

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1339 OF 2014

BETWEEN

KOO MING KOWN

Plaintiff

and

THE BAPTIST CONVENTION OF HONG
KONG OPERATING AS PUI CHING
PRIMARY SHOOL AND PUI CHING
ACADEMY

1st Defendant

YOUNG KWOK HUNG CLEMENT

2nd Defendant

Before: DHCJ Seagroatt in Chambers (Open to the public)
Date of Hearing: 13 July 2016 at 10.08 am
Present: Ms Sara Tong, instructed by Ince & Co, for the
 plaintiff
 Mr Kenneth Lam, instructed by Lui & Law, for the
 1st and 2nd defendants

PROCEEDINGS

MS TONG: May it please you, my Lord, I appear on behalf of
the plaintiff and my learned friend, Mr Lam, appears on
behalf of the 1st and 2nd defendants.

My Lord would have received a fax from my learned friend
in the early hours of this morning which confirms that
the two defendants would consent to an order in terms of
the judgment summons and would withdraw their summons
dated 8 July for relief against sanction, and would
consent to pay the entire costs of this action and of
the summonses before this court today, as well as costs
of today's hearing.

The plaintiff is agreeable to such proposal which would
no doubt considerably shorten the length of the hearing,
but subject to two matters, my Lord.

A First of all, we ask that the costs of the plaintiff's A
B summons, judgment summons, and the defendants' summons B
C for relief against sanction, that's the one dated 8 C
D July, and the costs of today's hearing be paid by the D
E 1st and 2nd defendants to be taxed on an indemnity E
F basis. My Lord, I have discussed with my learned friend F
G and he has instructions to agree to that proposal. G

H The second matter, my Lord, is that my Lord would note H
I that in paragraph 1 of our judgment summons, which can I
J be found in the hearing bundle, tab 13, page 141... J

K COURT: Yes. K

L MS TONG: ...my Lord will see that at paragraph 1, we asked L
M for a declaration against the 1st defendant that it M
N holds the gift of 20 million, as defined in paragraph 18 N
O of the statement of claim, on constructive trust for the O
P plaintiff. My Lord, I am duty-bound to draw the court's P
Q attention to the general practice that the court would Q
R not, as a matter of practice, generally allow R
S declaratory relief to be granted by consent without a S
T trial. However, this is only a matter of practice and T
U not a legal principle. U

V If I could ask my Lord to take up the authorities V
W bundle, tab 17, which is the case of Top One W
X International. My Lord, this is a judgment of Fok J (as X
Y he then was) where he was asked to grant a judgment in Y
Z default of an unless order. And at paragraph 4 of the Z
headnote, it is at page 609... Z

A COURT: Yes. A

B MS TONG: ...my Lord will see there it is stated: B

C "In general, a declaration would not be granted C
D when giving judgment by consent or without a trial D
E where judgment was obtained in default of defence. E
F This, however, was a rule of practice and not law F
G and would give way to the paramount duty of the G
H court to do the fullest justice to the plaintiff to H
I which he was entitled." I

J And the same paragraph can be found at paragraph 78 of J
K the main judgment. So my Lord, I am duty-bound to draw K
L the attention to this general practice. However, we L
M say, in this particular case, it is in the interests of M
N justice for the declaratory relief to be granted. N

O And whilst I am on this judgment, if I could ask my Lord O
P also to look at paragraph 63 of the judgment of Top One. P
Q Paragraph 63 is at page 625. Q

A COURT: Got it. A

B MS TONG: It stated there that: B

C "The consequences of the striking out of the
D amended defence of the 1st and 3rd defendant is
E that the allegations in the amended statement of
F claim are deemed to have been admitted." D

E So in the present case, my Lord, as a consequence upon
F the undisputed breach of the unless order, the 1st and
G 2nd defendants' defence was struck out as of after 4 pm
H on 13 January, and as a consequence, the allegations in
I the statement of claim would be deemed to have been
J admitted. So my Lord, the constructive trust claim
K arises as a result of the pleading at paragraph 26 of
L the statement of claim which can be found at tab 2 of
M the bundle, page 33. G

H COURT: I recall that. H

I MS TONG: Yes, and our claim is based on a fundamental
J mistake of the payment of the sum and also that there is
K a total failure of consideration by reason of the breach
L of the condition that the new education building was to
M be used exclusively for the school, rather than partly
N for other purposes. I

L So my Lord, in the event that the 1st and 2nd
M defendants' defence has been struck out and these
N allegations are deemed to be admitted, we respectfully
O submit that clearly this gives rise to a constructive
P trust in respect of the 20 million which has been asked
Q for in the declaration. It is also consistent with the
R other relief that we seek. J

O COURT: Two and 3 go with it, don't they? O

P MS TONG: Yes, that's right. So I respectfully submit that
Q in this case, it is right and proper for the court to
R grant the declaratory relief sought. P

Q So subject to these matters, my Lord, I would ask that
R the proper order for the court to make today is an order
S in terms of the judgment summons, save that paragraph 8,
T which deals with costs, should mention that: "Costs of
U the plaintiff's summons including all reserved costs and
V costs of today's hearing be paid by the 1st and 2nd
defendants on an indemnity basis". Q

T And my Lord would also have to grant an order in respect
U of the summons of the two defendants dated 8 July,
V giving them leave to withdraw that summons and for costs
of that summons to be paid by them to the plaintiff on R

A an indemnity basis, including costs of this hearing, and
B that would, I think, dispose of all the matters for
today. I'm grateful, my Lord.

C COURT: Mr Lam, I was grateful for your letter which I
received this morning.

D MR LAM: Yes.

E COURT: Extremely helpful, very prompt considering the late
F hour at which you were instructed, and encapsulating, if
I may say so, a thoroughly realistic, helpful, sensible
resolution to this matter.

G MR LAM: I'm grateful for the kind words.

H COURT: And as far as the matters set out by Ms Tong are
concerned, I understand you accede to all of them.

I MR LAM: Yes. I agree to all of what my learned friend has
just said and I have nothing to add.

J COURT: I say this only because I don't want it to happen
K again. I say this really for the benefit of your
L clients and perhaps on a wider basis, and I say it
without argument, but I have had the benefit of looking
through the papers for some time now and it really does
reflect an appalling approach by the defendants to this
particular litigation.

M MR LAM: I understand that.

N COURT: It would embarrass you if I were to invite you to
make any comments and I certainly won't.

O MR LAM: I'm grateful.

P COURT: Because I don't think that's necessary. But
resolution there is. I just hope no other litigant
seeks to treat the court and its opponent in this
particular fashion.

Q Miss Tong, I'd like to say as far as you're concerned,
R that I thought your skeleton submissions, perhaps a bit
more than skeletal, but none the worse...

S MS TONG: I apologise for the length.

T COURT: ...none the worse for that, encapsulated everything,
U was absolutely correct and singularly helpful, directed
me to all the material matters which in fact I'd had a
look at to some extent before I had the benefit of your
submission because I wanted to see what the unfortunate
history of this was involving the Baptist Convention,

and it was, if I may say so without embarrassing you, a classic example of what a submission should be.

MS TONG: Thank you, my Lord.

COURT: All right. I don't need to say anything more. The orders will be as prayed for, as agreed by the defendants, including the matter of the indemnity costs in respect of the matters where those apply.

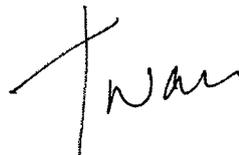
MS TONG: Thank you, my Lord.

MR LAM: Thank you, my Lord.

COURT: Thank you.

Hearing adjourns - 10.18 am
13 July 2016

I/we certify that to the best of our ability and skill, the foregoing is a true transcript of the audio recording of the above proceedings



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Tolaigus Wan
Date: 9 September 2016