

HONG KONG / JUDGMENT

RE MR. JAMES KENNETH PICKUP, Q.C.

COURT

Court of First Instance

DECIDED

19 November 2008

CASE / FILE NUMBER

HCMP1604/2008

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bjbj HCMP 1604/2008 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1604 of 2008

IN THE MATTER OF MR. JAMES KENNETH PICKUP, Q.C., Barrister of Gray s Inn, England IN
THE MATTER of Section 27(4) of the Legal Practitioners Ordinance, Chapter 159

Before : Hon Ma CJHC in Court Date of Hearing : 2 September 2008 Date of Judgment : 2
September 2008 Date of Handing Down Reasons for Judgment : 19 November 2008

REASONS FOR JUDGMENT

In the Notice of Motion before me on 2 September 2008, the Applicant applied to be admitted to represent Mr Yung Tim in an application for leave to appeal to the Court of Appeal against conviction and sentence. The applications for leave to appeal were in fact heard on 18 September

2008. In a judgment handed down on 23 October 2008, Mr Yung s application was granted and the appeal against conviction was allowed. At the earlier hearing before me on 2 September, I had refused the Applicant s application to be admitted, with the Reasons for Judgment to be handed down in due course. A certain matter was left outstanding at the conclusion of the hearing; I shall presently elaborate on this. Mr Yung was convicted in the District Court (before H H Judge Mackintosh) on 24 July 2007 on one count of accepting an advantage as an agent, contrary to section 9(1)(b) of the Prevention of Bribery Ordinance, Cap. 201 (the Ordinance). The case against him was based on the fact that, as the managing director of a brokerage firm called VC CEF Brokerage Ltd, he accepted money from the chairman of a publicly listed company (Semtech International Holding Ltd) one Wong Chong Kwong, Derek in return for his efforts in influencing an analyst in the firm to make a strong recommendation to clients to purchase Semtech shares. After a trial lasting

28 days, H H Judge Mackintosh convicted Mr Yung, Mr Wong (who had absconded before the verdict) and another defendant (the director of a financial institution to whom Mr Wong had paid money in return also for encouraging his company's clients to purchase Semtech shares. It is unnecessary to go through the reasons for the convictions : they are contained in the Judge's Reasons for Verdict lasting some 51 pages. The day after the convictions, Mr Yung was sentenced to 23 months imprisonment. The applications for leave to appeal against conviction and sentence were made on 17 August 2007; perfected grounds of appeal were provided on 7 December

2007. The dates for the present appeal were fixed as early as 5 February 2008. From the affirmation in support of the present application, the following grounds were relied on That the appeal involved arguments of complexity, both factual and legal. That the appeal involved the determination of points that would have a real impact on the development of Hong Kong law. Further, it was also said that were the application for leave to appeal to be unsuccessful, an application would be made for leave to appeal to the Court of Final Appeal. The client, Mr Yung, would feel a sense of grievance if the applications were refused since in another appeal said to be connected to his appeal, CACC 248/2006, involving Mr Wong, his girlfriend, his former solicitor and a barrister), leading counsel from overseas had been admitted. The first two grounds may conveniently be taken together. In my judgment, no case was made out to support the contention that the appeal involved matters of unusual difficulty or complexity (in fact neither the supporting affirmation nor the requisite certificate signed by counsel asserted there was any unusual difficulty or complexity). Indeed, there are none. An examination of the amended Perfected Grounds of Appeal (which were drafted by the Applicant)) and also the written submissions prepared for the purposes of the application for leave to appeal, reveals that as far as the application for leave to appeal against conviction was concerned, all that was really being put forward were submissions based on the trial judge having convicted on insufficient evidence, drawing incorrect inferences or entering into speculation. The closest that the Grounds of Appeal came to a question of law was the submission that the Judge misapplied *Li Defan & Another v HKSAR* (2002) 5 HKCFAR 320. It is said that the Judge placed too much emphasis on, and wrongly draw inferences from, the fact that Mr Yung did not give evidence in his trial. This type of submission is a common one raised in the courts. In my view, in the present context, there are no points of unusual difficulty or complexity here. It was also submitted that the points to be run in the appeal would have a real impact on the development of local jurisprudence. I fail to see how this could be made out. The judgment of the Court of Final Appeal in *Li Defan* clearly and comprehensively sets out the applicable principles. The judgment of Lord Hoffmann analysed those very cases relied on by Mr Yung in his appeal : *Weissensteiner v The Queen* (1993) 178 CLR 217; *Azzopardi and Davis v The Queen* (2001) 119 A Crim R; and *R v Martinez Tobon* [1994] 1 WLR 388. The case for Mr Yung, I emphasize, was that the Judge has simply misapplied or misunderstood the applicable principles. This involved, with respect, only questions of fact or application of the law to the facts. It was said that if the application for leave to appeal

against conviction was dismissed, the matter would likely end up in the Court of Final Appeal. This was not at all an obvious possibility given, I reiterate, that the basic theme was that the Judge had wrongly analysed the facts and misapplied *Li Defan*. Rather belatedly, it was faintly suggested that it could be argued in the Court of Final Appeal that *Li Defan* was wrongly decided. Properly analysed, there is nothing in this point at all and this was merely a regurgitation of the basic theme. Even if I had been able to accept that the appeal did involve matters of unusual difficulty or complexity, or that points raised in it would have a significant impact on the development of Hong Kong law or even that the matter may well end up in the Court of Final Appeal, that is not the extent of the court's inquiry in applications for admission. The court has to go on to inquire whether it has been shown that reasonable efforts had been made to instruct suitable leading counsel see *Re McGregor QC* [2003] 3 HKLRD 585, at 590 (paragraphs 11(2) and (3)). In the present case, it would appear that little or no efforts were made. The supporting affirmation reveals that the Applicant was consulted soon after conviction and had even come to Hong Kong to meet with clients and the legal team. The Applicant had been involved in the preparation of the appeal since February this year. As I have earlier observed, he drafted the Amended Perfected Grounds of Appeal. However, there was no suggestion that the pool of available or suitable leading counsel in Hong Kong was either non-existent or even small. One of the aspects of the appeal where it was contended the Applicant had expertise was his experience of share dealings and share placements. I do not doubt this but the pool of counsel in Hong Kong, similarly experienced, must be large. Quite apart from the fact that no real attempts were made to instruct local leading counsel, the present application was made at a very late stage. The affirmation that was filed the day before the 2 September hearing seeking to explain the delay, showed that a very leisurely pace was adopted. It was not until 8 July 2008 that a letter to the Hong Kong Bar Association requesting consent to the Applicant's admission was sent. The present Notice of Motion was only made on 21 August 2008, this in relation to an appeal to be heard less than a month away but which had been fixed since early February this year. Had it been argued that the number of available and suitable counsel was so small so that this might somehow reinforce the application of the admission, it would have been rejected on the delay ground alone. However, as it turned out, Hong Kong leading counsel was engaged for the appeal. Next, it was argued that since the appeal had attracted a great deal of media attention, it was desirable that an advocate from another jurisdiction would be able to approach the case more independently. No real basis (much less evidence) was provided in support of this contention. It was notable that neither counsel who had signed the requisite certificate had even mentioned this point. This leaves the point about the client's sense of grievance on the basis that in relation to a connected appeal, leading counsel from England had been admitted. There was again nothing in this point. That other appeal involved issues so different to those in the present application for leave to appeal that there was simply no resemblance. For these reasons, the application for admission was dismissed. This leaves one final matter. As mentioned above, the Applicant had been involved in the application for leave to appeal from a fairly early stage. The affirmation from the solicitor in charge

revealed that in June 2008, the Applicant had come to Hong Kong to meet his clients and the legal team. At the hearing, I queried whether this had taken place without the Applicant having first been admitted. Although counsel for the Applicant appeared to submit that the visit was merely a personal one, I was of the view that further affidavit evidence was required to clarify this matter. If the Applicant had been in Hong Kong in a professional capacity (that is, in his capacity as a practicing barrister), then it was required by the Legal Practitioners Ordinance, Cap.159 (the LPO) that he had first to be admitted for that purpose. I had expected affidavits from the solicitor in charge and Hong Kong counsel. However, only the Applicant filed an affidavit. He explained that the client wished to meet him before deciding whether or not to instruct him for the appeal. As the client was not free to travel, it was felt that it was more convenient for the Applicant to come to Hong Kong. This he did in late June. He was in Hong Kong for about four days. During his stay, he met with leading counsel and junior counsel from Hong Kong, the instructing solicitor and the client (and his family and friends). The Applicant adds that as far as his meetings with counsel were concerned, these focused on whether any application for admission on his part would be approved. Other than these meetings, his time in Hong Kong was taken up with social activities and sightseeing. No fee was received by the Applicant for the visit, although his expenses were met by the client or his family. In his affidavit, the Applicant was at pains to stress that he did not consider that he had acted improperly and was much concerned over any suggestion that he may have committed a criminal offence. It is right to point out that I was not addressed (certainly not fully addressed) over the point as to whether the Applicant had first to be admitted before coming to Hong Kong in June

2008. I make no finding on this aspect one way or the other. I would merely point out the requirement contained in the LPO that all persons practicing or acting as barristers must first be admitted before they can do so. There are other formalities to be fulfilled but these follow from admission. Section 44 of the LPO makes it a criminal offence for any person to practice or act as a barrister if unqualified. At the risk of stating the obvious, the reason therefore why persons have to be admitted first before practicing or acting as a barrister is because this is a requirement of the governing statute. Every common law jurisdiction, of which I am aware, has similar statutory provisions. It is not a question of, as the Applicant puts it in his affidavit, a matter of sensitivity , whether with the court, the Hong Kong Bar Association or indeed anyone else. It is simply a matter of law. It is not the court s concern at this stage to say whether or not the Applicant s (or anyone else
- s) conduct was improper. This can be left to others, if deemed appropriate. For my part, I make no finding or comment on this aspect. As I have earlier stated, the court was not addressed on whether, as a matter of law, the Applicant had to be admitted for the June trip. I should also point out that following the Applicant s affirmation filed after the hearing, no party requested a further hearing. To be fair, the Applicant had stated if his conduct was in any way improper or wrong, he then apologized unreservedly to the court and to the Hong Kong Bar Association. It was never his intention to show any discourtesy. He adds that in his 32 years at the Bar, he has maintained a high reputation for professional conduct and integrity.

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