DCPI 1223 / 2011

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1223 OF 2011

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BETWEEN

|  |  |  |
| --- | --- | --- |
|  | KO FUNG | Plaintiff |
|  | and |  |
|  | PHYSICAL BEAUTY CENTRE (CENTRAL) LIMITED | 1st Defendant |
|  | RED INTERNATIONAL BEAUTY & SLIMMING LIMITED | 2nd Defendant |

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Coram: Before Master I. Wong in Court

Date of Hearing: 6th June, 2012

Date of Handing Down Decision: 12th June, 2012

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**ASSESSMENT OF DAMAGES**

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1. This is an assessment of the 1st Defendant’s damages against the 2nd Defendant on the basis of a Notice of Claiming Contribution and Indemnity dated 4th August, 2011 (“**the Contribution Notice**”), which was ordered to stand as the Statement of Claim. The claim was made pursuant to Section 3 of the Civil Liability (Contribution) Ordinance, Cap. 377.
2. Since the 2nd Defendant failed to file and serve its Defence, Interlocutory Judgment on liability was entered pursuant to O. 16, r. 5, RDC with damages to be assessed on 12th December, 2011.
3. The main Action by the Plaintiff against the 1st Defendant was disposed of by way of an Acceptance of Sanctioned Payment by the Plaintiff on 19th January, 2012 pursuant to O. 22, r. 15(4), RDC. The legal costs payable by the 1st Defendant to the Plaintiff was also disposed of by a further Acceptance of Costs Sanctioned Payment on 22nd February, 2012 pursuant to O. 62A, r. 13(4), RDC.
4. Subsequent to the above Acceptances, notwithstanding that an Interlocutory Judgment in default of notice of intention to defend had been entered on 2nd September, 2011 by the Plaintiff against the 2nd Defendant with damages to be assessed, the Plaintiff discontinued her proceedings against the 2nd Defendant on 12th March, 2012.
5. Hence, what remains is the assessment of the 1st Defendant’s damages against the 2nd Defendant pursuant to the Interlocutory Judgment as referred to in paragraph 2 above.

*Background*

1. The original action was brought by the Plaintiff against the 1st Defendant and the 2nd Defendant for damages as a result of personal injuries suffered by her in an accident on 18th November 2008.
2. At the material times, the 1st Defendant was in the business of provision of beauty services and the Plaintiff was one of its customers. The 2nd Defendant was the 1st Defendant’s supplier of a skin treatment machine called “Syneron Electro-Optical Synergy” (Serial No.F00010166) (“**the Machine**”). According to Ms. Lam Hau Yin Darrie, the witness for the 1st Defendant at trial, the Machine was a medical cosmetic laser and light equipment for treating skin pigment and dark skin.

*The Accident*

1. In or about September 2008, the 1st Defendant purchased the Machine from the 2nd Defendant.
2. On 18th November 2008, the Plaintiff attended 1st Defendant’s Centre for facial treatment, in the performance of which the 1st Defendant’s staff used the Machine on the Plaintiff’s faces. In the course of such treatment, she sustained burn injury to her left face. The Plaintiff therefore claimed against the 1st and 2nd Defendants for damages.

*The 1st Defendant’s Claim for Indemnity*

1. The 1st Defendant’s case is that since it has settled the Plaintiff’s claim and costs in the respective sums of $255,000 and $120,000 by way of Sanctioned Payments and has also incurred legal costs in the sum of $101,257 in defending the Plaintiff’s claim, it therefore claims against the 2nd Defendant for indemnity at a total sum of $476,257 (i.e. $255,000 + $120,000 + $101,257) with interest.
2. As pleaded by the 1st Defendant in the Contribution Notice, the 1st Defendant asserted that “*the accident was caused solely or materially contributed to by the negligence of the 2nd Defendant as appeared in the 1st Defendant’s Defence filed in the main proceedings”.* Notwithstanding the use of the words “*materially contributed”* it is clear from the Defence that the 1st Defendant denies its liability towards the Plaintiff and pleads that the accident was caused by the negligence and/or breach of contractual duty and/or breach of statutory duty on the part of the 2nd Defendant (paras 9 and 10 of the Defence).
3. Pursuant to O. 16, r. 5(1), RDC, if the 2nd Defendant failed to serve a defence, it shall be deemed to admit any claim stated on the Contribution Notice and shall be bound by any judgment (including judgment by consent) or decision in the action in so far as it is relevant to any claim, question or issue stated in that notice.
4. As Interlocutory Judgment on liability has already been entered under the said O. 16, r. 5, RDC, in my view, the 1st Defendant is entitled to seek full indemnity from the 2nd Defendant.
5. Ms. Lam Hau Yin Darrie, the Financial Controller of the 1st Defendant, testified in court in support of the claim. Her evidence, in essence, was to confirm that the main proceedings was settled and paid by the 1st Defendant’s insurer.
6. As for the 2nd Defendant, all along it was absent in both the main and the Contribution proceedings.

*The Law*

1. Section 3(4) of the Civil Liability (Contribution) Ordinance, Cap. 377 provides that,

*Section 3*

*(4) A person who has made or agreed to make any payment in* ***bona fide settlement or compromise*** *of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established. (emphasis added)*

1. On the evidence before me, there is nothing to suggest that the 1st Defendant’s settlement with the Plaintiff was not a bona fide one.
2. Further, the relevant common law principles in assessing the 1st Defendant’s damages in the present context can be found in paragraph 17-062 of ***McGregor on Damages****, 18th Edn*, which state as follows,

*(a)* ***Settlements.*** *Where the now claimant has made a payment by way of settlement of a claim brought against him, he can recover this amount as damages from the now defendant provided that the settlement represented a reasonable figure. Biggin v Permanite, which established this and that a settlement was a relevant consideration, is the leading case. At the time when Biggin was decided, over 50 years ago, settlements of damages claims were not so common but, now that they are practically the order of the day, in the last decade there has been a number of first instance decisions on the matter, some of which have relied heavily on Biggin. Recovery of the amount paid out in settlement was allowed in General Feeds Inc Panama v Slobodna Plovidba Yugoslavia, the court holding that it was for the claimant to prove that the fact and the amount of settlement were reasonable in all the circumstances. Similarly, in Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd main contractors claiming from their subcontractors the amount in liquidated damages they had paid their employer were required to show that such payment had been made in reasonable settlement of the employer’s claim. And, most recently, in Contigroup Companies Inc v Glencore AG, where there was delay in delivery of goods sold, the amount paid in settlement was held to be reasonable and therefore recoverable.*

*Was the Settlement Reasonable?*

1. Hence, the question is whether the settlement is reasonable in all the circumstances. In the present case, it is clear that the Costs Sanctioned Payment is also part and partial of the settlement deal between the Plaintiff and the 1st Defendant; and as such, it constitutes part of the damages for which the 1st Defendant is seeking indemnity.
2. The relevant pleadings and documents discovered from the Plaintiff have been placed before me. They include the Plaintiff’s Statement of Claim and Statement of Damages, 3 medical reports provided by the Plaintiff, 2 of which are from the doctors treating the Plaintiff and another from one Dr. Walter King, the Plaintiff’s medical expert, and the relevant receipts issued by the doctors.
3. The documentary evidence before me shows the following.
4. On the day following the accident, the Plaintiff consulted a private dermatologist, Dr. Wong Kwok On for treatment. Examination by Dr. Wong revealed rectangular erythematous area with blister on the left side of her face. Dr. Wong diagnosed the Plaintiff to have suffered from scald injury. After 8 sessions of treatment, the Plaintiff’s skin lesion was healed leaving a superfacial, pigmented scar.
5. Thereafter, the Plaintiff consulted another dermatologist, Dr. Tinny Ho for treatment of her scar.
6. The Plaintiff was also examined by her medical expert, Dr. Walter King who was a plastic surgeon. Dr. King considered that she suffered from left mid cheek rectangular patch of permanent scarring due to burning injury. Dr. King took the view that her scar is permanent although further treatment may improve the appearance of the scar or improve the degree of scarring. He recommended various treatments. The estimated costs are in the region of $99,000. Dr. King further assessed the Plaintiff to have suffered from 3% cosmetic disability, 3% loss of earning capacity and 1% permanent impairment.
7. The Plaintiff’s Statement of Damages filed on 17th June 2011 claimed the followings:

|  |  |  |
| --- | --- | --- |
|  | Pain and Suffering and Loss of Amenities (PSLA) | $250,000.00 |
|  | Loss of Earning Capacity | To be provided |
|  | Special Damages | $65,262.00 |
|  | Unused portion and/ or wasted fees pre-paid | $24,500.00 |
|  | Future Medical Expenses | $99,000.00 |
|  | Interest | To be quantified |
|  |  | $438,762.00 + Loss of Earning Capacity + Interest |

1. On 4th January 2012, through her solicitors Messrs. Winston Chu & Company, the Plaintiff put forward a without prejudice offer in the total sum of $430,000.00, inclusive of damages, interest and costs, in full and final settlement of her claim.
2. Mr. Kwong, for the 1st Defendant, submitted that before putting forward the Sanctioned Payment of $255,000, his firm, which was instructed by the 1st Defendant’s insurer by way of subrogation, had quantified the Plaintiff’s damages.

*PSLA*

1. Mr. Kwong referred me to ***Shabbina Khokhar v. Europe Beauty International Limited****, DCPI No. 579 of 2007, date of judgment: 4th January, 2008*, ***Leung Yuk Kwan v. Maple Professional Beauty Centre Limited****, HCPI No. 274 of 2002, date of judgment: 4th December, 2002* and ***Leung Ka Yee v. L&Y Beauty Centre Limited****, DCPI No. 196 of 2003, date of judgment: 22nd October, 2003* where damages for PSLA were awarded with similar injuries as points of reference.
2. Mr. Kwong submitted that in light of these authorities, a reasonable award for PSLA should be in the region of $125,000.
3. I do not think I need to venture into analyzing these authorities against the Plaintiff’s injuries as if I *were* to assess the Plaintiff’s PSLA. Suffice for me to say is that, in my judgment, Mr. Kwong has given a reasonable estimate.

*Loss of Earning Capacity and Special Damages*

1. Mr. Kwong submitted that since there was no documentary evidence adduced from the Plaintiff such as salary slips, tax return or appraisal report to substantiate the allegations of loss of earning capacity or disadvantage in the labour market, the 1st Defendant therefore did not give any sum under this head of claim. As for special damages, the Plaintiff was able to adduce receipts issued by her treating doctors in the total sum of $55,651 and these expenses were seemingly reasonably incurred, the 1st Defendant therefore included $55,651 in its quantification.

*Pre-paid Service Charges*

1. The Plaintiff claimed for the refund of pre-paid service charges in the sum of $24,500, $20,000 of which belonged to a new package and the balance of $4,500 to an old package. I agree with Mr. Kwong that the 1st Defendant could hardly resist the claim for the refund of $20,000, for the reason that it was entirely unused. As for the remaining $4,500, on the evidence before me the position was rather unclear but nevertheless the 1st Defendant only included $20,000 in the quantum.

*Future Medical Expenses*

1. As for the future medical treatments, Mr. Kwong submitted that these were recommended by the Plaintiff’s expert Dr. Walter King and in light of this, the 1st Defendant could hardly resist the claim. The 1st Defendant therefore included $99,000 in the quantum.
2. Mr. Kwong submitted that for the above reasons, the Plaintiff’s claim was quantified at $309,485.63 and it was after this quantification that the Sanctioned Payment of $255,000 was made. The particulars are as follows,

|  |  |  |
| --- | --- | --- |
|  | **1st Defendant’s Quantification** | **Plaintiff’s Claim** |
| PSLA | $125,000.00 | $250,000.00 |
|  |  |  |
| Loss of Earning Capacity | $0.00 | To be quantified |
|  |  |  |
|  |  |  |
| Medical Expenses | $55,651.00 | $65,262.00 |
| Refund of facial package | $20,000.00 | $24,500.00 |
| Future Medical Expenses | $99,000. | $99,000.00 |
| Interest on Special Damages @ 4% for 39 months | $9,834.63 |  |
|  | $309,485.63 | $438,762.00 |

1. I have carefully examined the documentary evidence adduced by the Plaintiff against Mr. Kwong’ submissions. There is nothing for me to cast doubt on the reasonableness of his quantification. I am satisfied that the quantification was arrived at after careful consideration of the evidence available at the time. I find that it was reasonable for the 1st Defendant, or in truth, for the insurer, to settle at $255,000. Indeed, this sum is rather favourable to the 1st Defendant in light of the original amount claimed.

*The Plaintiff’s Legal Costs*

1. The 1st Defendant also paid the Plaintiff’s costs in the sum of $120,000 by way of a Costs Sanctioned Payment. I note that at the time of the settlement, the stage of discovery had completed and one Checklist Review Hearing had taken place. From a letter dated 4th January, 2012 by the Plaintiff’s solicitors, it was revealed that counsel fees and medical report fees up to $88,500 had been incurred. Considering all these, I find it was reasonable for the 1st Defendant to settle the costs at $120,000.

*The 1st Defendant’s Own Costs*

1. As a result of defending the Plaintiff’s claim, the 1st Defendant incurred legal costs in the sum of $101,257, for which the 1st Defendant also seeks indemnity. On this subject matter, I need to refer to the following paragraphs in ***McGregor on Damages***, *supra*.

***17-063 (b) Costs****. The issue of reasonableness assumes a much greater importance when it arises in connection with the now claimant’s claim to recover as damages costs which he has paid in the previous proceedings. Reasonableness in bringing claims, successfully and unsuccessfully, and in defending claims, successfully and unsuccessfully, falls to be considered, and also reasonableness in the costs incurred themselves.*

***17-065(ii) Unsuccessful defence****. Where the now claimant has unsuccessfully defended a civil action, his claim for costs will fail if the defence is held unreasonable. As was said in Short v Kalloway.*

*“no person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend.”*

*Illustrations of reasonableness are nevertheless more common in the cases than of unreasonableness. This is so particularly where the action in which the costs are claimed is brought against a seller of goods or a seller or lessor of land for breach of contract. In such cases the seller or lessor is generally in a better position to know about the condition, quality and title of the goods or the land than the buyer or lessee, who may therefore be considered to be entitled to rely, when sued by a third party in relation to the goods or land, upon his seller or lessor not being in breach of contract. As Lord Esher M.R. put it in Hammond v Bussey, a case of breach of warranty in a sale of coal in which the unsuccessful defence was held reasonable,*

*“the reasonable course to be pursued by the vendees might be that they should not at once submit to the claim but that, unless they could get information from the vendor that there was really no defence, they should defend the action.”*

*And in Rolph v Crouch it was held that a lessee’s unsuccessful defence of an action for possession brought against him by a third party was reasonable, he having notified his lessor who paid no attention to the notice. Kelly C.B. said: “The claimant, being left to himself, acted for the best, upon his own judgment. He acted bona fide, giving credence to the defendant’s warranty” of quiet enjoyment. He was thus “justified in the course which he took”....*

1. As can be seen, again, the yardstick is whether the defence and the amount of costs are reasonable. Here, it is true that the 1st Defendant had put up a defence but on the evidence before me, I do not think it was unreasonable for the 1st Defendant to put up a defence at the initial stage and indeed, one of the grounds of defence was that the accident was caused by the 2nd Defendant. Considering that the main proceedings were quickly settled before the exchange of witness statements, I consider the 1st Defendant is justified in the course it took.
2. The relevant fee-note has been disclosed. It covers the work from receipt of instructions in July, 2010 up to settlement in March, 2012 and is in the sum of $101,257. I note that no counsel was retained on the matter. However, by way of reference, the Plaintiff’s costs were $120,000 which already included medical report fee but on the 1st Defendant’s part, it was not necessary to engage its own medical expert. Considering all these, I would think that the amount of $101,257 is on the high side. Doing the best I can, I would assess it at $70,000.

*Conclusion*

1. To sum up, the 1st Defendant’s damages are therefore assessed at $445,000 (i.e. $255,000 + $120,000 + $70,000).
2. I order that the 2nd Defendant do pay the 1st Defendant a sum of $445,000 with interest at half of the judgment rate from the date of the Notice of Contribution and Indemnity, i.e. 4 August, 2011 to the date hereof and thereafter at judgment rate until payment.

*Costs*

1. The 1st Defendant should also be entitled to the costs of the assessment.
2. The 1st Defendant elects summary assessment. The Statement of Costs, inclusive of the costs on liability, states a total sum of $39,250. Taking a broad-brush approach and considering the brevity of the Contribution Proceedings, I assess the costs at $25,000.
3. I order that the 2nd Defendant do pay the 1st Defendant the costs of the Contribution and Indemnity Proceedings, summarily assessed at $25,000.

(Signed)

I. Wong

Master, District Court

Mr. R. Kwong of Messrs. Winnie Leung & Co., Solicitors for the 1st Defendant

Red International Beauty & Slimming Limited, the 2nd Defendant (in person) absent