## DCPI 1503/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1503 OF 2007

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| BETWEEN | CHAN WAI TUNG | Plaintiff |
|  | and |  |
|  | TANG KWOK KWONG | 1st Defendant |
|  | KWOK LEUNG formerly trading as  kam hing engineering Company | 2nd Defendant |
|  | kin wo construction machinery limited | 3rd Defendant |
|  | and |  |
|  | kwoK leung formerly trading as  KAM HING ENGINEERING COMPANY | Third Party |

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Coram : Her Honour Judge Mimmie Chan in Chambers (open to public)

Date of hearing : 27 September 2010

Date of handing down Decision : 29 October 2010

# DECISION

**Background**

1. This is an application by the 3rd Defendant ("**KW**") for variation of the costs order which I made when handing down Judgment in this action on 22 April 2010, whereby the Plaintiff ("**Chan**")'s claims against KW were dismissed and KW's costs of the action were ordered to be paid by Chan. By a summons issued on 6 May 2010 (subsequently amended), KW applied for an order that Messrs. Hau, Lau, Li and Yeung ("**HLLY**"), the solicitors formerly acting for Chan, and/or counsel for Chan should bear half of the costs from 19 March 2009 (when HLLY served the trial bundles) until the date of the Judgment as wasted costs ("**Wasted Costs Order**").
2. The application for the Wasted Costs Order was prompted by the observations I made in the Judgment when dismissing Chan's action against KW, that I could not discern any factual basis for Chan's legal advisers, when preparing the Statement of Claim filed in the action, to claim that KW was in breach of its statutory duties under s.7 of the Occupational Safety and Health Ordinance ("**s.7**") and under regulation 38A of the Construction Sites (Safety) Regulations ("**regulation 38A**"), or in breach of its common law duty as occupier to Chan.
3. On 22 September 2010, Mr. Lee of HLLY filed an affirmation, to say that Chan had refused to waive privilege, and that HLLY therefore was not in a position to adduce any factual evidence to support its opposition to the application for the Wasted Costs Order.
4. Order 62 rule 8B provides that the Court should consider whether to make a Wasted Costs Order in two stages. Counsel for HLLY, in their valiant defence, submits that in the first stage of this consideration, there is no evidence which, if unanswered, would be likely to lead to the Wasted Costs Order being made, and that even if the Court should proceed to the second stage, it is not appropriate to make the Wasted Costs Order by reason of Chan's refusal to waive privilege, as HLLY are not able fully to present their case.

**Is there evidence or other material which, if unanswered, would be likely to lead justifiably to a Wasted Costs Order being made?**

1. The gravamen of HLLY’s case, as submitted by Counsel, is that even if a solicitor is negligent in the conduct of proceedings by pursuing a hopeless or doomed cause, a Wasted Costs Order cannot be made at the first stage of the Court's consideration, as negligence is not sufficient to form the basis of a Wasted Costs Order. Counsel relies on s.53 of the District Court Ordinance (the equivalent of s.52A of the High Court Ordinance), which defines "wasted costs" as any costs incurred by a party as a result of (a) an improper or unreasonable act or omission; or (b) any undue delay or other misconduct or default on the part of the legal representative. Counsel further relies on *Dolphin Advertising Ltd. v. Tronken Enterprises Ltd.* [2010] 1 HKC 138, in which the Court held that an error of judgment by solicitors or a failure to apply any judgment at all, rendering a weak case hopeless, was not conduct which s.52A was intended to address.
2. The distinction between the language used in s.53 of the District Court Ordinance and that used in s.51 (7) of the English Supreme Court Act 1981 was emphasized by Counsel for HLLY, and by Harris J in *Dolphin Advertising*, supra. Whereas s.53 of the District Court Ordinance refers to ***improper or unreasonable*** act or omission, undue delay or other ***misconduct or default***, the English Supreme Court Act defines "wasted costs" to mean any costs incurred by a party as a result of any "***improper, unreasonable or negligent act or omission***" of the legal representative.
3. In my view, the remarks made by Harris J in *Dolphin Advertising*, when dismissing the application for a wasted costs order on the ground that the solicitors' conduct in question was ***not*** conduct which was intended to be addressed by s. 52A of the High Court Ordinance, should be properly read in their context. The conduct which the Court was considering in *Dolphin Advertising* was, to use the learned judge's own words, "an error of judgment by solicitors or a failure to apply any judgment at all" to a case for which they are responsible, which renders a weak case hopeless. The Court accepted in that case that there was no evidence that the solicitors were assisting in the continued prosecution of the action for some ulterior motive, or in advancing a case that they thought was misconceived, but only a prima facie case of a failure by the solicitors to bring the care and judgment expected to the proceedings, or of negligence or incompetence.
4. The real test, which is not at all disputed in *Dolphin Advertising*, is to consider whether there is in each case any "improper" or "unreasonable" act or omission as referred to in s. 53 (5) (a) of the District Court Ordinance, as such behavior has been characterized by the courts, and whether there is any other "misconduct or default" as referred to in s. 53 (5) (b).
5. Counsel for HLLY has stressed that the courts have made it clear in *Ridehalgh v. Horsefield* [1994] Ch 205 and in *Medcalf v. Mardell* [2003] 1 AC 120 that a legal representative is not to be held to have acted improperly, unreasonably or negligently by the mere fact of his pursuing a hopeless case which is plainly doomed to fail. However, if they assist in the continued prosecution of the action for some ulterior motive, or pursue a case known to be dishonest or is an abuse of the process, there is obviously improper or unreasonable conduct, or misconduct to justify a wasted costs order (*Ma So So v. Chan Yuk Lun* [2004] HKLRD 294).
6. "Improper" conduct has been held to mean conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct, as well as conduct which would be regarded as improper according to the consensus of professional and judicial opinion, whether or not such conduct violates the letter of a professional code (*Ridehalgh v. Horsefield*, [1994] Ch 205, at 232). It does not require proof of bad faith (*Medcalf v. Mardell* [2003] 1 AC 120, at 139).
7. "Unreasonable" has been explained in *Ridehalgh* to mean conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case (whether such conduct be the product of excessive zeal or improper motive), the test being "whether such conduct permits of a reasonable explanation".
8. Although it is rare to find legal representatives taking actual involvement in assisting the advancement of a false case to mislead the court, as in *Ma So So* 's case (supra), unreasonable or improper conduct and misconduct should not be confined to such extreme cases. In *Persaud v. Persaud* [2003] EWCA Civ 394, the English Court of Appeal makes it clear that the jurisdiction of the Court to make wasted costs orders against solicitors is founded on the solicitor's breach of his duty to the Court as an officer of the Court. In *Yau Chiu Wah v. Gold Chief Investment Ltd.* [2003] 3 HKLRD 553, Ma JA (as he then was) when dealing with an application for a wasted costs order clearly recognized that the exercise of the Court's jurisdiction to order a solicitor to pay costs personally under Order 62 rule 8 does ***not*** depend on dishonesty, personal obliguity or behavior such as would warrant disciplinary action being taken, and that while mere mistake or error of judgment may not necessarily be enough, "misconduct, default or even negligence which is serious or gross" may be sufficient.
9. Counsel for HLLY submits that cases decided before the Civil Justice Reforms ("**CJR**") should be reviewed or considered with caution after the CJR, and that Harris J’s decision in *Dolphin Advertising* (supra) is more illuminating as to when wasted costs orders are appropriate. The provisions of Order 62 rule 8 existed before the CJR. I consider the Court's decision in *Yau Chiu Wah* on the language used in Order 62 rule 8, which remains unchanged after the implementation of the new rules under the CJR, and on misconduct and default in particular, to be just as relevant and useful after the CJR. The most that can be said by way of comparison to the English rules is that negligence has not been expressly included in Order 62 rule 8.
10. The facts of the case which came before me at trial are quite unique.
11. The Statement of Claim pleads that KW was in breach of s.7 and regulation 38A. For the purposes of s.7, Chan had to establish that KW was the occupier of the premises where Chan had worked, that KW had failed to ensure that such premises, the means of access to and egress from the premises, and any plant or substances kept at the premises were safe, and that Chan was injured as a result of KW's failure.
12. For the purposes of regulation 38A, Chan must establish that KW was the contractor responsible for the construction site in question, that KW had failed to ensure that "suitable and adequate safe access to and egress from every place of work on the site is provided and properly maintained", and that Chan was injured as a result of KW's failure.
13. In addition, Chan also relied on KW’s breach of occupier’s duty towards Chan. This naturally entailed proof that KW had occupational control of the place where Chan was working and injured.
14. The Plaintiff, Chan, had limited evidence to give in this action. According to the Statement of Claim and Chan's witness statement, he was working all along in the first construction site ("**1st Site**"), and he was injured when working in the 1st Site. According to the independent investigation report and evidence of the Labour Department ("**Independent Report**"), KW and its subcontractor, the 2nd Defendant, were contractors doing work in a separate construction site ("**2nd Site**"), and had caused a metal pole which was implanted in the government land situated between the 1st Site and the 2nd Site to fall onto Chan, injuring him as a result. According to the Independent Report which was available to Chan and his legal advisers before the commencement of proceedings, and which was never disputed in the proceedings, the accident occurred when Chan was in the 1st Site, the metal pole was on government land, and the 2nd Defendant (KW's subcontractor) was operating an excavator on the 2nd Site to remove the metal pole.
15. At trial, KW was found not to be liable to Chan, as KW was never the occupier of the 1st Site where Chan worked and was injured, nor the occupier of the government land where the metal pole was implanted and from which it was extracted whilst the 2nd Defendant worked in the 2nd Site. This is ***not*** a case in which Chan, the 2nd Defendant and KW gave conflicting evidence at trial, and KW succeeding as a result of the Court preferring the Defendants' evidence over Chan's evidence. This is ***not*** a case of a party putting the other to proof of the latter's allegations, and the Court accepting that the case has been proved. This is ***not*** a case of Chan presenting some evidence of KW and the 2nd Defendant's occupation of the 1st Site or the government land or any access to and egress from the government land or the 2nd Site occupied by KW, but the Court rejecting such evidence as unreliable, or insufficient to show KW's occupational control. Nor is this a complicated case of whether the facts as instructed by a lay client are reasonably sufficient to support a prima facie case of fraud. This is just a simple matter of where Chan was physically, and where the 2nd Defendant and KW's employees were working at the time of the accident. From the time when the Statement of Claim was prepared and the proceedings commenced, Chan never had nor presented any evidence that KW or the 2nd Defendant were in occupation or in control of either the 1st Site where Chan had worked and was injured, or the government land where the metal pole was extracted. If Chan had any such evidence, he would have so stated it in his witness statement. He never did. Nor did he so assert when he gave evidence at trial. The Independent Report stated that the metal pole was on government land between the 1st Site and the 2nd Site, that Chan was working on the 1st Site and the 2nd Defendant was working on the 2nd Site at the material time of the accident. There was naturally nothing in the Defendants' statements that they were occupying or controlling either the 1st Site or the government land.
16. Paragraph 5.02 of the Guide to Professional Conduct issued by the Law Society of Hong Kong ("**Guide**") provides that a solicitor must not act or must cease to act, where to do so would involve him in professional misconduct. Paragraph 5.14 of the Guide states that it is an implied term of a solicitor's retainer with his client that a solicitor is under a duty, at all times, to observe the rules of professional conduct. A solicitor must therefore not breach the principles of professional conduct in order to benefit his client. Paragraph 6.01 of the Guide provides that a solicitor owes his client a duty to be competent to perform any legal services undertaken on the client's behalf. Under paragraph 10.18 of the Guide, a solicitor must inform his client if a proposed or continuing action has no prospect of success as a matter of law.
17. There can be no doubt that as an officer of the Court, a solicitor owes duties to the Court not to mislead the Court, not to abuse the Court process and now, expressly under Order 1A rule 3, to assist the Court to further the underlying objectives of the Rules of Court: to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court, to ensure that a case is dealt with as expeditiously as is reasonably practicable, and to ensure that the resources of the Court are distributed fairly.
18. I considered and maintain that there is material to show that HLLY, the solicitors who had prepared and filed the Statement of Claim, had acted in breach of their duties as officers of the court not to present and plead a case on the basis of KW's occupation and control of either the place where Chan worked, or the place where the 2nd Defendant operated the excavator which caused the metal pole to collapse and fall onto Chan, if there is no reasonable basis to make such a plea or claim. To maintain such a plea and to continue the claim of breach of s.7 and regulation 38A is conduct which misleads the Court that there is a reasonably arguable cause of action based on breach of statutory duties. It is in breach of the Guide which requires a solicitor not to act or to cease to act where to do so would involve him in professional misconduct (reference can be made to *Richard Buxton Solicitors v. Mills-Owens* [2010] EWCA Civ 122). It is arguably in breach of the implied term of the solicitor's retainer to act competently. It is akin to gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy (para 62/8/1 Hong Kong Civil Procedure 2010). It brings into question whether the solicitor was in breach of his duty under the Guide to inform his client if a continuing action has no prospects of success as a matter of law. It certainly defeats the solicitor's duty to assist the Court to further the underlying objectives of the Rules of the Court. A solicitor acting in breach of his duties as an officer of the Court should, by the consensus of professional and judicial opinion, be rightfully stigmatized as "improper" conduct, and serious professional misconduct. This is not a case of a mere error of judgment or failure to apply any judgment at all, thus rendering a case hopeless to pursue (of the type considered in *Dolphin Advertising)*, nor a case of procedural irregularity (of the type considered in *CTT & KYK v. SLWE & Others* FCMP 228 /2009, unreported, 9 September 2010). If unanswered, the conduct of HLLY would be likely to lead to a Wasted Costs Order being made.
19. I am hence satisfied, at the first stage of the Court's consideration under Order 62 rule 8B, that there is material upon which a Wasted Costs Order may be made. Unnecessary costs were wasted as a result of, inter alia, part of the trial and submissions having to be spent on the questions of whether, by virtue of the work and activities of the 2nd Defendant and KW’s employees, KW can be said to have been in occupational control or responsible for the government land adjacent to the 2nd Site, or the area where Chan was working at the time of the accident.

**Whether it is appropriate to make the Wasted Costs Order**

1. The next stage of the consideration under Order 62 rule 8B presents more difficulties.
2. In *Medcalf v. Mardell* [2003] 1 AC 120, the House of Lords allowed an appeal against the wasted costs orders made by the Court of Appeal. It was emphasized that since wasted costs orders have a penal effect against whom they are made, solicitors and counsel are entitled to defend themselves against the making of the orders. When, due to legal professional privilege, legal representatives are unable to defend their conduct of a case by revealing their instructions and other relevant material, the Court should not make the wasted costs orders unless, proceeding with extreme care, the Court can say that it is satisfied that there is nothing that the legal representatives could, if unconstrained, have said to resist the order, and that it is in all the circumstances fair to make the order. It was emphasized by the House of Lords that in the absence of the full facts due to the lay client's refusal to waive privilege, the Court is not entitled to speculate and infer that there could not have been any material upon which the legal representatives could have been justified in taking their course of action, and that the benefit of the doubt has to accrue to the legal advisers.
3. The part of the judgment of the Court of Appeal in *Ridehalgh v. Horsefield* [1994] Ch 205, at 237 has often been cited :

*"Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."*

1. Lord Bingham of Cornhill further adds in *Medcalf v. Mardell* (supra) at p. 135:

*"But with the benefit of experience over the intervening years it seems clear that the passage should be strengthened by emphasizing two matters in particular. First, in a situation in which the practitioner is of necessity precluded (in the absence of any waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another…*

*Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based. The second qualification is no less important. The court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so. … Even if the court were able properly to be sure that the practitioner would have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied."*

1. I have expressed in the earlier parts of this Decision that the facts of this case are perhaps more unusual. I come very close to saying that even making full allowance for the inability of HLLY to tell their whole story, I have no doubt that in the situation of this case, there could have been no instructions from Chan or any material which could have supported Chan’s claim that KW was in control or occupation of the 1st Site or the government land, other than Chan’s and HLLY's benevolent hope that something may emerge when the witnesses of the 2nd Defendant or KW are cross-examined on their evidence in Court. Even if Chan had been advised by HLLY on his hopeless case, and Chan had agreed or insisted that the pleas of KW’s occupier’s liability and breach of s.7 and regulation 38A should be made and the claims continued as a form of "fishing expedition" and to buy time, this could not have absolved HLLY from their breach of their duties as officers of the Court. However, the House of Lords in *Medcalf v. Mardell* (supra) have warned against the court drawing inferences, and it is to be assumed (when privilege is not waived by the lay client) that in all respects, legal representatives are acting on the express instructions of their lay clients.
2. Even if I should have no doubt that HLLY's conduct of launching or continuing the case of breach of statutory duty and/or occupier’s liability is quite plainly unjustifiable or constitutes misconduct such that it can be appropriate to make a Wasted Costs Order, what I cannot safely say is that there is nothing which can be said by HLLY, if unconstrained by legal professional privilege, which will influence the exercise of my discretion as to the making of the Wasted Costs Order sought. These are indeed exacting conditions, and I can only conclude that it is not appropriate to make the Order, given the constraints of legal professional privilege under which HLLY are placed.

**Conclusion**

1. I have to decline KW's application for the Wasted Costs Order.
2. On the question of costs, however, these are within my discretion and I am still entitled to consider the conduct of HLLY. I have concluded at the first stage of the consideration under Order 62 rule 8B that they do have a case to answer for their conduct. The Wasted Costs Order is declined only because any benefit of the doubt, of whether they were justified to proceed with the claims made for breach of statutory duties and occupier’s liability, has to be given to HLLY because of Chan's refusal to waive legal professional privilege. Having considered all the relevant circumstances of this case, I consider that KW and HLLY should each bear its own costs incurred in this application.

(Mimmie Chan)

District Judge

*Mr. Clark Wang, instructed by Messrs. K.B. Chau & Co., solicitors for the 3rd Defendant*

*Mr. Frederick H.F. Chan, instructed by Messrs. Hau, Lau, Li & Yeung, former solicitors for the Plaintiff*