# DCMP 1372/2020

[2025] HKDC 157

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# MISCELLANEOUS PROCEEDINGS NO. 1372 OF 2020

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IN THE MATTER OF 6th Floor, 11 Wan Lok Street, Hung Hom, Kowloon, Hong Kong (香港九龍紅磡環樂街11號七樓)

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| BETWEEN |  |
| YEUNG WING KWONG (楊永光) | Plaintiff |
| and |  |
| LEE JIA RUI SABRINA LEE (李珈睿), appointed by order dated 6th June 2023 to represent the estate of CHOI WAI KONG (蔡煒光), deceased | Defendant |

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Coram: His Honour Judge Harold Leong in Chambers

Date of Hearing: 9 January 2025

Date of Decision: 26 February 2025

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DECISION

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1. This is the defendant’s Summons for setting aside the default judgement entered by the plaintiff on 23 May 2022 (“the Set Aside Summons”).
2. The plaintiff has already consented to the setting aside of the judgment with unconditional leave to defend and the relevant orders were already given during the hearing. The only issue here is costs: the defendant ask for costs (payable forthwith) while the plaintiff seeks costs be in the cause.

**Background and chronology**

1. This is an adverse possession action. On 14 May 2020, the plaintiff commenced the action by way of Originating Summons to seek, inter alia, a declaration that he had acquired possessory title of the property in question (“the Property”) on or before 31 August 2019. The Property has been resumed by the government so the plaintiff is seeking the declaration in order to obtain the relevant compensation.
2. The Property belonged to Choi Wai Kong, deceased (“Choi Senior”) before land resumption. At the time of the commencement of the action, the registered owner of the Property was Choi Siu Wai Franky (“Franky”) in his capacity as the administrator of the estate of Choi Senior.
3. The plaintiff performed a death search on Franky on 6 August 2020 and the result was negative.
4. On 18 August 2021, the plaintiff obtained an order for substituted service of the Originating Summons (“the 1st Substituted Service Order”).
5. The plaintiff has complied with the 1st Substituted Service Order by way of: i) an ordinary post sent on 24 August 2021 to the last known address of Franky, and ii) inserting an advertisement of a notice of the proceedings in a local Chinese newspaper on 5 November 2021.
6. Unknown to the plaintiff, Franky passed away on 23 August 2021, one day before the plaintiff effected the service.
7. Thus, there is no question that the service was rendered irregular under the circumstances.
8. For the Notice of Hearing for the Originating Summons, the plaintiff applied for a second substituted service and this was granted on 10 May 2022 (“the 2nd Substituted Service Order”) and this was executed by way of inserting an advertisement of a notice of the proceedings in a local Chinese newspaper on 16 May 2022.
9. On 23 May 2022, judgment in default was entered by this court.
10. Franky’s widow, Lee Jia Rui Sabrina (“Sabrina”) first became aware of these proceedings and judgement on 14 February 2024 via communication with the Lands Department. These events were documented in paragraphs 7-17 of the Affirmation of Sabrina, hearing bundle p. 51-53) which was made in support of an application to appoint her (in place of Franky) to represent Choi Senior for the current proceedings.
11. This was granted on 6 June 2023 and thus Sabrina became the defendant in the current proceedings (“the defendant”).
12. The defendant applied to set aside the default judgment on 19 April 2024. The plaintiff’s solicitors wrote on 28 May 2024 agreeing to set aside but the parties continued to negotiate various conditions. In the end, the parties have managed narrowed down their dispute to just the issue on costs, and the defendant issued a Summons to amend the Set Aside Summons on 12 July 2024.
13. I have already given the relevant orders as agreed by the parties. The costs of both summons is therefore the only issue here.

**Legal Principles**

1. Mr. Aidan Tam, counsel for the defendant, took the court to the following paragraph in the Hong Kong Civil Procedure 2025:

*“Costs of setting aside an irregular judgment – The usual costs order is for the plaintiff to bear his own costs of signing the irregular judgment and further to pay the defendant’s costs of the application to set aside judgment (Hughes v. Justin [1894] 1 QB 667…*

*…The mere making of an order that the costs of the application to set aside an irregular judgment be costs in the cause was held to be improper as having in effect impose a term on the defendant and qualified or subtracted from his absolute right to have the judgement set aside (White v Western [1968]…)*

*…The court, however, retains a discretion as to costs in that terms might be imposed as a condition of giving costs to the defendant (Hughes v Justin (above) where the defendant was awarded costs on the condition that no action was brought by him in respect of the irregular judgment).” (paragraph 13/9/11)*

1. This approach has been adopted by Deputy High Court Judge Martin Hui SC in *To Kwan Ho and Li Kwok Hoi v Deputy Registrar of the High Court and Director of Legal Aid* HCAL 895/2019, under paragraph 57 of the Decision.
2. It is also important to consider the general principles regarding the award of costs:

*“Usually, a judicial officer would start from the assumption that “costs should follow the event”, which is to say that the losing party should pay for the costs incurred by the winning party, not because there is such a rule, but because in the vast majority of scenarios that would be the fair, just and most appropriate order.”* (*Pacific Ace Finance Limited V Delay, Gilda H* [2023] 4 HKC 424, [2023] HKDC611)

1. However, one must also bear in mind *“the most important principle”* regarding the court’s discretion regrading costs (again from the Pacific Ace case):

*“the most important principle is that a judicial officer has a wide discretion on matters concerning costs, but the discretion must be exercised judicially.”*

1. My interpretation of paragraph 13/9/11 from Hong Kong Civil Procedure is that it is no more than re-stating the general assumption of *“costs should follow the event”*. I do not think that the case laws cited there meant to restrict or fetter the discretion of the court under the *“most important principle”* regarding costs.
2. Indeed, when one reads into the judgment of *Hughes v Justin*, it is clear that the court has considered the issue of culpability when awarding costs: here the plaintiff signed the judgment when he knew full well that the claim was already settled and the agreed sum paid. It would therefore be *“fair, just and appropriate”* that he should pay for the costs of the defendant in the setting aside proceedings.
3. On the other hand, in *White v. Weston*, the defendant has moved address but somehow, and in accordance to whatever service procedures in practice at the time in UK, a local court was tasked with effecting service. The bailiff of that local court was unable to meet the defendant but still stated that the defendant *“resides at the address given and would get summons by post”*.
4. To cut a long story short, a judge set aside the default judgment but ordered that the costs should be costs in the cause. It is of note that one of the grounds of appeal was that the judge *“did not exercise his discretion judicially in making an order in all the circumstances of the case”* (p.650 at D to E of the decision).
5. It was found that the order for *“plaintiff’s costs in the cause”* was wrong because the defendant should have absolute right to set aside the judgment under the circumstances so ordering costs in the cause would be subtracting from this absolute right by imposing a term (p.659 at E). As such, this order for costs in the cause was set aside on appeal.
6. This was clearly a correct decision. As I see it, the court found no culpability on the part of neither the plaintiff nor the defendant. The judgment should be set aside *as of right* so plaintiff’s costs in the application for setting aside should not be paid by the defendant under any circumstances. Thus, a no order as to costs was the fair and just decision after considering all the circumstances.

**Consideration**

1. In the current case, Mr. Tam conceded that there was no issue of culpability on the part of the plaintiff in irregular service in the execution of the 1st Substituted Service Order.
2. I agree: the plaintiff has conducted a death search and up to the time when the court granted the 1st Substituted Service Order, Franky was still alive.
3. However, Mr. Tam argued that there was material non-disclosure on part of the plaintiff in his ex-parte application for the 2nd Substituted Service Order (the “2nd ex-parte Application”). If the plaintiff performed an updated death search, it would be clear that Franky had passed away.
4. There is no dispute regarding the duty of *“full and frank disclosure of all material facts”* with *“the highest good faith”* for an ex-parte application:
   1. The applicant must not only make disclosure of material facts known to him, but to disclose any additional material facts which he would otherwise be aware of by way of *“proper”* enquiries.
   2. *“Material”* facts means all matters which are material for the judge to know which are necessary to enable him to consider in the weighing operation for properly exercising his discretion.
   3. The extent of what constitute *“proper”* enquiries would depend on all the circumstances of the case.

(Hong Kong Civil procedure 2025 Vol.1 paragraph 29/1/51, *Sin Yuk Hung v Sin Tung San* HCA 474/2013, paragraphs 94 to 95 of the Decision of Deputy High Court Judge Marlene Ng (as she then was) on 18 December 2013)

1. Turning to the circumstances of this case, the plaintiff performed a death search on 6 August 2020. It was negative. When the plaintiff applied for the 1st Substituted Service Order on 18 August 2021 which was just about 1 year later, there should not be an issue of not disclosing material facts: it would be unlikely that a person passed away within just one year.
2. As above, there is no dispute on the issue of culpability at this stage.
3. Indeed, with hindsight, even if the plaintiff performed an updated death search on 18 August 2021, the result would still be negative.
4. After obtaining the 1st Substituted Service Order, the plaintiff did not delay but complied with it 6 days later on 24 August 2021.
5. Of course, we now know that Franky unfortunately, and by pure coincidence, passed away on 23 August 2021. As such, there was no acknowledge of service.
6. I accept the plaintiff’s submission that, under such circumstances, there was no requirement of service of the Notice of the hearing of the Originating Summons under Order 65, rule 9. However, the plaintiff took out the 2nd ex-parte Application anyway and obtained the 2nd Substituted Service Order on 10 May 2022.
7. Thus, the crucial question is whether the circumstances of this case required the plaintiff to perform an updated death search in May 2022 at the 2nd ex-parte Application as a *“proper”* enquiry to ensure material disclosure.
8. The defendant raised the argument that this was some 20 months after the first death search and thus an updated search was a *“proper”* enquiry.
9. However, I do not think that this argument is fair.
10. The plaintiff posted the Originating Summons 6 days after obtaining the 1st Substituted Service Order. There was no delay. As such, when there was a default of acknowledgement of service, any reasonable person would not have suspected that Franky had passed away exactly during this short period of time.
11. Indeed, had Franky been alive for just a few more days, there would have been a good argument for deemed proper service.
12. In other words, the only scenario that would have rendered the 1st Substituted Service irregular was, similarly, the improbability that Franky passed away within a period of around 1 year after the death search.
13. Under the circumstances (as far as the plaintiff was aware of), there would have been no need to apply for the 2nd Substituted Service Order under Order 65 rule 9. Despite this, the plaintiff proceeded with it anyway. The plaintiff was being perfectly fair in allowing a further opportunity for Franky to respond to the newspaper publication.
14. Clearly, the plaintiff did not know (and would not have reasonably suspected) that Franky had passed away exactly during that period of time. As such, there was no reason why the plaintiff should be alerted that there was a need to do an updated death search after the apparent default of acknowledgement of service.
15. As such, if the plaintiff could not be held culpable for not doing an updated death search before the 1st Substituted Service Order was obtained, he could not be held culpable for not doing the same *after* the apparent default of acknowledgement of service (which was shortly after the compliance of the 1st Substituted Service Order).
16. There were further arguments regarding the conduct of the parties during the negotiation phase. I need not dive into details of the correspondence but I am of the view that although the plaintiff’s solicitors wrote on 28 May 2024 agreeing to set aside, both parties have taken time to negotiate and agree on the other conditions. I do not find any obvious unreasonable conduct or delay on the part of either party during the process.

**Conclusion**

1. I find no blame on either party in the Set Aside Summons (and the consequent Summons to amend the Set Aside Summons on 12 July 2024) which was the unfortunate result of a very improbable event.
2. The most just and appropriate cost order under the circumstances would therefore be that the court would not give any order as to costs.

(Harold Leong)

District Judge

Mr Lewis Lam, instructed by Messrs Vitus Lawyers, for the plaintiff

Mr Aidan Tam, instructed by Messrs CHOW & CHOW SOLICITORS, for the defendant