

HONG KONG / JUDGMENT

RE JOHN McDONNELL QC

COURT

Court of First Instance

DECIDED

6 September 2007

CASE / FILE NUMBER

HCMP1532/2007

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bjbj HCMP 1532/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1532 of 2007

IN THE MATTER of the application of John McDONNELL QC to be approved, admitted and enrolled to practice as a barrister of the High Court of the Hong Kong Special Administrative Region for the purpose of a particular case IN THE MATTER of section 27 of Legal Practitioners Ordinance (Cap.159)

Before : Hon Ma CJHC in Court Date of Hearing : 6 September 2007 Date of Judgment : 6 September 2007

J U D G M E N T

The Applicant applies for admission under section 27(4) of the Legal Practitioners Ordinance, Cap.159 to appear as leading counsel before the Appeal Committee of the Court of Final Appeal on 27 September 2007 to represent Kung Ming Tak Tong Co Ltd in an application for leave to appeal. If admitted, the Applicant will lead Mr Benjamin Chain and Mr Chan. Mr Chain appears for the Applicant today. The Notice of Motion dated 14 August 2007 also seeks admission to appear in the appeal proper should leave be granted but it is unnecessary (in that the application is premature) for this latter application to be dealt with today. The application for leave derives from an action (HCA 1926/2001) in which Kung Ming Tak Tong Co Ltd was the Plaintiff and the Defendants were Park Solid Enterprises Limited (the 1st Defendant) and Info King Limited (the 2nd Defendant). The appeal (CACV 227/2005) was brought by the Plaintiff. The brief facts of the case are as follows The case involves a building in Tsuen Wan called Fou Wah Centre which is a composite building (the Building) comprising both residential and commercial portions. Only the commercial portion of the Building is relevant in the proceedings. Subsequent to the

construction of the Building in 1978, the developer sold all units in the residential portion but retained the whole of the commercial part. This portion comprised the ground to third floors of the Building. In 1997, the developer sold the entire commercial portion to the 1st Defendant. As originally constructed, the first floor of the Building had on its outside a pedestrian walkway. The only point of entry into the Building was on the south side. In 1990, another entry point was constructed at the north side to facilitate access to and from the MTR station. This opening was carved out of a shop on the first floor. The proceedings are concerned with Shop B on the first floor. Since 1998, these premises have been used as a fast food outlet, with food being sold over a counter running along the length of the lobby of that floor. Customers would buy their food while standing in the lobby. In 2000, the 1st Defendant sold Shop 2B (which contained Shop B) and the second and third floors to the Plaintiff. In 2001, the 1st Defendant sold the first floor lobby area to the 2nd Defendant (which was an associated company). The 2nd Defendant then decided to reduce the width of the lobby (which, I should add, was not a common part of the Building) in order to create a new shop space adjacent to Shop B. This obviously affected Shop B in that customers would no longer be able to purchase food from across the counter while standing in the lobby, although they could be served from a small entrance to the shop. It was the plan to reduce the width of the lobby that led to proceedings being instituted by the Plaintiff against both Defendants. Essentially, the Plaintiff claimed a right of way or easement over the first floor lobby area just outside the shop and it was said that this was necessary for the reasonable enjoyment of Shop B. The claim was dismissed by Recorder J Leong SC. On appeal to the Court of Appeal, the Plaintiff argued that an easement or right of way could be implied under the rule in *Wheeldon v Burrows* [1879] 12 Ch D 31; alternatively there was an express grant. By a judgment handed down on 12 March 2007, the Court of Appeal held against the Plaintiff on both issues. On 20 June 2007, the Plaintiff applied to the Court of Appeal for leave to appeal to the Court of Final Appeal and sought to introduce a point that had not been argued before the Court of Appeal. This new point involved the argument that in construing a Deed of Mutual Covenant (the Building was governed by various Deeds and Sub Deeds of Mutual Covenant), a term could be implied by analogy to the rule in *Wheeldon v Burrows*. The Court of Appeal dismissed the application on the basis that the new point had not been argued before it and that it was therefore inappropriate to grant leave. Le Pichon JA said, in the judgment handed down on 26 June 2007, that it was for the Court of Final Appeal to decide for itself whether leave should be granted. I have provided this brief summary of the proceedings in order to put in proper context the application for admission. The hearing before the Appeal Committee of the Court of Final Appeal later this month will involve a consideration of the issues that were before the Court of Appeal and the so called new issue that was canvassed before the Court at the hearing of the application for leave. The principles governing the present application for admission are well known. As the court said in *Re Pannick QC* [2004] 1 HKLRD 950, at 957E where a hearing before the Court of Final Appeal is involved, the court will be more, rather than less, inclined than at any other level to admit overseas counsel. This is provided of course that the matter is one that is substantial and in which overseas counsel is able to contribute significantly by reason of his expertise. In examining whether the matter for which admission is sought to be substantial, the court will look both at the importance of the matter itself and also the issues that arise in it : see *Re Jones QC*, unreported, HCMP 2629/2006,

19 January 2007 at page 6 (paragraph 12). In my view, notwithstanding the detailed submissions advanced by Mr Ismail (for the Hong Kong Bar Association), both in writing and today, the application for leave to appeal to the Court of Final Appeal is a substantial one. If leave is refused, that is the end of the litigation for the parties. The issues sought to be raised in the Court of Final Appeal are potentially interesting and important ones. Of course, I say nothing about the merits of the points but note that neither Mr Ismail nor Ms Chui (for the Secretary for Justice) has submitted that the points which are sought to be argued and said to justify leave being granted, are somehow hopeless or far fetched. It is fair, however, to add here that Mr Ismail calls these points somewhat ambitious. I am content to leave the adjudication of the merits to the Appeal Committee itself. For completeness sake, I should note that the application for leave to the Court of Final Appeal will also involve an argument that leave should be automatic under section 22(1) (a) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484 but this is by no means certain and it will be necessary to canvass the other points I have earlier referred to. In dealing with these various issues before the Appeal Committee (albeit the application is only for leave), the Applicant will, in my view, be able, by his expertise and experience, to make a significant contribution. It is to be noted that the Applicant has in the past appeared in our courts in a number of land related matters. In his written submissions, Mr Ismail relied on *Re Porten QC*, unreported, HCMP 466/2005, 8 April 2005, to challenge the Applicant's suitability by submitting that the issues involved very much local circumstances in Hong Kong. Indeed they do, but this is not a point that can be said to be critical as far as this Applicant is concerned. Lastly, a point was raised whether the Applicant's solicitors had made sufficient enquiries in approaching suitable local Senior Counsel. It is relevant to the court's consideration to be fully apprised of the size of the available pool of local counsel and the reasons why local counsel were not instructed, even where a hearing before the Court of Final Appeal is involved : see *Re Spence QC*, unreported, HCMP 1690/2005, 21 September 2005 at pages 5 (paragraph 7). In the present case, while the solicitors could perhaps have provided more by way of detail and explanation and the pool of available senior counsel can be said to be quite sizeable (although not that large), this was, in my view, not sufficient by itself to overcome the CFA factor (as this has been described in various cases). For these reasons, I make an order that the Applicant be approved, admitted and enrolled to practice as a barrister of the High Court of Hong Kong for the purpose of advising and appearing on behalf of Kung Ming Tak Tong Co Ltd, the Plaintiff (Applicant/Appellant) in FAMV 39/2007, at the hearing scheduled for 27 September 2007 and any adjourned hearings as the case may be in the application for leave to appeal. There will be no order as to costs. (Geoffrey Ma) Chief Judge, High Court Mr Benjamin Chain, instructed by Messrs Peter Lau & Co for the Applicant Mr Anthony Ismail, instructed by Messrs Cheung, Tong & Rosa for the Hong Kong Bar Association Ms Michelle Chui of the Department of Justice for the Secretary for Justice

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