

CACV 19/2021
[2022] HKCA 498

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

CIVIL APPEAL NO 19 OF 2021
(ON APPEAL FROM HCMP 290 OF 2020)

IN THE MATTER of section 740 of
the Companies Ordinance (Cap 622
of the Laws of Hong Kong)

and

IN THE MATTER of ALPHA
TOOL. COM. HK LIMITED
(Company No 945706)

BETWEEN

YOE HAN YAUW (尤漢耀) Applicant

and

YOE HAN HIAN (尤漢賢) 1st Respondent

YOE HAN LENG, MARSHALL 2nd Respondent
(尤漢令)

YOE MEI LAN (尤美蘭) 3rd Respondent

ALPHA TOOL. COM. HK LIMITED 4th Respondent

Before: Hon Kwan VP, Barma and Au JJA in Court

Date of Hearing and Judgment: 7 October 2021

Date of Reasons for Judgment: 11 April 2022

REASONS FOR JUDGMENT

Hon Au JA (giving the reasons for judgment of the court):

A. *INTRODUCTION*

1. This is an appeal by the applicant against the costs order made by DHCJ Eva Sit SC (as the Recorder then was) (“the Deputy Judge”) on 6 May 2020 (“the Costs Order”), whereby she awarded the respondents costs of and incidental to an Originating Summons issued by the applicant on 17 March 2020 (“the Originating Summons”). The applicant first sought leave to appeal against the Costs Order before the Deputy Judge, who refused leave on 15 October 2020 ([2020] HKCFI 2613) (“the Decision”).

2. By way of a summons filed on 29 October 2020, the applicant re-applied to this Court for leave to appeal against the Costs Order.¹ Leave to appeal was granted by this Court (Barma and Au JJA) on 15 January 2021. A notice of appeal was issued by the applicant on 21 January 2021.

3. We heard the appeal on 7 October 2021. At the end of the hearing, we allowed the appeal with costs and set aside the Costs Order.

¹ Under CAMP 200/2020.

We also ordered that the costs of the leave applications both before the Deputy Judge and this Court to be paid by the respondents jointly and severally to the applicant. We indicated that we would hand down our reasons in due course. This is what we do now.

B. BACKGROUND

4. We shall briefly state the uncontroversial background facts to put this appeal in context.

5. The applicant and the 1st to 3rd respondents are siblings. Together with their father, they ran a family business of manufacturing and trading in electronic appliances. In 2005, they incorporated the 4th respondent (“the Company”). The applicant and the 1st to 3rd respondents were shareholders and directors of the Company.

6. From about mid-2015, the applicant and his siblings’ relationship deteriorated. On 18 October 2017, the applicant was removed as a director and remained only as a 25% shareholder of the Company.

7. Thereafter, from August 2019 until February 2020, the applicant made repeated written requests to the respondents for the provision of various documents of the Company but to no avail:

- (1) On 19 August 2019, the applicant made a request for copies of the Company’s “yearly account reports” (會計年度報告). The applicant was however informed through Mega Alliance Consultants Limited on 20 August 2019 that “all materials are handled via solicitors and the Applicant should instruct

solicitors to issue a written request.” (「我們收到的指示是所有資料均由律師樓交收，請直接指示律師樓出信要求。」).

- (2) On 11 September 2019, by a letter, the applicant’s solicitors requested the 1st to 3rd respondents to, *inter alia*, give the applicant unfettered access to the Company’s accounting, financial and business records, and asked the respondents to reply by 5pm on 18 September 2019. On 17 September 2019, the 2nd respondent replied by letter that more time was needed to reply to the applicant’s letter.
- (3) On 23 September 2019, the applicant’s solicitors sent another letter to the 1st to 3rd respondents extending the reply deadline to 5pm on 30 September 2019. On 27 September 2019, the 2nd respondent replied that as their mother had passed away recently, they “do not have time to reply question in short period”.
- (4) About five months later, on 4 February 2020, the applicant’s solicitors again sent a letter to the 1st to 3rd respondents asking them to provide the applicant with various documents of the Company as set out in the attached schedule, and requiring them to reply by 5pm on 11 February 2020. It was further stated in this letter that the 1st to 3rd respondents’ delay in providing the documents to the applicant despite repeated requests was unsatisfactory and the applicant would commence legal action against them if they did not comply with the request by the deadline.
- (5) By a letter dated 5 February 2020 to the 1st to 3rd respondents, the applicant’s solicitors provided a revised schedule to replace the schedule attached to their 4 February 2020 letter

which they said was the incorrect version. The four classes of documents listed in this revised schedule were (a) the reports of the directors and the audited financial statements of the Company for the period from its incorporation up to 31 March 2006, the financial years ended 31 March 2007 to 2014 and the financial years ended 31 March 2017 to 2019; (b) all the documents provided to the Company's auditors for the preparation of the audited accounts for the years ended 31 March 2016 to 2019; (c) all the minutes and resolutions of the shareholders' meetings from 1 January 2016 to 4 February 2020; and (d) the bank statements of all of the Company's bank account(s) from 1 January 2016 to 4 February 2020 (collectively "the Documents"). The respondents however did not reply to the letter or provide the Documents.

8. As a result, on 17 March 2020, the applicant took out the Originating Summons seeking an order requiring the respondents (a) to disclose and produce the Documents² within 14 days of the order and allow the applicant to inspect and take copies of those documents; and (b) to allow the applicant to enter the registered office or other business offices of the Company to search for, inspect and copy the Documents. In the affirmation in support of the Origination Summons, it was stated that the application was made pursuant to section 740 of the Companies Ordinance (Cap 622). The hearing of the Originating Summons was fixed to be heard on 6 May 2020 before the Deputy Judge ("the Hearing").

² In the Schedule attached to the Originating Summons, the applicant further extended the scope of the Documents requested under (c) and (d) beyond 4 February 2020 to the date of the order to be made.

9. Only two days before the Hearing, by a letter dated 4 May 2020 (“the 4 May 2020 Letter”), the respondents’ solicitors informed the applicant that an Acknowledgement of Service of the Originating Summons dated 4 May 2020 had been faxed to the Court³. It was also stated in the letter that the respondents agreed to disclose and produce to the applicant the Documents as set out in the Schedule attached to the Originating Summons and to allow the applicant to enter the registered office of the Company to inspect and copy the documents. The respondents further proposed that the Hearing be vacated and that the costs of the Originating Summons be paid by the 1st to 3rd respondents jointly and severally to the applicant, to be taxed if not agreed. The respondents however refused to allow the applicant to search the Company’s registered office for the reason that it was jointly occupied by three different companies. Apparently, this letter was faxed to the applicant’s solicitors after office hours⁴.

10. On 5 May 2020, the applicant’s solicitors wrote to the respondents’ solicitors, insisting on the applicant being allowed to search the Company’s registered office and having indemnity costs for the application. The respondents did not agree and the parties therefore proceeded to attend the Hearing.

³ The Acknowledgement of Service of Originating Summons was in fact only filed with the court on 6 May 2020.

⁴ See the Decision at [4] and the fax header on the 5 May Letter [Appeal Bundle, pp74 - 75].

C. *THE HEARING AND THE COSTS ORDER*

11. The parties' respective solicitors attended the Hearing. They did not file skeleton submissions before the Hearing.

12. At the Hearing, the applicant's solicitor referred to, and the respondents' solicitors confirmed, the respondents' agreement to produce the Documents and allow the applicant to inspect and take copies of them. Hence, the only outstanding matters before the Deputy Judge were in relation to the applicant's application for a search order and the question of costs. In this respect, it is noted that upon the Deputy Judge's question, the applicant's solicitor was unable to point to any legal basis and justification for the court in making a search order⁵.

13. At the end, the Deputy Judge made an order requiring the respondents to disclose and produce to the applicant the Documents and allow the inspection and copies thereof to be taken. She further ordered that the applicant be allowed to enter the registered office of the Company to inspect and copy the Documents, but did not make any order for searching the registered office.

14. As to costs, the Deputy Judge was of the view that the circumstances did not warrant a split costs order⁶, and awarded the respondents all the costs of and incidental to the Originating Summons (ie, the Costs Order).

⁵ See Transcript of the Hearing, pp3J - 4J [Appeal Bundle, pp23 - 24].

⁶ See Transcript of the Hearing, pp10G - O [Appeal Bundle, p30].

D. APPLICATION FOR LEAVE TO APPEAL BEFORE THE DEPUTY JUDGE

15. The applicant subsequently applied to the Deputy Judge for leave to appeal against the Costs Order. In dismissing the leave application, the Deputy Judge was of the view that the applicant failed to demonstrate any palpable error in her exercise of discretion in ordering the applicant to pay all the costs of the Originating Summons. In particular, the Deputy Judge explained in the Decision the basis of her exercise of discretion as follows:

- (1) Whilst it was correct that the applicant had to issue the Originating Summons to obtain the Documents and succeeded in obtaining the same, he wrongly and unreasonably insisted on having the search order, when even his legal representative accepted at the Hearing that there was no legal basis to support that application: [14];
- (2) Immediately after the solicitors came on record for the respondents, they promptly sent out the 4 May 2020 Letter to the applicant, offering to provide disclosure and inspection of the Documents and pay the costs of the Originating Summons to avoid the Hearing. However, the applicant still insisted on the search order and indemnity costs which led to the Hearing, but the applicant failed to obtain what he had insisted upon: [17];
- (3) When these matters were considered as a whole, a “split costs” order would not be appropriate and the respondents should have all the costs of the Originating Summons: [18].

E. THIS APPEAL

E1. The grounds of appeal and contentions

16. In this appeal, Mr Lui for the applicant contended that in exercising her discretion to make the Costs Order in favour of the respondents⁷:

- (1) The Deputy Judge erred in principle in awarding costs to the losing parties. The applicant was substantially successful in the application in obtaining the “vast majority” of the reliefs sought in the Originating Summons and only failed to obtain the search order which constituted a “very minor” part of the application. It was thus wrong in principle to award all the costs of the application to the respondents who were in substance the losing parties;
- (2) The Deputy Judge failed to consider and/or give proper consideration to the highly relevant fact that the applicant had to issue the Originating Summons in order to obtain the Documents as a result of the 1st to 3rd respondents’ repeated refusals to disclose the Documents from September 2019 to February 2020; and
- (3) The Deputy Judge failed to consider and/or give proper consideration to the “repeated and express concessions” made by the respondents on the issue of costs by way of the 4 May 2020 Letter, and the fact that the respondents themselves did not seek costs of and incidental to the Originating Summons at the Hearing.

⁷ See also the Notice of Appeal filed on 21 January 2021 and the applicant’s skeleton submissions lodged on 9 September 2021.

17. In the premises, the applicant submitted that the Deputy Judge ought to have awarded the costs of and incidental to the Originating Summons to the applicant. Alternatively, the Deputy Judge ought to have made a split costs order by (a) awarding the costs of and incidental to the Originating Summons to the applicant (save for the costs of the Hearing); and (b) awarding the entire or part of the costs of the Hearing to the respondents.

18. In opposing these grounds of appeal, Ms Tam for the respondents contended that the applicant's conduct in insisting on the search order and indemnity costs had been unreasonable and contrary to the spirit of the underlying objectives under Order 1A, rule 1 of the Rules of the High Court (Cap 4A). As the applicant eventually failed to obtain the search order and indemnity costs at the Hearing, which he had all along insisted upon, the applicant was not the "clear winning party" and thus awarding all the costs of the Originating Summons to the respondents was justified. Counsel further argued that that no "concession" was made by the respondents' solicitor at the Hearing, and the respondents' offer by way of the 4 May 2020 Letter was not an "admission" as contended by the applicant as that was made on conditions. In any event, there was no principle nor authority to support the applicant's apparent contention that the Court could only make a costs order in a way that was raised by a party.

E2. Applicable legal principles

19. It is trite that costs are a matter of wide discretion for the judge. The discretion is to be exercised in accordance with principles and

with a view to reality and justice⁸. The appellate court will only interfere when it is satisfied that the judge in exercising her discretion has erred in principle, taken into account irrelevant considerations or failed take into account relevant considerations, and/or is plainly wrong⁹.

20. The relevant principles on the exercise of discretion as to costs has further been succinctly summarised by Lam VP (as he then was) in *YBL v LWC (No 2)* [2017] 2 HKLRD 783 at [10]:

- “(a) Whilst the courts often started with the proposition of costs following the event, it was no longer the general rule but a starting point (*Hung Fung Enterprises v Agricultural Bank of China* [2012] 3 HKLRD 679 applied);
- (b) There had to be some justification for depriving a successful party of his costs;
- (c) In measuring who was the successful party and the extent of his success, the court must examine the reality and justice of the case. Thus, in *Hysan Development Co Ltd v Town Planning Board (No 2)*, no order as to costs was made notwithstanding the success of the appellant in reversing the Court of Appeal's decision because they did not achieve the full objects of their appeals (*Hysan Development Co Ltd v Town Planning Board (No 2)* (2016) 19 HKCFAR 635 applied);
- (d) In addition, under O.62 r.5, the court in exercising its discretion should take into account the matters set out in r.5(1) as might be appropriate in the circumstances;
- (e) Order 62 r.5(2) highlighted conduct which the court could take into account including whether it was reasonable for a party to take an issue, the manner in which the matter was pursued or defended, the extent of success, and conduct before, as well as during the proceedings;

⁸ *Mimi Kar Kee Wong Hung v Raymond Kin Sang Hung* (unreported, FACV 10 & 11/2014, 7 July 2015) at [7].

⁹ *Chan Shun Kei v Hong Kong Construction (HK) Ltd.* (unreported, CACV 192/2014, 7 March 2016) at [22]; *Poon Ching Man v Lam Hoi Pun* [2016] 3 HKLRD 815 at [34]; *Ho Shu Kwong v Chiang Chun Yuan* [2002] 3 HKLRD 419 at [15] and [22].

- (f) If a successful party had brought the litigation upon himself or had done some wrongful act in the course of the transaction, he could be deprived of his costs.”

21. It is also not necessary to establish that a successful party has acted unreasonably or improperly in raising an issue for it to be deprived of whole or part of its costs. The Court may so order where the failed allegation of the successful party has caused a significant increase in the length or costs of the proceedings: *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at p1214; and *Zhuhai International Container Terminals (Jiuzhou) Limited v Lo Tong Hoi* (unreported, CACV 181/2011, 31 July 2012) at [33]. However, while the Court in the exercise of its discretion may refuse to make a costs order in favour of a successful party, it is most unusual and rare for a successful party to be ordered to bear the costs of the unsuccessful party: *Jiang Zhong v Yeung Chun Leung* [2018] 1 HKLRD 886 at [6.21] *per* Cheung JA.

E3. Discussion

22. Bearing the above principles in mind, in our view, the Deputy Judge erred in principle and was plainly wrong in exercising her discretion to award all the costs of and incidental to the Originating Summons to the respondents:

- (1) Given the chronology of the events, it is clear (and in fact it is common ground) that the applicant had to issue the Originating Summons in order to obtain the Documents from the respondents and to inspect and make copies of them. These reliefs formed the main crux of the application. Hence, the applicant was the ultimate substantial successful party in the application, even though he failed to obtain the search

order (which constituted a minor part of the reliefs sought). The Deputy Judge failed to give any or any proper weight to this important factor in making the Costs Order.

(2) Further, the conduct of the respondents in unjustifiably refusing to produce the Documents and, on some occasions, failing to even reply to the requests made by the applicant which had led to the issue of the Originating Summons was most unreasonable. The respondents' unreasonable conduct was further underlined by the fact that, despite the applicant's repeated previous written requests and the issue of the Originating Summons in March 2020, the respondents still only instructed solicitors to act for them in this matter close to the Hearing¹⁰ and sent out the 4 May 2020 Letter to the applicant's solicitors just two days before the Hearing (and after office hours). In making the Costs Order, the Deputy Judge also clearly failed to give any or any proper weight to this unreasonable conduct of the respondents before and after the commencement of the present proceedings.

(3) It is of course noted that the applicant had unjustifiably and hence unreasonably insisted upon being given the right to search the registered office after receiving the offers made in the 4 May 2020 Letter¹¹, which resulted in the need to proceed with the Hearing. However, given that the offers were made very late and close to the Hearing, and coupled with the respondents' persistent unreasonable conduct in failing to produce the Documents to the applicant for some seven months, which documents he as a shareholder was plainly

¹⁰ As mentioned above, the Acknowledgement of Service was also only filed on 6 May 2020.
¹¹ Given the circumstances, and the fact that the applicant had to issue the Originating Summons in order to obtain the Documents, we do not think the applicant's insistence of having indemnity costs *at that stage* was unreasonable.

entitled to, we do not think this factor considered in context amounted to any exceptional circumstance to justify requiring the applicant (who was the eventual successful party in the application) to bear all the costs of the application.

23. For these reasons, we are of the view that the Judge was wrong in principle and/or plainly wrong in ordering all the costs of and incidental to the Originating Summons to be paid by the applicant to the respondents.

24. We would therefore exercise the discretion on costs afresh. Having considered all the matters we have outlined above at [22], we are of the view that it is just and fair to award costs of and incidental to the Originating Summons to the applicant up to the Hearing. Further, as to the costs of the Hearing, given the matters set out at [22(3)] above, we regard it also only to be fair and just to make no order as to costs in relation to the Hearing.

F. CONCLUSION

25. For all the above reasons, we allowed the appeal and set aside the Costs Order, substituting it with an order that the respondents do jointly and severally pay the costs of and incidental to the Originating Summons up to the Hearing on 6 May to the applicant, and that there be no order as to costs for the Hearing.

26. As the applicant was successful in this appeal and in obtaining leave to appeal from this Court, we also set aside the Deputy Judge's costs order made in the Decision in refusing leave, and ordered that the respondents shall jointly and severally pay (a) the costs of this appeal, and

(b) the costs of the leave to appeal applications both before the Deputy Judge and this Court in CAMP 200/2020.

(Susan Kwan)
Vice President

(Aarif Barma)
Justice of Appeal

(Thomas Au)
Justice of Appeal

Mr Victor Lui, instructed by Alvan Liu & Partners, for the Appellant
(applicant)

Ms Isabel Tam, instructed by Chan & Chan, for the 1st to 4th respondents
(respondents)