DCPI 470/2014

[2018] HKDC 1152

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 470 OF 2014

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BETWEEN

CHANG LOK KUAN ROCKY (鄭樂群) Plaintiff

and

GERMAN POOL KITCHEN EQUIPMENT LIMITED

(德國寶廚房設備有限公司) Defendant

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

Date of Hearing: 12 September 2018

Date of Decision: 12 September 2018

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DECISION

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*Introduction*

1. On 6 June 2018, I handed down the judgment in this action, making an award of damages in the sum of $30,204 in favour of the plaintiff and dismissing the defendant’s counterclaim for defamation. I found that the defendant was negligent for selling to the plaintiff a set of kitchen cabinets where insufficient silicone gel had been applied causing a glass pane to fall off from one of the cabinet doors and injuring the plaintiff in his right thigh and right hand. I made a costs order *nisi* that the defendant do pay the plaintiff’s costs of the action and the counterclaim. The defendant now applies to vary that *nisi* order and seeks an order that there be no order as to costs of both the action and the counterclaim. The basis of such application is that the plaintiff has exaggerated his claim throughout these proceedings. I shall adopt below the terms defined in the judgment.

*The defendant’s ground*

1. The defendant relies on my finding that the plaintiff has exaggerated his injuries – see paras 76, 82 and 87 of the judgment. I set out the extent of the exaggeration in para 95:-

“I accept the plaintiff’s factual account in general subject to two exceptions. First, I find that he did not suffer from a cut to his right big toe in the accident and that he has not suffered from the residual symptoms after the accident as alleged, such as numbness and pain to his right thigh and right foot and his sleep being affected. … ”

1. Mr Douglas Clark, counsel for the defendant, also highlights in his submissions that the final award of damages ($30,204) was less than 25% of what was originally claimed in the action ($125,274).
2. Mr Clark relies on the remark made by Zervos J in *Li Ming Tak v Hong Kong Airport Services Ltd* HCPI 860/2009, 19 November 2014 at para 122. The judge highlighted that exaggerating a personal injury claim is a serious matter and that a fraudulent or an exaggerated personal injury claim will not be tolerated. Where a plaintiff is found to have acted dishonestly or knowingly made a false statement or claim, the court may take a number of steps, including refusing costs to a successful plaintiff. The Supreme Court decision in *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004 was cited in the judgment.
3. The decision on liability was overturned on appeal: see [2015] 4 HKLRD 749. The above remark was therefore not specifically commented on by the Court of Appeal. But it should be noted that the trial judge in fact did not refuse any part of the costs even though he had found that the plaintiff had exaggerated his claim.
4. At today’s hearing, Mr Clark indicates to the court there are in fact a number of actual decisions in Hong Kong and England in which the court disallowed costs to a successful plaintiff *solely or primarily* on the ground that he has exaggerated his claim. But he has not cited any of them as these decisions are concerned with the particular circumstances of the cases.
5. In his oral submissions this morning, Mr Clark emphasises that where a plaintiff has been found to have exaggerated his claim and therefore was acting dishonestly in court proceedings, it imposes on the defendant a heavy burden of analysis, so as to weed out the exaggerated claims from the justified ones. This is unfair and such behaviour fundamentally undermines our system of administration of justice: see *Summers* at para 57. In the present case, the court should refuse the plaintiff’s costs and send a loud and clear message to litigants and their legal advisers that there is no place for exaggeration in our civil justice system. Otherwise it would, Mr Clark submits, effectively be rewarding dishonesty.

*Discussion*

1. The issue of costs is within the discretion of the court. Order 62, rule 5(1)(e) of the Rules of the District Court expressly provides that in exercising its discretion, the court may, if appropriate, take into account the conduct of all the parties. Rule 5(2)(c) further provides that the conduct includes whether a claimant who has succeeded in his claim exaggerated his claim.
2. It is therefore clear that it is within the power of the court to deprive a successful party of his costs if he is found to have exaggerated his claim.
3. The power is there but the key question remains – when is it appropriate to exercise such power? There is no absolute answer or hard and fast rule. It must depend on the circumstances of each case. However, as accepted by counsel, the extent of the exaggeration would be relevant. So would be the impact of the exaggeration on the progress of the proceedings, such as the time and efforts spent on pursuing and defending the exaggerated part of the claim.
4. Having considered all the circumstances of the present case, I refuse to exercise my discretion to deprive the plaintiff of any of his costs in the action and the counterclaim. I consider that the following matters are relevant and material considerations on the issue.
5. First, if one is to take an overall view of the action and the counterclaim, the crux of the dispute was whether the kitchen cabinets supplied by the defendant were defective as alleged by the plaintiff. The plaintiff won on this issue. His factual and expert evidence on this issue has been accepted by the court. It is true that on quantum he was not awarded damages as claimed in full. Nevertheless, he was the overall winner. To accede to the defendant’s present application to deprive the entirety of his costs would require a very strong justification.
6. Second, one therefore needs to ascertain critically the extent of his exaggeration of his injuries. I have set out my finding on this above. If I have to somehow “quantify” it in words, I would tend to think that the degree of exaggeration is at the lower end of the spectrum. To put it in another way, as far as exaggeration goes, it is not the worst of its kind, as submitted by Ms Percy Yue, counsel for the plaintiff. And it is certainly not to such an extent that warrants the wholesale deprivation of his costs.
7. I pause here to note that while the exaggeration in *Li Ming Tak* would appear to be a lot more serious, the judge, after giving thought to it, did *not* deduct any costs of the succeeding plaintiff in the end.
8. Third, the practical impact of the exaggerated part of the claim on the proceedings was not significant. As accepted by Mr Clark, it had the effect of prolonging the cross-examination of the plaintiff. But that was really it as no leave was granted to adduce any medical evidence on the plaintiff’s injuries.
9. Fourth, it is of note that in these proceedings the plaintiff has revised the claim amount downwards from about $125,000 at the pleading stage to about $85,000 in the opening of the trial. The concession is, in my view, a sign that the plaintiff was being realistic about his claim.
10. Fifth, I reject Mr Clark’s submission that the exaggeration has made it *impossible* for the defendant to assess the plaintiff’s case and try to settle the matter. As remarked above, the crux of the issue was whether the cabinets were defective as alleged. The defendant’s staff had had a chance to inspect both the upper and lower cabinet doors just a few days after the accident allegedly happened. The defendant had appointed its own expert to inspect the cabinets again in 2015. In the circumstances, I fail to see how the defendant was not in a position to evaluate the prospect of its defence on the issue of liability and make a decision as to whether to settle or not and, if so, on what terms.
11. On quantum, if the defendant strongly felt that the injuries had been exaggerated, it was always open to it to pitch a settlement figure at a suitably low level. There is always some degree of estimate or guesswork in this exercise. A party would simply have to form a view and take a stance if it is genuine about settling the case. I simply do not see why it was *impossible* for the defendant to go through this exercise. If it had done so, the defendant could have protected its costs position by making a sanctioned payment or otherwise making a suitable costs offer.
12. Sixth, it must not be forgotten that the defendant raised a counterclaim for defamation. At trial, the defendant stated that of particular concern was the publication to Apple Daily. Yet it had not even adduced evidence of the publication itself and hence arguably not passed the first hurdle of the cause of action (see para 66). The defamation claim based on the publication to the defendant’s staff was also dropped at the trial. In the end, the defamation claim failed because the plaintiff succeeded in proving his case. But time and costs had already been spent on resisting the counterclaim.
13. The action which should have otherwise been a straightforward personal injuries claim was unnecessarily complicated by the raising of the counterclaim, which turns out to have no merit based on my ruling on the accident.

*Conclusion*

1. While the court has found that the plaintiff has exaggerated his injuries, I do not consider that this is an appropriate case to deprive him of his costs, given the extent of the exaggeration, its practical impact on the overall conduct of the case and the other conduct of the parties.
2. I should stress that I accept that there is much force in Mr Clark’s argument that the court should send a clear message to litigants in general that exaggeration of a claim is wrong by, for instance, making an appropriate costs order adverse to the plaintiff. Even though the amounts at stake here are small, it is the principle that matters. Nevertheless, in the circumstances of the present case, when all the matters are considered in the round, it seems to me that the defendant’s conduct as outlined above may be said to have the effect of “offsetting” the exaggeration factor. Hence my decision.
3. Accordingly, I dismiss the defendant’s summons dated 20 June 2018.

*(Submissions on costs)*

1. The plaintiff do have costs of the summons with certificate for counsel, summarily assessed in the sum of $58,000, payable by the defendant within 14 days from today.

( Winnie Tsui)

District Judge

Ms Percy Yue, instructed by Yip, Tse & Tang, for the plaintiff

Mr Douglas Clark, instructed by Benny Kong & Tsai, for the defendant