

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
PERSONAL INJURIES LIST NO. 828 OF 1997

BETWEEN

LILY TSE LAI YIN	1 st Plaintiff
TSUI HO	2 nd Plaintiff
NG PAK MUI	3 rd Plaintiff
TSUI WAI NGON by her father and next friend TSUI SIU ON	4 th Plaintiff
CHAN MIN WAH	5 th Plaintiff
LEUNG PUI YING by her father and next friend LEUNG TAI FUK	6 th Plaintiff
TSUI SAI NUI the Personal Representative of MO YEE, deceased	7 th Plaintiff

and

THE INCORPORATED OWNERS OF ALBERT HOUSE (also known as THE OWNER INCORPORATION OF ALBERT HOUSE)	1 st Defendant
HOUSING MANAGEMENT AGENCY LIMITED	2 nd Defendant
HO WING HANG	3 rd Defendant
NEW BEST RESTAURANT LIMITED	4 th Defendant
ABERDEEN WINNER INVESTMENT COMPANY LIMITED	5 th Defendant
(transliterated as WONG KAY ON trading as HANG ON DEMOLITION AND TRANSPORTATION COMPANY alternatively HANG ON TRANSPORTATION COMPANY)	6 th Defendant

Coram : Suffiad J. in Chambers

Date of Hearing : 10th December 1998

Date of Ruling : 10th December 1998

REASONS FOR RULING

The Plaintiffs took out three summonses, all under O.24, r.7(8) for non-party discovery against the Director of Buildings, the Director of the Urban Services Department and the Commissioner of Police respectively, dated 1st, 2nd and 8th December 1998. After hearing the parties, I gave the orders sought by the Plaintiffs in respect of all three summonses. I now give my reasons for the Orders.

Background

This is a claim by seven Plaintiffs for damages, either for personal injuries or under the *Fatal Accidents Ordinance* in respect of a tragic accident which took place on 1st August 1994 when the canopy on the first floor of Albert House in Aberdeen collapsed, falling onto the pavement below and causing either the injuries or the death to the passers-by who were on that pavement at that time. The trial in respect of liability is scheduled for May 1999.

There are six Defendants altogether being sued. One of the issues in the case is the allegation by the Plaintiffs that a fish tank installed at one end of this canopy caused or contributed to the collapse of the canopy either because of its weight, or due to the fact that at the time of the accident, this fish tank was being dismantled. This fish tank was being used at the time of the accident by the 4th Defendant, the New Best Restaurant Limited, the licensee of which is the 3rd Defendant, Ho Wing Hang. At the pre-trial review of this action on 30th November 1998, the 3rd Defendant was given leave to amend his Defence

to include, *inter alia*, reliance upon advice given by alleged professionals and/or contractors in so far as the installation of the fish tank was concerned, and also reliance upon approval for the fish tank allegedly given by the Urban Services Department in consultation with the Buildings Department. This amendment has obviously opened up new avenues and therefore the necessity to follow this up with the Urban Services Department and the Buildings Department. It is for this reason that the Plaintiff now wish to inspect the files of these two departments particularly in relation to the installation of the fish tank.

After the accident, the Police took statements from a number of witnesses for the purpose of investigation into this accident and no doubt to see whether any person should be prosecuted as a result of this accident.

At the hearing of these summonses, I was informed by Ms Remedios that the Buildings Department and the Urban Services Department have already supplied to the Plaintiffs some documents but not all the documents in the relevant files have been disclosed, in particular, those relating to the canopy, including the application by the 3rd and 4th Defendants for approval of the fish tank and any material bearing upon the accident. Ongoing attempts to obtain such material first from the Buildings Department and subsequently from the Police met eventually with opposition, particularly in relation to unedited witness statements taken by both the Police and the Buildings Department after the accident.

Stance taken by the Department of Justice

Mr Li, appears on behalf of the Department of Justice, who in turn represents the Director of Buildings, the Director of Urban Services Department and the Commissioner of Police. I was informed by Mr Li that whilst the Director of Buildings does not oppose the disclosure of unedited statements of witnesses because consent from those witnesses have already been obtained, however, the main opposition comes from the Commissioner of Police on the

grounds that indiscriminate disclosure of the personal data of data subjects as contained in the witness statements taken by the Police will contravene the provisions of the *Personal Data (Privacy) Ordinance, Cap.486* (“the *Ordinance*”).

Reliance is placed on Principle 3 set out in Schedule 1 of the *Ordinance* which principle relates to the use of personal data, and that section 4 of the *Ordinance* provides that a data user shall not do an act or engage in a practice that contravenes a data protection principle unless it is required and permitted under the *Ordinance*. There is no dispute that, for the purpose of the *Ordinance*, the Hong Kong Police Force is the data user and the witnesses who gave those statements are the data subjects. It can also be safely presumed that the contents of those witness statements would contain personal data of the relevant data subjects.

It was submitted by Mr Li that Principle 3 requires that the personal data of a data subject shall not, without the written consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data, or any other purpose directly related to that purpose. In the present case, Mr Li submits that the sole purpose for the taking of those witness statements which contain the personal data of the data subjects, was for Police investigations into the accident with a view to possibly prosecuting any person who may be found criminally responsible for the accident, and did not include the disclosure of such data to the Plaintiffs in the civil action herein. Mr Li further highlights in his argument the fact that there is no specific provision under the *Ordinance* whereby compliance with a Court Order may be exempted from Principle 3, unlike Section 34(5) of the *Data Protection Act 1984* in the United Kingdom whereby personal data are exempted from the non-disclosure provisions in the Act in any case in which the disclosure is required by the order of a court made in the course of legal proceedings.

A further point relied on by Mr Li is that he seeks to rely on common law principles that where a subsequent statute is inconsistent with any earlier statute and the conflicts cannot be reconciled, the legislature is taken to intend that the subsequent statute should prevail over the earlier statute. Whilst acknowledging that section 42 of the *High Court Ordinance* gives the Court power to order non-party discovery, he argues that the *Personal Data (Privacy) Ordinance, Cap.486* is subsequent in time to the *High Court Ordinance, Cap.4*, therefore any inconsistency between the *Ordinance* and section 42 of the *High Court Ordinance*, where the conflict cannot be reconciled, the provisions of the *Ordinance* should prevail.

For these reasons, Mr Li submits that the Plaintiffs' summonses for unedited statements should be dismissed.

Law and practice in respect of non-party discovery

In personal injuries or fatal accident cases, there is a long standing jurisdiction of the High Court to order the disclosure by a non-party to the proceedings, documents in his possession, custody or power which are relevant to any issue arising out of that claim. This jurisdiction of the High Court is derived from section 42 of the *High Court Ordinance, Cap.4* with rules enacted under O.24, r.7A to carry into practice what is provided for in section 42 of the *High Court Ordinance*. In the case of **Wong Siu Hing & Anor v. Lo Che Keung & Anor** [1991] 1 HKC 412, it was held by Kaplan J. that the power of the court to order a non-party to produce relevant documents was not fettered except as provided by the relevant provisions of statute and the rules, and was to be exercised so as to further the proper administration of justice.

In the case of **Chan Tam Sze and Others v. Hip Hing Construction Co. Ltd. and Others** [1990] 1 HKLR 473, it was ordered against the Commissioner of Labour a non-party to that action, the discovery of files

relating to construction sites at which the plaintiffs had been injured at work despite the objection by the Commissioner of Labour that such an Order for discovery against him may contravene section 5 of the *Factories and Industrial Undertakings Ordinance* by disclosing either the name or identity of a complainant under that *Ordinance*, or by disclosing any manufacturing or commercial secret or working process. It was further held by Bokhary J. (as he then was) that such order for discovery would be accompanied by an order made on the undertaking of the solicitors for the plaintiffs not to disclose the name or identity of a complainant, or any secret process contained in the discovered material other than to the plaintiff, his counsel, secretarial and clerical staff and experts.

These two cases underline not only the importance of the power given to the court under section 42 of the *High Court Ordinance* for ordering disclosure by non-parties, but also the extent to which that power relates.

Personal Data (Privacy) Ordinance

Generally speaking, this *Ordinance* came into effect on 20th December 1996, although Part II of that *Ordinance* dealing with administration came into effect on 1st August 1996. As stated in the *Ordinance*, this is an *Ordinance* to protect the privacy of individuals in relation to personal data and to provide for matters incidental thereto, or connected therewith.

“Personal data” is defined in the *Ordinance* to mean any data –

- a. relating directly or indirectly to a living individual;
- b. from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- c. in a form in which access to or processing of the data is practicable.

“Data user” is also defined in the *Ordinance* as “in relation to personal data means a person who either alone or jointly or in common with other persons controls the collection, holding, processing or use of the data”. “Use” is defined in the *Ordinance* in this way : “in relation to personal data, includes disclose or transfer the data”. Section 4 of the *Ordinance* provides that a data user shall not do an act, or engage in a practice that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance. Schedule 1 of the *Ordinance* contains Data Protection Principles and Principle 3 thereof, in relation to use of personal data, provides that :-

“Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –

- a) the purpose for which the data were to be used at the time of the collection of the data; or
- b) a purpose directly related to the purpose referred to in paragraph (a).”

Part 8 of the *Ordinance* deals with exemption and section 58 provides as follows :-

“(1) Personal data held for the purposes of –

...

- (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons.

... are exempt from the provisions of data protection principle 6 and section 18(1)(b) where the application of those provisions to the data would be likely to (1) prejudice any of the matters referred to in that subsection or (2) directly or indirectly identify the person who is the source of the data.

(2) Personal data are exempted from the provisions of data protection principle 3 in any case in which –

- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and

- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection ...”

It is clear from section 58(2) that personal data are exempted from the provisions of Data Protection Principle 3 where the use of the data is for any of the purposes referred to in section 58(1), and whether or not the data are held for any of those purposes. What I have to decide, therefore, is whether the use of such data in a civil action claiming for damages resulting from the collapse of this canopy falls within the ambit of section 58(1)(d) of the *Ordinance* which provides for, *inter alia*, the remedying of unlawful conduct.

Firstly, I note that in section 58(1), the use of the word ‘crime’ in paragraph (a) and the word ‘offender’ in paragraph (b). This to my mind suggest, therefore, that the use of the words “unlawful or seriously improper conduct” in paragraph (d) extend beyond criminal conduct to include civil wrongs. Secondly, the use of the word ‘remedying’ in paragraph (d) is again suggestive of the same thing. The most natural meaning that can be given to the word ‘unlawful’ is that it normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. (See **R. v. R.** [1991] 4 All ER 481 per Lord Keith of Kinkel at page 484.)

Since tort is a civil wrong, the bringing of a civil claim for damages in tort amounts to the remedying of unlawful or seriously improper conduct. For these reasons, I have no hesitation in coming to the conclusion that the words contained in section 58(1)(d) of the *Personal Data (Privacy) Ordinance* is sufficiently wide to cover claim for damages in a personal injuries and/or fatal accident case. That being the case, the use of such data in respect of such a civil claim is therefore exempted from the provisions of Data Protection Principle 3 by section 58(2) of the *Ordinance*.

If I should be wrong on the above, I further hold that paragraph (b) of Data Protection Principle 3 in Schedule 1 of the *Ordinance* creates a further

exemption in that the bringing of this civil action for damages in relation to the collapse of the canopy is a purpose directly related to the initial purpose for which the witness statements were originally taken by the Police, namely, the Police investigation into the collapse of this canopy, and, therefore, there is no need to obtain the consent of the data subject before such data can be used in the ensuing civil action. The nexus of that relationship is the collapse of the canopy.

In the way that I have construed the *Personal Data (Privacy) Ordinance*, there is therefore no inconsistency between it and section 42 of the *High Court Ordinance*. It should also be noted that it was never the intention of the legislature that the *Personal Data (Privacy) Ordinance* would impede the administration of justice by restricting or eliminating the power of the High Court to order discovery under section 42 of the *High Court Ordinance* and it would be a very sad day for the administration of justice in Hong Kong if that consequence came about, whether intended or not.

Moreover, I have not the slightest hesitation to hold that the material sought by the Plaintiff in this application are highly relevant to the issues in this case. I should just add here that what evidence is or is not relevant to the issues in a personal injuries action is to be determined by the Court and not by the data user as seems to have been suggested by Mr Li in his submission. That no doubt is the *raison d'être* for section 42 of the *High Court Ordinance*.

Hopefully with this ruling, those involved in the administration of Government departments will no longer have to live with the shadow previously cast over them by the *Personal Data (Privacy) Ordinance* when being requested for witness statements by parties involved in personal injuries litigations arising out of the same accident, in respect of which those witness statements were taken initially. Secondly, perhaps these Government departments would like to

consider redrafting the standard forms of witness statements to be taken in future so as to include in those standard forms words which have the effect of making known to the witnesses that such statements, once given and signed by them, may be used in ensuing civil actions or in matters directly related to the purpose for which such statements were initially taken.

(A.R. Suffiad)
Judge of the Court of First Instance,
High Court

Ms Corinne Remedios, inst'd by M/s Wilkinson & Grist, for the Plaintiffs

Mr Herbert Li, S.G.C., of Department of Justice, for the Director of
Urban Services, Director of Building Department and
Commissioner of Police

Miss V. Lee, of M/s Gallant Y.T. Ho & Co., for the 2nd Defendant

Mr Lai, of M/s J. Chan Yip So & Partners, for the 3rd Defendant

The 1st, 4th, 5th and 6th Defendants absent