DCPI 2647/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2647 OF 2007

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BETWEEN

TAM WAI CHUN Plaintiff

and

CHOI SUI KWONGDefendant

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Coram: Deputy District Judge Frederick HF Chan (in Chambers open to public)

Date of hearing: 29th January 2009

Date of handing down reasons for decision: 6th February 2009

**REASONS FOR DECISION**

**Leave to appeal**

1. On 6th October 2008, I handed down a reserved written judgment and thereby dismissed with costs the Plaintiff’s claims for damages for personal injury in respect of a traffic accident which happened on 7th January 2005 (“***the Judgment***”). The Judgment was a judgment on the *merits* of the Plaintiff’s claim after trial. I shan’t repeat what I have said in the Judgment.

**Legal framework**

1. The Plaintiff is dissatisfied with the Judgment and now seeks leave[[1]](#footnote-1) of the District Court to appeal to the Court of Appeal on the following aspects:

(a) The dismissal of the Plaintiff’s claims with costs;

(b) The PSLA Award of HK$80,000;

(c) The costs order against the Plaintiff made on 2nd October 2008 in relation to the Plaintiff’s application for recusal.

1. Regarding limb (c) of the Plaintiff’s application for leave to appeal, I can recall quite vividly that at the trial hearing before me on 2nd October 2008 when I dismissed the Plaintiff’s application to have me recused from the trial on the grounds of apparent bias. There and then, the Defendant (through his counsel, Mr. Victor T. Gidwani) applied for costs of the recusal application to be paid by the Plaintiff. Mr. Simon H. W. Lam (the trial counsel for the Plaintiff) immediately submitted to me that:

“I cannot resist the costs of the application”.

1. It was on that basis that at the end of the recusal application, I ordered the costs of the recusal application to be paid by the Plaintiff to the Defendant with a certificate for counsel.
2. The proposed appeal was made by the Plaintiff pursuant to:

(a) section 63 of the **District Court Ordinance** (Cap. 336) (“*DCO*”) which stipulates that:

“**Appeals to Court of Appeal**

(1) … an appeal can, with leave, be made to the Court of Appeal from every judgment, order or decision of a judge in any civil cause or matter.

(2) An appeal is subject to the rules of court”;

(b) Section 14 of the **High Court Ordinance** (Cap. 4):

“(3) No appeal shall lie …

1. Without the leave of the court … from an order of … any other court … made … ***with the consent of the parties or relating only to costs*** which are left to the discretion of the court …” (emphasis added).12
2. The **Rules of the District Court** (Cap. 336, Sub. Leg.) (“*RDC*”) provided relevantly that:

“**2. Appeals to Court of Appeal** (O. 58, r. 2)

… Subject to the provisions of this rule, an appeal lie to the Court of Appeal from any judgment, order or determination of a judge … Subject to the provisions of the Ordinance [*DCO*], an appeal under this rule shall lie with the leave of the Court or the Court of Appeal”.

1. In **King Royal Ltd. v. Lam Kwan Yuk** [2005] 3 HKLRD 488 (“*the King Royal’s Case*”), the Vice-president of the Court of Appeal, Mr. Justice Rogers laid down the following guidance on the granting of leave of appeal by the District Court to the Court of Appeal:

(a) The existing provisions of DCO and RDC do *not* require an intended appellant to file a notice of appeal and specify the grounds of appeal (see: §6);

(b) If leave to appeal is granted by the District Court Judge, there is *no* power on the District Court Judge to make an order to restrict the grounds of that particular appeal and the leave to appeal so granted would, to all intents and purposes, be a *general* leave to appeal (see: §13);

(c) It will then be up to the appellant (who has succeeded in obtaining the leave to appeal from the District Court Judge) to formulate the grounds of appeal as best as he/she can; ultimately, it would be up to the Court of Appeal to scrutinize and determine the grounds of appeal advanced at the substantive hearing of the civil appeal (see: §13);

(d) It is *not* mandatory but often useful for the District Court Judge, when granting the leave to appeal, to give an indication as to why leave to appeal to the Court of Appeal was granted (see: §13).

1. It seems that, with the advent of the forthcoming **Rules of the District Court (Amendment) Rules 2008**, the *King Royal*’s Case will remain good law.

**The extant threshold**

1. Section 63 DCO does not specify the threshold test which the intended appellant has to satisfy before the District Court Judge may grant the leave to appeal to the Court of Appeal.
2. In the HKSAR, the legal threshold under section 63 DCO was first propounded by Mr. Justice Arthur Leong JA (as the Chief Judge of the High Court then was) in the *ex tempore* judgment of **Ma Bik Yung v. Ko Chuen**, HCMP4303/1999, 8th September 1999 (“*the Ma Bik Yung’s Case*”).
3. There, the applicant was a taxi driver who, due to his permanent disability, could not lift heavy objects. The respondent was a doctor in sociology who was paraplegic and bound to a wheel-chair. On the fateful day in question, the respondent hailed the applicant’s taxi and asked him to help her to load her wheel-chair into the taxi’s boot. He refused and quarreled with her. With the assistance of the Equal Opportunities Commission, the respondent issued legal proceedings before the District Court for disability discrimination and harassment under the **Disability Discrimination Ordinance** (Cap. 487) and won before Her Honor Judge H. C. Wong[[2]](#footnote-2). Dissatisfied, the applicant wished to take the case to the Court of Appeal and engaged Mr. Wong Yan Lung (as the Secretary of Justice then was) as his counsel[[3]](#footnote-3).
4. The grounds of appeal were that the trial judge did not properly assess the credibility of the respondent, failed to consider the inherent improbability of the respondent’s story and applied the wrong test.
5. Her Honor Judge HC Wong refused to grant leave to appeal and the applicant took the case to Leong JA. in HCMP4303/1999 to renew his application for leave to appeal. Mr. Justice Leong JA. granted him leave to appeal and stated:

“Both counsel for the applicant and counsel for the respondent have submitted lengthy written skeleton arguments and authorities in support of their respective cases. But I do not think it is necessary for me to consider these details which should better be reserved for the appeal proper. ***What is required for the purpose of this application is for the applicant to show that he has an arguable case with reasonable chance of success on appeal***. The authority on this should be found in the case cited by Mr. Wong for the applicant, the case of *Smith v. Cosworth Casting Processes Ltd.* [1997] WLR 1538 in which Lord Woolf provided that following guidance:

“1. The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word “realistic” makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

1. The court can *grant* the application even if it is not satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying”.

Having considered the judgment and the findings of the Judge and the grounds submitted by the applicant and having heard the arguments from both sides, I am unable to say that this is a case which does not come within the jurisdiction of this court to grant leave and I see no reason that leave of the appeal should not be refused. Accordingly I grant leave to the applicant to the Court of Appeal and the costs of this application should be costs in the appeal”[[4]](#footnote-4).

1. Pausing here, it is crucial to focus on the fact that in the *Mak Pik Yung*’s Case:

(a) Whilst Mr. Justice Leong JA stated the question to be:

“What is required for the purpose of this application is for the applicant to show that he has an arguable case with ***reasonable*** chance of success on appeal”;

(b) His Lordship then proceeded to pose the test thus:

“I am unable to say that this is a case which does not come within the jurisdiction of this court to grant leave and I see no reason that leave of the appeal should not be refused”;

(c) In doing so, his Lordship was obviously *not* adding a gloss to but was faithfully *applying* the *Smith*’s test of realistic prospect of success as set out in the *Smith*’s case:

“The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. ***This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case***”.

**CJR- the new test**

1. In the HKSAR, because of the Civil Justice Reforms which are well in the pipeline, the *Smith*’s test of “realistic prospect of success” would (in due course) be completely revamped and overtaken by the much more stringent test of “reasonable prospect of success” under section 63 of the **District Court (Amendment) Ordinance 2008[[5]](#footnote-5)** which will provide:

“(2) Leave to appeal shall not be granted unless the judge … or the Court of Appeal hearing the application for leave is satisfied that –

(a) The appeal has ***a reasonable prospect of success***; or

(b) There is some other reason in the interests of justice why the appeal should be heard”.

1. The report of **Smith v. Cosworth casting Processes Ltd. (Practice Note)** which appeared in [1997] 1 WLR 1538 was only the excerpts and the full judgment was unreported in the Official Law Reports (see: **Smith v. Cosworth Casting Process Ltd.** [1997] EWCA Civ. 1099[[6]](#footnote-6)).
2. There, the plaintiff suffered an industrial accident on 27th August 1990 and issued legal proceedings in the county court. He obtained a default judgment against the defendant with damages to be assessed. The plaintiff and defendant later agreed to set aside the default judgment. However, procedural skirmishes and confusions followed concerning the filing date of the defence which culminated in the plaintiff’s claim being automatically struck out by the county court. The plaintiff pursued *interlocutory appeals* to the English Court of Appeal[[7]](#footnote-7).
3. On the basis of a paper application, Lord Justice Otton granted *ex parte* leave of appeal to the plaintiff on 17th September 1996 and the defendant took out an application to set aside the leave of appeal. The defendant’s application to set aside the leave to appeal was dismissed by the English Court of Appeal (Lord Woolf MR, Peter Gibson and Swinton Thomas LJJ.) on 26th February 1997.
4. Lord Woolf MR[[8]](#footnote-8) (with the concurrences of Peter Gibson and Swinton Thomas LJJ.) took the opportunity to laid down guidance and went on to state in **Smith v. Cosworth Casting Process Ltd. (Practice Note)** [1997] 1 WLR 1538 (“*the Smith’s Case*”), 1538-1539:

“… I only add to what has been said in order to give some general guidance as to applications for leave to appeal … The guidance which I propose to set out is largely a matter of common sense. It was because it was appreciated that this application might make it appropriate to give general guidance, that it has been heard by a three-judge court whereas normally an application of this nature would be heard by two Lords Justices only. The guidance is as follows …

3. When leave is refused, the court gives reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave. There may be only one issue that the judge or judges giving leave felt it was necessary to draw to the attention of the parties and the court hearing the appeal. It is a misconception to assume that, because only one aspect of the proposed appeal was mentioned in any reasons which were given, leave was granted under a misapprehension that there were no other issues to be determined on any appeal unless the reasons make this clear.

4. When leave is granted, the applicant does not need to know more that that he has the leave which he needs and therefore that he is entitled to proceed with the appeal …”[[9]](#footnote-9).

1. Mr. Simon Lam for the Plaintiff relied on the *Hong Kong Civil Procedure 2009* where in Volume 1, p. 945, paragraph 59/14/7, the learned editors commented that:

“**Circumstances in which leave will be granted** – The general test which the court applies in deciding whether or not to grant leave to appeal is this: leave will normally be granted unless the grounds of appeal have no realistic prospect of success (*Smith v. Cosworth Casting Processes Ltd. (Practice Note)* [1997] 1 WLR 1538 …)”.

**The exiting test of an arguable appeal**

1. In view of the above authorities from the HKSAR which are binding on me, it is clear that when a District Court Judge decides whether to grant leave to appeal to the Court of Appeal, the applicable test is the one laid down in the *Smith*’s Case, namely:

“Whether the proposed appeal to the Court of Appeal is arguable in that it has a realistic prospect of success?”

1. Admittedly, the threshold test in the *Smith*’s Case is a low one. However, it is equally trite law that when the applicant is seeking to disturb the findings of fact made at first instance, the Court of Appeal will only set aside the findings of fact in exceptional circumstances.
2. In **James v. Fairley** [2002] EWCA Civ. 162, the plaintiff was aged 16 when she met a tragic accident. The traffic accident happened on a busy road about 5:50 p.m. in the evening. She crossed a road with 3 lanes, 1 was southbound and 2 were northbound. The defendant was driving a car in the northbound direction. She walked from west to east from the western pavement into the path of the defendant’s car. She was hit and suffered injuries. The trial judge held that the defendant was not liable in negligence to the plaintiff. The plaintiff’s appeal was dismissed by the English Court of Appeal (Ward and Longmore LJJ.).
3. Lord Justice Ward stated that:

“12. … This court should not interfere with findings of fact unless it can be shown that the judge has been plainly wrong. I cannot possibly substitute my judgment for his on this question”.

1. In the HKSAR, the landmark case is **Ting Kwok Keung v. Tam Dick Yuen trading as Tam Dick Yuen Engineering & Others** [2002] 5 HKCFAR 336 (“*Ting Kwok Keung’s Case*”) where the issue of law which the Court of Final Appeal authoritatively determined was:

“1. Ultimately this case turns on an issue of primary fact. However certain questions of legal principle arise. They concern the resolution of factual disputes of fact at trial and how such disputes are to be approached on intermediate appeal and on final appeal”[[10]](#footnote-10).

1. There, the plaintiff was injured in an industrial accident and he sued the defendants for employees’ compensation. He succeeded before Deputy District Judge D. Lok (as he then was) and the Court of Appeal reversed the findings of fact as to who was the plaintiff’s employer which were made by the trial judge and overturned the judgment. The plaintiff obtained special leave to appeal to the Court of Final Appeal. The Court of Final Appeal allowed the plaintiff’s appeal and restored the findings of fact made by the trial judge and the judgment.
2. Mr. Justice Bokhary[[11]](#footnote-11) sagely observed thus:

“41. “On an appeal against a judgment of a judge sitting alone” – Lord Sankey LC said in *Powell v. Streatham Manor Nursing Home* at p. 249 – “the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way”. I would reinforce that by respectfully adopting what Lord Hoffmann said in *Biogen Inc. v. Medeva Plc* [1997] RPC 1 at p. 45 and repeated in *Piglowska v. Piglowski* p. 1372 D-F:

“The need for appellate caution in reversing the trial judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of impression as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation”.

…”.

1. With those principles in mind, I would proceed to determine the Plaintiff’s application for leave to appeal. At the hearing before me, Mr. Lam summarized his grounds of appeal. I have given those grounds my most careful consideration and found them failing the *Smith*’s test. In substance, those suggested grounds were all challenges on the findings of fact which I have made in the Judgment. Mr. Lam argued that:

(a) I have “imaged” my findings of fact to tally with the case law I have quoted in the Judgment. This, I did not do.

(b) He relied on p. 44 of the Road Users’ Code. In my view, what was said in the Road Users’ Code must yield to the particular circumstances of a specific case. The Road Users’ Code could not detract from the general principles I have summarized and applied in the case.

(c) I failed to consider the alleged negligence of the Defendant in the Judgment. I disagree. The Judgment speaks for itself. It is not appropriate for me to further enhance or elaborate what I have already said in the Judgment.

1. In the premises, I would dismiss the Plaintiff’s application for leave to appeal to the Court of Appeal.
2. Both counsel agreed that costs should follow the event. I therefore hold that the costs of this application for leave to appeal and the oral hearing be paid by the Plaintiff to the Defendant, to be taxed if not agreed. I would also certify the suitability of engaging counsel by the Defendant to resist the Plaintiff’s application for leave to take the case to the Court of Appeal at the oral hearing.

( Frederick HF Chan )

Deputy District Court Judge

Representations:

Mr. Simon H. W. Lam instructed by Messrs. Andrew Chan & Co., solicitors for the Plaintiff;

Mr. Victor T. Gidwani instructed by Messrs. Deacons, solicitors for the Defendant.

1. The hearing for leave to appeal was originally scheduled to 31st October 2008 at 2:30 p.m. However, the Plaintiff made an application for legal aid and that hearing was therefore vacated and subsequently rescheduled to 29th January 2009. [↑](#footnote-ref-1)
2. Judge HC Wong’s first instance judgment was reported at [1999] HKLRD 263. [↑](#footnote-ref-2)
3. The Equal Opportunities Commission engaged Mr. Raymond Leung as counsel. [↑](#footnote-ref-3)
4. In due course, the Court of Appeal allowed the appeal of the taxi-driver in part (see: [2000] 1 HKLRD 514). The case ended up before the Court of Final Appeal (see: (2006) 9 HKCFAR 888). [↑](#footnote-ref-4)
5. Under the **Civil Justice (Miscellaneous Amendments) Ordinance 2008**. [↑](#footnote-ref-5)
6. It was reported in the specialist report of Personal Injury & Quantum Report at [1998] PIQR P 192. [↑](#footnote-ref-6)
7. In due course, the plaintiff’s appeal was allowed by the English Court of Appeal (comprising Brooke and Waller LJ.) (see: [1998] PIQR P 192). [↑](#footnote-ref-7)
8. As the Lord Chief Justice of England & Wales then was. [↑](#footnote-ref-8)
9. The plaintiff prevailed in the subsequent substantive appeal (see: **Smith v. Cosworth Casting Processes Ltd.** [1997] EWCA Civ. 1598, unreported, 1st May 1997, English Court of Appeal (Brooke and Waller LLJ.). [↑](#footnote-ref-9)
10. Per Mr. Justice Bokhary PJ. [↑](#footnote-ref-10)
11. With the concurrences of Chan PJ., Ribeiro PJ., Mortimer NPJ and Lord Hoffmann NPJ. [↑](#footnote-ref-11)