

CAMP 261/2020
[2021] HKCA 1919

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

MISCELLANEOUS PROCEEDINGS NO 261 OF 2020
(ON AN INTENDED APPEAL FROM DCCJ NO 505 OF 2019)

BETWEEN

GEORGE Y. C. MOK & CO. (a firm) Plaintiff

and

NEW LAND PROPERTIES
DEVELOPMENT LIMITED 1st Defendant

CHAN WAI LEUNG JACKY 2nd Defendant

Before: Hon Kwan VP and Cheung JA in Court

Date of Judgment: 17 December 2021

J U D G M E N T

Hon Kwan VP (giving the Judgment of the Court):

1. This is the renewed application of the plaintiff, a firm of solicitors, for leave to appeal against the decision of Deputy District Judge Jonathan Wong handed down on 22 May 2020 (reported in [2020] 3 HKLRD 74) (“**the Decision**”). The judge refused leave to appeal on paper by a decision handed down on 17 December 2020 (“**the Leave Decision**”), having considered the draft grounds of appeal and

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the parties' submissions. The draft grounds of appeal before this court are virtually on all fours as those placed before the judge. Having read the Leave Decision, it is fair to say that the arguments advanced by Mr Richard Leung¹ in this court are a repetition of his contentions in the leave application before the judge.

2. The primary issue raised in the intended appeal relates to the construction of section 56 of the Legal Practitioners Ordinance, Cap 159 (“the LPO”), which is found in Part VI of the LPO on “Remuneration of Solicitors” and comes under the heading of “Non-contentious Business”. Section 56 reads as follows:

“56. Agreement for remuneration for non-contentious business

(1) Whether or not any rules made under section 74 are in force, a solicitor and his client may, either before or after or in the course of the transaction of any non-contentious business by the solicitor, make an agreement as to the remuneration of the solicitor in respect thereof.

(2) The agreement may provide for the remuneration of the solicitor by a gross sum, or by commission or percentage or by salary, or otherwise, and it may be made on the terms that the amount of the remuneration therein stipulated for either shall or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees or other matters.

(3) The agreement shall be in writing and signed by the person to be bound thereby or his agent in that behalf.

(4) The agreement may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor:

Provided that if on any taxation of costs the agreement is relied on by the solicitor and objected to by the client as unfair or unreasonable, the taxing officer may inquire into the facts and certify them to the Court, and if on that certificate it appears just to the Court that the agreement

¹ With Mr Tommy Cheung

should be cancelled, or the amount payable thereunder reduced, the Court may order the agreement to be cancelled, or the amount payable thereunder to be reduced, and may give such consequential directions as it thinks fit.”

3. The plaintiff sued on an oral agreement with the defendants by which they agreed and undertook to pay \$600,000 to the plaintiff as agreed costs for rectifying the defects in title raised in one of the requisitions in a conveyancing transaction which had fallen through. The claim is for \$600,000 with interest thereon at \$29,750. The judge found in the Decision there was no agreement in writing within the meaning of section 56(3). The plaintiff does not seek to challenge this finding. The only contention sought to be raised in the intended appeal is as follows: under section 56 of the LPO, whether an agreement for remuneration in a non-contentious business which is not in writing and/or not signed by the client or his agent in that behalf is unenforceable and/or cannot be relied upon by a solicitor against his client.

4. Mr Leung repeated his contention that section 56 was “not drafted in clear terms”. He argued that on the proper construction of section 56 and in the context of other relevant provisions of the LPO, the provisions in section 56 are “not exhaustive and the Courts in Hong Kong still have powers under common law to enforce an oral agreement”, notwithstanding that the express requirements in section 56(3) are not met.

5. The judge rejected the plaintiff’s contentions for the cogent and comprehensive reasons given in the Decision (at §§38 to 76) and the Leave Decision (at §§9 to 21).

6. In this renewed leave application, Mr Leung did not advance any arguments to show how it might be said that the judge was in error in the proper reading of section 56 and the authorities cited to him as decided in the English courts (*Clare v Joseph* [1907] 2 KB 369; *Re A Solicitor* [1956] 1 QB 155) and the Hong Kong courts (*Super Strategy Investments Ltd & Anr v Kao Lee & Yip (a firm)* [2008] 5 HKC 71 and [2009] 3 HKC 92). We are in complete agreement with the judge. In no way could it be said that the drafting of section 56 (which was modelled on section 57 of the Solicitors Act 1957) is unclear or that the authorities are conflicting, as contended by Mr Leung.

7. We do not propose to rehearse the judge’s reasoning. We would just add these observations to supplement the judge’s reasons.

8. As rightly submitted by Mr Benny Lo for the defendants², English jurisprudence in this area is directly relevant, in particular the legislative history governing the agreement for remuneration of solicitors.

9. Before the enactment of the Solicitors Act 1870, a solicitor was under a disability at common law (being in a fiduciary relationship to the client) in making an agreement with his client to charge more than the amount of his bill of costs when taxed, as it was his duty to advise his client that it would be contrary to his interest to pay more (*Clare v Joseph* at 378, per Buckley LJ).

10. By section 4 of the Solicitors Act 1870, these provisions were made: (1) a solicitor “may make an agreement in writing” with his client in respect of the amount and manner of payment for his fees, and this would

² With Mr Jack Chan

apply to business done or to be done “whether as an attorney or solicitor or as an advocate or conveyancer”, in other words, covering both contentious and non-contentious businesses; (2) the agreement may provide for remuneration “by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated”; (3) the amount of remuneration agreed to be payable is not to be received until the agreement has been examined and allowed by a taxing officer.

11. Thus, the effect of section 4 of the 1870 Act was to relieve the solicitor of the disability at common law as aforesaid, so that the solicitor would be able to enforce the agreement with his client for remuneration, provided that the express statutory requirements were complied with. (*Gundry v Sainsbury* [1910] 1 KB 645 at 650, per Fletcher Moulton LJ)

12. In 1881, the regulation of non-contentious business was lifted out of the Solicitors Act 1870 and placed within the regime under the Solicitors Remuneration Act 1881. Section 8 of that statute was the forerunner of provisions similar to our section 56. It added a mandatory requirement that an agreement of remuneration for non-contentious business “shall be in writing, signed by the person to be bound thereby or by his agent in that behalf.”

13. The separate regulation of non-contentious and contentious businesses was retained in sections 57 and 59³ of the Solicitors Act 1932 (a consolidating act) and the Solicitors Act 1957 (which reproduced the 1932 Act).

³ The equivalent to section 59 in the LPO is section 58, which relates to an agreement with the client in a contentious business.

14. As explained by Wilberforce J in *Electrical Trades Union v Tarlo* [1964] 1 Ch 720 at 730 to 731:

“In the Solicitors Remuneration Act, 1881, the position was changed by section 8, and non-contentious business was taken out of the Act of 1870 and dealt with under a new section which contained a formula similar to that which is now in section 57 of the Act of 1957. In other words, it contained a prescriptive provision that the agreement should be in writing, signed by the person to be bound thereby, or by his agent in that behalf. So, to my mind, that left contentious business regulated by the Act of 1870, and in accordance with the decision of *Clare v. Joseph* enabled a client to rely upon a special agreement, without that being in writing.

The Solicitors Act, 1957, which is a consolidation Act, contains two separate sections. Section 57 dealing with non-contentious business positively requires the agreement to be in writing, and section 59, dealing with contentious business, merely says that a solicitor may make an agreement in writing with his client. The question is whether the position as established by *Clare v. Joseph* applies to contentious business and what happens where there is a mixed agreement dealing with non-contentious and contentious business. ...

I come to the conclusion that section 59 preserves the position as established by *Clare v. Joseph*, and that a client may take advantage of a special agreement in contentious business even though that agreement is not in writing. ...

One can put the matter in another way, that these sections are super-imposed upon the common law, and in particular section 57 reproduces section 8 of the Act of 1881, it brings in a new type of disability which did not exist before the Act, a disability to make an agreement as regards non-contentious business unless it is in writing. It does not seem to me that, that being so, there is any justification for spreading over that disability, imposed in relation to non-contentious business, into the area of contentious business which, under the common law, was not affected by this requirement. It seems to me that I should regard the restriction as to writing as applying only over the particular area to which it is expressly said to extend by statute, namely, over that of non-contentious business.”

15. Quite clearly, section 56(3) of the LPO is a prescriptive provision that the agreement for remuneration in a non-contentious business should be in writing, signed by the person to be bound thereby, or

by his agent in that behalf. It brings in a “disability to make an agreement as regards non-contentious business unless it is in writing”. So unless the prescriptive requirements are complied with, the agreement for remuneration in a non-contentious business is not enforceable. The position is clear and the plaintiff’s arguments to the contrary are quite simply untenable.

16. As mentioned earlier, the only basis of the claim in this action for \$600,000 with interest is the alleged oral agreement for remuneration. It was submitted before the judge that if the questions of law and of construction were determined in the defendants’ favour, the claim ought to be dismissed and the plaintiff did not argue to the contrary⁴. The plaintiff’s stance in that respect would appear to remain unchanged. It is not appropriate for us to speculate what other alternatives might have been open to the plaintiff.

17. For all the above reasons, we refuse to give leave to appeal against the Decision. As this application is wholly without merit, we make a further order under Order 59 rule 2A(8) that no party may under rule 2A(7) request the determination of this court to be reconsidered at an oral hearing *inter partes*.

18. There is no reason to depart from the general rule that costs should follow the event. We make an order *nisi* that the plaintiff is to pay the defendants’ costs of this summons. Having considered the defendants’ statement of costs for summary assessment, we assess the reasonable costs of the plaintiff at \$126,000. The costs order and summary assessment are

⁴ Decision, §82

in the nature of orders *nisi* and will be made absolute if no application for variation is made by any party within 14 days of the handing down of this judgment.

(Susan Kwan)
Vice President

(Peter Cheung)
Justice of Appeal

Written submissions by Mr Richard Leung and Mr Tommy Cheung,
instructed by George Y. C. Mok & Co., for the Plaintiff (Applicant)

Written submissions by Mr Benny Lo and Mr Jack Chan, instructed by
Au-Yeung, Cheng, Ho & Tin, for the 1st and 2nd Defendants
(Respondents)

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Date of Corrigendum: 22 December 2021

C O R R I G E N D U M

Please note the following corrigendum in the Judgment dated 17 December 2021:-

1. At page 7, between line R to T (the 3rd sentence of paragraph 18), “Having considered the defendants’ statement of costs for summary assessment, we assess the reasonable costs of the plaintiff at \$126,000.” should read “Having considered the defendants’ statement of

costs for summary assessment, we assess the reasonable costs of the defendants at \$126,000.”.

(Annie Fung)
for Registrar, High Court