# DCPI 3783/2019

[2022] HKDC 372

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 3783 OF 2019

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BETWEEN

GURUNG DIL BAHADUR Plaintiff

and

FULCRUM ENGINEERING & CONSTRUCTION 1st Defendant

LIMITED

PENTA-OCEAN CONSTRUCTION CO., LTD. 2nd Defendant

and CHINA STATE CONSTRUCTION

ENGINEERING (HONG KONG) LTD. and

DONG-AH GEOLOGICAL ENGINEERING CO.,

LTD. trading as PENTA-OCEAN – CHINA STATE

– DONG-AH JOINT VENTURE

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Before: His Honour Judge Andrew Li in Chambers (paper disposal)

Date of plaintiff’s written submissions: 17 November 2021

Date of 1st and 2nd defendants’ written submissions: 30 November 2021

Date of handing down decision: 13 October 2022

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DECISION

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*INTRODUCTION*

1. This decision is related to the wasted costs order nisi I made in the decision which I had handed down on 27 October 2021 in the above case. That decision was subsequently reported in [2021] 5 HKLRD 239 (“the Decision”).

1. I would like to apologize to the parties for the delay in handing down this decision in respect of the wasted costs order. This was completely due to an oversight on my part and had nothing to do with the parties or my staff. I hope the delay has not caused and will not cause too much inconvenience to the parties.

*BACKGROUND*

1. For the background of the case and the reasons leading to my decision on the wasted costs order nisi, the parties are referred to §§3-11 of the Decision.
2. Pursuant to the order I made in the Decision, Mr Tsui Pui Hung (“Mr Tsui”) of the plaintiff’s solicitors, namely, Messrs WT Law Offices, has lodged his written submissions dated 17 November 2021 (“P’s Submissions”).
3. Gleaning from P’s Submissions, it appears that the main grounds relied on by Mr Tsui to say that the costs of the defendants in relation to the issue of quantum from 26 April 2021 and up to 9 September 2021 should not be borne by them personally are as follows:-
4. The plaintiff’s solicitors have all along followed the instructions given by the plaintiff;
5. The plaintiff’s solicitors were handicapped by reason of their duty to observe privilege and confidentiality not only at the Assessment of Damages (“AOD”) on 25 August 2021 (for which Mr Tsui did appear) and on 9 September 2021 (for which he did not appear) but also in their written submissions on costs; and
6. The plaintiff’s solicitors were unable to comply with the requirements of O67 r6(1) of the Rules of the District Court (“the RDC”) because the sealed Order was not made available before the adjourned hearing on 9 September 2021.
7. Further, pursuant to the directions I gave in the Decision, Mr David Yuen (“Mr Yuen”), counsel for the defendants, has lodged the defendants’ written submissions on 30 November 2021 in reply to P’s Submissions (“Ds’ Submissions”).
8. In Ds’ Submissions, Mr Yuen reiterates the reasons as to why the plaintiff’s solicitors should be held personally liable for the costs order nisi stated in §32(2) of the Decision, which in turn was based on the reasons that can be found in §§25 and 26 thereof.
9. Mr Yuen submits that the plaintiff’s solicitors had taken positive steps to prepare for the hearing of the AOD scheduled on 25 August 2021. In particular, he claims that Mr Tsui on behalf of the plaintiff’s solicitors had prepared the plaintiff’s opening submissions dated 18 August 2021 and had prepared and subsequently served the trial bundle on the defendants on 19 August 2021.[[1]](#footnote-1) Therefore, up and until 25 August 2021, as Mr Yuen submits, all the above steps taken by the plaintiff had led the defendants to believe that the plaintiff’s solicitors would continue to represent the plaintiff at the AOD hearing and would proceed with the trial on that date.
10. As fairly pointed out by Mr Tsui in P’s Submissions and contrary to what Mr Yuen had informed the court at the hearing on 9 September 2021, the defendants’ solicitors, Messrs Kim & Company, did receive a reply letter from the plaintiff’s solicitors dated 2 September 2021 informing them that their firm *“is not the representing solicitors for the Plaintiff any more”*. Mr Yuen had erroneously informed the court at the hearing that the last document received by the defendants was on 27  August 2021.[[2]](#footnote-2)
11. In Ds’ Submissions, Mr Yuen explains that it was due to the inadvertence of the defendants’ legal team that it had mistakenly informed the court at the hearing that the last document received from the plaintiff’s solicitors was dated 27 August 2021 when it should have been the one dated 2 September 2021. Mr Tsui was not present on 9 September 2021 to assist the court in that regard. In any event, Mr Yuen says the defendants’ legal team did not harbour any of the ill intentions as suggested by Mr Tsui in P’s Submissions.[[3]](#footnote-3)

*DISCUSSION*

*Issues to be determined*

1. In my view, whether the plaintiff’s solicitors should be made personally liable to bear the wasted costs caused by the unnecessary adjournment of the AOD hearing should revolve around the 3 issues raised by the parties in their written submissions. They are:-
2. solicitors’ duty to make application to apply to cease to act as early as possible;
3. whether Master Catherine Cheng’s Order in allowing the plaintiff’s solicitors to cease to act had been complied with; and
4. whether the plaintiff’s solicitors are protected from legal professional privilege (“LPP”) and confidentiality in this case.

*(a) Solicitors’ duty to make application to apply for cease to act as early as possible*

1. The plaintiff’s solicitors seek to rely on their client’s alleged “late instructions” as justification for not proceeding with the AOD. The plaintiff’s solicitors stated that they had *“all along followed the plaintiff’s instructions”*[[4]](#footnote-4) and also that *“(T)hey all along followed the instructions given by the plaintiff with the help of the Nepali interpreter to be appointed if necessary / appropriate.”*[[5]](#footnote-5) According to the plaintiff’s solicitors’ case, since the plaintiff had instructed them to brief counsel on 17 August 2021[[6]](#footnote-6), it is expected that counsel would have prepared the plaintiff’s written opening submissions prior to the hearing and would appear for the plaintiff at the AOD.
2. But that did not happen. No counsel was instructed and no opening submissions were prepared by counsel. The opening submissions prepared by the plaintiff’s solicitors was lodged with the court on 17 August 2021 only.
3. Mr Tsui in his submissions states that his firm had acted for the plaintiff in this case until 23 August 2021 only, when his firm *“suddenly received Plaintiff’s written instructions on 24 August 2021 after successful arranging Nepali interpreter that he decided to withdraw his claim even they were instructed to send the brief to the counsel on 17 August 2021.”[[7]](#footnote-7)*
4. On 24 August 2021, which was the date before the original scheduled AOD hearing, the plaintiff’s solicitors issued the summons under Order 67 r6(1) of the RDC to apply to cease to act for the plaintiff (“the Cease to Act Summons”).
5. Mr Tsui tries to explain in P’s Submissions that these are all due to the late instructions given by the plaintiff, in particular his last minute decision of not to engage counsel to represent at the AOD. 
6. With respect, I cannot accept that as a valid reason in this case at all. I am of the view that such a predicament was brought upon mainly if not entirely by the plaintiff’s solicitors themselves. I agree with Mr Yuen that had the application for ceasing to act been made before the matter was set down for trial or even before the AOD hearing, the plaintiff’s solicitors would not have found themselves in such a situation at all. It is worth reminding ourselves here that the case was first fixed for trial at the hearing before me on 29 June 2021 when an associate / junior solicitor from the plaintiff’s firm was present in court to represent the plaintiff. Hence, the plaintiff’s solicitors had had plenty of time (almost 2 months) to take instructions from their client and to instruct counsel if they so wished before the AOD hearing. They should not have waited until the last couple of days prior to the commencement of the AOD before deciding to do so. Further, once they were aware that they might not have sufficient time to instruct counsel or that their client was not able to put them in funds to instruct counsel, then they should have applied to the court to cease to act for the plaintiff at the first available opportunity. In my judgment, it was very wrong for the plaintiff’s solicitors to wait until the last minute (in this case only on the day before the commencement of the AOD hearing itself) to take out the summons to apply to cease to act for the plaintiff.
7. §67/6/1 of the Hong Kong Civil Procedure 2022 Vol. 1 states that *“(F)or due administration of justice, an application to “cease to act” should be made promptly to avoid disruption of trial dates. A late application might entail a risk that a litigant lack reasonable time to arrange legal representation to prepare to act in person. In that case, the court might find it necessary to adjourn the trial to enable the litigant to seek proper legal representation.”*
8. I find the very late application on the part of the plaintiff’s solicitors to cease to act was the main and direct cause of the adjournment of the AOD hearing on 25 August 2021. In my judgment, the failure to seek instructions early and to make the application to cease to act promptly were only reasons why the case could not proceed to the assessment on 25 August 2021 I so find that was the case.

*(b) Whether Master Catherine Cheng’s Order had been complied with?*

1. As stated in the Decision, after some initial hiccups, Master Catherine Cheng (“Master Cheng”) eventually issued the order to allow the plaintiff’s solicitors to cease to act for the plaintiff on 31 August 2021. However, that was subject to the plaintiff’s solicitors in observing specific the requirements under Order 67, rule 6(1) (“O67, r6(1)”) of the RDC as clearly stated in the Master Cheng’s Order itself (“Master Cheng’s Order”).
2. Specifically, Master Cheng’s Order stated that the ceasing to act as the plaintiff’s solicitors would only take effect upon their compliance with the requirements under O67, r6(1). Having gone through all the papers in the court file, I find there is nothing to suggest that the plaintiff’s solicitors have followed up those 3 matters which were specifically mentioned in Master Cheng’s Order prior to the adjourned AOD hearing on 9 September 2021. Therefore, as far as the court is concerned, they are still the solicitors on record.
3. The plaintiff’s solicitors now seek to rely on circumstances allegedly beyond their control in explaining why they were unable to comply with O67 r6(1) of the RDC. In particular, Mr Tsui explains that because the Master Cheng’s Order could or had not been sealed by her clerk by the time of the adjourned AOD on 9 September 2021, therefore, they could not, *inter alia*, serve a copy of the sealed Order on every party to the proceedings.
4. I have no hesitation in rejecting such a flimsy and ludicrous excuse from a qualified solicitor in failing to meet such basic requirements under O67, r6(1). It is clear that the plaintiff’s solicitors have failed to follow up with the 3 requirements clearly stated in O67, r6(1) which had been repeated in Master Cheng’s Order before the adjourned hearing on 9 September 2021. In my view, whether Master Cheng’s Order had been sealed or not had nothing to do with a solicitor’s obligations to fulfill the requirements under the rules.
5. Thus, in my judgment, at least up until the time when the plaintiff’s solicitors’ lodged P’s Submissions on 17 November 2021, they remained the solicitors on record for the plaintiff. This is because the requirements under O67, r6(1) of the RDC had not been complied with by the plaintiff’s solicitors up to that date. In particular, §(a) of r6(1) requires a solicitor who wished to cases to act on behalf of his client to serve a copy of the order on every party in the case. That was not done. And it was only upon the defendants’ solicitors’ request by letter dated 23 November 2021 that a copy of Master Cheng’s Order was subsequently provided by the plaintiff’s solicitors to them.
6. I therefore find that the plaintiff’s solicitors have failed to comply with Master Cheng’s Order and the very clear and well established rules set out in O67, r6(1).

*(c) Whether the plaintiff’s solicitors can rely on LPP?*

1. Refusal to waive privilege does not preclude a finding of abuse when the particular conduct admits of no reasonable explanation: See §62/8/4 Hong Kong Civil Procedure 2022 Vol l.
2. It is noted from P’s Submissions that they had not provided any reasons as to why they could not have made the application to cease to act for their client when the case was set down for trial or well before the AOD hearing scheduled on 25 August 2021. The plaintiff’s solicitors are now claiming privilege and confidentiality in that regard. As I found above, there was no reasonable explanations provided by the plaintiff’s solicitors on their failure to make the application earlier in time.
3. The plaintiff’s solicitors main focus was on the reasons *behind* making the late application for which was said to be subject of privilege and confidentiality and therefore forbidden from disclosure.
4. The plaintiff’s solicitors claim to be under a duty to observe privilege and confidentiality and is therefore unable to give a full account of the dealings between the plaintiff and them. In this regard, Mr Tsui of the plaintiff’s solicitors stated that:-

“Our client had not been advised his right and has not waived privilege and we cannot reveal all that went on involving his actions which would reveal privileged information in support of opposition to HH Judge Li’s Order Nisi on costs to be borne by Solicitors.”[[8]](#footnote-8)

1. With respect, I find the plaintiff’s solicitors did not hesitate to divulge client-solicitor communications in circumstances where it may have been perceived by them to be helpful in substantiating their complaint. However, when it suits them, they would try to hide behind LPP.
2. For example, it has been stated that the plaintiff *“decided to withdraw his claim even they were instructed to send the brief to counsel on 17 August 2021”*.[[9]](#footnote-9) According to the plaintiff’s solicitors’ case, the instructions from the plaintiff for them to instruct counsel is client-solicitor communication and subject of privilege and confidentiality. Yet, it was disclosed by the plaintiff’s solicitors. In the premises, I find there is no substance in the plaintiff’s solicitors’ complaint of being so handicapped by privilege and confidentiality.
3. Further, on 9 September 2021, the plaintiff himself has specifically mentioned in open court that it was only a couple of days before the original date of the AOD hearing on 25 August 2021 that his solicitors had, for the first time, asked him to *“pay counsel’s fees and put money as costs on account”*. In my view, if the reason behind the late application for the plaintiff’s solicitors to cease to act was due to the lack of funds from the plaintiff (and the plaintiff who appeared in person has confirmed that it was the case), then the plaintiff had obviously waived any privilege in that regard. I note that the plaintiff’s solicitors have not disputed what the plaintiff had said in court in their written submissions in dealing with the wasted costs order.

*The Court’s Findings*

1. I note that the basis of taxation, in the event that the Order nisi at §32(2) of the Decision is made absolute, has not been dealt with in the plaintiff’s solicitors written submission on costs. Instead, Mr Yuen in Ds’ Submissions submits that those costs should be taxed on an indemnity basis.
2. In deciding whether an order for indemnity costs is to be made, Chu J (as she then was) in *Town Planning Board v Society for Protection of the Harbour Ltd* (No 2) (2004) 7 HKCFAR 114 at §23 observed that factors such as the reasonableness of the conduct of the parties may need to be taken into account.
3. In the circumstances of this case, I find that it was unreasonable for the plaintiff’s solicitors to wait literally until the eve of the AOD hearing before taking out the application to cease to act as by this time they knew that the defendants would have already instructed counsel and had started to prepare for the hearing. In my view, there is nothing contained in P’s Submissions which has convinced me as to why the plaintiff’s solicitors could not have acted much earlier. The fact they chose to do so a couple of days before the original AOD hearing means that the plaintiff was not really given a choice when they knew very well that he was not on legal aid. Either the plaintiff had to represent himself on a case which he had all along been assisted by the plaintiff’s solicitors (who were contended not to ask the plaintiff to put any money on account) or he had to abandon his claim all together. Either way, the plaintiff was left “in the cold” by the plaintiff’s solicitors. In my view, not only this was unfair to the plaintiff, it was unfair to the defendants. It also led to the waste of the limited resources of the court in that the dates reserved for the hearings were vacated.
4. However, having said the above, as Mr Tsui has rightly submitted in P’s Submissions, the defendants had only admitted liability in this case on 10 August 2021 and interlocutory judgment was agreed to be entered against the defendants on that date by consent. Under the consent summons, the defendants had agreed to pay the costs on the issue of liability. The consent summons was subsequently made into a court order on18 August 2021. In my view, there is no reason why the defendants should not be made liable to pay all the costs in relation to the issue of liability which they had agreed to pay under the consent summons.
5. Further, I agree with the plaintiff’s solicitors that, latest by 2 September 2021, in reply to the defendants’ solicitors’ enquiry whether the they were still representing the plaintiff, the defendants’ solicitors were aware the plaintiff’s solicitors stance that they were no longer representing the plaintiff. While the plaintiff’s solicitors have failed to observe the 3 requirements under O67, r6(1), it cannot be said that the defendants were not aware of the plaintiff solicitors’ position.
6. What Mr Yuen had told the court at the hearing on 2 September 2021 in this regard was therefore incorrect and rather misleading. While I accept it was not done deliberately, I do not accept Mr Yuen’s submissions that *“most likely his attendance would not be required at the adjourned AOD”* and that *“the plaintiff’s solicitors had all along led the defendant to believe that they would appear on behalf of the plaintiff at the AOD”*. My view is that in any event the defendants would most likely still instruct counsel to contest the plaintiff’s claim at the AOD at the adjourned hearing on 2 September 2021. The fact that the plaintiff had suddenly decided not to proceed with the case was totally unexpected. However, this was not something which the plaintiff’s solicitors should be made personally responsible for.
7. I therefore consider that the only wasted costs which the plaintiff’s solicitors should be personally made liable is for the aborted hearing on 25 August 2021 which I find to be due entirely to the fault of the plaintiff’s solicitors in not making the application to cease to act much earlier. While the plaintiff’s solicitors have failed to comply with the requirements under O67, r6(1) of the RDC, the defendants’ solicitors were well aware of their stance by 2 September 2021. I do not think the plaintiff’s solicitors should be penalized for the plaintiff’s own decision of not to pursue with the claim at the AOD at the adjourned hearing on 9 September 2021.
8. I therefore would set aside the order nisi made under the Decision and substitute with the following order:-
9. From the date of commencement of the proceedings up to 10 August 2021 (when the defendants agreed by consent that interlocutory judgment on liability be entered against them), the costs on liability will be in the plaintiff’s favour and borne by the defendants as agreed by the defendants under the consent summons, such costs to be taxed if not agreed on a party and party basis;
10. For the rest of the costs of the case, ie on the issue of quantum, from the date of commencement of the proceedings up to 25 April 2021, ie before the case was set down for trial, the costs to be borne by the plaintiff, such costs to be taxed if not agreed on a party and party basis;
11. From 26 April 2021, ie the date on which the case was set down for trial by the plaintiff’s solicitors and up to the date of the hearing of the original date of the assessment of damages hearing on 25 August 2021, the costs to be borne by the plaintiff’s solicitors personally and on an indemnity basis, such costs to be taxed if not agreed with certificate for counsel; and
12. From 26 August 2021 to the conclusion of the proceedings, including the costs of the adjourned assessment of damages hearing on 9 September 2021, the costs to be borne by the plaintiff, such costs to be taxed if not agreed on an indemnity basis with certificate for counsel.
13. As technically the plaintiff’s solicitors have successfully varied the cost order nisi, I would make an order in their favour in terms of this application.
14. As all the above costs would be intertwined with the costs on the issue of liability, I consider that the best way to deal with them is to let the taxing master to deal with the costs in this case at a single hearing during the taxation proceedings, if the parties cannot agree the costs between them. I therefore would further make an order that all the costs should be taxed if not agreed with certificate for counsel, including the hearings on 25 August 2021 and 2 September 2021; and for this application for the variation of the costs order nisi contained in the Decision.

( Andrew SY Li )

District Judge

Mr Tsui Pui Hung of WT Law Offices, for the plaintiff

Mr David Yuen, instructed by Kim & Company, for the 1st and 2nd defendants

1. §26 of the Decision [↑](#footnote-ref-1)
2. §22 of the Decision [↑](#footnote-ref-2)
3. §6(ix) of P’s Submissions [↑](#footnote-ref-3)
4. §6(vi) of P’s Submissions [↑](#footnote-ref-4)
5. §7 of P’s Submissions [↑](#footnote-ref-5)
6. §1 of P’s Submissions [↑](#footnote-ref-6)
7. §1 of P’s Submissions [↑](#footnote-ref-7)
8. §6(i) of the written submissions of the plaintiff’s solicitors on costs [↑](#footnote-ref-8)
9. §1 of the P’s Submissions [↑](#footnote-ref-9)