## DCPI 58/2015

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 58 OF 2015

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BETWEEN

WONG HIN CHUEN Plaintiff

and

WANG ON MAJORLUCK LIMITED 1st defendant

CHOI WU TONG trading as

CHUEN YUEN CLEANING & PEST

CONTROL SERVICE COMPANY 2nd defendant

GREATEST WEALTH LIMITED

trading as 萬有放心肉 3rd defendant

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Before: Deputy District Judge Eric Tam

Date of Hearing: 16 February and 9 May 2017

Date of Decision: 29 May 2017

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DECISION

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*Background*

1. The plaintiff claimed for damages he sustained in a slip and fall accident (“the Accident”) on 16 May 2012 at Po Lam Market, Tseung Kwan O (“the Market”). The Market was a wet market. The Accident happened outside shop 54B (“the Stall”) at the Market. The plaintiff was shopping at the Market. When he passed the Stall, he stepped on some slippery substance which caused him to lose his footing and balance. He fell and suffered a fracture of the left femoral neck commonly known as hip fracture. It is the plaintiff’s case that after the fall he found out that he had stepped on some pork residues that were discarded by the staff of the Stall. The floor of the passageway was wet at that time.
2. At the time of the Accident, Wang On Majorluck Limited (“the 1st defendant”) was the property manager of the Market. Choi Wu Tong trading as Chuen Yuen Cleaning & Pest Control Service Company (“the 2nd defendant”) was the cleaning contractor engaged by the 1st defendant to provide cleaning service for the Market. Greatest Wealth Limited trading as 萬有放心肉 (“the 3rd defendant”) was a tenant of the 1st defendant at the Market and operated the Stall selling pork.
3. Judgment was granted in favour of the plaintiff and the claims against the 1st defendant and the 2nd defendant were dismissed.
4. There was order nisi that the 3rd defendant do pay costs to the plaintiff, the 1st and the 2nd defendants.
5. The was also order nisi that the costs of the contribution and indemnity proceedings be paid by the 3rd defendant to the 1st and the 2nd defendants.
6. The 3rd defendant applied to vary the order nisi.
7. The 3rd defendant contended that the plaintiff should pay costs to the 1st and the 2nd defendants (including contribution proceedings among the defendants) for the reason that:-
8. the plaintiff’s claims against the 1st and the 2nd defendants had been dismissed;
9. based on the finding of facts of the court, there was no good reason to commence proceedings against the 1st and the 2nd defendants; and
10. the 3rd defendant did nothing to lead or induce the plaintiff to claim against the 1st and the 2nd defendants.
11. Mr Ho, counsel for the 3rd defendant, submitted in paragraphs 8 to 16 of his written submissions as follows:-

“8. The Court accepted the plaintiff’s evidence at §8 of his witness that the plaintiff saw the 3rd defendant’s worker drop the pork substances onto the floor of the Market (我看到該員工在切除那些豬皮、碎骨、碎肉等時會把這些東西散佈在該豬肉枱附近的地上。). This finding of fact must be the basis of the court’s exercise of discretion: see §7 of Lui Yin.

9. As the plaintiff was a shopper at the Market (§1 of the judgment), based on the finding of the court, the pork substances must be discarded seconds before the plaintiff stepped on them - otherwise the plaintiff would not be able to say that he saw that pork substances were discarded by the 3rd defendant’s worker.

10. Further, as the plaintiff is the only eye-witness of the Accident, whether it is reasonable to claim against the 1st and 2nd defendants depend solely on his version of the Accident as accepted by the court.

11. However, if the plaintiff’s case is that pork substances were dropped seconds before he slipped over them, it will be ludicrous to suggest that the 1st and 2nd defendants would have a duty to remove pork substances immediately, because the duty on the part of the 1st and 2nd defendants is only up to a reasonable standard. The plaintiff’s claim against the 1st and 2nd defendants was rightly dismissed by the court.

12. Therefore, if the plaintiff has been properly advised based on his version of the Accident, there is no reason why he should claim against the 1st and 2nd defendants.

13. The plaintiff’s case against the 3rd defendant is that the 3rd defendant’s littered pork substances on the ground of the Market. The plaintiff’s case against the 3rd defendant is completely different from that against the 1st and 2nd defendants, which is failure to keep the floor to be free from slippery substances. Further:

1. If the plaintiff succeeded in his claim, he would be able to claim damages from the 3rd defendant fully.
2. The plaintiff’s claim against the 3rd defendant depends solely on the court’s acceptance of his evidence. It does not depend on evidence from the 1st and 2nd defendants.
3. The 1st and 2nd defendants were not joined because they were vicariously liable or otherwise connected to the 3rd defendant. They were joined in because the plaintiff had separate and distinct causes of action against them, which were dismissed by the court.
4. As held in Irvine, the absence of connection of claims between successful and unsuccessful defendants is a material factor against the making of a Sanderson Order.
5. The plaintiff sent a pre-action letter to the 3rd defendant on 17 December 2012, where the plaintiff invited the 3rd defendant to suggest whether other parties were at fault. The 3rd defendant did not write back to blame any other party. Notwithstanding that, the plaintiff commenced proceedings against all 3 defendants.
6. In the 3rd defendant’s Amended Defence, the 3rd defendant did not seek to blame the 1st and 2nd defendants. Although the 3rd defendant filed a Notice of Contribution, the 3rd defendant cannot possibly lead or induce the plaintiff to commence proceedings against the 1st and 2nd defendants, because:
7. The 3rd defendant’s Notice of Contribution was issued 6 days before the trial, some 18 months after the plaintiff decided to claim against the 1st and 2nd defendants.
8. The 3rd defendant simply relied on the plaintiff’s claim against the 1st and 2nd defendants as the basis of the Notice of Contribution. No additional cause of action or evidence was adduced on the part of the 3rd defendant against the 1st and 2nd defendants.”

*Legal principles on Sanderson or Bullock order*

1. In *Chong Ngan Seng v China Harbour Engineering Co Ltd and 3 ors* CACV no 54 of 2012 (judgment on costs handed down on 25 September 2013) Fok JA, as he then was, stated at paragraphs 6 and 7 of the judgment as follows,

“6. In deciding whether to make a Sanderson or Bullock order and, if so, which of the two orders to make, the court is exercising its discretion.

7. It was common ground that, in deciding whether to exercise that discretion, the court looks to see whether it was reasonable in all the circumstances of the case for the plaintiff to join the successful defendant in the action.”

1. In*Fung Chun Man v Hospital Authority* [2012] 1 HKC 531 Bharwaney J stated at paragraphs 6 and 7 of the judgment as follows,

“6. The classic case where a Sanderson or Bullock order is made is where the unsuccessful defendant blames the successful defendant and causes the plaintiff either to join the successful defendant or to continue the proceedings against the successful defendant. However, even absent such circumstances, it may be reasonable for the plaintiff to join the successful defendant, in cases where the plaintiff is faced with a denial of liability by the unsuccessful defendant and the real risk that the unsuccessful defendant may either be absolved from liability or unable to satisfy any judgment that may be obtained against him. In such circumstances, if the plaintiff is in possession of evidence that can implicate the successful defendant, evidence that is neither tenuous nor speculative nor far-fetched, it would be reasonable for the plaintiff to join or to proceed against the successful defendant and the court, at the conclusion of such a case, may, in the exercise of its discretion over costs, make a Sanderson or Bullock order.

7. In the context of actions in tort, it does not matter that the claim against the successful defendant was not made in the alternative but was a separate and independent cause of action. Although a Sanderson or Bullock order is unlikely to be made in a case of successive and unrelated torts by different tortfeasors causing different damage, whether tortfeasors jointly caused the same damage or whether they separately caused different damage or only one of them caused the damage may only be known after a final determination by court. In exercising its discretion whether or not to make a Sanderson or Bullock order, the court would have regard to all the circumstances of the case and the state of the evidence to determine whether or not it was reasonable for the plaintiff to pursue the successful defendant. In making its decision, the court must be careful not to lose sight of the uncertainties surrounding the case before its conclusion (per Bokhary J., as he then was, in *Lee Lai Ha & Anor. v. Hong Sau Ling & Anor.* [1993] 1 HKLR 86)”.

1. In a nutshell, the court should consider whether it is reasonable to join the successful defendants, and whether the unsuccessful defendant blames the successful defendant.

*Discussion and analysis*

1. I agree with Mr Lim’s submission that it is reasonable to join the 1st and the 2nd defendants. It is my finding that the plaintiff fell because he stepped on pork residues. The pork residues were left on the passageway by the staff of the 3rd defendant. The wet floor also contributed to the slippery floor and the fall of the plaintiff. For the purpose of this application, we shall proceed on the basis that it is the finding of the court that the plaintiff saw the pork residues bounced off from the pork and scattered on the floor of the Market while the worker of the 3rd defendant was chopping the pork. In the present case, it was alleged that the floor of the Market was wet and not clean. The negligence of the 3rd defendant does not mean that the 1st and the 2nd defendants will not be liable. The finding that the plaintiff saw the disposal of the pork residues is only one of the factors to be considered. The wet floor was also one of the factors that contributed to the Accident of the plaintiff. It is reasonable in the circumstances to join the 1st and the 2nd defendants.
2. The 3rd defendant did try to shift the blame to the 1st and the 2nd defendants in the trial. Mr Chan, counsel for the 3rd defendant at the trial, suggested that the design of the Stall was at fault and the pork residues might have been left there by other stalls. In paragraph 27(4) of the closing submissions, Mr Chan submitted that “the pork substances could have been discarded by other parties:-

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|  | “(i) | The plaintiff admitted that the neighbouring stall 54A was a cooked food stall selling, inter alia, chicken feet and spare ribs rice (鳳爪排骨飯) and beef rice. Mr Cheung added that minced lean meat would be sold to stall 54A, but the 3rd defendant was not responsible for transferring the minced lean meat. |
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|  | (ii) | Mr Cheung gave evidence the lard company would pick up pork waste from the Stall with a trolley from time to time.” |

1. The 3rd defendant tried to shift the blame to the 2nd defendant, the cleaning contractor.
2. It is also noted that in the letter from Falcon Insurance Company (Hong Kong) Limited (“Falcon”), the insurer of the 3rd defendant, to the plaintiff’s solicitors dated 17 January 2013, Falcon asked the plaintiff’s solicitors to provide documentary proof that the alleged place of accident was under the control and management of the 3rd defendant. It implied that the person in control and management of the place, that is, the 1st defendant, should be liable.
3. I agree with Mr Lim that the plaintiff’s claim against the defendants was for the same damages arising out of the same incident. The argument of different causes of action is not accepted.
4. In addition, the 3rd defendant served the Notice of Contribution against the 1st and the 2nd defendants on 2 February 2016. It strongly indicated that the other defendants should be a party to these proceedings. The fact that it was served 6 days before the trial does not matter much. Mr Ho sought to rely on *Tam Kam Fai v Michael J Design Limited and others*, HCPI 347/2005. I do not agree. The facts of the case are completely different. The indemnity and contribution notices served amongst the defendants in this case are evidence that they blamed each other. To say the least, I agree with the submission of Mr Chung, counsel for the 1st defendant, that the 1st and the 2nd defendants are the successful parties in defending the contribution proceedings, the 3rd defendant should bear the costs of the 1st and the 2nd defendants in defending the Notice of Contribution.
5. The 3rd defendant was held liable and is the only person at fault. It was reasonable for the plaintiff to join other defendants. The 3rd defendant failed to claim contribution from other defendants.
6. Besides, on 20 January 2016 (which at that time, the 3rd defendant is yet to issue any Notice of Contribution), the 1st and the 2nd defendant jointly issued a Calderbank Offer in relation to the Contribution and Indemnity proceedings to the 3rd defendant, consisting, inter alia, the following terms:-

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|  | “(1) | Subject to the plaintiff’s contributory negligence, the 1st defendant do bear 25%, the 2nd defendant to bear 25%, and the 3rd defendant do bear 50% of liability; and |
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|  | (2) | There be no order as to costs amongst the defendants in the main proceedings and the contribution proceedings. |
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|  | (3) | The 3rd defendant may accept the offer in 14 days.” |

1. The 3rd defendant never reverted to the joint offer. It is appropriate that the 3rd defendant should be liable for the costs of the contribution and indemnity proceedings.
2. In the circumstances, the application for variation be dismissed. I order that all the nisi costs orders be made absolute.
3. There be costs order nisi that costs of this application be paid by the 3rd defendant to the plaintiff, the 1st defendant and the 2nd defendant, with certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. Unless application for variation is made within 14 days from the date hereof, such order shall become absolute 14 days thereafter.

( Eric Tam )

Deputy District Judge

Mr Patrick D Lim, instructed by Szwina Pang, Edward Li & Co., for the plaintiff

Mr Gary K H Chung, instructed by Cheng, Yeung & Co., for the 1st defendant

Au Yeung, Cheng, Ho & Tin for the 2nd defendant, who attendance was excused

Mr Leon Ho, instructed by Au & Associates, for the 3rd defendant