

HONG KONG / JUDGMENT

CY v. WTW

COURT

Court of First Instance

DECIDED

18 November 2016

CASE / FILE NUMBER

HCMP2775/2016

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bjbj HCMP 2775/2016 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NO 2775 OF 2016 (ON AN INTENDED APPEAL FROM FCMC NO 15393 of 2014) BETWEEN Petitioner Respondent Before: Hon Lam VP and Kwan JA in Court Dates of Written Submissions: 17 October 2016 and 7 November 2016 Date of Judgment: 18 November 2016

JUDGMENT

Hon Lam VP (giving the Judgment of the Court): This is an application for leave to appeal against a costs order made by Deputy District Judge KK Pang [the Judge] in FCMC 15393 of 2014 on 14 March 2016. By that costs order, the Judge made no order as to costs in respect of the petitioner s application for prohibition order against the respondent. The Judge refused to grant leave to appeal on 5 October 2016. The application for prohibition order was made by the petitioner on ex parte basis but no order was actually made. After the petitioner had made the application by her affirmation of 5 August 2015, solicitors for the respondent came on record to act for the respondent on 23 October 2015. Since the main purpose of the petitioner in applying for prohibition order (rightly or wrongly) was to secure the presence of the respondent at the First Appointment hearing, the application became unnecessary once solicitors for the respondent went on record. It is not clear to us what had happened between 5 August and 23 October 2015 but the prohibition order was not granted. There was a First Appointment hearing on 27 October 2015, at which solicitors for the respondent (and through them the respondent) first learnt of the application for prohibition order. The application was withdrawn and the judge made a costs order nisi giving the costs of the application to the petitioner. Solicitors for the respondent wrote a letter to court applying for a variation of that costs order nisi. At a hearing on 25 November 2015, the judge took the view that the application should be made by summons and he was not minded to deal with the application for variation without a summons. Solicitors for the respondent therefore took out a summons on 2 December 2015. After hearing arguments on costs on 23 February 2016, the judge held that the evidence of the petitioner did not establish that the

respondent was about to leave Hong Kong and the application for prohibition order could not succeed in any event. He explained his reasoning in his judgment of 14 March 2016. Thus, he made no order for costs in respect of the application for prohibition order. He however ordered the petitioner to pay 50% of the costs of the application for variation of the costs order nisi. This Court had said repeatedly that we would be very circumspect in intervening in costs decisions as such decisions by their nature have a very high discretionary content, see *Poon Ching Man v Lam Hoi Pun* [2016] 3 HKLRD 815 at [34]. An appellate court would only disturb a costs order when it is plainly wrong or wrong in principle. Thus, lawyers advising their clients to appeal against a costs order must act cautiously. In the absence of any valid basis for intervention, such an appeal is unlikely to succeed. This is particularly so when a judge had explained, as the judge did in the present case in his judgment of 5 October 2016 in refusing leave, why the intended appeal has no merit. Having read and considered the submissions of Ms Lau (counsel for the petitioner) and the submissions of Mr Yim, we are of the clear view that none of the grounds advanced on behalf of the petitioner give rise to proper ground to disturb the costs order of the judge. Ms Lau put at the forefront of her submissions that the costs order had been sealed and perfected and the judge had no jurisdiction to re-open the costs order. This submission simply flies in the face of the record. For the reasons given by the judge at [15] to [19] of the judgment of 14 March 2016, the order that was perfected was the costs order nisi. There had never been any perfection of the costs order absolute. It is surprising that counsel still put forward such submission when the judge reiterated the same in his decision refusing leave at [10]. The same observation can be made with regard to what had been determined at the hearing on 25 November 2015. The transcript clearly shows that the judge only declined to deal with the application for variation at that stage. The judge had not dismissed it. Hence, there is absolutely no question of the judge being functus. A judge is only functus after the order in question had been perfected, see *In re L* [2013] 1 WLR 634. Whilst Ms Lau is on firmer ground when she submitted that the judge should consider the matter in the context of the summons of 2 December 2015 instead of the informal application by the letter of 23 November 2015 (in that connection, in addition to *PCCW-HKT Telephone v Telecommunications Authority* CACV 274 of 2003 [11], see also the recent observations by this Court in *AXA China Region Insurance v Leong Fong Cheng* CACV 113 of 2016, 28 October 2016 [44] to [54] on procedural discipline which applies equally to solicitors as well as litigants in person), we do not regard this as affording a valid ground of appeal. On the facts of the present case, even granted that the respondent was late in his application for variation of the costs order nisi and therefore he had to satisfy the court that it is proper to grant him relief under Order 2 Rule 5 from the sanction of the costs order being made absolute in the meantime (see *Poon Ching Man v Lam Hoi Pun*, supra, at [42(g)]), it is quite obvious that such relief should be granted in light of the fact that notice had been given (albeit without issuing a summons as required by the rules) of the intention to vary the costs order, the judge correctly came to the view that the application for prohibition order was unmeritorious (see discussion below), the failure to issue the summons was excusable, and the failure to issue the summons could not have caused any prejudice to the petitioner. The effect of granting the relief in terms of varying the costs order nisi after hearing submissions was to arrive at a fair determination on costs. Ms Lau also submitted that the judge erred in concluding that the application for

prohibition order was unmeritorious. The judge came to that conclusion after a review of the evidence before him. Ms Lau could not pinpoint any palpable error in the assessment by the judge. The fact that the respondent had left Hong Kong after his retirement is not a ground for the making of a prohibition order. The intended appeal has no prospect of success and there is no reason to give leave for another round of hopeless satellite litigation. We dismiss the summons of 14 October 2016 with costs. We are of the view that the application is so devoid of merit that it should not be pursued in light of the judge's reasons for refusal of leave. We shall order the petitioner to pay the costs of the respondent on indemnity basis. Having considered the costs statement of the respondent, we fix such costs at \$35,000. We are of the view that the application is totally without merit and we make an order pursuant to Order 59 Rule 2A(8), the Rules of the High Court, that no party may request the determination to be reconsidered at an oral hearing inter partes. (M H Lam) Vice President (Susan Kwan) MACROBUTTON nomacro Justice of Appeal Written Submissions by Ms Lorinda Lau, instructed by Joseph Leung & Associates, for the petitioner Written Submissions by Mr Eugene Yim, instructed by Withers, for the respondent PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V vmcZPZPIB;Z hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ gd\$# }k[N hi> hoHQ saVH< hoHQ hoHQ ytay gdT qcUG9 hoHQ h@Gu wrmre`\\`T`M`T` h UG hoHQ hoHQ gdK(M gdFp) xg[gHA3 hFp) hK(M hK(M hK(M hK(M hK(M hK(M gdFp) gdFp) gdqi_ }hWOKOKOK hFp) hFp) hFp) xr~rxr~ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ hoHQ gdFp) :pt~ ytay [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%#q x}r :T'ZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K&=al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> H; < Voo\$ lJnsw ManWah Lam Normal.dotm Judiciary Microsoft Office Word Judiciary Hong Kong Title Source Erica <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{C0D73458-1787-4EFC-9D6C-AAC5B9E4CBDD}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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