation, if any, by 18 April 2017, which deadline was extended to 25 April 2017.
37. By her email dated 25 April 2017, the defendant objected to the 2nd Special Report, again on the basis that there was a lack of factual basis for the assessment stated therein. In addition to the complaints made against the 2nd Special Report, the defendant also provided two tables which addressed all the reports set out at §3.3 above.
38. By a letter dated 31 May 2017, RTHK referred to the defendant’s emails dated 19 December 2016 and 15 February 2017 and provided a lengthy response and informed the defendant that it was considered that the ratings given in the 4th Full Report and the 1st Special Report were justified and fair.
39. By an email dated 6 June 2017 (ie about a week before the plaintiff first met Mr Cheung on 13 June 2017), RTHK informed the defendant that it had considered the defendant’s representations made on 25 April 2017 but considered that the defendant’s challenges against the 4th Full Report, the 1st and 2nd Special Reports to be unsubstantiated, and as a result, RTHK decided to uphold the notification stated in its letter dated 11 April 2017.
40. A meeting between the defendant and Mr Cheung was arranged to take place on 13 June 2017. By an email dated 12 June 2017, the defendant provided to Mr Cheung a chronology of events for the purpose of appealing against her staff appraisal reports.
41. On 13 June 2017, the defendant, accompanied by Mr Sze, met with Mr Cheung. In addition to the documents provided by way of the defendant’s email to Mr Cheung the day before, Mr Cheung was supplied with two more box files of documents at the meeting. As stated at §3.12 above, the defendant had on 6 June 2017 received an email from RTHK, effectively informing her that she would not be re-appointed following the expiry of her three-year term. It was decided, either at the meeting or shortly thereafter, that a response to RTHK’s email would be prepared. It was further agreed between Mr Cheung and the defendant that all correspondence, although prepared by Mr Cheung, would be issued by the defendant as it was thought that such an arrangement (ie in not issuing “formal” letters from a firm of solicitors) would less likely antagonize RTHK and the related parties.
42. Before I deal with the next phase of the chronology, I should first make a few observations on this pre-Retainer phase.
43. It is not unnecessary for me, and I have not been invited by counsel, to form a view on whether the defendant’s complaints against RTHK were justified. However, it seems to me quite clear from the complaints made by the defendant during the pre-Retainer stage that she was a sophisticated, meticulous and well-educated person (she graduated from The Chinese University of Hong Kong with a business degree and had received some legal training). It is also fair to say that she would not hesitate to assert her rights, was clear in what she wanted to achieve, was prepared to invest the time and effort in her pursuit of her objectives and did not shy away from adopting a strong stance.
44. On the other hand, Mr Cheung was recommended to the defendant by Mr Sze. Mr Cheung had previously acted for Mr Sze in an employment dispute with RTHK and he accepted in cross-examination that he had experience with RTHK employment matters. It would therefore only be natural that the defendant placed confidence in the abilities of and advice given by Mr Cheung.
45. The period between signing of the Retainer and 21 November 2017 (Pre-Impugned Period)
46. The defendant accepted in cross-examination that Mr Cheung had advised her shortly after the signing of the Retainer that it was unlikely that she would be re-appointed by RTHK as any decision to do so was within RTHK’s discretion. Mr Cheung had also advised the defendant that one method of challenging RTHK’s discretion was to demonstrate that the assessments in the performance appraisals were unjustified.
47. As may be gleaned from the 1st and 2nd Bills and the contemporaneous documents, Mr Cheung and the defendant spent considerable time preparing a response to RTHK’s email of 6 June 2017. The response was issued on 15 July 2017 (although it did not make express reference to RTHK’s email of 6 June 2017). Between the signing of the Retainer on 15 June and 15 July 2017:
48. by an email dated 20 June 2017, Mr Cheung informed the defendant that the contents of the applicable guidelines were an important part of the case;
49. in response to the above email, on 21 and 22 June 2017, the defendant supplied to the plaintiff what she then considered to be the relevant guidelines (including the Guidelines on Compiling Performance Appraisals, CSB’s Circular on Performance Management in the Civil Service, CSB’s Performance Management Guide 2016) and also a draft response to RTHK’s email of 6 June 2017 in which specific provisions of the various guidelines were cited;
50. on 26 and 30 June 2017, Mr Cheung had meetings with the defendant at which he took instructions, considered the various guidelines supplied to him and discussed the draft response provided by her;
51. between 3 and 7 July 2017, Mr Cheung worked on the draft response and by an email dated 10 July 2017, Mr Cheung provided his draft to the defendant;
52. Mr Cheung and the defendant continued to finalize the draft response until 14 July 2017 during which amendments were proposed by the defendant and a further meeting was held on 13 July 2017;
53. the finalized response was issued to RTHK by the defendant on 15 July 2017 (“**15/7/17 Response**”).
54. The 15/7/17 Response was a detailed document and focused on, as agreed by the defendant in cross-examination, complaints that the assessments were unjustified and that there were various breaches of the guidelines. The 15/7/17 Response was copied to the Complaints Unit of CSB. There was at that stage no request for any discovery from RTHK or any other party.
55. The defendant accepted in cross-examination that the 15/7/17 Response, with Mr Cheung’s input, was a more sophisticated document than her own draft. It is therefore unsurprising that the defendant swiftly settled the 1st and 2nd Bills (by costs on account and a further payment made on 24 July 2017).
56. There was no substantive response from RTHK until 25 August 2017. In the meantime, in August 2017, the 6th Full Report (for the period 1 March to 31 August 2017) was compiled in which it was stated that the defendant did not show any improvements. On 22 August 2017, the defendant sent two emails to RTHK (drafted by Mr Cheung) to the effect that the 6th Full Report should not have been issued as there was an extant objection by way of the 15/7/17 Response which had not been substantively addressed.
57. In RTHK’s reply dated 25 August 2017, it disagreed with the 15/7/17 Response and maintained that the assessments given in the appraisal reports were justified and fair.
58. On 28 August 2017, RTHK wrote to the defendant in, *inter alia*, the following terms:

“*Further to our letter of 11 April 2017, I write to inform you that on the advice of the Public Service Commission, you will not be offered further appointment upon expiry of your 3-year agreement terms to be ended on 31 August 2017.”*

1. On 29 August 2017, the defendant issued a number of documents.
2. In the light of RTHK’s reply on 25 August 2017 to the 15/7/17 Response, between 27 and 28 August 2017, Mr Cheung drafted a complaint letter (amended by the defendant) to CSB. In this letter, a summary of the defendant’s complaints and RTHK’s responses was provided and a request was made to CSB to take appropriate actions.
3. In the light of RTHK’s indication in its letter dated 28 August 2017 that the decision not to re-appoint the defendant was on the advice of PSC, letters were issued to the PSC and RTHK enquiring what documents were provided by RTHK to PSC and what advice was given by the PSC to RTHK.
4. On 26 and 27 September 2017, PSC and RTHK respectively provided their responses to the defendant’s query, each stating cursorily that due process and proper procedures had been followed. On 30 September 2017, the defendant issued a letter each to PSC and RTHK reiterating her request for answers on what was or was not provided by RTHK to PSC before PSC gave its advice to not renew her appointment. The replies given by PSC and RTHK on 9 October 2017 did not take the matter any further.
5. In the meantime, by an email dated 6 October 2017, Mr Cheung suggested to the defendant that counsel be retained to advise on possible causes of action, including breach of contract and judicial review and provided some material to the defendant outlining the law on judicial review. Mr Cheung also suggested that, should CSB not give a positive response, counsel should be retained shortly thereafter.
6. On 12 October 2017, CSB replied and stated that RTHK was best placed to handle the defendant’s appeal against the decision of not offering any reappointment and referred the appeal to the DB for a review.
7. By an email dated 25 October 2017, the defendant agreed to Mr Cheung’s suggestion that counsel Mr Lawrence Hui (“**Mr Hui**”) be retained to advise on the merits and incidental matters. There was some suggestion in that email that the defendant was considering applying for legal aid but she stated that she would arrange payment of the 3rd Bill (issued two days earlier) as soon as possible.
8. As CSB had referred the appeal to the DB for a review, on 31 October 2017, Mr Cheung provided his first draft of further submissions which the defendant regarded as “*thoughtful*”. The defendant provided her comments on 1 November 2017. On 9 November 2017, the defendant informed RTHK that she would require more time to submit further representations.
9. Mr Hui was formally instructed on 6 November 2017 to advise on the merits of the defendant’s complaints and objections and the potential causes of action and to review the further submissions to be made to RTHK.
10. Mr Cheung and the defendant attended a conference with Mr Hui on 20 November 2017. At the conference, Mr Hui advised against commencing a judicial review and recommended that further submissions should be made to RTHK.
11. On 21 November 2017, a finalized version of the further submissions settled by counsel was provided by Mr Cheung to the defendant. The defendant made further modest changes and issued the further submissions on 22 November 2017. The further submissions demanded RTHK to consider offering to the defendant a new appointment and/or nullifying the appraisal reports in issue. Litigation was stated to be a possibility should there be no positive response.
12. The following observations may be made on the pre-Impugned Period.
13. I am of the view that Ms Ip is astute in curtailing the defendant’s case on negligence to the subsequent Impugned Period. As outlined in this sub-section, the defendant’s three-year term expired during the pre-Impugned Period. Although her employment was not renewed by RTHK, there is nothing in the contemporaneous documents to show that that result came as a surprise (§3.18 above). There is also nothing to suggest that the defendant was unhappy with the services provided by Mr Cheung. To the contrary, she was intimately involved in the entire process and was actively providing her input throughout.
14. The Discovery Issue crystallized following RTHK’s letter dated 28 August 2017 (§3.24 above), because it became apparent that RTHK’s decision to not renew the defendant’s employment was on the advice of PSC. Although the issue had crystallized, apart from writing to PSC and RTHK on 29 August and 30 September 2017 requesting and repeating its request for clarification as to what material was provided by RTHK and considered by PSC, it did not assume real significance. The attention of Mr Cheung and the defendant was then focused on the general direction and counsel’s advice was obtained on that basis. It is common ground that Mr Hui was not specifically instructed to advise on the Discovery Issue.
15. The Impugned Period
16. Nothing of substance happened in the month following the issuance of the further submissions on 22 November 2017. By an email dated 22 December 2017, the defendant informed Mr Cheung that she was minded to issue a chaser to CSB on 12 January 2018 (three months from the date on which CSB referred to appeal to RTHK on 12 October 2017) which would “*also serve as final reminder before proceeding to file the case*”.
17. Mr Cheung immediately wrote back and sought clarification as to whether “*to file the case*” meant starting legal action, and if so, the defendant was reminded that the plaintiff (instead of the defendant herself) should issue a letter of demand, to which the defendant replied “*we are on the same page*” but she further stated that she would further discuss the matter shortly before 12 January 2018.
18. Pursuant to the defendant’s email of 22 December 2017, on 11 January 2018, Mr Cheung provided to the defendant draft letters to be issued to RTHK and CSB. They were issued by the defendant on the same day. It is noted that the letter to RTHK again threatened legal action if there was no positive or favourable response.
19. It is Mr Cheung’s evidence that prior to 18 January 2018, he had discussed the Discovery Issue with the defendant and in the process both NPO and PDPO were canvassed. It is also Mr Cheung’s evidence that the defendant was not in favour of the PDPO as she regarded it as a mere formality and was not effective. Conversely, the defendant gave evidence that she was not familiar with the PDPO and throughout the Impugned Period Mr Cheung did not mention the PDPO at all. I shall return to this factual dispute below.
20. In the morning of 18 January 2018, RTHK provided its reply to the further submissions sent by the defendant on 22 November 2017. RTHK upheld its decision of not offering the defendant further appointment and declined to nullify the reports in issue. The defendant immediately forwarded RTHK’s response to Mr Cheung. It appears from the Whatsapp messages that the defendant had a telephone conversation with a Ms Chan of CSB and she was advised to file an appeal with CSB in respect of RTHK’s review.
21. At 2:23pm on 18 January 2018, Mr Cheung sent an email to the defendant attaching information on NPO and stated that he would await further instructions on the defendant’s communications with Ms Chan.
22. It appears that a decision was made to follow the suggestion given by Ms Chan. On 24 January 2018, Mr Cheung provided to the defendant two draft letters, one to RTHK and the other to CSB, the former informing RTHK that she would lodge an appeal against RTHK’s review (and setting out her grounds of objections) to CSB and the latter requesting assistance from CSB (and attaching the letter to be issued to RTHK). The draft letters were issued formally to RTHK and CSB by the defendant on 25 January 2018.
23. On 2 February 2018, the defendant sent a Whatsapp message to Mr Cheung requesting him to discuss with counsel whether they could start working on the application for NPO after Chinese New Year. In Mr Cheung’s email to Mr Hui, it was proposed, due to budgetary constraints, that a more junior counsel Mr Keith Tam (“**Mr Tam**”) be engaged in Mr Hui’s stead. In a follow-up email to the defendant, Mr Cheung stated that it was not necessary to engage counsel at that stage as much depended on whether any assistance was forthcoming from CSB.
24. On 15 February 2018, CSB responded unfavourably to the defendant’s letter issued on 25 January 2018. This was forwarded by the defendant to Mr Cheung on 21 February 2018 and Mr Cheung provided a draft letter in response to CSB to the defendant on 27 February 2018 for comments. In Mr Cheung’s draft, legal proceedings were threatened. The defendant formally issued the letter on 1 March 2018.
25. By then, it was clear that the correspondence drafted by Mr Cheung (with the defendant’s input and amendments) was not yielding any positive results. On 2 March 2018, Mr Cheung agreed fees with Mr Tam for a conference to be held at which he would provide his advice regarding the defendant’s claims and the remedies available. Mr Cheung also informed the defendant that he would start preparing the Demand Letter to RTHK.
26. By an email dated 5 March 2018, Mr Cheung explained to the defendant the purpose of a NPO, which included (1) discovery of evidence in support of her claim, (2) increasing her bargaining power and (3) less costs exposure than full-scale litigation. It was clarified also that the proposed NPO was to be issued against the DB and possibly other responsible officers and not RTHK or not only RTHK, who may be motivated to reach a settlement. Mr Cheung specifically concluded that the it was open to the defendant to decide against mounting an application for NPO, but she would then have to consider what she would do after a Demand Letter was sent to RTHK but was not complied with. Mr Cheung specifically sought the defendant’s instructions in the above regard.
27. The defendant replied on 6 March 2018 in which she stated that *“[m]y hesitation did not come from the NPO itself, nor any intention to withdraw at this point. I was simply thinking of commencing an action as early as possible while I can still afford to do so. Thank you for explaining to me in details and please proceed as discussed.”*
28. At the trial, the defendant said that she did not recall what was discussed. She further accepted that, in so far as her witness statement that she had already decided on the NPO route on or shortly after 18 January 2018, it is not accurate.
29. The conference with Mr Tam took place on 21 March 2018. It is Mr Cheung’s evidence that PDPO was mentioned at the conference briefly but not too much attention was paid to it.
30. On 27 March 2018, Mr Cheung emailed the defendant to provide a report on the developments, in which the defendant was told that, following the conference with Mr Tam, he had been drafting the Demand Letter to RTHK but it was a complex and difficult task. The defendant thanked Mr Cheung by Whatsapp on the same day and stated that she would, on her part, work on the chronology.
31. On 6 April 2018, CSB replied to the defendant’s letter issued on 1 March 2018, stating that it did not find any irregularities in RTHK’s handling of the defendant’s case. CSB’s letter was copied to the Department of Justice.
32. On 11 April 2018, Mr Cheung provided to the defendant his first draft of the Demand Letter to RTHK. The first draft of the Demand Letter is a lengthy document and concluded by making various demands and threatening legal proceedings. The demands included a declaration setting aside the identified performance appraisals and their review, a further term of employment, and full disclosure of information and documents including those provided to PSC.
33. On 19 April 2018, the defendant sent a Whatsapp message to Mr Cheung in which she stated that she intended to issue the Demand Letter to RTHK on 7 or 8 May 2018, which was about one month from CSB’s last reply. Mr Cheung replied by stating that there was no strict time limit but he drew the defendant’s attention to the fact that there was a limitation period of 6 years. On 23 April 2018, the defendant provided her comments to the draft Demand Letter to RTHK.
34. Thereafter the defendant and Mr Cheung continued to make amendments to the draft Demand Letter to RTHK. Eventually, on 7 May 2018, a draft was provided to Mr Tam for comments. In the covering email to Mr Tam (which was copied to the defendant), Mr Cheung stated that the draft was lengthy because it was difficult to present the case briefly and it was desirable to let RTHK feel the weight and seriousness of the defendant’s demand. In addition, it was specifically stated that separate letters for discovery or NPO would have to be issued, but only if RTHK rejected the demand for discovery made in the draft Demand Letter.
35. On the following day, the defendant by Whatsapp thanked Mr Cheung for his email to Mr Tam.
36. The defendant further revised the draft Demand Letter to RTHK and the latest draft was provided to Mr Tam on 9 May 2018.
37. Whilst waiting for Mr Tam’s comments on the draft Demand Letter to RTHK, on 16 May 2018, Mr Cheung provided a draft Demand Letter to CSB, which was in reply to CSB’s letter of 6 April 2018, to the defendant for her comments. Thereafter the defendant and Mr Cheung continued to amend the draft Demand Letter to CSB.
38. On 25 May 2018, Mr Tam provided his comments on the draft Demand Letter to RTHK. There were minor substantive comments, save that Mr Tam added to the concluding section a data access request made pursuant to the PDPO.
39. On 28 May 2018, Mr Cheung forwarded the draft Demand Letter to RTHK with Mr Tam’s comment to the defendant. In addition, Mr Cheung also provided the latest draft Demand Letter to CSB and a new draft Demand Letter to PSC for the defendant’s consideration. The defendant provided her comments on all three documents on 29 May 2018.
40. On 30 May 2018, Mr Cheung provided to Mr Tam the draft Demand Letter to RTHK which was further amended by the defendant and Mr Cheung, the draft Demand Letter to CSB and the draft Demand Letter to PSC. It was expressly stated in the email to Mr Tam (copied to the defendant) that the main purpose of the Demand Letter to PSC was to explore the possibility of discovery and that of the draft Demand Letter to CSB was to explore whether there was any further avenue other than the review procedure previously embarked upon but without success. The defendant sent a Whatsapp message to Mr Cheung on the same day thanking him and stated that she thought Mr Tam’s addition of a data access request to the draft Demand Letter to RTHK was good. The draft Demand Letter to PSC, whilst principally issued for the purpose of exploring the possibility of discovery, did not include a data access request pursuant to the PDPO in contrast to the draft Demand Letter to RTHK.
41. Eventually the Demand Letters were issued under the plaintiff’s letterhead on 14 June 2018 each of which, in one form or another, contained a request for discovery amongst other demands. There was no immediate substantive reply. On 12 July 2018, chasers were sent to RTHK and PSC (amended and approved by the defendant) and legal proceedings were again threatened should there be no positive reply by the stipulated deadline (23 July 2018).
42. As shown in the Whatsapp records, the defendant and Mr Cheung had two telephone conversations respectively on 16 and 23 July 2018. It is the defendant’s evidence that during those conversations, she expressed her frustration on the lack of results and questioned Mr Cheung whether he had done any research on NPO, to which Mr Cheung replied that it would cost the defendant a lot for the research. Mr Cheung in cross-examination said that he was not able to recall the telephone conversations but stated that he did not believe he would have told the defendant that it would cost her a lot for the research on NPO.
43. On 23 July 2018, RTHK responded by agreeing to comply with the personal data request by supplying data held in the defendant’s personnel file, staff report file and case files on appeal against the assessment of the 2nd and 4th Full Reports and the 1st Special Report upon payment of copying charges ($1,231.20). It further stated that a further reply would be provided to the other issues raised in the Demand Letter to RTHK as soon as possible. This was forwarded to the defendant on the following day. Discussions were held between Mr Cheung and the defendant. In a Whatsapp message, the defendant stated to Mr Cheung that she found RTHK’s reply insulting, that she did not need the documents, that she needed time to consider her next move and that further instructions would likely only come in the middle of the following month.
44. On 26 July 2018, Mr Cheung sent an email to the defendant in which he advised the defendant that RTHK’s reply constituted an admission that the demand for discovery was meritorious, that it provided a stepping stone for obtaining documents which were pertinent and important to her (namely those relating to the giving of advice by PSC in not renewing her appointment). The email ended with Mr Cheung stating that he awaited the defendant’s further instructions.
45. As stated at §1.5 above, the defendant terminated the Retainer on 27 July 2018. In that email, the defendant stated that:
46. she did not consider RTHK’s reply a positive response at all;
47. a request for personal data was a routine exercise;
48. RTHK did not agree to the provision of the documents because of the Demand Letter to RTHK;
49. it should not be expected that full discovery would be made, even if a NPO was obtained;
50. nevertheless she would obtain the documents for reference in future proceedings;
51. she could no longer afford the plaintiff’s professional service and was bound to look for other affordable options to carry on the fight and requested Mr Cheung to continue to reply any response from RTHK, PSC and CSB to her email.
52. In an email dated 28 July 2018, Mr Cheung acknowledged that the plaintiff would not act for the defendant further except only passing to her the relevant correspondence. Mr Cheung also stated that a further bill would be issued for services provided and Mr Tam’s fees.
53. On 28 July 2018, the defendant confirmed by email the arrangement to terminate the Retainer. She further stated in the email that as the drafting of the Demand Letters took a much longer time than expected and since she had exceeded her budget as a result, she “*begged*” Mr Cheung’s consideration for a concession of her fees or a more favourable payment term. On 30 July 2018, Mr Cheung replied by stating that the defendant’s request for a concession would be considered and borne in mind.
54. I will first deal with the relevant events subsequent to the termination of the Retainer before I make a number of factual findings.
55. The period after the termination of the Retainer
56. On 7 August 2018, the defendant visited the Office of Legal Advice Scheme for Unrepresented Litigants on Civil Procedures with the view to consider commencing proceedings against RTHK. She was advised that she should consult the Office of the Privacy Commissioner for Personal Data (“**PCPD**”) to find out how PDPO could assist her case.
57. On 9 August 2018, the defendant visited the PCPD and was told of her entitlements under the PDPO.
58. Also on 9 August 2018, the plaintiff issued the Outstanding Bill to the plaintiff. The Outstanding Bill included Mr Tam’s fees for settling the Demand Letters[[7]](#footnote-7).
59. It is common ground that the defendant called Ms Tang on 9 August 2018. It is also a further common ground that, during the telephone conversation, the defendant said that many of the plaintiff’s services were unnecessary as a result of what she was advised by a free legal advice scheme on the applicability of the PDPO to her case. The material difference between Ms Tang and the defendant was on whether the defendant came across as being unhappy.
60. Thereafter, the defendant made a number of data access requests and data correction requests. The defendant accepted in cross-examination that her data correction requests were unfruitful, as she was only able to change an incorrect reference to the name of an appraising officer.
61. More importantly, the defendant was able to obtain through a data access request to the PSC a number of documents (60 pages) including the advice which PSC gave to RTHK in not renewing her appointment (an one-page document). Ms Ip however confirmed that the defendant did not make discovery of the documents obtained from the PSC.
62. It is the defendant’s evidence that through her own initiatives, on 31 January 2019, the Office of the Chief Executive relayed her case to CSB and her submissions by CSB. Although the defendant said that he was optimistic about the result of the review, none of the relevant documents was disclosed. As at the time of the trial, the defendant was not reinstated by RTHK.
63. Findings of fact
64. It is tolerably trite that significant weight should be attached to the contemporaneous documents, as they are usually prepared in good faith before a dispute has arisen or at any rate crystallized. Of course, once a dispute has been identified it is necessary to pay careful attention to the documents created after that time because it is only natural that the parties will reflect their grievances and justification for actions in those documents: *EU Asia Engineering Ltd v Wing Hong Contractors Ltd*, HCCT 16 of 1990, 23 December 1991 (page 9). I am satisfied that the contemporaneous documents can and should be relied upon, especially when the majority of them were created before the crystallization of the disputes in the present case.
65. As is plain from the Agreed List of Issues, the disputed factual events took place during the Impugned Period (§§2.4 and 2.5 above). I set out chronologically my factual findings.
66. It is plain that the Discovery Issue was relevant during the Impugned Period and thus reasonably incidental to the Retainer, both factually and as a matter of proper interpretation of the Retainer.
67. As set out at §§2.5(1) and 3.40 above, at the initial stage of the Impugned Period, it is Mr Cheung’s own evidence that he had discussed the issue of NPO with the defendant. Moreover, the Demand Letters all contained requests for discovery against RTHK, PSC and CSB (§§3.53 and 3.62 above).
68. As a matter of proper interpretation of the Retainer, Items A(1) and (2) of the Retainer (§1.3 above) expressly provide, in wide terms, the scope of the services to be provided by the plaintiff. Further Item B provides that the plaintiff’s services included “*such other services as agreed between you and us from time to time*”. In my view, it is self-evident that the Discovery Issue is relevant to any consideration given to the process of appealing against the performance reports and seeking a further appointment.
69. In my view, Mr Tse’s eventual concession that Issue 1 should be answered in the affirmative is a correct and sensible one (§2.5(1) above).
70. I do not accept Mr Cheung’s evidence that he had himself advised the defendant in January 2018 on PDPO when he discussed NPO with the defendant. I therefore also do not accept his evidence that the defendant was not in favour of making a request pursuant to the PDPO (§3.40 above). There is simply no documentary evidence to support that he did so or that the defendant had instructed him not to proceed with a request made under the PDPO. Further, there is no dispute that a PDPO request was added to the draft Demand Letter to RTHK by Mr Tam (§3.59 above) and that the defendant had commented favourably on the addition (§3.61 above).
71. By March 2018, the defendant was clearly desirous of commencing a full action. I do not accept the defendant’s evidence that she had only agreed to pursue an application for NPO. However, I also do not accept Mr Cheung’s evidence that the defendant had by March 2018 focused only on commencing a full action. The contemporaneous documents show that the position seemed to be somewhere between the two extremes.
72. In January 2018 (§3.38 above), the defendant clearly understood that a demand letter was to be issued by the plaintiff (as opposed to the previous practice of issuing letters under the defendant’s own name) should the defendant decide to commence a legal action.
73. It is true that the defendant had in early February 2018 enquired whether counsel could start working on an application for NPO, but at the time Mr Cheung and the defendant was still waiting for a response from CSB (§3.44 above). By mid to late February 2018, CSB responded unfavourably and legal proceedings was threatened in response (§3.45 above).
74. Importantly, it was clearly explained in Mr Cheung’s email dated 5 March 2018 that the strategy involved a two-stage process. It was envisaged that a pre-action demand letter would first be issued and an application for NPO would follow should RTHK not comply with the demand for the reasons stated therein (§3.47 above). Whilst it was open to the defendant to decide against a NPO, she would then need to decide what to do next should the demand letter was not complied with. The instruction given by the defendant on the following day was that she was inclined to commence an action as early as possible while she could still afford to do so (§3.48 above).
75. On 27 March 2018 (§3.51 above), Mr Cheung informed the defendant, and the defendant agreed, that he had been drafting the Demand Letter to RTHK following the conference with Mr Tam. The first draft provided by Mr Cheung on 11 April 2018 was already in the form of a pre-action letter (§3.53 above) and the issue of time-bar was mentioned on 19 April 2018 (§3.54 above).
76. It seems to me that a telling contemporaneous document is Mr Cheung’s email to Mr Tam dated 7 May 2018 which was copied to and acknowledged by the defendant (§§3.55 and 3.56 above). In this email, it was clearly stated that the understanding at the time between the defendant and Mr Cheung was to proceed with the two-stage strategy as proposed in Mr Cheung’s email of 5 March 2018 to the defendant, namely to first issue a Demand Letter to RTHK to be followed by separate letters for discovery and NPO if the Demand Letter was not complied with.
77. As is plain from the chronology of the Impugned Period set out above, the defendant was intimately involved in revising and approving the Demand Letters which were all issued under the plaintiff’s letterhead. There could be no misunderstanding on her part that they clearly were issued for the purpose of the first stage of the two-stage strategy.
78. Another telling document is the defendant’s email to Mr Tam on 30 May 2018 (again copied to and acknowledged by the defendant) in which the purposes of the draft Demand Letters to PSC and CSB were explained (§3.61 above). It is true that it would have been logical to have included a PDPO request in the Demand Letter to PSC when the same has been added to the Demand Letter to RTHK by Mr Tam. I shall return to this issue in the subsequent section dealing with the defendant’s case on negligence.
79. I am prepared to accept that in the two telephone conversations on 16 and 23 July 2018 the defendant had expressed her frustration to Mr Cheung (§3.63 above). However, I do not accept the suggestion that the defendant was unhappy with Mr Cheung’s performance in that she harboured doubts whether Mr Cheung had conducted any research on NPO. First, as stated at §3.18 above, there was no illusion on the defendant’s part that hers was at least challenging. Secondly, the suggestion that she was dissatisfied with Mr Cheung’s performance was inconsistent with her own email dated 28 July 2018 “*begging*” Mr Cheung for a concession (§3.68 above). Indeed, before the issuance of the Outstanding Bill, there was no contemporaneous document showing any complaints on the part of the defendant.
80. Following RTHK’s reply on 23 July 2018 agreeing to the PDPO request made in the Demand Letter, the defendant formed the view that (1) it was useless as she already had the documents and (2) RTHK would not comply with a NPO even were one obtained against it. Due to budgetary concerns, she decided to, in her own words, “*carry on the fight*” by looking for more affordable options. The defendant was clearly at a loss. Originally she told the defendant on 23 July 2018 that she would only provide further instructions in the middle of August but she terminated the Retainer four days later on 27 July 2018 (§§3.64 to 3.68 above).
81. The defendant was plainly intent on commencing a full action herself following the termination of the Retainer (§3.70 above). However, more likely than not due to budgetary concerns, she decided to first proceed under the PDPO but met with limited success. She has only been able to make an insignificant data correction and obtained a number of documents from PSC, the usefulness of which is entirely suspect as no discovery has been made (§§3.71 and 3.74 to 3.76 above).
82. The defendant’s case on negligence
83. As is evident from the formulation of the Agreed List of Issues, counsel are in broad agreement on the applicable principles. Although a number of different cases were cited, the following principles appear to be common ground (*Foshan* *Hua Da Industrial Co v Johnson, Stokes & Master (a firm)* [1999] 1 HKLRD 418 at page 425 and *Ng Chiu Mui v Robertsons*, HCA 1166 of 2010, 3 November 2014 §§54-57).
84. A retained solicitor owes a duty to his client, both in contract and tort. There arises, when a solicitor is engaged for rewarded, a contractual duty to exercise skill and care on behalf of his client. A solicitor is not expected or bound to know all the law, nor is he to be judged according to the standard which might be demonstrated by a “*particularly meticulous and conscientious practitioner*”.
85. The duty of a solicitor is to exercise that reasonable degree of skill and care to be expected of a competent and reasonably experienced solicitor. The test is what a reasonably competent practitioner would do having regard to the standard normally adopted in his profession. The law does not impose liability for damages for a solicitor’s error unless no reasonably well-informed and competent member of the profession could have made that error.
86. The standard of care to be expected of a professional man must be based on events as they occur in prospect and not in retrospect. In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. Even if the choice actually made by a solicitor can be shown to be turned out badly that is not in itself proof of negligence.
87. The onus of proving professional negligence over and above errors of judgment is a heavy one. It is much harder to show breach of duty by proof of error of judgment as opposed to basic mistakes and in the absence of a specific agreement a solicitor does not warrant to obtain a particular result.
88. Further, if negligence were established, the parties proceeded on the basis that the plaintiff may be deprived some or all of its costs: *Heywood v Wellers* [1976] QB 446, applied in *Baker & McKenzie (a firm) v The Grande Holdings Ltd* [2011] 3 HKC 510 §§15-17 and *Lo Siu Ping and Tam Sin Yee v Kenneth Woo & Co (a firm)*, HCA 506 of 2009, 16 May 2012 §72.
89. As I understand Ms Ip’s submissions, the defendant’s case on negligence as pursued in closing is as follows.
90. She submitted that Issue 1 should be answered in the affirmative. I agree. As I found at §3.79 above, in view of the circumstances from 22 November 2017 to 14 June 2018 (the date on which the Demand Letters were issued), the Discovery Issue was relevant and thus reasonably incidental to the Retainer.
91. She next submitted that Mr Cheung himself did not advise the defendant on the PDPO. I also agree, as I have found at §3.80 above.
92. She then submitted that no reasonably competent practitioner in the position of Mr Cheung would have failed to advise the defendant on the PDPO, in that the use of PDPO would have generated useful documents including the PSC advice (§§3.36, 3.61, 3.75 and 3.82 above). Premised on the foregoing, she said that had Mr Cheung advised on the PDPO shortly after the advice given by Mr Hui in November 2017, the services thereafter provided by Mr Cheung would not have been necessary or at least not be in the form or manner which was provided.
93. Related to subparagraph (3) above, she further submitted, by reference to *Heywood*, that the Demand Letters were useless and did nothing to forward the object which the defendant had in view. In particular, she relied on the fact that the content of the Demand Letter to RTHK (issued under the letterhead of the plaintiff) was similar to that of the 15/7/17 Response for which the plaintiff had already charged.
94. She finally submitted that Mr Cheung’s recommendation to proceed with NPO, which was the only matter the defendant had agreed to pursue, was in any event wrong in law, on the bases that the NPO is a third-party proceeding that is not intended to target the intended parties and that it should not be used as a fishing exercise.
95. Except those matters set out at subparagraphs (1) and (2) of the preceding paragraph, I am unable to agree with Ms Ip.
96. A critical component of the defendant’s case is that she was concerned solely with discovery of documents, and hence her case that she had only agreed to pursue an application for NPO. It is from the foregoing premise that Ms Ip argued that the Demand Letters were useless and did nothing to forward the object which the defendant had in view, as the correspondence only yield a response from RTHK to disclose documents pursuant to a PDPO request which the defendant already had in her possession. Underscoring that argument is the fact that the defendant was able to obtain some additional documents from PSC after the termination of the Retainer on her own by a request made under the PDPO.
97. However, it is plain from my factual findings that the defendant was not only concerned with discovery of documents but had agreed on was a two-stage strategy (§3.81 above), namely to first issue the Demand Letters and, depending on the outcome, to next consider an application for pre-action discovery.
98. It must be emphasized that it was the defendant who declined to follow through with the two-stage strategy due to budgetary constraints (§§3.84 to 3.85 above). It seems to me to be opportunistic for the defendant to invite the court to gauge the usefulness of the steps taken at the time when she terminated the Retainer, when the two-stage strategy plainly envisaged a longer time horizon, in particular where it was expressly contemplated that the first stage (ie the Demand Letters) might not yield any favourable response.
99. I am prepared to accept that following Mr Tam’s addition of a PDPO request during the drafting stage of the Demand Letter to RTHK, it would have been logical to include a corresponding request also in the Demand Letter to PSC (§3.82 above). However, I am of the view that that omission is not sufficient to make out a case of negligence, for the following reasons.
100. First, as stated at §3.85 above, the defendant has not disclosed the documents which she obtained from PSC. There is nothing before me to suggest that the documents obtained by the defendant would have materially altered the course taken. As stated by Mr Cheung, depending on the content of the PSC advice, there might have been some minor alteration of the Demand Letters but it would not have changed their content drastically. Indeed, the submissions made by Ms Ip in closing was that the PSC advice might have changed the content of the Demand Letters and render them more useful. Where, as here, the defendant has refrained from disclosing the documents she obtained from PSC, Ms Ip’s submission can only be described as speculative.
101. Secondly, as stated in the preceding paragraph, the defendant terminated the Retainer without following through the two-stage strategy. The omission to include a PDPO request to PSC is not irremediable, especially when it was expressly contemplated that pre-action discovery would be considered in stage two.
102. Related to the foregoing, I am prepared to accept Mr Cheung’s advice to proceed with an application for NPO against the DB (the head of RTHK) does not fit comfortably within the rubric of a NPO, which is, as submitted by Ms Ip, usually against an innocent non-party. However, as is clearly stated in the email of 7 May 2018 to Mr Tam (which was copied to the defendant), the scope of the pre-action discovery was not limited to NPO (§3.55 above). It is trite that under RDC Order 24, rule 7A and section 47A of the District Court Ordinance Cap 336 pre‑action discovery is viable even against a person who is likely to be a party to intended proceedings. In the present case, the two-stage procedure envisaged that the pre-action discovery would be further considered at stage two (and likely with the involvement of Mr Tam) which did not materialize due to the defendant’s termination of the Retainer. This is not a case that the defendant was charged for the pursuit of an unsuccessful application for NPO.
103. The suggestion that the defendant was dissatisfied with the Demand Letters is also inconsistent with the defendant’s own action. First, the defendant was throughout intimately involved in the drafting of the Demand Letters. Secondly, the defendant sought to pay Mr Tam’s fee directly, which was solely related to Mr Tam’s work done in relation to settling the Demand Letters (Footnote 7 above). Thirdly, it was only after the issuance of the Outstanding Bill that the defendant started to complain about the quality of the services provided by the plaintiff. During the drafting stage of the Demand Letters, the defendant was always appreciative of the work done by Mr Cheung.
104. The pursuit of the two-stage strategy was a matter of judgment on the part of Mr Cheung and in reaching that view, he had no doubt factored into his consideration the defendant’s budgetary constraints. Whilst I am of the view, as a matter of hindsight, that a PDPO request could have been made earlier and Mr Cheung could have been more thorough in advising the defendant on avenues on pre-action discovery other than NPO, such omission was not irremediable given that issues of pre-action discovery was to be considered in more detail during stage 2 of the two-stage strategy. In particular, I am of the view that such omission, even if not committed, would not have materially changed the course which was in fact taken.
105. In my view, the defendant has not overcome the heavy onus of proving professional negligence.
106. Where, as here, the defendant has failed to establish her case on negligence, it is inappropriate for me to consider Ms Ip’s submission that there should be a reduction of the plaintiff’s entitlements as the content of the Demand Letter to RTHK was similar to that of the 15/5/17 Response. The defendant has not applied for taxation, despite the fact that the plaintiff had informed the defendant may have right to do so by its letter dated 4 January 2019: *So Keung Yip & Sin (a firm) v Gold Horn International Enterprises Group Limited & Anor* [2020] HKCFI 1418.
107. For completeness, in closing, Ms Ip did not rely on the actions taken by the defendant following the termination of the Retainer, which were avenues alternative to litigation, to show that she has since forwarded her objectives.
108. Conclusion
109. For the above reasons, I enter judgment in favour of the plaintiff in respect of the Outstanding Bill and dismiss the defendant’s counterclaim.
110. The plaintiff’s bills provide that they are due on presentation and interest would be charged at 1% per month if payment is not made within 7 days after the due date. In the present case, the Outstanding Bill was issued by the plaintiff and received by the defendant on 9 August 2018. The plaintiff is entitled to pre-judgment interest of 1% per month on the judgment sum from 16 August 2018 until the date of judgment and thereafter at judgment rate until payment.
111. On a *nisi* basis, I order the defendant to pay to the plaintiff the costs of the action and the counterclaim (including any costs reserved), with a certificate of counsel to be taxed if not agreed.
112. I thank counsel for their assistance.

( Jonathan Wong )

District Judge

Mr Edward K H Ng and Mr William Tse, instructed by Herman H M Hui & Co, for the plaintiff

Ms Lilian Ip, instructed by Huen & Partners, for the defendant

1. Subsequently, by a letter dated 28 August 2017, RTHK informed the defendant that she would not be offered further appointment. [↑](#footnote-ref-1)
2. Although the period covered is described as ending on 4 December 2017 (ie the date of the 4th Bill), only work done up to 21 November 2017 is set out in the bill. [↑](#footnote-ref-2)
3. Although the period covered is described as beginning on 5 December 2017, only work done from 11 January 2018 is set out in the bill. [↑](#footnote-ref-3)
4. With Mr Edward K H Ng. [↑](#footnote-ref-4)
5. See §§1.6 to 0 and Footnotes 3 and 4 above. [↑](#footnote-ref-5)
6. Defendant’s Closing Submissions §56 [↑](#footnote-ref-6)
7. Although the defendant did not settle the Outstanding Bill, she attempted to pay Mr Tam directly by cheque in early September 2018, which Mr Tam properly declined as such direct payment was in breach of the Bar Code. [↑](#footnote-ref-7)