# DCPI 2824/2018

[2021] HKDC 27

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 2824 OF 2018

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BETWEEN

CHOW FELIX Plaintiff

and

NGAI YIU HING WILLIAM Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 14 October 2020

Date of Decision: 8 January 2021

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DECISION

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*INTRODUCTION*

1. This is an appeal brought by the defendant against the decision of Master W Y Ho (“the Master”) dated 8 July 2020 when she ordered that there would be no order as to costs of a controversial affirmation filed by the plaintiff dated 22 June 2020 (“P’s Affirmation”).
2. The grounds of the appeal as stated in the notice of appeal are as follows:-
3. The Master erred in law by not granting the costs of and occasioned by P’s Affirmation to the defendant because:-
4. P’s Affirmation exhibited without prejudice correspondence;
5. The plaintiff’s solicitors refused to follow the defendant’s solicitors’ recommendations in correspondence to expunge P’s Affirmation from the court file and to file a new one;
6. The hearing of 8 July 2020 was only required in order to deal with P’s Affirmation, as confirmed by the Master at the hearing; and
7. The Master agreed with the defendant’s solicitors’ recommendation on the course of action on the only issue in dispute and adopted the same in her Order dated 8 July 2020.
8. Costs of and occasioned by P’s Affirmation should therefore be granted to the defendant accordingly.

*BACKGROUND*

1. On 30 October 2019, the defendant took out a summons for specific discovery, *inter alia*, for documents to support the plaintiff’s claim for loss of earnings and the loss of earning capacity in this personal injury action. There are standard documents one would expect a defendant will seek in a personal injury case like employment contracts, bank statements, tax filings, correspondence with the Inland Revenue Department and other documents in relation to the plaintiff’s claim for medical expenses. The list of documents appeared in the schedule attached to the discovery summons.
2. On 6 December 2019, at the hearing before Master Peony Wong, the master ordered the plaintiff to file and serve an affirmation in opposition by 3 January 2020.
3. On 3 January 2020, the plaintiff defaulted on Master Peony Wong’s Order dated 6 December 2019 and did not file an affirmation as ordered.
4. On 3 March 2020, the plaintiff’s solicitors, instead of filing an affirmation, responded to individual specific discovery requests in writing by letter.
5. On 4 March 2020, the defendant’s solicitors wrote to the plaintiff’s solicitors and questioned why those responses were not set out in an affirmation as ordered by Master Peony Wong.
6. On 27 April 2020, the defendant’s solicitors wrote to the plaintiff’s solicitors again to ask them to confirm their position regarding filing an affirmation in opposition within 7 days.
7. On 22 May 2020, the plaintiff’s solicitors wrote to the defendant’s solicitors, requesting a time extension until 22 June 2020 to file their client’s affirmation, ie an almost 6 months time extension with no reasons provided.
8. On 5 June 2020, the Master granted the time extension requested on an “unless” basis.
9. On 22 June 2020, the plaintiff filed and served P’s Affirmation. However, rather inappropriately, the plaintiff exhibited his solicitors “without prejudice” letter dated 29 December 2019 in the affirmation (“the WP letter”).
10. On 26 June 2020, the defendant wrote to the plaintiff objecting to the WP letter being exhibited in P’s Affirmation and proposed the same to be expunged and a new affirmation without the WP letter be re-filed by the plaintiff.
11. On the same day, ie 26 June 2020, instead of agreeing to have the WP letter expunged and to re-file a new affirmation, the plaintiff wrote back and stated to the defendant that they could not understand what the defendant’s complaint was about and they did not see any problems with enclosing the without prejudice information in the WP letter in P’s Affirmation. The plaintiff’s solicitors claimed that “*no prejudice [had] been caused*” and suggested that, if the defendant’s solicitors insist that “*those information contained in the letter are protected by without prejudice privilege*”, the matter can be “*easily resolved*” by redacting parts of the letter in the hearing bundle.
12. On 29 June 2020, the defendant wrote to the plaintiff to explain why the plaintiff’s proposed solution would not be sufficient to resolve the issue, principally because P’s Affirmation would remain on the court file. They cited the case of *Kind Respect Limited v Apex Logistics Limited*, unreported, DCCJ 502/2004, 5 June 2006, where it has been stated, *inter alia*, that “*… the without prejudice rule applies to exclude all negotiations, whether oral or in writing, genuinely aimed at settlement from being given in evidence*”. The defendant also cited § 24/5/41 of the *Hong Kong Civil Procedure 2020* where it states the following:-

“The rule applies to exclude all negotiations genuinely aimed at reaching a settlement, whether oral or in writing, from being given in evidence. The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.”

1. However, no response had been provided by the plaintiff on the above.
2. Instead, on 30 June 2020, which was a day after the above letter was sent by the defendant, the plaintiff wrote to the court to suggest that the entire exhibit be removed, but without amending the body of P’s Affirmation. The defendant also wrote to the court on the same day, stating why this would not work as the body of P’s Affirmation still refers to the exhibit in its contents.
3. As a result of the above exchanges, the Master directed the parties to attend the hearing before her on 8 July 2020.
4. At the hearing on 8 July 2020, after hearing submissions from the parties, the Master ordered the plaintiff to file a new affirmation in exchange of the Plaintiff’s Affirmation on an “unless” basis.
5. However, no order as to costs was made by the Master on the basis that “the parties should have telephoned each other” to resolve the matter.

*DISCUSSION*

*Legal principles on the court’s exercise of discretion on costs*

1. §62/2/11 of the *Hong Kong Civil Procedure 2021* (“HKCP 2021”) states *inter alia* the following:-

“The Court of Appeal *will not interfere with the exercise of a judge’s discretion in the award of costs unless* it was shown that he failed to exercise the dis-cretion, or exercised it upon a false principle, or did not exercise it judicially.

In general a judge in chambers should not allow an appeal from an order for costs made by a master unless it can be shown, either that it was unreasonable or that the master erred in law or took into account matters which he should not have taken into account.”

1. §62/2/6 of the HKCP 2021 states as follows:-

“Wide thought the discretion is, it is a judicial discretion, and must be exercised on fixed principles, that is according to rules of reason and justice, not according to private opinion…

Where a party successfully enforces a legal right, and in no way misconducts himself, then he is entitled to costs as of right.

[However], a successful party may be deprived of his costs if he presents a false case or false evidence, or acts oppressively in the action.

A trial judge who wished to reflect disapproval of the way in which [a party] had conducted the litigation, justice could be done by making no order as to the costs of the action.”

*DISCUSSION*

1. The parties have no dispute over the established principles on how the court would deal with a costs issue, particularly when a judge hearing a case on appeal from an ordered costs made by a master.
2. With respect to the Master, I am afraid that I do not share her approach on the decision she had arrived on the costs order in this case.
3. First and foremost, it is clear that it was the plaintiff who had flouted the rules by exhibiting the WP letter in P’s Affirmation and at the same time referred the contents of the letter in the body of the affirmation itself. The defendant had in my view rightly pointed this matter out to the plaintiff in writing and asked them to take out any reference or copy of the WP letter in the affirmation and to re-file a new affirmation instead. However, that was not followed. A delay of more than 6 months was caused due to the errors made by the plaintiff. As admitted by Miss Wong for the plaintiff at the hearing before me, it was her who had decided to put the WP letter in P’s Affirmation. She has since realized that it was a mistake. She apologised for the same during the appeal hearing before me.
4. Despite of this, the plaintiff failed to follow the sensible and practical approach made by the defendant in their correspondence, ie to take out both the exhibits and reference made in P’s affirmation by re-filing a new one. In my judgment, the plaintiff’s failure in following such sensible and simple suggestion has led to an unnecessary hearing before the Master. What the Master has ordered at the end of the hearing was exactly the defendant had proposed to the plaintiff all along.
5. As such, in my view, it is clear that the defendant was the “*real winner*” of the application. As a matter of general principle, the winner of an application or argument should be entitled to his costs. In *Melvin Waxman v Li Fei Yu* [2013] 6 HKC at 434 (§20), To J stated the following:-

“20. As for the onus of proof, I think it is the same post-CJR as it was pre-CJR. It must be the successful party’s burden to satisfy the court as to the type of costs order it is entitled. *To begin with, the successful party is assisted by the general rule of costs to follow the event. By the mere fact of being successful, the successful party has discharged the evidential burden of showing it is entitled to costs. Thus, effectively, the evidential burden is on the unsuccessful party to adduce sufficient evidence or argument that some other or lesser order is appropriate, such as no order as to costs, costs be to the successful party’s costs in the cause or costs to the unsuccessful party.* In the absence of evidence or convincing argument to the contrary, the successful party would also have discharged the legal burden. Costs to follow the event would be the appropriate order to make. If the unsuccessful party is able to discharge that evidential burden, it will be the legal burden of the successful party to show that he is entitled to the costs order which he seeks. In reality, having heard the interlocutory application, it would be quite obvious to the court what costs order would best serve the justice between the parties without relying on the burden of proof.” [emphasis added]

1. In my judgment, the plaintiff’s solicitors clearly were wrong in exhibiting the WP letter to P’s Affirmation in the first place. Initially, they refused to acknowledge this was a problem. They then rejected the defendant’s proposed remedy but failed to suggest any alternative workable solution. I consider the hearing on 8 July 2020 before the Master was only necessary due to the plaintiff’s mistake and stubborn refusal to remedy the same in accordance with the defendant’s proposed solution. Ultimately, the court agreed with the defendant’s proposed solution and adopted the same by giving an unless order on those terms. The plaintiff’s solicitors had conceded, both in correspondence and at the hearing, that they should pay the costs.
2. I therefore do not see any good reason why they should not do so and why the Master should order otherwise. Following the principles enshrined in *Melvin Waxman, supra*,I consider that the plaintiff should be ordered to pay the costs of the hearing before the Master.
3. The only reason given by the Master at the hearing to deprive the defendant of his costs was that the party should have telephoned each other, instead of exchanging correspondence. At the appeal hearing, I was told that the Master considered that the defendant’s approach was “too hostile”. The above seem to be the only reasons which the Master had based on in denying the defendant’s costs.
4. With respect to the Master, that is not a matter that should had been taken into account by the Court: see *Hoddle v CCF Construction Ltd* [1992] 2 All ER 550. In my judgment, in the context of a case where the offending materials such as the WP letter had been erroneously exhibited to P’s Affirmations, it must be proper and correct for a party to point out to the other side such obvious error in writing. This is a serious error and not just a slip on the part of the plaintiff’s solicitors. In my view, a telephone call would not suffice. As transpired in this case, the plaintiff’s solicitors had stubbornly refused to follow the simple and yet sensible proposal to take out the offending WP letter and reference to the same in P’s Affirmation and re-file a new affirmation despite a few correspondence exchanges. I do not see how this could be resolved with a simple telephone conversation when several exchange of correspondence could not persuade the plaintiff to do so. I therefore do not agree with the Master. In my judgment, correspondence is appropriate in such context because parties were discussing the precise redactions and quoting legal principles and case authorities to support their arguments. I do not see how the plaintiff would accept the points put forward by the defendant on the telephone when they did not accept them after they were put in writing.
5. I do not find the defendant “too hostile” or aggressive. I find that they did was entirely appropriate in the circumstances.

*CONCLUSION*

1. In conclusion, I find myself in the unfortunate position that I do not agree with the approach nor the decision reached by the Master at the hearing below. I find that she had erred in failing to take into the above principles of law when dealing with the costs of the successful party. Further, I find that the Master has taken into account of matters which she should not have taken into account when making the costs order.
2. Accordingly, I would allow the defendant’s appeal and vary the order made by the Master on 8 July 2020 to the extent that the costs of and occasioned by the plaintiff in filing P’s Affirmation should be granted in favour of the defendant. I would also allow costs of this appeal in favour of the defendant. I further order that such costs, including the costs before the Master, will be summarily assessed by me on paper. In this regard, the defendant is invited to lodge his statement of costs within 7 days with the clerk of this court with copy to the plaintiff. The plaintiff shall lodge his list of objections, if any, within 7 days thereafter with copy to the defendant.

( Andrew SY Li )

District Judge

Miss L Wong of Messrs B Mak & Co, for the plaintiff

Miss H Y Chung of Messrs Howse Williams, for the defendant