

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
ACTION NO. 7665 OF 1998**

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BETWEEN

Holiday Resorts (Management) Co. Limited                      Plaintiff

And

Chan Yuk Yan and  
Chan Shui Ying Mindy  
(By Original Action)                      Defendants

And

BETWEEN

Chan Yuk Yan and  
Chan Shui Ying Mindy                      Plaintiffs

And

Holiday Resorts (Management) Co. Limited      1<sup>st</sup> Defendant  
Holiday Resorts (H.K.) Limited                  2<sup>nd</sup> Defendant  
(By Counter Claim)

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Coram:    Mr. Registrar C. Chan

Date of Hearing:    1 March 2001 and 12 April 2001

Date of Handing Down:    - 2 MAY 2001

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J U D G M E N T

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This Judgment relates to taxation of a bill of costs submitted by the Plaintiff and the 2<sup>nd</sup> Defendant by counterclaim pursuant to an Order made by the Honourable Mr. Justice Pang dated 9 August 2000. The parties came before me on 1 March 2001. The Defendants in the original action i.e. the paying parties who were acting in person raised two preliminary issues for me to decide before hearing the actual taxation:-

- (a) whether I should proceed to taxation as an appeal against the order is pending and
- (b) whether the solicitor Mr. Kam acting for the receiving party acted on pro bono basis.

I brought a further point to the attention of Mr. Kam that any cost awarded is based on indemnity principle. After hearing submission by both parties I decided to continue with the taxation. However I directed Mr. Kam to submit to me the bill he had tendered to his client for my examination within 14 days.

At the second hearing, the paying parties did not appear but appointed a certain Ms. Tsoi Ming Wai to apply for adjournment as the paying parties were not in Hong Kong. I refused the application as the date had been fixed some time ago and also that the paying parties had filed their list of objections. At the last hearing I examined each and every item of the bill and invited comments from the paying parties who could hardly give any. I could not find any assistance from them except those set out in the list. I do not think that it will do justice by further delay. During the adjournment before I resumed the hearing I had examined each and every item and also scrutinized the different documents produced to me in

support of the claim by the receiving party. I proceeded on with the taxation as usual.

After the taxation I expressed my concern to Mr. Kam that he had not addressed the issue I had raised relating to the principle of indemnity. What Mr. Kam had submitted to me was an interim bill no. 3117 dated 22 December 1999 relating to the matters covering the period before that date. It was not related to the items that I had taxed. The bill I had taxed related to the period from January 2000 onwards. Mr. Kam confirmed to me that he had not issued any bill for that period but stressed that he was not doing the case on pro bono basis. He had agreed with the client that the amount of costs he could recover from the other side would be the costs that he would charge his client. Such agreement was not evident in writing. I expressed my doubt as to such arrangement and asked, if no costs were recovered from the other side, whether he would issue a bill to his client. He then answered that he would issue and charge his client at the rate \$5,000 per hour. Mr. Kam is a solicitor of long standing and a senior partner of his firm. I should not have doubted or challenged what he told me. But my difficulty is that I have no evidence as to what is the amount his client should or would pay him and what his charge out rate of \$5,000 an hour would cover. The indemnity principle is that the costs order is to enable the receiving party to recover what has already incurred. But, the receiving party cannot receive more.

Mr. Kam's main argument was that I have to honour the Order of Mr. Justice Pang that the bills had to be taxed if not agreed. I have no difficulty with such argument and I have performed what Mr. Justice Pang had ordered me to do. This does not affect the common law position that an order for costs between the parties allows the receiving parties to claim

from the paying party only an indemnity in respect of costs covered by the order. The receiving party cannot recover a sum in excess of its liability to its own solicitors. This principle has been upheld in the case of *Gundry v. Sainbury* [1910] 1KB 645 at 649 where the Master of the Rolls quoted a passage from another case *Harold v. Smith* 5H. & N. 381:

“Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed is also ascertained.”

Following such indemnity principle the Supreme Court Taxing Office in England has incorporated it into Practice Note No. 2 of 1998, [1998] 1WLR 1674. I can find at least 2 cases in Hong Kong follow such principle, *the Building Authority v. Business Rights Limited* CACV 212/93 (unreported) and *the Attorney General v. Leung Ka Ki* Magistracy Appeal No. 502 of 1996 (unreported). I have no reason why I should depart from such principle. The agreement that, Mr. Kam told me, he had with his clients was so vague and uncertain that I do not know what is the liability of his clients to him. That causes me to think whether we should introduce a practice direction similar to Paragraph 12 of the Practice Note No. 2 of 1998 at page 1675:

- “(1) In this note the expression “written agreement or arrangement between solicitor and client” includes any letter or other written information provided by the solicitor to the client explaining how the solicitor’s charges are to be calculated.
- (2) Receiving parties must give to paying parties a short but adequate written explanation of any agreement or arrangement between solicitor and client which affects the costs claimed against the paying parties. The explanation may precede the narrative of the bill or be set out in a

separate document attached to the bill served on the paying parties and to the bill filed with the court when proceedings for taxation are commenced.

- (3) The receiving parties must attach to the copy of the bill filed with the court a *full copy* of any written agreement or arrangement between solicitor and client which affects the costs claimed in that bill. The taxing officer will compare that copy with the written explanation included in or served with the bill. If not satisfied that the written explanation given is adequate, the taxing officer will give such directions or order as to further disclosure as may be appropriate.
- (4) Every bill filed for taxation must contain a certificate substantially in the form set out below which is signed by the solicitor whose bill it is, or, if the costs are due to a firm, by a partner of that firm. The name of the solicitor signing must also be shown in block letters.

“I certify that this bill is both accurate and complete and that, in relation to each and every item it covers, the costs claimed herein do not exceed the costs which the receiving party/parties is/are required to pay me/my firm.”

- (5) If the costs to be taxed are affected by any written agreement or arrangement between solicitor and client which fixes hourly rates payable by the receiving parties to their solicitors, the bill drawn for taxation may claim costs on the basis of those hourly rates instead of claiming costs on the basis of expense rates and mark-up thereon (the A + B formula).”

In this case unless I am satisfied that the amount that I have allowed does not exceed the sum the receiving party is liable to pay their solicitors I will not issue the certificate (commonly known as the allocatur) certifying the amount that is due and payable by the paying party in this case.

I take the liberty of sending a copy of this Judgment to the Director of Practitioners' Affairs, the Law Society of Hong Kong, not as a

complaint against Mr. Kam but for the Society's consideration whether Hong Kong should adopt the practice in England that I have quoted above.



(Christopher C. Chan)  
Registrar, High Court

Appearances: Mr. A. Kam of Messrs. M. K. Lam & Co. for Plaintiff  
Ms. Tsoi Ming Wai represent Chan Yuk Yan, Defendant