#### DCPI 508/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 508 OF 2012

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BETWEEN

HUSSAIN BASHARAT Plaintiff

and

曾慶裕 1st Defendant

TSANG KWOK KEUNG 2nd Defendant

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Coram: Deputy District Judge L C Cheng in chambers (open to public)

Date of Hearing: 20 July 2015

Date of Judgment: 29 September 2015

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DECISION

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*Application*

1. My Judgment in this case was handed down on 1 June 2015. In my Judgment, I held that the 2nd defendant was not liable in this case and ordered, on a *nisi* basis, the plaintiff to pay costs to the 2nd defendant regarding those costs between them.
2. By a summons dated 15 June 2015, the plaintiff applied to vary the costs order I made. The plaintiff’s application is to vary the costs order *nisi* between the plaintiff and the 2nd defendant to the extent that the 2nd defendant do pay the plaintiff’s costs of the proceedings with enhanced interest.
3. In this Decision, I shall not repeat the factual background of this case, which is covered in my Judgment. In a nutshell, the plaintiff’s case is that he sustained personal injuries due to the negligent driving by the 1st defendant. The van involved was owned by the 2nd defendant. After trial, I decided that the 2nd defendant was not liable as I accepted that he was not vicariously liable for the negligent act of the 1st defendant. In particular, I accepted that he had a contractual relationship with the 1st defendant through a rental (or leasing) agreement (§§ 8-18 of my Judgment).
4. Ms Chung, solicitor appearing for the plaintiff, submits that the 2nd defendant acted unreasonably by deliberately withholding the rental agreement contrary to the underlying objectives set out in Order 1A, rule 1 of the Rules of District Court. She also comments that the 2nd defendant had failed to provide information including documents regarding the identity of the driver and the insurance policy and caused a significant increase in the length or costs of the proceedings.

*Identity of the 1st defendant and the rental agreement*

1. Ms Chung points out that at the outset, the plaintiff did not know the identity of the 1st defendant, ie, the driver. Having sent various letters to the police from May 2011 to January 2012 and after making a phone call on 19 March 2012 to the police, the police still refused and/or failed to disclose the name of the 1st defendant. After reading the correspondences, I accept that the plaintiff was unable to know the correct name of the 1st defendant and the insurer of the vehicle from the police.
2. Ms Chung further submits that from 22 August 2011 to 29 May 2012, the plaintiff was again unable to learn the identity of the 1st defendant through the communication with the 2nd defendant and/or his solicitors, Lim & Lok. In particular, by a letter dated 18 May 2012, Lim & Lok wrote to the solicitors for the plaintiff and said,

“We hereby confirmed that our client has *no document* showing the name of the driver …. and has *no rental agreement* between the owner of the public light bus and the driver.” *(my emphasis)*

1. Having read those correspondences, I am satisfied that the plaintiff was not only left in darkness as to the true identity of the 1st defendant but was also misled into belief that no rental agreement existed between the 1st and 2nd defendants.
2. In the circumstance, I understand why initially the plaintiff commenced this action against the 2nd defendant only and pleaded that the 2nd defendant was the driver of the vehicle at the time of the accident.
3. It is true that in §4 of the Defence, which was filed in October 2012, the name of the 1st defendant was stated. §6 of the Defence mentioned the rental agreement and averred that the 2nd defendant was neither the principal nor the employer of the 1st defendant. By then, the 2nd defendant’s case was clear.
4. On one hand, the plaintiff was “informed” by Lim & Lok, through the said letter dated 18 May 2012, that there was no rental agreement. On the other hand, after being served the Defence, the 2nd defendant’s case was that a rental agreement existed. I find that at that juncture, the plaintiff would no doubt be very confused.
5. Ms Siu, counsel for the 2nd defendant, concedes that a copy of the rental agreement was only provided to the plaintiff on 4 January 2013, ie, after the parties exchanged the list of documents in December 2012.
6. *Hong Kong Civil Procedure 2015, Vol 1,* clearly stated that,

“In the case of a wholly successful defendant the judge must award him costs unless there is evidence :

1. That the defendant brought about the litigation; or
2. has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense; or
3. has done some wrongful act in the course of the transaction of which the plaintiff complains.” (§62/3/3)
4. Although costs should normally follow events, taking all the circumstance into account, particularly the misleading information contained in the said letter dated 18 May 2012, I have no hesitation in concluding that the 2nd defendant brought about this litigation. The plaintiff was reasonable, or even necessary, to pursue this action against the 2nd defendant prior to 4 January 2013.
5. However, after the “production” of the rental agreement, the 2nd defendant’s case had been unfolded. The plaintiff could have decided to discontinue this case against the 2nd defendant at that juncture and sought to apply for all costs incurred due to the misleading information provided by the 2nd defendant. The plaintiff, in deciding to continue to pursue the case against the 2nd defendant, has to accept that it has to bear the risk of the 2nd defendant being able to prove its case successfully at trial, leading to the consequential risk of having to pay costs to the 2nd defendant.

*Information about the insurance policy*

1. Another reason for applying to vary the costs order *nisi* relied upon by Ms Chung relates to the 2nd defendant’s failure to provide information about the insurance policy and/or the identity of the insurer. Ms Chung submits that despite numerous enquiries, the 2nd defendant had failed to clarify if a valid insurance policy existed and that led the plaintiff to believe that there was no valid insurance policy. Further, the 2nd defendant filed an answer dated 30 May 2014 to the interrogatories in that the 2nd defendant replied “No” to the question on whether insurance policy includes the name of the 1st defendant and covers liability of the 1st defendant. Ms Chung therefore submits that the plaintiff was misled to believe that there was no third party insurance at the material time. By a summons heard during PTR, the plaintiff did in fact applied to further amend its re-amended statement of claim to include a cause of action based upon the absence of a valid third party insurance. The application was granted but on the 1st day of trial, the plaintiff decided not to pursue on that issue.
2. In reply, Ms Siu points out that the plaintiff has been well aware of the existence of a valid insurance in 2012. She refers me to a letter dated 17 April 2012 from Messrs Mayer Brown JSM, representing the Motor Insurers’ Bureau of Hong Kong, to the solicitors for the plaintiff. In that letter, it is clearly stated that,

“According to our investigations, the mini van was in fact covered by valid insurance at the material time of the accident.”

1. The plaintiff, in receipt of the said letter, should be fully aware that the van had “a valid insurance policy”. I therefore do not agree with Ms Chung’s submission that the plaintiff was misled into belief that there was no valid insurance at the material time. The plaintiff could have, and in my view should have, taken out application seeking information about details of the insurance policy by disclosing the said letter by Messrs Mayer Brown JSM. Unfortunately, the plaintiff decided not to take that course. Rather, the plaintiff applied to add a new cause of action during PTR but decided not to pursue during trial. That extra costs incurred was quite unnecessary and the 2nd defendant should not be blamed for it.
2. In the circumstance, I do not agree that the 2nd defendant’s conduct regarding the disclosure of the insurance policy would increase the length or costs of the proceedings.

*Enhanced interest*

1. I fail to see any basis for the plaintiff to apply for enhanced interest on costs. In fact, Ms Chung makes no submission on that. I do not see any sanctioned offer. In any event, there is no evidence in this case as to when the plaintiff was out of pocket in having to make payment on account of costs, or in having to actually put up funds for payment of his legal costs. I do not consider appropriate to order any enhanced interest on the costs incurred by the plaintiff.

*Without prejudice correspondence*

1. In the circumstance, 4 January 2013 should be the cut-off date. Costs incurred on or before that date should be borne by the 2nd defendant. Costs after that date should be borne by the plaintiff.
2. The plaintiff, through a without prejudice letter dated 24 April 2015 to Lim & Lok, proposed to discontinue the action against the 2nd defendant with no order as to costs. That letter was only issued almost immediately before the commencement of trial and substantial costs should have already been incurred by the 2nd defendant since 4 January 2013. I therefore do not think the offer contained in that letter will affect my decision on costs.

*Conclusion*

1. Both parties failed to conduct their respective case properly. The 2nd defendant gave misleading and inaccurate information to the plaintiff. The plaintiff took out unnecessary application. Taking all the circumstance into account, I decide that the plaintiff should be entitled to costs against the 2nd defendant on or before 4 January 2013. The 2nd defendant should be entitled to costs against the plaintiff after 4 January 2013.
2. I therefore vary the costs order I made as follows :-
3. The 1st defendant do pay costs of this action to the plaintiff (include all costs reserved, if any) to be taxed if not agreed.
4. As between the plaintiff and the 2nd defendant,
5. the 2nd defendant do pay cost to the plaintiff (include all costs reserved, if any) on or before 4 January 2013, to be taxed if not agreed;
6. the plaintiff do pay costs to the 2nd defendant (include all costs reserved, if any) after 4 January 2013, to be taxed if not agreed, with certificate for counsel.
7. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulation.

*Costs of this application*

1. The costs of this application is a matter between the plaintiff and the 2nd defendant only. The submissions by Ms Chung and Ms Siu clearly show that the plaintiff intended to apply for all the costs to be borne by the 2nd defendant whereas the 2nd defendant fully contested. Neither party has fully succeeded and nobody is the ultimate winner. Taking all the circumstance into account, I order that, on *nisi* basis, there is no order as to costs of this application. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulation. Application to vary should be made within 14 days, otherwise, this costs order *nisi* shall become absolute.

L C Cheng

Deputy District Judge

Miss Chung Lai Kuen, of M C A Lai & Co for the plaintiff

The 1st defendant was not represented and did not appear

Miss Rachel Siu, instructed by Lim & Lok for the 2nd defendant