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HCAL93/2006

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IN THE HIGH COURT OF THE

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HONG KONG SPECIAL ADMINISTRATIVE REGION

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COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

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NO. 93 OF 2006

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BETWEEN

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GLORY SUCCESS TRANSPORTATION LIMITED Applicant

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and

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SECRETARY FOR JUSTICE Respondent

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Before : Hon Chu J in Chambers

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Date of written submissions : 6, 15 and 25 March 2008

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Date of Decision : 31 March 2008

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DECISION ON COSTS

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1. This is the decision on the costs of the applicant's summons for joinder of additional respondent filed on 29 August 2007.

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Background

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2. In these proceedings, the applicant seeks to challenge a resolution passed by the Legislative Council under section 23(3) of the

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Road Traffic Ordinance, cap.374, extending the existing limitation on the total number of public light buses for a period of five years up to 2011.

3. The Secretary for Justice was named as the respondent, as representing the Secretary for Environment, Transport and Works.

4. In the course of the substantive hearing, the applicant through leading counsel conceded that it was wrong to name the Secretary for Justice as the respondent and submitted that the Legislative Council was the person directly affected by the judicial review application and against whom relief could be obtained. The hearing was adjourned to enable the applicant to serve the papers on the Legislative Council and for the Legislative Council to consider whether to make representation on the conduct of the case.

5. By summons filed on 29 August 2007, the applicant applied to add the Legislative Council as an additional respondent. The summons was addressed to and served on the Secretary General of the Legislative Council Secretariat (“the Secretary General”).

6. On the returnable day on 18 September 2007, the Secretary General appeared by counsel and made the submission, *inter alia*, that the Secretary General does not represent the Legislative Council and has no authority to accept whether the Legislative Council is a proper respondent or whether there had been proper service of the summons. The hearing was adjourned for the applicant to consider whether the Legislative Council is a proper respondent and whether the summons had been properly served. The costs as between the applicant and the Secretary General was reserved.

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7. At the adjourned hearing of the summons on 21 February 2008, the proposed joinder of the Legislative Council was refused. Upon the oral application made by the applicant's counsel, the President of the Legislative Council in her personal capacity and as representative of all members of the Council was added as an additional respondent.

8. The Secretary General did not attend the hearing. Directions were given for the lodging of written submissions to deal with the issue of the costs of the summons.

9. In the written submissions lodged, the Secretary General asks that his costs of and incidental to the summons, including the hearing on 18 September 2007, be paid by the applicant, to be taxed if not agreed and paid forthwith.

10. The applicant opposes the costs application. As a fall back position, the applicant says that the Secretary General should not be awarded counsel fees for the hearing on 18 September 2007.

Reasons for decision

11. For the reasons set out below, I am of the view that the applicant should bear the costs of the Secretary General of the summons, including the costs of the hearing on 18 September 2007.

12. First, the summons insofar as it seeks to join the Legislative Council as an additional respondent is misconceived and the applicant has

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failed in the application. The Legislative Council, being an unincorporated body, is not a proper respondent. Second, the summons was addressed to and served on the Secretary General. Applying the normal rule of costs follow event, the applicant is liable to pay the costs incurred by the Secretary General as a result of being served with the summons.

13. The applicant argues that the Secretary General's costs were unnecessarily and unjustly incurred and that the applicant should not be held responsible for them.

14. In support of this argument, the applicant refers to correspondences exchanged between the applicant's solicitors and the Secretary General prior to the issue of the summons. It is said that after the case papers were sent to the Legislative Council Secretariat, the Secretary General in his letter dated 1 February 2007 merely raised queries as to, *inter alia*, the appropriateness of serving the documents and papers on the Secretary General in light of section 6(1) of the Legislative Council (Powers and Privileges) Ordinance, cap.382. The subsequent exchanges focused primarily on waiver of the privilege or exemption under section 6(1). The applicant says that these correspondences gave rise to an unequivocal indication that the Secretary General was representing the Legislative Council.

15. The applicant further complains that it was only until the letter dated 17 September 2007 from Messrs Lo & Lo that the Secretary General indicated that it does not and cannot represent the Legislative Council. It is said that the Secretary General's failure to make clear his

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position at an early stage has caused substantial delay to the progress of the proceedings.

16. In mounting these arguments, the applicant have overlooked the fact that the primary duty is on the applicant to ascertain whether the Legislative Council is the proper respondent and whether the Secretary General has authority and can represent the Legislative Council. While the Secretary General should not positively mislead the applicant, it has no duty to assist or to advise the applicant on issues of service or joinder.

17. The functions and responsibilities of the Secretary General are set out in section 15 of The Legislative Council Commission Ordinance, cap.443. The Secretary General is part of and is the chief executive of the Legislative Council Secretariat and he is responsible to the Chairman for the administration of the Secretariat. At the same time, he is the Clerk to the Legislative Council. There is nothing in the section to indicate or support that the Secretary General can represent the Legislative Council to accept service of process. In the letters written to the applicant's solicitors, the Secretary General had not stated that he was acting on behalf of or on the authority or instruction of the Legislative Council. Although it can be said that the Secretary General could have made the position more explicit, the fact remains that he has no duty to be helpful to the applicant.

18. More fundamentally, even had the Secretary General been more forthcoming and helpful, it would not have changed the fact that the application to join the Legislative Council could not succeed, which is the cause for the time and costs wasted.

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19. As to the costs of the hearing on 18 September 2007, the Secretary General cannot be criticised for his attendance by counsel, given that the summons was addressed to and served on him. The Secretary General is a proper party before the court: see section 2 of the High Court Ordinance, cap.4 which defines “party” as including every person served with notice of or attending any proceeding, although not named on the record. He is entitled to appear by counsel.

Conclusion

20. For the above reasons, I order that the applicant pays the Secretary General the costs of the summons, including the costs of the hearing on 18 September 2007, to be taxed if not agreed and paid forthwith.

(C Chu)
Judge of Court of First Instance
High Court

Mr Hylas Chung instructed by Messrs Gary Lau & Partners for the applicant.

Mr Jat Sew-Tong SC and Mr Anthony Chan instructed by Messrs Lo & Lo for Secretary General of the Legislative Council Secretariat.