## DCPI 126/2013

[2019] HKDC 408

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 126 OF 2013

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##### BETWEEN

WONG YUNG TAI Plaintiff

and

TOP EAGLE SECURITY

MANAGEMENT LIMITED 1st Defendant

(discontinued)

LONGWORTH MANAGEMENT

LIMITED 2nd Defendant

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Before: Her Honour Judge Winnie Tsui in Chambers (Open to Public)

Date of Hearing: 8 March 2019

Date of Decision: 28 March 2019

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DECISION

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*The plaintiff’s claim*

1. The plaintiff commenced the present personal injuries action against the 1st and 2nd defendants in January 2013. The plaintiff claims that she was injured in an accident on 23 January 2010 when she was working as a cleaner at Langham Place Office Tower in Mongkok.
2. Her pleaded case is that, on that day, she was instructed by her employer, Sun Fook Kong Housing Services Limited, to move some shelves and for that purpose she took the goods lift to go from the 20th floor to the 22nd floor. When she entered the lift, a security guard responsible for controlling the goods lift pressed the “Close Door” button (instead of the “Open Door” button) by mistake. As a result, the lift door closed very quickly and the plaintiff was struck by the closing door.
3. She immediately felt pain in her low back and left lower limb. She attended the Accident & Emergency Department of Kwong Wah Hospital on the same day. Her back pain persisted and she attended the A&E Department on nine more occasions in 2010. She was referred for physiotherapy and occupational therapy. She was also referred to the Department of Orthopaedics and Traumatology for management of her persistent back and left lower limb pain.
4. As pleaded in her revised statement of damages filed on 15 February 2016, which is more than six years after the alleged accident, she “has still been suffering from severe low back pain with left leg sciatica, together with associated symptoms such as weakness, numbness and stiffness in the affected areas”. Her daily life has been greatly affected by the injuries. She has to rely on painkillers and medical ointment to manage the persistent pain. As her lifting and carrying capacity has been limited by the pain, she is no longer able to return to her pre-accident job as a cleaner which requires strenuous manual work.
5. Other than physical injuries, she has also developed mental symptoms and has been attending the West Kowloon Psychiatric Centre since January 2014. She was diagnosed with adjustment disorder with prolonged depressive reaction and the disorder was found to be causally related to the persistent low back pain.
6. In this action, the plaintiff was examined by orthopaedic experts. In the Joint Medical Report dated 15 November 2015, Dr Andrew Miu, the plaintiff’s expert, assessed her loss of earning capacity caused by the accident at 8% and opined that she “would have great difficulty to get back to her pre-injury job” and she should consider changing to jobs with lighter duties, such as car park attendant.
7. The plaintiff’s claim against the 1st and 2nd defendants is for “breach of statutory duty and/or Common Law Duty of Care”.
8. The 1st defendant was the security services company appointed for the building and the 2nd defendant its property manager. In gist, the main contention is that the defendants failed to take reasonable steps to ensure that the goods lift was in a safe operating condition; they failed to conduct reasonable supervision of the security guard who controlled the goods lift in order to ensure the safety of the lift users; and that they are vicariously liable for the negligent act of the security guard.
9. In the revised statement of damages, the plaintiff claims a sum of about $960,000.

*The contribution and indemnity proceedings*

1. The 1st defendant, acting in person, filed its defence in April 2013 and the 2nd defendant, who is at all times legally represented, filed its defence in July 2013. A number of checklist review hearings took place in the course of 2013 and 2014 in which directions were given for discovery, witness statements and expert medical evidence.
2. Then, in February 2015, the 2nd defendant commenced contribution and indemnity proceedings against the 1st defendant by filing a statement of claim. In gist, the 2nd defendant avers that if the alleged accident did occur in the manner claimed by the plaintiff, it was wholly caused or alternatively contributed to by the negligence of the security guard, negligence, breach of statutory duty or common duty of care and/or breach of contract by the 1st defendant. Hence if the 2nd defendant is found to be liable to the plaintiff in respect of the alleged accident, the 2nd defendant says it is entitled to recover from the 1st defendant an indemnity or contribution.
3. The 1st defendant filed a defence to that claim in March 2015.
4. Apart from the above pleadings, no separate discovery, witness statements or expert reports were made in the contribution and indemnity proceedings. It was ordered that those proceedings are to be tried at the same time as the main action.

*Progress of the action up until November 2018*

1. The plaintiff has all along been represented by L & L Lawyers in these proceedings, save for a brief period from early March to early October in 2013 when the plaintiff retained another law firm.
2. She was granted a legal aid certificate in January 2015.
3. The action was eventually set down for trial in January 2018. The trial was scheduled to commence on 9 November 2018 with a total of six days reserved.
4. The pre-trial review took place on 10 October 2018 before me. At that hearing, the plaintiff and the 2nd defendant could not agree on whether certain documents should be included in the trial bundles. The documents related to another two accidents which the plaintiff allegedly met in October 2009 and February 2010, ie shortly before and shortly after the present accident. I shall have to come back to these alleged accidents shortly. Also in dispute was the relevance of some other documents which related to the court actions instituted by the plaintiff in relation to the two accidents.
5. The disagreement was resolved at the pre-trial review and I gave directions on the lodging of updated bundles accordingly.
6. Then on 16 October 2018, which is less than one month before the trial, the plaintiff’s legal aid certificate was discharged.
7. By summons dated 24 October 2018, the plaintiff, who was then represented by L & L Lawyers on a private basis, sought leave to discontinue the action against the 1st and 2nd defendants with costs. In her affirmation filed in support of the summons (which did not accompany the summons but was only filed on 6 November 2018), she stressed that she is experiencing severe financial difficulties and deteriorating health. She was not in a position to engage lawyers to represent her at the trial. She was advised that if she lose the case at trial, she would have to be personally liable for the substantial legal costs of the defendants which she simply does not have the means to pay. Out of fear of the litigation risks and the potential staggering adverse costs consequences, the plaintiff decided to discontinue the action. But she still has a firm conviction that she has a proper cause of action against the defendants.
8. The summons was returnable on the first day of the trial. At the hearing, the 1st defendant, through its director, expressed the wish to see the end of the matter. By consent, as between the plaintiff and the 1st defendant, I granted leave to the plaintiff to discontinue her action against the 1st defendant, with no order as to costs. Also, by consent, I granted leave to the 2nd defendant to discontinue the contribution and indemnity proceedings against the 1st defendant, again, with no order as to costs. As a result of these orders, the 1st defendant effectively drops out of the picture from then onwards.
9. The 1st defendant’s position is to be contrasted with the 2nd defendant’s. The latter is highly critical of the plaintiff’s case and how it has been handled on her behalf. It is not content with the usual order that the action be discontinued with costs to be assessed on a party-and-party basis. Its position is that the plaintiff should only be permitted to discontinue the action on the condition that she do pay costs of the *whole* action to the 2nd defendant on an indemnity basis.
10. By their earlier letter dated 31 October 2018, the 2nd defendant’s solicitors expressed the view that the plaintiff’s claim is “unwarranted” and the case has dragged on for more than five years since its commencement. Much costs and public resources were spent and wasted on the action. And the plaintiff only chose to seek leave to discontinue on the brink of the trial. The 2nd defendant’s solicitors also criticised the plaintiff’s solicitors for how the latter had handled the discontinuance application. The 2nd defendant’s solicitors said that parties ought to have promptly filed their respective affirmations so that the time allotted to the trial could be made use of to deal with the costs issue and would not be (completely) wasted. The 2nd defendant’s solicitors also asked for the plaintiff to tender herself for cross-examination on the return date.
11. On 9 November 2018, I heard submissions from the plaintiff and the 2nd defendant as to how the discontinuance application should be dealt with. I adjourned the costs issue for substantive argument and made a number of orders, including:-

“*As between the Plaintiff and the 2nd Defendant*

6. Leave to the Plaintiff to discontinue her claim against the 2nd Defendant in this action with costs of the main action to the 2nd Defendant, to be taxed if not agreed, subject to paragraph 7 below;

7. The issue of the basis of costs to be paid by the Plaintiff to the 2nd Defendant and whether the Plaintiff is to pay the 2nd Defendant’s costs of the contribution and indemnity proceedings be reserved for argument;

8. Leave to the Plaintiff and the Director of Legal Aid to file and serve their affirmations in reply to (i) the 2nd Defendant’s Affirmation filed on 8th November 2018; (ii) the issue of the 2nd Defendant’s costs for the contribution and indemnity proceedings by 21st December 2018;

…

14. Liberty for the Plaintiff to attend the adjourned hearing to give evidence on the 2 outstanding issues. The Plaintiff do inform the Court in writing on or before 15th February 2019 whether she elects to do so;

15. The Director of Legal Aid do inform the Court by letter within 21 days from the filing of the 2nd Defendant’s affirmation in reply as to:

1. The Director’s stance on the 2nd Defendant’s application for indemnity costs;
2. The Director’s stance on the 2nd Defendant’s application for costs of the contribution and indemnity proceedings;

16. The Plaintiff’s application for Legal Aid taxation for the period when she was granted a Legal Aid Certificate be reserved with liberty to restore;

… ”

1. Since that hearing, there have been the following developments:-
2. Further affirmations were filed by the plaintiff and the 2nd defendant on the two outstanding issues, as directed.
3. The plaintiff was granted legal aid on 13 December 2018 to argue the issues.
4. The Director of Legal Aid confirmed by letter that he would rely on the plaintiff’s affirmation and would not file a separate one.
5. By the plaintiff’s 5th affirmation, the Director’s letter to L & L Lawyers dated 6 November 2018 was disclosed. In the letter, the Director stated that it would be unjust to impose an indemnity costs order on the plaintiff. He explained that counsel’s advice was obtained in late December 2017. He went on to explain why the legal aid certificate was discharged shortly before the trial. It was not due to the merits of the case.

“The Counsel Opinion obtained shows that there is merits in the Plaintiff claims including the joinder of the 2nd Defendant and sufficient quantum to be recovered from the case. Legal aid was subsequently discharged mainly because the costs incurred have already exceeded the likely damages to be recovered and your client may not have real benefit from the outcome of the case given the questionable sharing of liability between the Defendants in the case. This is particular so as the updated offer from the Defendant to settle this case appears unreasonable;”

1. By letter dated 15 February 2019, the plaintiff elected not to give evidence on the costs issues at the substantive hearing.
2. By letter dated 22 February 2019, the Director of Legal Aid reiterated his stance as set out in his letter of 6 November 2018.
3. The above account provides the factual backdrop leading to the two costs issues. As mentioned briefly above, the two other accidents alleged by the plaintiff and the related court actions intertwine with the present action and, consequently, the two costs issues. It is necessary to give an account of the allegations made there and the progress and outcome of those court actions.

*The three accidents and the related court actions*

1. According to the plaintiff, she was employed by Sun Fook Kong as a cleaning worker in August 2009. She worked there for about six months and during that period she met with three accidents, all resulting in (amongst other things) back injuries.
2. The first accident took place on 10 October 2009. The plaintiff was hit by a falling large heavy wooden plank which had been set against a wall. She lost her balance, fell on the ground and sustained injuries over her right wrist, back and right upper limb. She was given intermittent sick leave of about 18 days between 13 October 2009 and 2 November 2009. After that, she resumed work for fear of being laid off although she still suffered from persistent pain.
3. The second accident is the accident on 23 January 2010 which forms the subject-matter of the present action. As a result of this accident, the plaintiff was granted intermittent sick leave for the period between 23 January 2010 and 13 February 2010. Because of pressure from her employer, she resumed work in about mid-February for fear of being laid off. But she was still suffering from intense pain and had to take rest and take painkillers.
4. She then met with the third accident on 20 February 2010. Although the employer was aware that she had been advised by the doctor to perform light duties only, she was instructed to carry out some heavy manual cleaning works, including sweeping and mopping floors and walls, and to complete them within a short time frame. On the day, when she was sweeping the floor, she sprained her back and immediately felt that there was a substantial increase in her back pain which radiated to her left leg and she experienced numbness from her left knee to toes. The plaintiff was granted intermittent sick leave during the period between 22 February 2010 and 10 December 2015.
5. The plaintiff commenced a series of employees’ compensation and personal injuries actions against Sun Fook Kong in respect of the three accidents. They started earlier and appeared to have progressed at a quicker pace than the present action. I set out below a chronology of the events relevant to the discussion here. (It is largely taken from the chronology prepared by the 2nd defendant.) Save as otherwise indicated, all the actions were against Sun Fook Kong.

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| --- | --- |
| 19 Jan 2012 | The plaintiff commenced employees’ compensation claim under DCEC 125/2012 in respect of the second accident |
| 17 Feb 2012 | The plaintiff commenced employees’ compensation claim under DCEC 251/2012 in respect of the third accident. (Sun Fook Kong paid $22,090 to the plaintiff as employees’ compensation without a court action.) |
| 14 Sep 2012 | The two employees’ compensation claims were consolidated |
| 28 Sep 2012 | The plaintiff commenced personal injuries action under DCPI 2068/2012 in respect of the first accident |
|  |  |
| 21 Jan 2013 | The plaintiff commenced the present action against the 1st and 2nd defendants in respect of the second accident |
| 4 Feb 2013 | In the plaintiff’s statement of damages filed in the present action, the plaintiff claimed damages of about $990,000 in respect of the second accident |
| 15 Feb 2013 | The plaintiff commenced personal injuries action under DCPI 295/2013 in respect of the third accident |
| 15 Jul 2013 | The orthopaedic experts compiled a joint medical report in DCEC 125/2012 and DCEC 251/2012 (consolidated) (the “EC Joint Medical Report”) |
| 18 Jul 2013 | The two personal injuries actions against Sun Fook Kong were consolidated |
| 3 Dec 2013 | The plaintiff filed consolidated statement of damages in which she sought damages of over $1,800,000 from Sun Fook Kong |
| 12 Mar 2014 | The consolidated personal injuries action was transferred to the Court of First Instance as HCPI 382/2014 |
| 28 Aug 2014 | The consolidated employees’ compensation action was settled at the sum of $233,800. Half of that sum, ie $116,900, was for settling the second accident and the other half the third accident |
| 10 Feb 2015 | The orthopaedic experts compiled a joint medical report in HCPI 382/2014 |
| 2 Nov 2015 | The plaintiff filed a revised statement of damages in which the amount claimed in HCPI 382/2014 in respect of the first and third accidents was increased to about $2,800,000 |
| 15 Nov 2015 | The orthopaedic experts compiled a joint medical report in the present action (the “Joint Medical Report”) |
| 15 Feb 2016 | The plaintiff filed a revised statement of damages in the present action. The sum claimed in respect of the second accident was revised to about $960,000, which is slightly lower than the original claim |
| 12 May 2016 | The personal injuries action under HCPI 382/2014 in respect of the first and third accidents was settled at a sum of $900,000 (net of the settled sums already paid for the employees’ compensation claims in respect of the two accidents) |

1. In her submissions, Ms Phillis Loh, counsel for the plaintiff, highlighted the following points which stand out when one takes an *overall* view of the three alleged accidents and all the related court actions.
2. First, on the plaintiff’s own case, there is a substantial degree of overlap of the injuries sustained by her in the three accidents and most notably *all* the accidents resulted in injuries to her back. To recap, she complains of the following:-
3. In the first accident, she was injured in her back and right upper limb.
4. In the second accident, she sustained injuries to her low back with left leg sciatica.
5. In the third accident, she injured her back which subsequently resulted in severe low back pain with left leg sciatica.
6. At this juncture, I would highlight the following averments as regards the plaintiff’s present state as disclosed in her latest pleadings in the respective personal injuries actions:-
7. As a result of the first accident, she “has still been suffering from right upper limb pain and lower back pain”. See para 4 of the revised statement of damages in HCPI 382/2014.
8. As a result of the second accident, she “has still been suffering from severe lower back pain with left leg sciatica, together with associated symptoms such as weakness, numbness and stiffness of the affected areas”. See para 9 of the revised statement of damages in the present action.
9. As a result of the third accident, she “has still been suffering from severe lower back pain with left leg sciatica”. See para 9 of the revised statement of damages in HCPI 382/2014.
10. The obvious point here is that due to the overlapping back injuries and the overlapping residual back pain and related symptoms caused by the three accidents, any damages that the plaintiff would be entitled to claim would have to be apportioned amongst the three accidents. The apportionment would affect the calculation of quantum, including PSLA, loss of earnings, loss of earning capacity and future medical expenses. In light of that, one would reasonably expect that the plaintiff and her lawyers to reflect and take into account the overlapping back injuries when presenting her case in her pleadings and in the general conduct of her case in all the court actions. The 2nd defendant says that the plaintiff and her lawyers had blatantly failed to do so, at least as far as the present action is concerned. This points to an ulterior motive that in the present action the plaintiff intended to conceal the other two accidents, exaggerate her injuries suffered in the second accident, thus inflating her claim.
11. The second point which Ms Loh highlighted in her submissions is that in all the court actions taken out by the plaintiff in respect of the three accidents, she has been represented by the same firm of solicitors, L & L Lawyers (save for a brief period in 2013 as mentioned above). It follows that L & L Lawyers must have full knowledge of all the facts of all the three accidents (insofar as the plaintiff had informed them of the same) and what was going on in the different proceedings. Further, the plaintiff must be taken to have been given legal advice on how to conduct her various court actions on that basis. In other words, we are not dealing with a situation where a lay client retains two firms of solicitors in two different but related actions and one firm may not have full knowledge of what is going on in the other action. This kind of situation may in practice give rise to potential problems, such as inconsistent allegations being made in the two actions or the actions not being properly or efficiently managed together because of lack of co-ordination between the two firms. The point here is that there is no room for any of these problems to arise in the present case since L & L Lawyers have been the firm handling all the court actions for the plaintiff, whether they were against Sun Fook Kong or the two defendants here and whether they were in respect of the first, second and third accidents as alleged.
12. Having set out the material factual background, I now turn to the issue of indemnity costs.

*Legal principles on indemnity costs*

1. The general principles governing indemnity costs orders are not in dispute.
2. Generally speaking, the court has a broad discretion to determine how costs shall be paid and whether indemnity costs should be ordered. For actions heard in the District Court, the statutory underpinning is to be found in section 53 of the District Court Ordinance, Cap 336 and Order 62, rule 28(3) of the Rules of the District Court: see, in general, *Town Planning Board v Society for Protection of the Harbour Ltd (No 2)* (2004) 7 HKCFAR 114 at para 12.
3. In order to obtain an order for costs on an indemnity basis, it is for the party seeking it to show that the case has some “special or unusual feature”: *Town Planning Board* at para 15.
4. It is now well recognised that indemnity costs are no longer confined to cases where the paying party’s conduct lacks moral probity or deserves moral condemnation for which the court wishes to express disapproval. Conduct which falls short of that can be so unreasonable as to justify an order for indemnity costs. But such conduct would need to be unreasonable *to a high degree*. Unreasonable in this context does not mean merely wrong or misguided in hindsight: *Kiam v MGN (No 2)* [2002] 1 WLR 2810 at para 12; cited recently in Hong Kong in *Heung Wing Yan v Hangway Housing Management Ltd* HCPI 347/2012, 14 February 2017 at para 19.
5. The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs. On the other hand, to maintain a claim that one knows, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs: *Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd* 105 CLR 47 at 55; *Heung Wing Yan* at para 19.
6. There is an infinite variety of situations in which the court may consider appropriate to make an indemnity costs order. But ultimately what the receiving party must demonstrate is something in the conduct of the action or other circumstances of the case that “takes it out of the norm” which warrants such an order: *Heung Wing Yan* at para 20.
7. I shall now address the four grounds put forward by the 2nd defendant in support of an indemnity costs order.

*First ground – the plaintiff’s claim is unmeritorious*

1. In her written submissions, Ms Loh made the point that, first, the plaintiff’s claim on liability against the 2nd defendant is “wholly unmeritorious” and is “doomed to fail” and, secondly, the medical evidence does not support the substantial quantum which the plaintiff is claiming.
2. As regards liability, the 2nd defendant contends that the alleged second accident is not supported by any contemporaneous reports or medical records and “was likely made up by the plaintiff much later”. The 2nd defendant further argues that the plaintiff’s allegation that the goods lift was malfunctioning is not supported by any evidence. It is in fact contradicted by the 2nd defendant’s evidence, namely (a) contemporaneous records of inspection and maintenance of the goods lift around the time of the alleged accident in which no breakdown or malfunction was reported; and (b) a video demonstrating that the safety edge and infrared photocell sensor installed in the lift would detect any obstruction and would activate the safety mechanism to open the lift doors or to keep them in open position, even if the “Close Door” button was pressed. The maintenance records and the video demonstration were disclosed by the 2nd defendant in September 2013 and March 2014 respectively. The 2nd defendant says that in light of such strong evidence, the plaintiff’s claim is “wholly unmeritorious” and the plaintiff should have realised that her claim is “doomed to fail” no later than those two dates and should have discontinued the action by then.
3. As regards quantum, the 2nd defendant points to various medical reports and argues that the substantial claim is not supported. In this regard, the 2nd defendant highlights the fact that the plaintiff had in fact resumed work for Sun Fook Kong in mid-February 2010, ie shortly after the alleged accident on 23 January 2010.
4. In her written submission, Ms Loh concluded that it is doubtful if the plaintiff’s legal representatives had timely and properly advised her in proceeding with the action; that it also begs the question whether proper report of the case was made to the Director of Legal Aid and whether he was properly advised on the then available evidence. Ms Loh queried why in light of the 2nd defendant’s contrary evidence on the lift, legal aid certificate was subsequently granted to the plaintiff in January 2015.
5. The plaintiff disagrees that her claim on liability has no merit and that the quantum of her claim cannot be substantiated.
6. Mr Ernest Koo, counsel for the plaintiff, pointed out that there is contemporaneous medical record in support of the accident. He referred to the handwritten notes made by the A&E doctor at Kwong Wah Hospital when the plaintiff was seen there on 29 January 2010. The notes contained a remark that the plaintiff was “hit by elevator door” on 23 January 2010. As regards the extent of the plaintiff’s injuries, Mr Koo referred to the Joint Medical Report compiled in the present action. In the report, the plaintiff’s expert opined that as a result of the three accidents, the plaintiff suffered a 14% loss of earning capacity and 8% was attributable to the second accident. (This should be contrasted with the 2nd defendant’s expert’s assessment of not more than 0.5% loss of earning capacity caused by the same accident.)
7. In the present case, it is not necessary, nor is it appropriate, for me to go into a detailed evaluation of the evidential basis for and against the plaintiff’s claim, whether on liability or quantum, with a view to assessing the merits and strength of her case.
8. At the hearing, notwithstanding her written submissions, Ms Loh confirmed that the 2nd defendant is not inviting the court to find that the plaintiff had fabricated her claim. Counsel also accepted that in the absence of a full trial, it would not be possible for me to reach the conclusion that the plaintiff’s claim was bound to fail.
9. In my view, all that the 2nd defendant is able to demonstrate is that it has a strong defence and the plaintiff has a weak case on liability. On the face of the materials presently before the court, the plaintiff’s allegation that she was forcefully hit by the door of the goods lift in Langham Place Office Tower is strongly contradicted by the 2nd defendant’s evidence showing how the in-built device of the lift would prevent the alleged accident from happening and also by the evidence of the contemporaneous maintenance records which show no sign of any malfunction or breakdown. Ms Loh also submitted orally that we are here dealing with a lift in a modern office building, not some run-down building of a few decades old. So, when viewed that way, the plaintiff’s factual case on liability is fraught with difficulties. I accept that there is force in that submission.
10. On the other hand, however, her factual allegation is not the kind that can be rejected outright and her case of how she had been hit by the lift door is at least within the bounds of possibilities. If the action had gone to trial, live evidence would have been received from witnesses and the parties’ respective cases would have been tested by cross-examination. As things stand, the trial did not happen. The court is thus not in a position to make definitive factual findings one way or the other. Hence I am not able to come to the conclusion that the plaintiff’s claim was bound to fail and that the plaintiff knew or ought to have known that to be the case. Applying *Wates Construction*, the mere pursuit of a weak claim by itself does not amount to unreasonable conduct of a high degree. Hence the first ground relied on by the 2nd defendant will not *on its own* justify an indemnity costs order.

*Second ground – the plaintiff was dishonest and failed to disclose important facts*

1. The 2nd defendant’s complaint under this ground is twofold.
2. First, the plaintiff had *initially* in the present action knowingly withheld or concealed (a) the first and third accidents; (b) the injuries sustained as a result; and (c) the ongoing court actions in respect of those two accidents. With such concealment, the plaintiff had proceeded to make a dishonest claim or grossly exaggerate her claim in the present action, without giving allowance to the fact that her back injuries and the various heads of claims arose out of not only the second but also the first and third accidents which allegedly took place.
3. Second, the plaintiff resumed work as early as in March 2017. However, she had made no disclosure of this material change of circumstance and in fact deliberately concealed the fact in the course of the present proceedings. Similarly, the concealment would have the effect of inflating her claim.
4. Such dishonest and/or unreasonable conduct, the 2nd defendant submits, ought to be sanctioned by the court with an indemnity costs order.

*Complaint concerning initial concealment of the first and third accidents*

1. As to the first complaint, I accept that at the initial stage of the present action, that is from the issue of the writ in January 2013 to October of the same year when discovery was made, the plaintiff had made no proper disclosure of the other two accidents and there were material defects in her pleading. Having said that, however, I am unable to come to the conclusion that the plaintiff and/or L & L Lawyers were *deliberately and dishonestly* concealing the two accidents from the defendants with the ulterior motive of inflating her claim in the present action. While the failure to disclose on the part of the plaintiff and/or L & L Lawyers amounts to unreasonable conduct, it is not unreasonable to a high enough degree to warrant an indemnity cost order.
2. As noted in para 36 above, the objective reality is that throughout all the time since the occurrence of the first accident in October 2009, as alleged, the plaintiff and (after they were retained) L & L Lawyers were fully aware of the three accidents and all the related court actions.
3. Nevertheless, in the statement of damages dated 4 February 2013 filed in the present action:-
4. The plaintiff failed to mention the first and third accidents at all.
5. She positively pleaded that prior to the accident, she “was a healthy, outgoing and active person”. This statement is misleading because on her own case, she had been injured in her back and right upper limb in the first accident.
6. She pleaded that her daily life was affected by her back pain and the pain has been persistent. She further pleaded as follows:-

“*Due to the accident,* the Plaintiff sustained injuries to her back. She is still suffering from back and leg pain with stiffness and the pain greatly increases upon exertion.” (emphasis added)

1. The above pleas create an impression in the mind of a reasonable reader that her back pain was *wholly* caused by the accident on 23 January 2010 when in fact it was caused by all three accidents, according to her own case.
2. She sought to claim pre-trial loss of earnings for 24 months. That is to be read alongside with the consolidated statement of damages dated 3 December 2013 filed in the consolidated personal injuries action in respect of the first and third accidents. There, she pleaded that as a result of the third accident, she was granted sick leave from 21 February 2010 up to the date of the pleading and made a claim for pre-trial loss of earnings on that basis.
3. The plaintiff simply omitted to mention in the statement of damages in the present action that she indeed returned to work in mid-February 2010. And the sick leave period was not apportioned between the second and third accidents. There is therefore clearly an over-claim in the present action.
4. The plaintiff admitted to the omission and the over-claim but explained in her 5th affirmation that these were “simply results of an oversight on the part of [her] solicitors which had escaped [her] notice at that time as, while going through [her] claims in respect of the Accident, the thought of the 3rd Accident had not been on [her] mind.”
5. At the hearing, Mr Koo submitted that the plaintiff could not have intended to conceal from the defendants the other two accidents and the related injuries. He pointed out that in one of the medical reports listed in the statement of damages in the present action and filed together with it, there was an express reference to the injury sustained in the first accident. That report was made by Dr Chan Tung Ning, the A&E doctor at Kwong Wah Hospital and dated 23 November 2012. The 1st sentence of the report read:-

“The abovenamed patient presented to our AED on 23/1/2010 because of persistent back pain after injury that she had sustained in October 2009.”

1. The 2nd defendant and its lawyers, Mr Koo submitted, must be taken to have read that report and must have been alerted to the occurrence of the first accident.
2. In addition, in October 2013, that is a few months after the statement of damages was served on the 2nd defendant, the plaintiff filed a list of documents which included various medical reports and notes of treating doctors containing references to the injuries resulting from the first and third accidents. Most notably, the EC Joint Medical Report which was compiled on 15 July 2013 was disclosed in the list. In that report, the plaintiff’s expert discussed the three accidents and gave his opinions on the diagnosis, causation and prognosis of the plaintiff’s injuries and apportioned the loss of earning capacity between the three accidents.
3. There is therefore no question of the plaintiff trying to conceal the other accidents from the defendants in the present action upon the discovery of these medical reports and the EC Joint Medical Report in October 2013. The remaining question for me is whether *prior to that* the plaintiff and/or L & L Lawyers had dishonestly and deliberately concealed them.
4. Having taken into account the above matters, I am unable to draw the conclusion that at the initial stage of the present action, the plaintiff or L & L Lawyers or both acting together deliberately or dishonestly concealed the other accidents from the defendants with a motive to inflate the plaintiff’s claim and create an impression that all the back injuries suffered by the plaintiff was attributable solely to the second accident.
5. It is true that, objectively speaking, the statement of damages dated 4 February 2013 does create such an impression in the mind of a reasonable reader. But it does not necessarily follow that the impression was created deliberately with a motive to mislead. The inclusion of the report of the A&E doctor with the express reference to an accident in October 2009 would go against that conclusion. In the end, disclosure of medical reports, including the EC Joint Medical Report, was made shortly afterwards which would leave the defendants in no doubt that the back injuries were, on the plaintiff’s case, caused by the three accidents, albeit in varying degrees.
6. When one assesses the potential motive of the plaintiff when she put forward the defective statement of damages, one must ask – what tactical advantage or benefit could she have hoped to gain by deliberately withholding the other two accidents *at the initial stage*? The 2nd defendant is the property manager and it would be apparent to all that its case has since the beginning been conducted by its insurer. It would be expected that the plaintiff’s case would come under close scrutiny by the insurer and its lawyers. And it would appear to be the case that realistically there was nothing much to be gained by withholding the information during those early months. On balance, I am unable to draw the conclusion that the omission was deliberate and was driven by a motive to mislead.
7. Ms Loh submitted that the plaintiff’s explanation of oversight is too casual to be accepted. And it must be remembered that she had signed a statement of truth in relation to the statement of damages. The omission must be taken seriously by the court.
8. There is force in this submission. I should emphasise that it is clear that the pleader of the statement of damages fell short of the standard reasonably expected in such circumstances and that both the plaintiff and L & L Lawyers had failed to pay sufficient regard to the accuracy of the pleas in the statement of damages. But it is an altogether different thing to say that the plaintiff and L & L Lawyers had colluded together to inflate the claims. (By way of footnote, I note in the plaintiff’s *revised* statement of damages dated 15 February 2016, while the first and third accidents were expressly referred to and their relevance dealt with, in para 7, the inaccurate statement that prior to the second accident, the plaintiff was “a healthy, outgoing and active person” still remained.)
9. The factual basis of this complaint is not made out. I would add that the omission, whilst unreasonable, is not of such a high degree that would justify the grant of an indemnity costs order. As a matter of logic, an appropriate costs order in the circumstances would have been for the 2nd defendant to have costs incurred and thus wasted on meeting a case which was inaccurate in the first place. But here, by reason of the discontinuance, the 2nd defendant would have costs of the action in any event and that such a costs order would not therefore help.

*Complaint concerning the concealment of resumption of work since 2017*

1. The 2nd defendant obtained surveillance evidence in March and December 2017 and January 2018 revealing that the plaintiff had returned to work as a cleaning worker at the time of the surveillance. The video footage shows that she carried out the usual cleaning duties in different residential buildings apparently without any difficulty.
2. In her 4th affirmation, she admitted that due to severe financial difficulties, she worked as a temporary cleaning worker on an intermittent basis “in or about 2017” but due to the aggravation of her injuries, she was forced to stop work altogether “since in or about 2018”.
3. When describing the dates, the plaintiff was being vague in her affirmation. She was however more specific when she attended the West Kowloon Psychiatric Centre for treatment. According to the medical records, she told the treating doctor that she got back into employment as a cleaning worker in “early 2017” but had to stop working for periods of days when the pain got worse and she eventually quit job in June 2018.
4. The fact that she resumed working as a cleaning worker since as early as “early 2017” was never properly disclosed by her in these proceedings until her 4th affirmation when she was relying on the above medical records to show that she is suffering from worsening medical condition.
5. On the materials before me, I accept Ms Loh’s submissions and find that the plaintiff made a conscious decision to conceal her latest employment in this action so as to seek damages which she might not otherwise be entitled to. This finding is supported by the following matters.
6. First, the employment, whether or not on an intermittent basis, spanned over a long period of time from at least March 2017 to June 2018 when the present proceedings were in active progress. It was not an isolated or one-off incident. During this period of at least 15 months, the plaintiff would have been in possession of various documents in relation to her employment, such as employment contract, payroll slips etc. The plaintiff was under an ongoing obligation to make discovery. Yet no discovery of such documents had ever been made.
7. Secondly, the issue of whether the plaintiff could return to her pre-accident job as a cleaning worker is hotly disputed. The parties’ orthopaedic experts have given conflicting opinions and assessments – see paras 6 and 50 above. The fact that the plaintiff had resumed work about 16 months after the Joint Medical Report would clearly have a significant impact on the court’s assessment of the validity and soundness of the rival expert opinions. It would not only affect the issue of quantum (eg, loss of earnings to be reduced by reason of the new employment), it might also have a wider bearing, and potentially shine a negative light, on the credibility of the plaintiff’s case as a whole. This would therefore be a material issue at trial. Nevertheless the plaintiff made no mention of it of her own accord.
8. Thirdly, worse still, upon being prompted by the 2nd defendant at various times in 2017 and 2018, the plaintiff took no step to raise this point.
9. The 2nd defendant raised the query as to whether the plaintiff would need to amend or update her claims. L & L Lawyers indicated at the checklist review hearing on 28 April 2017 that they would take instructions and address the question whether an updated revised statement of damages would be required. But at the checklist review hearing on 8 September 2017, L & L Lawyers confirmed that no update was necessary.
10. The 2nd defendant served a notice to admit facts on the plaintiff in November 2017 in which it specifically asked the plaintiff to admit that she was capable of returning to work as a cleaning worker at the time of the notice. No admission was made by the plaintiff.
11. The 2nd defendant wrote to seek discovery of the information and documents in relation to the plaintiff’s resumption of work and her income on 25 October 2018 but the plaintiff has not replied. It is of note that while she makes the allegation that she only works on an intermittent basis, she has so far failed to disclose how “intermittent” her work had been.
12. Fourthly, the explanation given by the plaintiff in her 5th affirmation is unacceptable and unbelievable in view of the importance and the wider implication of the fact that she had resumed work over a substantial period of time. She said:-

“Upon the further explanation of my legal representatives, I am given to understand and verily believe that, in the interest of saving costs and efficient case management, it is not that a Re-revised Statement of Damages must be filed every time a change occurs in the plaintiff’s employment status. Instead, updated evidence might fairly be given by way of discovery and testimony at trial, and it has been my intention to do so.”

1. As explained above, the resumption of work is plainly a material development in this case. It was not proper for the plaintiff to sit on it and do nothing about it and wait till trial to give an update of the matter. This is not the kind of update in respect of a plaintiff’s employment status which would merely result in some modest or mechanical adjustment to the amount claimed. I reject the plaintiff’s explanation.
2. I am satisfied that the plaintiff had consciously concealed her employment and her income in the present action in 2017 and 2018 when such information was likely to be material to the issues in dispute. This amounts to unreasonable conduct of such a high degree that indemnity costs order ought to be imposed from March 2017 up to the discontinuance of the present action.

*Third ground – the plaintiff failed to consolidate the three DCPI actions*

1. Under this ground, the 2nd defendant contends that since the three accidents occurred within a very short space of time and they all resulted in back injuries and gave rise to overlapping sick leave periods and heads of claims, the three corresponding personal injuries action should have been consolidated. However, the plaintiff, acting with legal advice, chose to institute separate court actions and continued to prosecute them separately despite the 2nd defendant’s request for consolidation at one point. That had resulted in duplication of substantial time and costs. Ms Loh further made the point that such conduct might indicate that the plaintiff had intended to claim double compensation or inflate her claim.
2. In my view, the plaintiff cannot be criticised for bringing three separate actions in respect of the three accidents. As submitted by Mr Koo, they concern different defendants and the issues of liability are different. Having said that, however, upon the commencement of the actions, the plaintiff and L & L Lawyers are under a positive duty to prosecute the actions expeditiously and in a manner which would increase the cost-effectiveness of the proceedings and ensure fairness between the parties: Order 1A, rule 3. In this case, it is plain and obvious that the three actions should have been case managed together from the outset to ensure that the intertwined issues, such as the extent of the plaintiff’s injuries, causation and apportionment between the three accidents, were promptly brought to the forefront of the minds of the parties and the court such that these difficult issues could be addressed properly and effectively from the beginning. (In this regard, I note however that at a later stage a joint psychiatric expert report was compiled by the experts for the plaintiff, the 2nd defendant and Sun Fook Kong in September 2015.)
3. This was not done. However, the failure to do so does not by itself amount to unreasonable conduct which would justify an award of costs on an indemnity basis. I would repeat the remark I made in para 72 above. It might have been appropriate to order the plaintiff to pay any costs incurred but which could have been saved if the actions had been properly case managed. However, this point is academic in the present case.

*Fourth ground – the plaintiff exaggerated her disabilities*

1. Under this ground, the 2nd defendant says that there is evidence of exaggeration of the injuries sustained in the second accident, compared to those suffered in the first and third accidents. Ms Loh pointed to various medical reports to substantiate that point. She also highlighted that the plaintiff had already received a sum of over $1.15 million by May 2016 in settlement from Sun Fook Kong. It would therefore be most unlikely that she would recover any or any substantial damages in this action on top of the amount already received.
2. I do not consider that this is a valid ground. In the absence of a trial, the extent of the plaintiff’s injuries caused by the second accident cannot be determined in view of the conflicting medical evidence. Furthermore, as confirmed at the hearing, out of the settlement sum of over $1.15 million, only the sum of $116,900 was in relation to the second accident. That represents the settlement sum for the employees’ compensation claim. The rest of the settlement relates to the first and third accidents. As a matter of logic, they should not affect the assessment of quantum in the present action.

*Conclusion on indemnity costs*

1. In the above discussion, I have sought to deal with the four grounds individually and separately. At the hearing, Ms Loh urged the court to take an overall view of the conduct of the plaintiff and L & L Lawyers and argued that their conduct was so unreasonable on the whole that it would be appropriate to impose on the plaintiff a costs order on an indemnity basis for the *entire* action.
2. Overall speaking, what I have before me is a weak claim brought by the plaintiff and there are various shortcomings in the drafting of the original statement of damages and the failure to case manage the present action and other related actions properly from the outset. Some of the costs incurred might not have been necessary in the first place but I have not been told what those would be. Yet, I am not able to say that the plaintiff had deliberately and dishonestly withheld the other accidents from the defendants at the initial stage with a motive to inflate her claim. On the other hand, there are sufficient and strong materials before me to find that she consciously withheld her resumption of work from the defendants at a later stage where disclosure would potentially have the effect of undermining the credibility of her case (whether on the factual or expert front) and reducing the quantum of her claim.
3. Having considered the matter as a whole, I do not think I should accede to the 2nd defendant’s suggestion. I bear in mind that the starting point here is that the 2nd defendant should have party-and-party costs. The plaintiff and L & L Lawyers should be criticised for their shortcomings. But an indemnity costs order for the entire action would be too draconian a sanction for those shortcomings and a departure from the usual costs position based on them would be a disproportionate step for the court to take. The failure to disclose her resumption of work is, in contrast, conduct which takes the case out of the norm. The proper order to make would therefore be for the 2nd defendant’s costs to be taxed on an indemnity basis only from March 2017 onwards.

*Costs of the contribution and indemnity proceedings*

1. The 2nd defendant asks for an order that the plaintiff do bear its costs incurred in the contribution and indemnity proceedings.
2. In my view, it is not unreasonable for the 2nd defendant to commence those proceedings against the 1st defendant. On the plaintiff’s pleaded case, it is possible that the 2nd defendant may be held liable in negligence, but at the same time it may be entitled to an indemnity or contribution from the 1st defendant. For instance, this might be the case where the accident was found to have been caused by both the condition of the lift and the mistake of the security guard employed by the 1st defendant. Any reasonable lawyer would have advised the 2nd defendant to take step to protect its position to cover such potential eventuality. Furthermore, the contribution and indemnity proceedings have been conducted in a reasonable manner. Save for pleadings, there was no separate step taken for discovery, witness statements or expert evidence.
3. The plaintiff opposes such an order. In gist, she emphasises that it was the 2nd defendant’s sole decision to embark on this set of proceedings and the plaintiff had never played any role in them. In my view, there is no merit in this argument, which is totally beside the point. The plaintiff should pay to the 2nd defendant costs of the contribution and indemnity proceedings on a party-and-party basis.

*Conclusion*

1. I make the following orders:-
2. The plaintiff do pay costs of the action to the 2nd defendant before 1 March 2017 on a party-and-party basis and, from and including that date, on an indemnity basis, to be taxed if not agreed.
3. The plaintiff do pay the 2nd defendant’s costs of the contribution and indemnity proceedings on a party-and-party basis.
4. I also make an order *nisi* that the 2nd defendant do have costs of the discontinuance application, including any reserved costs, on a party-and-party basis, to be taxed if not agreed, with certificate for counsel and that the plaintiff’s own costs of the application be taxed in accordance with the Legal Aid Regulations.

( Winnie Tsui )

District Judge

Mr Ernest Koo, instructed by L & L Lawyers, assigned by the Director of Legal Aid, for the plaintiff

Ms Phillis Loh, instructed by Clyde & Co, for the 2nd defendant