

HONG KONG / JUDGMENT

CB v. APTHORP, BRIAN DREW

[2023] HKDC 1556

COURT

District Court

DECIDED

3 November 2023

CASE / FILE NUMBER

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DCPI 357/2021

[2023] HKDC 1556

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 357 OF 2021

BETWEEN

CB

Plaintiff

and

APTHORP, BRIAN DREW

Defendant

Before: Deputy District Judge David Chan in Chambers (Open to Public)

Date of Hearing: 13 October 2023

Date of Decision: 3 November 2023

DECISION

INTRODUCTION

This is the plaintiff's application by way of a Summons filed herein on 6 October 2023 for an anonymity order to the effects that: (1) she should be referred to as the letters "CB" throughout the proceedings; (2) her name should appear and be reported as "CB" at any hearing or any document to be filed with the Registry in these proceedings, and in any report of the proceedings, in the daily cause list and in any written rulings, orders and judgments to be published; and (3) no report by any member of the public (including the media) concerning these proceedings shall directly or indirectly identify the plaintiff by her name (the "Application").

The Application came before me on 13 October 2023, the day when the Pre-Trial Review ("PTR") took place. At the hearing, the plaintiff was represented by counsel Mr Erik Shum ("Mr Shum") and Ms Yvonne Leung ("Ms Leung"), and the defendant was represented by counsel Mr Edwin Choy SC ("Mr Choy") and Mr Jacky Ho ("Mr Ho"). In his written submissions, Mr Choy has conveyed the defendant's opposition to the Application.

Time was spent arguing on the Application at the PTR. Both Mr Shum and Mr Choy agreed that the argument took up about 1 hour of the PTR hearing. This information is provided for future taxation of costs purpose.

After hearing counsel's submissions, I have reserved my decision on the Application, to be handed down on or before 10 November 2023. It goes without saying that, by having the plaintiff's name in this written decision hidden, the Application is granted. I will in the sections below provide my reasons for such decision.

BACKGROUND

These proceedings were commenced on 5 February 2021 when a generally indorsed Writ of Summons was issued. In it, the parties' names are revealed. As per the court's records, all directions previously made by the court in this case were given on paper. Mr Shum and Mr Choy agreed that, until the PTR, there was no hearing fixed or attended by the parties.

The plaintiff's personal injuries claims stemmed from the allegation that she was indecently assaulted by the defendant when she was his domestic helper.

It is common ground that, for the same allegations, criminal charges were brought by the police against the defendant, and the parties had gone through 2 trials for these charges. A magistracy appeal was sandwiched between the 2 trials. At the end of the second criminal trial, the defendant was acquitted of all charges.

It is also common ground that, at the criminal trials and the magistracy appeal, the plaintiff's name was hidden and she was referred to as "X" by the courts in their decisions.

In her affidavit filed on 6 October 2023, the plaintiff gave the following narratives in support of the Application:-

She did not seek an anonymity order at the beginning of this action as she did not appreciate at that time the tremendous pressure and mental stress that would come with litigation. This changed after her experiences in the criminal trials.

Despite that her identity was protected in the criminal trials and the magistracy appeal, there were press coverages of the case, which led to negative comments made against her from the netizens, questioning her motive in suing the defendant.

Even the Filipino community, after reading the news on the criminal case, showed no sympathy towards her. Their views were unforgiving and cynical.

The said comments had added to her mental and emotional distress that she is already suffering due to the traumas she experienced from the alleged indecent assaults.

Revelation of her identity in the present action would continue the victim-blaming and shaming she has already experienced from the public and her own community during the criminal trials.

Disclosure of her identity could also be fatal to her career prospect in Hong Kong. Agencies had refused to help her find an employment after knowing the reason why she left the employ of the defendant, and that she has ongoing court cases against her former employer. She was able to secure the current employment only via assistance and recommendation of her friend.

Concern about the psychological well-being of her daughters, aged 21 and 16 years old, if they learnt from the media that their mother was subject to the alleged indecent assaults and exploitation. The daughters could also face undue pressure from their peers, and their reputations could be tarnished. The plaintiff added that she has not told the daughters about the alleged indecent assaults.

The plaintiff repeated that the Filipino community is not very sympathetic to victims of sexual assaults. The same also applies to the Catholic community, which she is a member of. If her identity in this case was made known to them, she would be shamed, degraded, and even ostracised by them.

She would not be able to handle the stress, and the humiliation would consume her, so much so that she may have to reconsider whether to continue with this action.

The defendant has not filed any affidavit in opposition to the Application. As one can see from the written submissions of Mr Choy, the defendant's contention premised on how the plaintiff fails to show there are exceptional circumstances for the displacement of the principle of open justice, and the delay in taking out the Application. The veracity of the plaintiff's narratives in the affidavit is unchallenged save for a few matters, which I will address in the discussion section below.

RELEVANT LEGAL PRINCIPLES

Mr Shum referred to the cases of *Re BU* and *Chao Pak Ki & Anor v Hong Kong Society of Accountants* to highlight the applicable principles to an application for anonymity order; Mr Choy chose to rely on the principles summarised by HH Judge Lok (as Lok J then was) in *Tam Kam Tong v Peter Wong & Partners*.

In *Re BU*, the applicant was an asylum seeker/torture claimant, who sought an anonymity order from Johnson Lam J (as Lam PJ then was) in pursuit for leave to bring a judicial review. His application for an anonymity order was rejected by Lam J, and he appealed against such decision. In considering the appeal, Cheung CJHC (as Cheung CJ then was) set out the general principles in §§10-17 of his judgment. In a nutshell, these principles are as follows:-

The starting point and general rule is that judicial proceedings are held in public and the parties are named in the judgments. Article 10 of the Hong Kong Bill of Rights (“HKBOR”), which is based on article 14.1 of the International Covenant on Civil and Political Rights, specifically provides that everyone shall be entitled to “a fair and public hearing” by a competent, independent and impartial tribunal established by law. The article further provides the circumstances under which the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society; or when the interest of the private lives or the parties so required; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The court’s jurisdiction to make an anonymity order to restrict publication of a person named in its proceedings is not in doubt. Such order is very often required in a piece of litigation where the trial or other hearings will be held in open court or in Chambers open to the public with no restriction on reporting.

However, when such an order is made, the principle of open justice is thereby compromised. Third parties’ (particularly the media’s) right to freedom of expression guaranteed under article 16 of the HKBOR, which includes freedom to seek, receive and impart information, is necessarily curtailed. Nevertheless, such right to freedom of expression is not absolute, as it may be restricted under article 16(3) for respect of the rights or reputation of others or for the protection of national security or public order, or of public health or morals.

As such, different rights are therefore in play. When considering whether to grant an anonymity order, much will depend on the circumstances of the case. Each application should be examined on its own facts and issues.

In dealing with a similar application in a judicial review case, Hartmann J in the *Chao Pak Ki* case first adopted what Sir John Donaldson MR said in *R v Chief Registrar of Friendly Societies*, ex parte *New Cross Building Society* at 235D-F as the guiding principle:-

“The general rule that the courts shall conduct their proceedings in public is but an aid, albeit a very important aid, to the achievement of the paramount object of the courts which is to do justice in accordance with the law. It is only if, in wholly exceptional circumstances, the presence of the public or

public knowledge of the proceedings is likely to defeat that paramount object that the courts are justified in proceeding in camera. These circumstances are incapable of definition. Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done. It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice." (emphasis added)

Hartmann J then cited the case of *R v Legal Aid Board, ex parte Kaim Todner* in identifying the circumstances in which justice may require an interference with the said general rule:-

"In deciding whether to accede to an application for protection from disclosure of the proceedings it is appropriate to take into account the extent of the interference with the general rule which is involved. If the interference is for a limited period that is less objectionable than a restriction on disclosure which is permanent. If the restriction relates only to the identity of a witness or a party this is less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors.

The nature of the proceedings is also relevant. If the application relates to an interlocutory application this is a less significant intrusion into the general rule than interfering with the public nature of the trial. Interlocutory hearings are normally of no interest to anyone other than the parties. The position can be the same in the case of financial and other family disputes. If proceedings are *ex parte* and involve serious allegations being made against another party who has no notice of those allegations, the interests of justice may require non-disclosure until such a time as a party against whom the allegations are made can be heard.

A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation." (emphasis added)

Applying the said principles to the application before him, Hartmann J had these to say:-

"15.

As I have indicated earlier, Mr Patterson has emphasised that what is sought by the applicants is limited to a restriction on the publication of their names. This, he has said, constitutes no more than a 'minimal' interference with the administration of justice. While I accepted that it is less draconian than an order which results in the proceedings as a whole being held behind closed doors, I do not see the interference as being of such little moment as Mr Patterson has advocated. Inherent in the principle of open justice is that, unless the interests of justice otherwise dictate, the identity of the parties should be known. No doubt, a great many litigants would rather enter into litigation behind the shield of anonymity but, as Lord Woolf MR said in *R v. Legal Aid Board*,

ex parte Kaim Todner (supra, para.14), parties to litigation have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is provided not by anonymity but by a judgment delivered in public which will refute unfounded allegations or misplaced suspicions.” (emphasis added)

As aforesaid, HH Judge Lok had also summarised the principles in the employees’ compensation case of Tam Kam Tong:-

“6.

I can try to summarize some of the legal principles relating to the making of an anonymity order from the authorities submitted by the parties:

The District Court has inherent jurisdiction to make an anonymity order (L v Equal Opportunities Commission & Others at para. 3);

Whether the court should make such order is a matter of discretion (L v Equal Opportunities Commission & Others at para. 13);

It is a general principle that the courts shall conduct their proceedings in public and it is only in exceptional circumstances that proceedings shall be conducted in camera (Chao Pak Ki Raymund & Another v Hong Kong Society of Accountants at para. 12);

It is inherent in the principle of open justice that the identity of the parties should be known (Chao Pak Ki Raymund & Another v Hong Kong Society of Accountants at para. 15); and

The exceptional circumstances for the displacement of the principle of open justice are incapable of definition and each application must be considered on its own merits, embarrassment for the parties is not a sufficient reason by itself and it must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice (Chao Pak Ki Raymund & Another v Hong Kong Society of Accountants at para. 12, citing with approval the dicta of Donaldson MR in R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society [1984] 1QB 227 at 235 D-F).”

The learned judge had these to say, amongst others, in dismissing an application for anonymity order:-

“11.

Mr. Burke further submits that in a simple claim for employee’s compensation, the general public would not be interested to know the identity of the litigants. However, one should not exaggerate the justification of such argument. Members of the public generally would not be interested to know the identity of the parties in the vast majority of cases before the court each day. If this argument is sufficient to displace the principle of open justice, most of the cases in our daily court lists would then be filled with the names of the parties in single alphabets rather than the full names of the litigants. This simply cannot be right.” (emphasis added)

DISCUSSIONS

As per Cheung CJHC in Re BU case, the starting point and general rule is that judicial proceedings are held in public and the parties are named in the judgments. Hence, what the plaintiff is now asking is for the court to depart from such general rule. Mr Shum argued that, in doing so, the plaintiff is not required to show that there are exceptional circumstances, as submitted by Mr Choy with reference to the principles summarised in the Tam Kam Tong case. Much was said by Mr Shum as to how the words of “exceptional circumstances” used by the learned judge applies only where application is to have proceedings conducted in camera.

In my view, dwelling on the words used by the learned judge in determining the standard required to displace the general rule is unnecessary. Suffice it to say, an applicant is required to, borrowing the words of Stock VP in the Re BU case, justify the making of an anonymity order, which, according to Cheung CJHC, is an exception to the general rule. This remains a tall task, as one can see the suggestion that a restriction on the publication of the parties’ names constitutes no more than a minimal interference with the administration of justice was rejected by Hartmann J in the Chao Pak Ki case. That being so, I also note that where the restriction relates only to the identity of a party this is less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors. Nonetheless, it remains objectionable. Moreover, the authorities clearly showed that it is not unreasonable to regard the person who initiates the proceedings, i.e., the plaintiff, as having accepted the normal incidence of the public nature of court proceedings.

Although, as mentioned at the start of this decision, I have granted the Application, I must say I am not impressed by some of the reasons relied upon by the plaintiff. First, I do not accept that disclosure of her identity could be fatal to her career prospect in Hong Kong, as one would know she has an ongoing court case against her former employer, is a valid argument in support of the Application. In this regard, majority of the cases in the Labour Tribunal, and in all employees’ compensation cases, involve employees suing their former employers. Should this be a valid reason for an anonymity order, then all these cases should have the claimants’ names hidden. This cannot be right. I echo what Hartmann J had said as reproduced in §15 above.

Second, even with her name hidden in the criminal trials and magistracy appeal, the media was not barred from, and they had indeed continued, reporting on the case; the plaintiff had to endure, and thus emotionally affected by, the negative comments from her own community and the public about the criminal case. It is thus questionable how an anonymity order in the present proceedings could ease her mental and emotional distress going forward. With or without her name revealed, the upcoming trial could still be reported by the media, and haters within the public/community/netizens are still going to express their hatred. If the history told us anything, the plaintiff, hearing and reading these comments, could again be emotionally distressed. She would not be relieved from such baggage with an anonymity order.

That being so, I could appreciate that having the plaintiff's identity revealed could possibly heighten the level of her distress, as the negative and derogative remarks would be directly connected to her. The more conservative and/or extreme members of the public (which may include the plaintiff's current employer, the employer's relatives and/or neighbours) would have a clear target for their shaming, blaming, and discriminating.

Moreover, it is understandable for the plaintiff to be concerned about the psychological well-being of her daughters. As they are unaware of the criminal trials and the alleged indecent assaults, revelation of these events to them by having the plaintiff's name appearing on a judgment and reported by the media, could well be devastating to the daughters. I see no reason why they should be put in such position.

And should the psychological well-being of her daughters be adversely affected, it would foreseeably add to the plaintiff's distress.

Pausing here, Mr Choy in his submissions reminded this court that one should not embrace without reservation the plaintiff's self-portrayal as a victim of the alleged indecent assaults, as the defendant has been acquitted of all criminal charges. I have no quarrel with this. But I do appreciate that the negative comments, shaming, blaming, and discriminating from the community and public against a victim of an alleged indecent assault case, could be made not based on or after the outcome of the litigation. Furthermore, I think it is fair for Mr Choy to accept, and I agree with him, that given the allegations of sexual assaults involved in this case, there may warrant some consideration of the potential risk of putting the plaintiff to further victimisation.

For the above reasons, I am of the view that it is appropriate for this court to depart from the general rule, as the interest of the private lives of the plaintiff so required.

Mr Choy also rebuffed the plaintiff's assertion that the mental problem she suffered from the alleged indecent assaults could deteriorate should her name be revealed. He said the psychiatric experts in the present case agreed that, despite the Post-Traumatic Stress Disorder features, the plaintiff did not require any sick leave and could continue working as a domestic helper. Her mental condition is static and stable, hence, there should not be any real risk that her mental condition would deteriorate. On this point, suffice it for me to say that, in coming to my decision on the Application, as shown in the reasons I have given in the above, I have given no weight to such assertion from the plaintiff.

I agree with Mr Choy's submissions that the Writ of Summons, thus the name of the plaintiff, is already in the public domain. However, as I have said in §5 above, all directions previously made by the court in this case were given on paper, and until the PTR, there was no hearing fixed or attended by the parties. If there was any disclosure of the plaintiff's name in this case, the extent should be minimal. I also agree with Mr Shum that by granting of an anonymity order in the terms as proposed, the media and persons whom attended the trial, and persons whom are already aware of the plaintiff's identity, would be restrained from further divulging the same in future reference of this case.

I note Mr Choy's complaint that the Application comes at a late stage of these proceedings, especially considering that she already had a taste of the negative comments from the public and her own community during the criminal trials, which finally concluded on 14 December 2022. Although the plaintiff has not provided any reason for such delay, I could appreciate that her concern would be reignited with the upcoming trial. Come what may, the lateness of such Application has not led to a need to postpone the trial, and the defendant has not complained of any prejudice he would suffer by the granting of an anonymity order to the plaintiff.

Finally, I find comfort in knowing that anonymity orders were granted in the similar cases of *X v Pang Ka Wai & Anor* and *H v Lau Ka Yee Michael & Anor*. Although in both cases the orders were granted at the early stages of the proceedings, and presumably on *ex parte* bases and uncontested, departing from the general rule of open justice and hiding the names of the alleged victims of indecent assaults in personal injuries claims are not unprecedented.

CONCLUSION

For the reasons above, I allow the Application, and make the following orders:-

The plaintiff should be referred to as the letters "CB" throughout the proceedings.

The plaintiff's name should appear and be reported as "CB" at any hearing or any document to be filed with the Registry in these proceedings, and in any report of the proceedings, in the daily cause list and in any written rulings, orders and judgments to be published.

No report by any member of the public (including the media) concerning these proceedings shall directly or indirectly identify the plaintiff by her name.

As to the costs of this Application, Mr Shum and Mr Choy agreed that it should follow the events. Hence, I order that costs of the Application should be paid by the defendant to the plaintiff, with certificate for counsel, to be taxed if not agreed. The plaintiff's own costs should be taxed in accordance with the Legal Aid Regulations.

I thank counsel for their assistance.

(David Chan)

Deputy District Judge

Mr Eric Shum and Ms Yvonne Leung (on *pro bono* basis), instructed by Patricia Ho & Associates, assigned by the Director of Legal Aid, for the plaintiff

Mr Edwin Choy SC and Mr Jacky Ho, instructed by Haldanes, for the defendant

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