高等法院 司法機構 JUDICIARY The High Court

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本函檔號 Our Ref.: HCA No. 1619/2014
來函檔號 Your Ref.:

14 August 2017

Dear Sirs/Madam,

Re: High Court Action No. 1619 of 2014

I forward herewith a copy of the written decision in respect of the above mentioned action for your kind retention.

Yours faithfully,

(Jeff Chan)
for Registrar, High Court

Parties:

M/s Lily Fenn & Partners
Solicitors for the Plaintiff
(Ref: LF/K/201716986/AS/fn)

M/s P.T. Yeung & Tang
Solicitors for the Defendants
(Ref: PY-4497/7547/14)

HCA 1619/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1619 OF 2014

BETWEEN

KOO MING KOWN	Plaintiff
and	
YOUNG KWOK HUNG CLEMENT	1st Defendant
YIP CHEE TIM	2nd Defendant
THE BAPTIST CONVENTION OF HONG KONG (in its capacity as the sponsoring body of PUI CHING ACADEMY under the Education Ordinance (Cap 279))	3rd Defendant
SHUM KAM HONG	4th Defendant
CHAN CHI MONG, HOPKINS	5th Defendant
LAW CHI KEUNG	6th Defendant
HO KANG WAI	7th Defendant
CHEUNG CHI KIM	8th Defendant
CHUNG HUNG KWAN, BARNABAS	9th Defendant
HO HIN HUNG	10th Defendant
LAM YIU WAH	11th Defendant
TSANG KAI MAN	12th Defendant
YIP WAI HONG	13th Defendant

Before: Deputy High Court Judge Kwok SC in Chambers

Date of Hearing: 31 July 2017

Date of Decision: 14 August 2017

DECISION

THE APPLICATIONS

1. By summons issued on 29 November 2016, the 1st to 13th defendants ("**D1 – D13**") applied to:

(a) strike out certain paragraphs[1] in "the Amended Statement of Claim" ("**the Striking Out Application**"); and

(b) "save for the purposes of conducting his claim set out in his pleadings herein, the Plaintiff be restrained … from doing the acts or any of them set out in the Schedule hereof" ("**the Injunction Application**").

"

SCHEDULE

1. Publishing, disclosing or making copies to any person not a party to the action herein, of the pleadings and documents filed and/or served by a party in this cause, and/or any information or materials revealed, disclosed or obtained in this action, or caused the same to be done either directly or indirectly;

2. Save and except for communication between the Plaintiff and his legal representatives, discussing or communicating in any form with any person not a party to the action herein, any matter relating to this action, or caused the same to be done either directly or indirectly;

3. Making use of the pleadings and documents filed and/or served by a party and/or any other information and materials revealed, disclosed or obtained in this action, or caused the same to be done either directly or indirectly;

4. Making contact or communicating in any form with the 1st to 13th Defendants and their servants and agents either directly or indirectly."

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[1] See §4 below.

2. By summons issued on 7 March 2017 ("**the March 2017 Summons**"), the plaintiff ("**P**") applied for leave to amend the Re-Amended Statement of Claim. That application was superseded by the application by summons issued on 26 July 2017.

3. By summons issued on 26 July 2017 ("**the July 2017 Summons**"), P applied for leave to:

(a) use the documents disclosed in Part I of Schedule 1 of the Supplemental List of Documents of D1 – D13 dated 30 September 2016 in HCA 2337/2016; and

(b) amend the March 2017 Summons and to replace the draft Re-Re-Amended Statement of Claim with the draft attached to the draft Amended Summons.

THE STRIKING OUT APPLICATION

4. The application reads as follows:

> " (a) That, pursuant to Order 18 rule 19(1)(b) and (d) RHC and the inherent jurisdiction of the court, paragraphs 31(8), 31A(2)(vi), 39(2)(vi), 43(c), 43(e)(ii), 44(b) of the Amended Statement of Claim be struck out on the ground that it [*sic*] is scandalous, frivolous or vexatious and/or it [*sic*] is otherwise an abuse of the process of the court."

5. The paragraphs in the Amended Statement of Claim sought to be struck out by D1 – D13 were added by amendment by P on 5 July 2016 *pursuant to leave granted by Master Chow* by Order made on 30 June 2016. The Order made by Master Chow was and remained valid and subsisting at the time of hearing before me on 31 July 2017.

6. It seemed to me that the Striking Out Application made by the team led by Mr K M Chong (comprising Mr K M Chong himself, Ms Emma Wong and Mr Darren Poon and P T Yeung & Tang) might be in contemptuous disregard of Master Chow's Order and might itself constitute an abuse of the process of the court. It cannot be over-emphasised that I was dealing with an application to strike out paragraphs in a pleading added pursuant to leave granted by Master Chow. I was *not* dealing with an appeal from the Master's decision.

7. I asked Mr K M Chong to address me on why I should hear him on the Striking Out Application.

8. Mr K M Chong said that:

> " Master Chow's Order was made on 29 [*sic*] June and the conduct in fact complained of all essentially happened after that date [and] we are relying on the abuse of process ground. Thereafter, there's a series of conduct after that date ..."

9. With all due respect to Mr K M Chong, he seemed to labour under a complete misunderstanding or lack of understanding of the ground(s) for striking out under Order 18, rule 19 of the Rules of the High Court, Cap 4A, which provides that:

> " (1) The Court may, either of its own motion or on application, at any stage of the proceedings order to be struck out or amended *any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement*, on the ground that —
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> (a) *it* discloses no reasonable cause of action or defence, as the case may be; or
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> (b) *it* is scandalous, frivolous or vexatious; or

> (c) *it* may prejudice, embarrass or delay the fair trial of the action; or
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> (d) *it* is otherwise an abuse of the process of the court;
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be." (*emphases added*)

10. The word "it" in Order 18, rule 19, sub-paragraphs (a), (b), (c) and (d) refers to:

> " any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement";

not conduct subsequent to the pleading.

11. Conduct subsequent to leave to amend is not a ground for striking out under Order 18, rule 19, let alone an amended pleading, amended pursuant to leave of court.

12. Mr K M Chong has cited no authority to support striking out on the ground of conduct after leave to amend had been granted by the court. His team should have properly studied the facts and researched the law before making the Striking Out Application. After all, there were 3 counsel and a firm of solicitors in his team.

13. The striking out application was thoroughly unmeritorious and was a complete waste of costs and the court's time and resources. The application itself constituted an abuse of process. It is lacking in any respect for a valid and subsisting court order. I dismissed the Striking Out Application on 31 July 2017 with costs to be taxed on indemnity basis

and paid by D1 – D13 to P. P asked for certificate for 2 counsel. D1 – D13 (who were represented by 3 counsel) opposed certificate for 2 counsel. I took the view that the matter was straight forward and certified the striking out application fit for (one) counsel.

THE INJUNCTION APPLICATION

14. The thinking behind the Injunction Application seems muddled and misconceived. The ground for the application has not been made clear and there are numerous reasons why the Injunction Application must and does fail.

The implied undertaking in relation on the use of documents and information acquired in the course of litigation

15. The proposed injunction seeks to cover all sorts of documents and information in relation to this case. No attempt has been made by Mr K M Chong to make good the legal basis for his blanket approach.

16. In *Shun Kai Finance Co Ltd & Others v Japan Leasing (HK) Ltd (No 2)* [2000] 3 HKLRD 539, the question before the Court of Appeal was whether any implied undertaking attaches to documents disclosed pursuant to Order 24, rules 10 and 11. The majority (Rogers VP and Le Pichon JA) held that:

> " After reviewing that decision and other authorities, Hobhouse J reached the conclusion that there was no blanket restriction on the use of documents and information acquired in the course of litigation.

> *Prima facie* there is no restriction. The *compulsion* exception is confined to documents and information which a party is compelled, without any choice, to disclose. Where a party has a right to choose the extent to which he will adduce evidence or deploy other material, then there is no compulsion even though a consequence of such choice is that he will have to disclose material to other parties." (at p 545)

" In deciding whether the compulsion principle applies, one needs to consider how the document was introduced: that is the point at which the voluntariness or otherwise of the disclosure is to be determined." (at p 546)

" Far from disavowing compulsion as the rationale for the implied undertaking, Lord Diplock had earlier in his speech (at pp.299G–300A) expressly referred to the compulsion aspect of discovery which gave rise to the need for safeguard against abuse, namely the implied undertaking. It is also clear from the speeches of Lord Scarman (at p.312C) and Lord Roskill (at p.321E) that they agreed with Lord Denning's explanation in *Riddick v. Thames Board Mills* [1977] QB 881 at p.896 that compulsion is the basis for the implied undertaking. For my part, I can find nothing in any of the speeches that cast any doubt on the rationale for the implied undertaking. I agree with Mr Fok SC, who appeared for the appellant, that compulsion is the bedrock for the implied undertaking.

I should mention that since the decision in *Derby & Co Ltd & Others v Weldon & Another* (unrep., *The Times*, 20 October 1988), English case law has almost without exception followed and applied that decision. The only exceptions that have come to light since the earlier hearing are *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158, where it was assumed without argument that the implied undertaking applied to documents disclosed under Rules of the Supreme Court O.24 r.10 and *Bourns Inc v Raychem Corp (No 3)* [1999] 3 All ER 154, where *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878 was distinguished. That case concerned documents disclosed in taxation. The implied undertaking applied although there was no automatic discovery and no order had been made because the party seeking costs was duty-bound to provide the taxing master with documents relevant to the claim. In my judgment, neither of these authorities undermines the principles stated in *Derby & Co Ltd & Others v Weldon & Another* (unrep., *The Times*, 20 October 1988).

Conclusion

I see no valid reason why the English decisions on this issue should not be followed." (at pp 546 – 547)

17. Thus, there is no blanket restriction on the use of documents and information acquired in the course of litigation.

18. I am bound by the majority judgment in *Shun Kai Finance* which refutes any attempt to make a blanket extension to documents covered by the implied understanding. No other basis for restricting use of documents or information has been mentioned or made out.

19. Mr K M Chong did not demonstrate how any of P's conduct complained of was in breach of the implied undertaking in relation to discovery. In their wisdom, Mr K M Chong's team did *not* include any list of Ds' documents in the hearing bundles. The Injunction Application does not get off the ground and falls to be dismissed.

Non-compliance with Order 41, rule 1(4)

20. Although the injunction application is said to be made by D1 – D13, only D5 (Chan Chi Mong, Hopkins) filed an affidavit in support.

21. Order 41, rule 1(4) of the Rules of the High Court, Cap 4A, provides that:

> " Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description …."

22. In breach of Order 41, rule 1(4), what Chan Chi Mong, Hopkins, did was to state in his affidavit sworn on 24 November 2016 that (written exactly as it stands in the original):

> " I, CHAN CHI MONG, HOPKINS, of [set out the address], [set out occupation], do make oath and say as follows ..."

Delay and irreparable damage

23. The matters complained of by Chan Chi Mong, Hopkins, started in about November 2015. There is no explanation as to why the Injunction Application was not launched until *one year later* in November 2016 and was not heard until 8 months later on 31 July, 2017.

24. In *Xcelom Ltd v BGI-Hongkong Co Ltd (No 1)* [2017] 1 HKLRD 421, I dealt with delay and irreparable damage at §§24 – 27 as follows:

> " 24. On the plaintiffs' pleaded case, they knew about the defendants' alleged infringement from about 17 and 18 January 2015 at the latest when the defendants advertised the NIFTY test run at the Third University of Hong Kong Symposium attended by many doctors in the field of obstetrics and gynaecology. Yet they did not commence legal proceedings against the defendants until more than 11 months later on 28 December 2015 when they also issued the *inter partes* summons for an interlocutory injunction.
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> 25. It is plain from the plaintiffs' pleaded case that the plaintiffs knew that the defendants stepped up their marketing activities throughout 2015.
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> 26. The delay of more than 11 months is substantial. The significance of delay was explained by Rogers V-P who had been an experienced IP silk and the summons judge, in *King Fung Vacuum Ltd v Toto Toys Ltd* [2006] 2 HKLRD 785. In that case, Rogers V-P explained the effect of delay on the allegation of irreparable damage:

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> [20] There has traditionally been a strong requirement when interlocutory injunctions have been sought, that the plaintiff must show that it has acted promptly and without delay. Promptly in the circumstances of interlocutory injunctions has been commonly understood to be a period of six weeks or so of unexplained delay and three months with an explanation given for the delay in making application for an injunction. Since the *American Cyanamid* decision the importance of irreparable damage in an application for an interlocutory injunction is paramount. If there is no irreparable damage demonstrated then the need for an interlocutory injunction has not been shown. This is important because of the approach that the courts take to interlocutory injunctions. They are not the trial of the action and the court is concerned with whether irreparable damage will occur before a trial can take place. It stands to reason that if a party is prepared to allow matters to proceed and takes no action with respect to matters which have been extant for lengthy periods, it lies ill in their mouth to say that there is likely to be irreparable damage and that is the case here.
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> [21] The defendants have come along a year or so after they had become aware of the facts of which they now complain, and say, 'Oh, well, there is likely to be irreparable damage'. But that is not established simply by so saying. ...
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> ...
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> [23] The Judge in his judgment appears to have totally overlooked the fact of the delay and its effect on the allegation of irreparable damage. ...

27. The plaintiffs in this case have come along a year or so after they had become aware of the facts of which they now complain. It took another 7 months for their application for interlocutory injunction to be heard. The trial of this action could have taken place by mid-July 2016 had the plaintiffs proceeded with due diligence in immediately issuing proceedings in January or February 2015 and promptly brought their action to trial. The parties' respective rights could have been determined at trial. In the event, the plaintiffs took their time in applying for an interlocutory injunction, the hearing of which took 4 days, with 19 lever arch files having been placed before the court at the hearing. I question whether the court's time could have been better utilised, the plaintiffs having taken their time in the first place."

25. Applying *King Fung* and *Xcelom (No 1)*, I note that D1 – D13 have come along a year or so after they had become aware of the facts of which Chan Chi Mong, Hopkins, now complains. It took another 8 months for their application for interlocutory injunction to be heard. The trial of this action could have taken place in 20 months had D1 – D13 proceeded with due diligence in bringing this action to trial. The parties' respective rights could have been determined at trial. In the event, D1 – D13 took their time in applying for an interlocutory injunction, the hearing of which was estimated to take 2 days, with 12 lever arch files[2] having been placed before the court at the hearing. That does not promote a sense of reasonable proportion and procedural economy in the conduct of proceedings and does not ensure that the resources of the court are distributed fairly.

26. There is no evidence of irreparable damage and there is no explanation for the inordinate delay. Absent irreparable damage, that is normally fatal against the applicant for an interlocutory injunction.

27. I should add that even if P has been in breach of any implied undertaking, there is no risk of repetition. On the contrary, since Mr Johnny Mok SC had been retained to represent P, P has sought to delete or exclude certain matters in pleadings and affidavits filed by him and indicated that he would not re-introduce them unless and until the court should release him from his implied undertaking.

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[2] Inexcusably, not including any of Ds' List of Documents.

Injunction sought unclear, imprecise and in sweeping terms

28. The terms of an injunction must be clear and precise so that the person sought to be restrained knows what he must not do. The terms must not be wider than justified and necessary. The proposed injunction does not satisfy any of these requirements. This is another fatal reason against grant of the injunction sought.

(1) The relationship between the opening exception ("save for the purposes of conducting his claim set out in his pleadings herein") and the exception under §2 in the Schedule ("save and except for communication between the Plaintiff and his legal representatives") is unclear. Does P have to come within both or either exception(s)?

(2) The court is not a party to the action. It is absurd to restrain disclosure to the court under §§1 and 2.

(3) The restrictions do not distinguish between sources of information. There is no reason why P should be restrained from using information which is *already* in the public domain.

(4) P is a party to this action. §3 seeks to enjoin P from making use of the pleadings served by P. Pleadings are intended to be used. Mr K M Chong did not try to address the legal basis for such restriction.

No evidence of the falsity of what P asserts in his campaign

29. P asserts that Chan Chi Mong, Hopkins, has a bogus PhD degree and intends to accuse Chan Chi Mong, Hopkins, of plagiarism.

Chan Chi Mong, Hopkins is the supervisor of an academic instittue, the Pui Ching Academy. His integrity and academic qualification are matters of legitimate public interest and comments may be protected by qualified privilege.

30. In this connection, it must be firmly bound in mind that Article 27 of the Basic Law provides that "Hong Kong residents shall have freedom of speech ...."

31. At this interlocutory stage, the court has not determined the truth of the assertions made by P and Ds. The following practice notes in §29/1/39 of the *Hong Kong Civil Procedure*, 2017 volume 1, are relevant:

> " The court's power to grant interlocutory relief in defamation cases seems to be guided by two associated notions, one of high principle and one of principle and practicality. The first is the importance of protecting the individual's right to free speech (see Godfrey J in *Ki Ming Po v. Yeung Wai Hong* [1993] 1 H.K.C. 595). The second is an acknowledgement that the court should not, save in the clearest case, usurp the jury's[3] role by restraining at an interlocutory stage publication of a statement that the jury might later find to be no libel or true or otherwise defensible (see, generally *Holley v. Smyth* [1998] 1 All E.R. 853, CA, where the authorities are reviewed, and particularly at 861 per Auld L.J.; *Lachman Narain v. Target Newspapers Ltd* [1989] 2 H.K.C. 16, CA). Thus it has been held that, in defamation proceedings, interlocutory relief to restrain defamation is not ordinarily granted where there is a defence or claim of justification unless the plaintiff can show that it is plainly untrue (*Bonnard v. Perryman* [1891] 2 Ch. 269, CA). Normally, neither the motive of the defendant in making the libel threat, nor the threatened manner of publication, nor the potential damage to the plaintiff provides an exception to this rule (*Holley v. Smyth*, above)."

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[3] Or the role of the judge on fact.

32. Significantly, Chan Chi Mong, Hopkins, has not filed any affidavit evidence on the falsity of P's assertion that Chan Chi Mong, Hopkins, has a bogus PhD. There is simply no evidence of Chan Chi Mong, Hopkins, having been conferred a research PhD degree by a genuine institute of higher education, instead of having "acquired" a "degree" from a "diploma mill" or a bogus "university". That is ill-advised for it can only bring suspicion upon Chan Chi Mong, Hopkins, himself and detracts from any justification (if any, and there is none) which he may otherwise have for an injunction.

Jury and (potential) witnesses

33. Neither P nor Ds has/have asked for trial by jury.

34. There is a long way to go before the trial of this action is to take place.

35. I am not persuaded there is any merit in Mr K M Chong's contentions on jury/(potential) witnesses.

Decision on Injunction Application

36. For the reasons I have given, I dismiss the Injunction Application. I make an order *nisi* under Order 42, rule 5B(6) of the Rules of the High Court, Cap 4A, that the costs of P in the Injunction Application be taxed on an indemnity basis (if not agreed) and paid by D1 – D13 to P.

THE MARCH 2017 SUMMONS

37. As the March 2017 Summons has been superseded, I make no order on it.

THE JULY 2017 SUMMONS

38. I have not been sufficiently informed about HCA 2337/2016 and would be reluctant to deal with the July 2017 Summons without such knowledge.

39. In relation to HCA 2337/2016 and this Action (HCA 1619/2014), P indicated that he intended to apply for consolidation of these 2 actions or to have them tried at the same time or one after another ("**the Intended Consolidation Application**").

40. I adjourn the July 2017 Summons *sine die*, with liberty to restore. If P shall make the Intended Consolidation Application, the July 2017 Summons shall be heard together with the Intended Consolidation Application. Liberty to apply to a Master. Costs of the July 2017 Summons be reserved, with certificate for 2 counsel.

(Kenneth Kwok SC)
Deputy High Court Judge

Mr Johnny Mok SC, leading Ms Amanda W M Li, instructed by Lily Fenn & Partners, for the plaintiff

Mr K M Chong, Ms Emma Wong and Mr Darren Poon, instructed by P T Yeung & Tang, for the 1st – 13th defendants