HCMP 2741/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2741 OF 2013

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BETWEEN

CHAN CHUEN PING Applicant

and

THE COMMISSIONER OF POLICE Respondent

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Before: Deputy High Court Judge Seagroatt in Chambers

Date of Hearing: 14 November 2013

Date of Decision: 14 November 2013

Date of Judgment: 19 November 2013

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J U D G M E N T

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1. On the 9 March 2013 the plaintiff was allegedly injured when he was struck by a wheelchair being pushed by an unknown woman in Tai Po Central Town Square outside Tai Man House, Tai Yuen Estate. Another woman, also unknown, was seated in the wheelchair at the time.

2. The plaintiff instructed solicitors a little later that month to advise on a claim for damages for personal injuries, but did not know the identity of either woman.

3. The incident had been reported to the Police and accordingly the solicitors wrote to the senior Police Officer of the Tai Po Division on the 26 March 2013 requesting, wholly reasonably, the essential information to enable the plaintiff to advance a claim for damages, i.e. the identity of the two women. There then followed an astonishing series of letters from the Police Office which, I regret to have to say, defied common sense, and which repeatedly refused to supply the information and tried to put forward a wholly unacceptable reason for the refusal.

4. The applicant's solicitors wrote seven letters to the Tai Po Division Police Office in an effort to get the information to which they were entitled and which the Police Force was obliged to supply and has over many decades in the past supplied to many potential litigants.

5. The Police Station under the authority of the Commissioner wrote five letters in reply. One of them, not the first, even complained that the solicitors had not sent their client's authority for them to request such information. In fact the solicitors had sent the requisite authority in the form of the Data Access Request with their very <u>first</u> letter.

6. Thereafter the Police maintained, repeatedly, that the solicitors had to issue a Writ first and prove the fact of its issue to the Police's satisfaction, failing, it seems, to realise that a Writ could not be issued against a possible alleged tortfeasor until his or her identity was known – and that was precisely what the Police were refusing to disclose.

7. In order to put an end to this the applicant's solicitors were forced to issue an Originating Summons for pre-action Discovery which they did on the 18 October 2013. By now over 7 months had passed since their initial request. The respondent Police Unit was wholly responsible for this delay and the pointless proliferation of letters.

8. It came before me on the 14 November (today). Two days ago the Department of Justice on behalf of the Police Force finally agreed to what the applicant's solicitors were seeking and persuaded them to take out a Consent Summons for my approval. I declined to approve it.

9. In fact the Originating Summons was served on the Department of Justice on the 4 November and it entered appearance on the 5 November. On the 7 November 2013 the applicant's solicitors wrote enclosing a Consent Order which provided for the disclosure of the information which the applicant's solicitors had sought seven months earlier. It also provided that there should be no order for costs.

10. That might have been an end to the matter but for the fact that someone in the Department thought that there should be an order for costs in favour of the Department. No doubt in a sense of frustration and in order to draw the contentious matter to a close the applicant's solicitors agreed to such an order (entirely undeserved as it was) in favour of the Department. Such was the state of play when the papers came before me.

11. For decades now in my experience it has been normal practice for the relevant Police Stations or Districts to provide at the request of an interested party or its solicitors, for a reasonable fee, a copy of the Police Report in respect of incidents or accidents reported to them,

in the same way that the Factory Inspectorate and other institutions have done. This has included an abstract of relevant details, statements and any plan in existence. Sometimes this has been done before proceedings have been commenced on behalf of the interested party and sometimes after they have been begun. I have never known an interested party have to have recourse to the courts in order to obtain disclosure of this sort of information.

12. There is of course under section 41 of the High Court Ordinance a provision whereby an applicant who "appears … to be likely to be a party to subsequent proceedings … in which a claim is likely to be made" may obtain an order for disclosure of documents before commencement of proceedings against "a person who appears to the court … to be likely to be a party to the proceedings …". The Commissioner of Police or the Department of Justice are not however likely to be a party to any proceedings by this applicant (at least not in the current circumstances) and so section 41 does not apply.

13. Therefore it is necessary, as far as the efficacy of resorting to the High Court is concerned, to consider section 42. By this provision "a party to any proceedings in which a claim is made" may obtain an order against "a person who is not a party to the proceedings and who appears to the court … to be likely to have … in his possession, custody or power any documents which are relevant to an issue arising out of that claim." Such documents would not of course be limited to that identifying the potential tortfeasor.

14. The terminology predicates the applicant as having commenced proceedings but this applicant has not. But the applicant

cannot commence proceedings because the Police Commissioner refuses to let him have the name (and address, which is also essential) of the person against whom the proceedings can be commenced. But the court has an inherent jurisdiction to do what is fair and just and would not send an applicant in such circumstances away empty-handed and section 42 is capable of the construction which would imply the following – "On the application, of a party to any existing or contemplated proceedings in which a claim is or may be made, the court … shall have etc" in order to remedy the situation whereby that person is withholding the very information which would enable proceedings to come into existence. Furthermore, and this is of signal importance especially in today's climate of litigation, the courts encourage settlement of such claims where reasonable settlements can be achieved, and disclosure of material is a vital ingredient in such a climate. There is yet another aspect of importance. Although an injury results from such an incident it may not be one that justifies proceedings being taken, either on the merits, or the value, or the general economic considerations. Courts and the legal profession have a collective interest in ensuring that there is every opportunity to evaluate such a claim. But if an institution which is founded for and holds itself out to be for the benefit of the public, withholds basic, essential information, how can any of those objectives be attained?

15. The residual power of implication and the inherent jurisdiction I referred earlier finds confirmation in subsection (3) of section 42 – "Subsections (1) and (2) are without prejudice to the exercise by the court … of <u>any</u> power to make orders which is exercisable apart from those provisions."

16. In her argument before me Miss Chung for the Department was dismissive of the provisions of the High Court Ordinance and the court's jurisdiction, in asserting that they provided no remedy for the applicant and imposed no obligation upon the Commissioner of Police. Instead she argued that the Personal Data (Privacy) Ordinance of 1996 gave, at most, a discretion to the Commissioner of Police to disclose information if he thought it appropriate.

17. Unfortunately this piece of legislation has been misconstrued and misunderstood (or simply not understood) by many in many circumstances. Government departments and private institutions often consider that it encourages secretiveness and lack of cooperation failing to understand that its purpose is to protect data where necessary, not to obstruct across the board. A frequently experienced, though minor example, is of the official, usually a low-ranking one, who on contacting a customer (potential or existing) and ascertaining that the latter's identity accords with the details he has in front of him or her, is then asked in return who he or she is. The response is to give the name of the department or institution on whose behalf he or she is telephoning, or at best a christian name, and then on further questioning to decline to give proper identification falling back on the lame excuse – "I am not allowed to give it – data protection!"

18. Miss Chung said that specific reliance was placed on section 58 of the Ordinance. However section 58(1) clearly says that where "Personal data [is] held for the purposes of … (d) the … remedying … of unlawful or seriously improper conduct … by persons" it "is exempt from the provisions of data protection principle 6 … where the application of those provisions to the data would be likely to:

(i) prejudice any of the matters referred to in this subsection." [i.e. subsection (d) above]

19. This clearly covers steps to remedy a civil wrong (unlawful conduct). Therefore there can be no justification for withholding the data requested by the applicant.

20. Some years before the Ordinance, in 1973, the House of Lords considered the matter of discovery and public interest in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

21. The action was initiated to discover from the Customs & Excise, a government taxation authority, the identity of certain individuals or other entities against whom they could proceed for, in effect, pirating and infringing their patent. The Customs & Excise were in possession of the identities of these "pirating" importers of the infringing goods, by virtue of the declarations made by the importers in respect of the goods. There was initially an additional claim against the Customs & Excise of infringement of patent but this was abandoned after the Court of Appeal decision. Only the discovery issue remained.

22. The House of Lords held that the Customs & Excise were obliged to disclose the information so that the patent holders could take proceedings against those found to be infringing it. The judge at first instance held against the government department; the Court of Appeal reversed him and the House of Lords reversed the Court of Appeal. The holding of their lordships was as follows:

> "Where a person albeit innocently and without incurring any personal liability, became involved in the tortious acts of others

> he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a duty, statutory or otherwise."

23. The House reviewed a number of Chancery cases of some vintage as well as a decision of the Supreme Judicial Court of Massachusetts. At page 175 Lord Reid said:

> "They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

24. Of course the Commissioner of Police is not "mixed up in the tortious acts of others so as to facilitate them". He is simply in exclusive possession of information concerning a person who may be involved in a tortious act. The principle is not thereby affected. He is in possession of information without which the potential claimant is unable to advance his claim or commence proceedings.

25. Lord Reid continued:

> "It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents (the Customs & Excise) must disclose the information now sought unless there is some consideration of public policy which prevents that."

26. Lord Cross (at page 197) in considering the decision in *Orr v Diaper* [1876] 4 Ch D 92 which he found to be of great assistance in the solution to the question he and their Lordships were considering, said that:

"It lays down a reasonable principle by which to judge whether a plaintiff should have this sort of discovery", that principle being:

> "When a plaintiff has a cause of action against persons who are defined either by statute or by their relations to property or a business by the management of which the plaintiff has suffered injury, and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons from their agents in charge of the property or business; and the decisions recognize that this may sometimes be done … It is necessary that the plaintiff, in order to enforce the liability of the stockholders … should bring suit against the corporation and all its stockholders; and the plaintiff, except by discovery, cannot ascertain who these stockholders are."

27. Lord Kilbrandon cited the Massachusetts Court to which I referred earlier, *Post v Toledo, Cincinnati and St Louis Railroad Co* [1887] 11 NE Rep 540 stating:

> "… the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them, or to their property, in order to discover who the persons are against whom he may proceed for relief."

28. He also referred to a paragraph in Story, J's *Commentaries on Equity Jurisprudence* 2nd English edition (1892) p.1011

> "– in general, it was necessary, in order to maintain a bill of discovery, that an action should already be commenced in another court, to which it should be auxiliary. There were exceptions to this rule, as where the object of discovery was to ascertain who was the proper party against whom the suit should be brought." [My emphasis]

29. The Norwich Pharmacal decision is "cast in stone" in relation to pre-action discovery, having distilled the judicial wisdom and

experience of a century. The basic principle of pre-action discovery had been asserted over a century ago.

30. I was also referred by Mr Lam to the decision of Suffiad, J in *Tse Lai Yin Lily & ors v Incorporated Owners of Albert House & ors* [1999] 1 HKC 386 in which he considered precisely the general situation I have reviewed – the matter of discovery or disclosure by the Commissioner of Police of statements taken by them from witnesses concerning the collapse of the canopy on the first floor of Albert House in Aberdeen in August 1994. His decision was after the Personal Data (Privacy) Ordinance came into force so he had to consider the implications of certain sections of that Ordinance. The whole of his review and reasoning calls for a re-reading by obstructing authorities who seek to rely upon the Ordinance to withhold information requested in circumstances like that case and this.

31. It is readily apparent that where a person has reported to the Police any accident involving injury to himself/herself which may arguably give rise to a claim for compensation, and the Police have ascertained the identity of the person alleged to be responsible; or they have investigated an accident or incident either of their own volition, perhaps in accordance with their statutory duty, or as a result of a report from an injured person or some third party, and then refuse to disclose the material identity to him/her or its agent, they are obstructing the proper efficient and fair administration of justice.

32. Not only has the Police Force caused the delay referred to and refused to fulfil its obligation to an individual in the society it serves but it has forced the applicant's solicitors to use the facilities of the High

Court in order to obtain redress. It has been a waste of administrative and judicial resources and must not happen again. I can only hope that a clear, firm direction or instruction has been given to those responsible for this so that it cannot recur.

33. The costs order must be that the Department of Justice pay the costs of and occasioned by the application to include the costs of six of the seven letters written to the Police and of considering their replies. I am aware that the Consent Summons provided for the applicant to pay the respondent's costs. I do not understand how that could be thought to be appropriate. It would be patently unfair. The only sum payable to the Police would be the standard fee required for a copy of the Police Report.

34. I thought we had advanced long past the stage when government departments, or other institutions owing duties to the public at large, or individuals, withheld from them, information which was needed to advance a potential remedy or possible cause of action, in reliance upon a misconstruction of the Personal Data (Privacy) Ordinance or of the High Court Ordinance, failing to realise that, as a matter of common law (and common sense), there was a duty to facilitate the administration of justice.

35. I am told by Mr Lam that over the past 12 months he had been experiencing what I can only term as obstruction, in his attempts to obtain the usual information in the form of Police Reports to enable a civil action to be advanced.

36. Miss Chung was reluctant to indicate to me what advice has been given to the Commissioner of Police in respect of their response to

such applications and more specifically the subject one before me, on the ground that it was privileged but I managed to persuade her that this was a matter of public interest, not a matter to be dealt with behind closed doors and therefore we should all know what the future held in store in the form of such advice.

37. She did in due course indicate that the Commissioner had been advised that discretion should be used in dealing with such an application and that the Data Protection Ordinance should be carefully considered. In my view this is not enough. The Commissioner should be advised as follows:

(i) In relation to accidents in general where the data comes into the possession of the Police, they are exercising a public duty in acquiring or receiving such data whether it has been reported to them or whether they have carried out their own investigations.

(ii) Where an application is made to the Police by or on behalf of a party who has or may have a claim, i.e. is seeking a remedy for an act against him, arising out of an incident in respect of which the Police have acquired information relating to such act, they are obliged to provide such information upon payment of a reasonable fee.

(iii) The Data Protection Ordinance does not inhibit such a response on its behalf nor can it justify any failure on the Police's part to respond promptly and constructively to such request.

(iv) Failure to respond accordingly is likely to constitute an obstruction to the administration of justice.

(Conrad Seagroatt)
Deputy High Court Judge

Mr Kenneth Lam, of Messrs Kenneth Lam, for the applicant

Miss Bonnie Chung, Government Counsel instructed by the Department of Justice, for the respondent