**FACV No. 1 of 2024**

**[2024] HKCFA 27**

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 1 OF 2024 (CIVIL)**

(ON APPEAL FROM CACV NO. 418 OF 2020)

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BETWEEN

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|  | **LUI MING LOK (雷明樂)** | **Plaintiff**  **(Appellant)** |
|  | **and** |  |
|  | **NG IM FONG LORETTA (伍艷芳), the executrix of the estate of  LUI KWAN CHEUNG (雷均祥), Deceased under the Grant of Probate No.HCAG016896/2015** | **Defendant (Respondent)** |

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| Before: | Chief Justice Cheung, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Lam PJ and  Lord Neuberger of Abbotsbury NPJ |
| Date of Judgment: | 16 September 2024 |

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|  | **JUDGMENT ON COSTS** |  |

The Court:

1. On 1 August 2024, the Court handed down its judgment unanimously dismissing this appeal. In paragraph [86] of the Judgment, the Court made an order *nisi* that the costs of the appeal be paid by the plaintiff (appellant) to the defendant (respondent). The Court directed that written submissions be filed within 14 days should any party wish to vary the costs order *nisi* and indicated that the Court would thereafter make a final order on the papers.
2. On 13 August 2024, the respondent filed written submissions seeking orders that:
   1. the appellant do pay to the respondent her costs of and occasioned by this appeal, certified fit for three counsel (save that the leave application before the Court of Appeal should be certified fit for two counsel);
   2. the costs orders of the Court of Appeal and Coleman J dated 14 July 2023 and 22 September 2020 remain; and
   3. the appellant do pay to the respondent costs of this application.
3. The appellant did not file submissions in response to those of the respondent, whether within 14 days of the handing down of the Court’s Judgment, or within 14 days of the filing of the respondent’s submissions, and his solicitors have confirmed to the Court that the appellant does not intend to file any such submissions.
4. Accordingly, as indicated in the Judgment, the Court has proceeded to consider the appropriate final order as to costs on the papers.
5. There is no controversy regarding the incidence of costs either in this Court or below. After the respondent’s strike out application was initially unsuccessful before the Master, she succeeded before Coleman J and, on appeal, before the Court of Appeal. The costs orders made respectively by Coleman J on 22 September 2020 and by the Court of Appeal on 14 July 2023 shall, in consequence, remain undisturbed.
6. Having succeeded again in the final appeal before this Court, the respondent is entitled to her costs of the appeal as against the appellant. We therefore make absolute the order *nisi* that the costs of the appeal be paid by the appellant to the respondent. Those costs will include the costs of the application before the Appeal Committee for leave to appeal, which the Appeal Committee ordered to be costs in the cause.
7. The practice of the Court in respect of the grant or refusal of a certificate for three counsel is well-established.[[1]](#footnote-1) The essential question in the present case is whether the grant can be justified by the presence of something exceptional.
8. The respondent relies on various factors in seeking to justify certification for three counsel. She highlights the fact she has been successful throughout the course of proceedings in the Court of First Instance and the Court of Appeal and also before this Court. She further relies on the view expressed in the Judgment at [20] that, confined to section 20 of the current Matrimonial Causes Ordinance, the respondent’s case seemed “simple and correct” whereas the appellant’s seemed “unattractive and unconvincing”; that the respondent’s stance “accord[ed] with common sense” (see [21]); and that the appellant’s case was “quite unrealistic” in the context of legislation that was “clear as a matter of language and practical and sensible in its effect” and that the appellant’s exercise of examining the background produced “a result which is not merely inconsistent with the natural meaning of the legislation, but eccentric” (see [24] and [26]).
9. The respondent contends that because of the appellant’s insistence on taking what was described (at [78] of the Judgment) as an “archaeological” approach the preparation, complexity and difficulty involved in the appeal was “something exceptional” justifying a team of three counsel. This was fortified, it is submitted, by the fact that the appellant engaged three counsel, two of whom were Senior Counsel, so that the respondent’s team of one Senior Counsel and two junior counsel makes certification of three counsel appropriate on the facts of this case.
10. The Court’s power to grant or refuse a certificate for more than two counsel is a matter of discretion and, regardless of the absence of contrary submissions from the appellant, the Court must nevertheless consider whether to exercise that discretion in favour of the respondent. That discretion should be exercised, so far as it can, consistently from case to case.
11. Taking into consideration other cases in which certificates for three counsel have either been granted or refused,[[2]](#footnote-2) we are not persuaded that this is an appropriate case for such certification and, accordingly, we refuse to certify the case as fit for three counsel. This was not, in our view, a case involving something exceptional in terms of the importance or complexity of the issues that would justify departing from the usual rule, reflecting the underlying objectives of civil procedure in this jurisdiction of increasing the cost-effectiveness of proceedings and promoting reasonable proportion and procedural economy in their conduct, that the costs of counsel in this Court recoverable from an opposing party are limited to the engagement of two counsel.
12. Nor did we find the “tit-for-tat” argument advanced by the respondent persuasive. The mere fact that an opposing party has used a particular number of counsel, or counsel of particular seniority, will rarely be a factor of any material weight in the grant or refusal of a certificate for three counsel.[[3]](#footnote-3) In the present case, the fact that the appellant was represented by three counsel does not lead us to regard this appeal as exceptional.
13. Since the Court has confirmed the costs order that it made on a *nisi* basis in its Judgment and the respondent’s request to vary that order has not succeeded, we decline to include the costs of the preparation of the written submissions on costs as part of the costs of the appeal itself. It is sufficient to record that we make no order as to the costs of the application to vary the costs.
14. For the above reasons, we therefore: (1) make absolute the order that the costs of the appeal to this Court be paid by the appellant to the respondent; and (2) confirm the costs orders below of Coleman J dated 22 September 2020 and the Court of Appeal dated 14 July 2023.

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| (Andrew Cheung)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

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| (M H Lam)  Permanent Judge | (Lord Neuberger of Abbotsbury)  Non-Permanent Judge |

Written Submissions by Ms Audrey Eu SC, Mr Au Lut Chi and Mr Griffith Cheng, instructed by Francis Kong & Co, for the Defendant (Respondent)

Chiu, Szeto & Cheng, for the Plaintiff (Appellant)

1. *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (No 3)* (2016) 19 HKCFAR 142 at [2]. [↑](#footnote-ref-1)
2. Certificates for three counsel granted, see: *Tam Sze Leung v Commissioner of Police* [2024] HKCFA 16 at [8]; *HKSAR v Chen Keen (alias Jack Chen) & Others* [2019] HKCFA 51 at [10]; *Comilang Milagros Tecson & Anor v Director of Immigration* [2019] HKCFA 23 at [5]. Certificates for three counsel refused, see: *HKSAR v Chan Kam Ching* (No 2) (2022) 25 HKCFAR 181 at [23]; *Leung Kwok Hung also known as “Long Hair” v Commissioner of Correctional Services* (No 2) (2021) 24 HKCFAR 23 at [5]; *HKSAR v Cheng Chee-Tock Theodore* (FACC 7/2014, 22 June 2016) at [10]. [↑](#footnote-ref-2)
3. *Fu Kor Kuen Patrick v HKSAR* (FACC 4/2011, 27 August 2012) at [5]; *HKSAR v Pang Hung Fai (No 2)* (2015) 18 HKCFAR 1 at [14]. [↑](#footnote-ref-3)