#### DCPI 548/2018

[2020] HKDC 360

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 548 OF 2018

(Transferred from High Court Personal Injuries Action No 941 of 2016)

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BETWEEN

FONG CHONG CHUEN Plaintiff

and

THE BOYS’ AND GIRLS’ CLUBS

ASSOCIATION OF HONG KONG Defendant

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Before: Deputy District Judge K C Hui in Chambers (Paper disposal)

Date of the Defendant’s Submissions: 26 February 2020

Date of the Plaintiff’s Submissions: 12 March 2020

Date of the Defendant’s Reply to the Plaintiff’s Submissions: 18 March 2020

Date of the Defendant’s Supplemental Submissions: 21 April 2020

Date of the Plaintiff’s Response Submissions: 4 May 2020

Date of the Defendant’s Reply to the Plaintiff’s Response Submissions: 12 May 2020

Date of Decision: 16 June 2020

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DECISON

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*INTRODUCTION*

1. This Court handed down a judgment dated 15 October 2019 (the “Judgment”) in favour of the plaintiff (“P”) for damages. By a Summons dated 11 November 2019, the defendant (“D”) made an application for leave to appeal against the Judgment pursuant to RDC O 58 r 2(4)(b), and a stay of execution of the Judgment pending the proposed appeal.
2. In this Decision, I will adopt the definitions and abbreviations in the Judgment.
3. The brief background of the present case can be summarised as follows. P was a participant of an orienteering activity organised by D in Sha Lo Tung, Tai Po. He had an accident during the Activity. While he was standing on the Bridge near Checkpoint 2 with two other teammates (namely, Wong and Tong), one of the beams of the Bridge broke. As a result, P fell into the stream below the Bridge and sustained personal injuries.
4. It was not disputed that D, as organiser of the Activity, owed a duty of care to P. In the Judgment, I found that D should reasonably have foreseen that at least 3 participants of the Activity would use and be on the Bridge at the same time. I also found that D’s scope of duty of care included the duty to test and/or ascertain whether the Bridge could hold at least 3 participants before the commencement of the Activity. Having found that D had failed to do so, I came to the conclusion that P was successful in its claim and entered judgment for damages in his favour.

*D’S LEAVE TO APPEAL APPLICTION*

1. Section 63A(2) of the District Court Ordinance (Cap 336) provides that:-

“(2) Leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that-

* 1. the appeal has a reasonable prospect of success; or
  2. there is some other reason in the interests of justice why the appeal should be heard.”

1. The threshold for granting leave to appeal is a “reasonable prospect of success” or the “interests of justice” test. In *SMSE v KL* [2009] 4 HKLRD 125 at 129, Le Pichon JA stated at §17 that:-

“Reasonable prospects of success involves the notion that the prospects of succeeding must be “reasonable” and therefore more than “fanciful”, without having to be “probable”.”

1. Chu J (as she then was) stated in *Wynn Resorts (Macau) SA v Mong Henry* HCA 192/2009 (unreported, 10 August 2009) at §19 that:-

“To meet the “reasonable prospect of success” test, an applicant is required to show more than just an arguable case, but an appeal that has merits and ought to be heard, although he does not have to demonstrate that the appeal will probably succeed.”

1. D’s summons for leave to appeal included a draft Notice of Appeal which set out 9 proposed grounds of appeal. I will deal with each of D’s grounds of appeal below according to the issues raised in those grounds of appeal.

*(A) Ground 1 §1(a); Ground 5 §6: Necessity of specifically pleading the cause of the collapse of the Bridge*

1. D submits that the Court erred in law in finding that the Bridge collapsed because it could not hold the combined weight of P, Wong and Tong. D makes the point that the Court should not have done so without any plea in the Statement of Claim (“SOC”) that this is the cause.
2. To deal with this pleading point, reference is made to the SOC:-
3. §3-6 plead how the accident happened, ie After P (and Wong and Tong) stood on the Bridge for about 30 seconds, it suddenly collapsed and P fell into the stream beneath, sustaining personal injuries.
4. §7 pleads the particulars of negligence and breach of duty of care. As stated in §9 of the Judgment, at trial P emphasised in particular the following:-
5. Failing to warn P of the dangers of walking on the Bridge, which was not obvious to him in the circumstances;
6. Failing to take reasonable care to ensure that the event is run in such a way that it is reasonably safe in all circumstances for P to participate in;
7. Failing to design out any unnecessary dangers of the Activity; and
8. Failing to place sufficient warning signs in the vicinity of the accident place or at all to warn the participants of the Activity of the inherent danger of the Bridge.
9. Although P’s pleaded case is brief, the Court had no difficulty in understanding P’s case. P’s complaint is that the Bridge was a danger to the participants of the Activity, and that D failed to do what was reasonably required of it in the circumstances to avoid harm to the participants resulting from this danger.
10. D also had no difficulty in understanding P’s pleaded case. The material part of its case is pleaded at §5 of its Defence. As Mr Ismail summarised in §29 of its opening submissions for trial, and recorded §12 of the Judgment, D’s defences were:-
11. The collapse of one of the two concrete slabs of the Bridge was not a foreseeably risk and the accident was not reasonably foreseeable;
12. The defect of the Bridge was a latent defect and not discoverable by reasonable inspection; and
13. D took all reasonable care in the circumstances to ensure P’s safety in the Activity.
14. In the circumstances, I am unable to accept D’s submissions that the cause of the collapse of the Bridge is a material fact of P’s claim in negligence which must be specifically pleaded. All that P needed to plead is that (i) the Bridge was a foreseeable danger to the participants of the Activity, (ii) D was under a duty of care to prevent that danger from harming the participants of the Activity, and (iii) D failed to do what is reasonably expected of it.
15. The Court’s findings and comments on the cause of the collapse of the Bridge at §14 of the Judgment were part of the detailed analysis on whether the risk of the collapse of the Bridge during the Activity was reasonably foreseeable. In other words, the cause of the collapse of the Bridge was relevant to the issue of foreseeability, and hence the scope of D’s duty of care. But as mentioned above, the cause of the collapse of the Bridge is not an essential element of P’s pleaded case. What is essential is the plea of the existence of a duty of care, and the breach thereof.
16. In determining (i) the scope of the duty of care owed by D to P as pleaded and (ii) the issue of breach of duty, the Court is entitled to consider the evidence and make factual findings. The cause of the collapse of the Bridge is one such findings. But it does not mean that all factual findings that the Court made must be pleaded in the SOC.
17. I therefore do not accept D’s submission that the Court was prevented from making any factual findings on the cause of the collapse of the Bridge if the cause was not pleaded in the SOC. I do not find that the grounds of appeal based on the pleading point are reasonably arguable.

*(B) Ground 2: Misunderstanding of D’s case*

1. D submits that the Court misunderstood or misinterpreted its case at §3, 4 and 47 of its closing submissions. This ground of appeal is directed at §14 of the Judgment which states that:-

“Both parties **accepted**, as stated in paragraph 10 above, that the Bridge collapsed **because one of the concrete slabs could not cope with the combined weight of P, Wong and Tong** who had been standing on it for about 30 seconds. But Mr Ismail argues that it is not known whether this is due to some latent defect in the concrete slabs that collapsed.” (emphasis added)

1. D’s argument is that the Court erred in stating that D “accepted” that the cause of the collapse of the Bridge was that it could not cope with the combined weight of P, Wong and Tong. D submits that it only accepted that the Bridge collapsed when P, Wong and Tong were on it. It further argues that its case is that the cause of the collapse of the Bridge was because of a latent defect in the concrete plank.
2. P submits that on a fair reading of D’s closing submissions (especially §4), D accepted that the Bridge collapsed because it could not cope with the combined weight of the 3 young man standing on it, albeit D contended that why this was so must be proved by expert evidence.
3. I agree. D’s position is that the Bridge could not bear the combined weight of P, Wong and Tong. This is no different from saying that the Bridge collapsed because it could not cope with the combined weight of P, Wong and Tong.
4. Further, D’s argument that the collapse of the Bridge was due to a latent defect in the concrete plank as opposed to overweight is a distinction without a difference in the context of this ground of appeal. The term “latent defect” simply refers to “a defect that had not been discovered and was not discoverable by the exercise of reasonable care. So if its existence and the fact that it caused the accident is proved by the defendant, such a defect would by definition be a defence to a claim based on the accident having been caused by a lack of reasonable care on the defendant’s part”: see *Sanfield Building Contractors Ltd v Li Kai Cheong* (2003) 6 HKCFAR 207 at §26 (emphasis added). The existence of a latent defect, even if proven, does not displace the Court’s finding that the cause of the collapse of the Bridge was overweight. It simply means that the overweight was caused by a defect which could not have been discovered by D even acting with reasonable care. As there is a separate ground of appeal on the issue of latent defect, I will say more on this below.
5. In any event, I fail to see how the Court’s understanding of D’s case on the cause of the collapse of the Bridge presented in its closing submissions is relevant to the outcome of the appeal. It is the Court’s finding in §§21-23 of the Judgment that it was within D’s reasonable contemplation that at least 3 participants would stand on the Bridge at the same time. Therefore, it had a duty of care to check and/or ascertain whether the Bridge would hold 3 people at the same time, or to make sure that no more than 2 people[[1]](#footnote-1) would cross the Bridge at the same time (see §§31 and 44 of the Judgment). The above conclusions were based on the Court’s finding that D should have reasonably contemplated the risk of the collapse of the Bridge due to the weight of 3 or more participants (see §33 of the Judgment). I fail to see how the Court’s error, if any, on the understanding of D’s case would render the findings and conclusions summarised above erroneous.
6. For the above reasons, I am of the view that this ground of appeal has no reasonable prospect of success.

*(C) Ground 3: Need for expert evidence*

1. Under this proposed ground of appeal, D submits that the determination of the cause of the collapse of the Bridge required specialist knowledge and experience of an expert such as a civil or structural engineer. Therefore, the Court is not qualified to make the factual finding that the cause of the collapse of the Bridge was because it could not cope with the combined weight of P, Wong and Tong.
2. I have dealt with this issue specifically in §46 of the Judgment. D was content to go to trial without adducing any expert evidence. In other words, D was content with putting P to proof of his case based on the existing evidence. It seems to me that it is not in a position to complain at the closing of or after the trial that the Court should hear expert evidence before determining the cause of the collapse of the Bridge.
3. Moreover, the Court had no difficulty in determining on a balance of probabilities the cause of the collapse of the Bridge, based on the evidence adduced at trial, that (i) fewer than 3 people had walked on the Bridge without incident before the accident, and (ii) the Bridge collapsed when P, Wong and Tong was on it. D is unable to persuade me why the Court cannot make factual findings based on such evidence, and *must* resort to expert evidence on, e.g. civil and structural engineering, especially when no other cause of the collapse had been suggested by D.
4. In §11-12 of D’s written submissions dated 26 February 2020, D also argues that expert evidence is also needed to answer questions such as (i) why the Bridge could not bear the weight of P, Wong and Tong when it was able to bear the weight of 2 adult males previously, (ii) the likelihood of the Bridge collapsing under the combined weight of P, Wong and Tong, and why it was likely or unlikely. But these questions were not issues in the trial. D never ran the case that as a matter of fact, the Bridge was able to bear the weight of P, Wong and Tong. Likewise, D never ran the case that had it test-walked the Bridge with 3 persons, it was unlikely that the Bridge would collapse. Its primary case is that the risk of the Bridge collapsing was not foreseeable, and/or that it has already done what was reasonably expected of it to ensure the safety of the participants, which was rejected in the Judgment.
5. In my view, this ground of appeal is not reasonably arguable.

*(D) Ground 4: Evidence of 3 or more people on the Bridge*

1. This ground of appeal is related to the Court’s finding on the cause of the collapse of the Bridge, and is directed at §46 of the Judgment:-

“Given that 3 participants were on the Bridge when it collapsed, and **there being no evidence that some other 3 (or more) persons have stood on Bridge without incident prior to the Accident**, I have no difficulty in concluding on the available evidence that it is more likely than not that the Bridge collapsed because it could not hold the combined weight of Wong, Tong and P.” (emphasis added)

1. D’s argument is that there is evidence from which an inference can be drawn that 3 or more people had crossed the Bridge prior to the accident without causing the Bridge to collapse, including:-
2. §6(g) of the Judgment, where the Court found that there were other participants standing ahead of Wong and Tong in front of the Bridge;
3. §19(b) of the Judgment, where the Court found that once the participants reached and completed Checkpoint 2, they would naturally walk across the Bridge to go to the next checkpoint;
4. §19(d) of the Judgment, where the Court found that there were a fair number of people from different teams that would use the Bridge after completing Checkpoint 2, and that each team of 5 members could likely travel together as a group;
5. §21 of the Judgment, where the Court found that it was not difficult to fit 3 people on the Bridge at the same time;
6. §27 of the Judgment which refers to evidence from D’s witnesses that they would expect 1, 2, 3 or even 4 people to walk on the Bridge at the same time.
7. In my view, a distinction should be made between the nature of the evidence in paragraph 30 above, and the evidence relied on by the Court at §46 of the Judgment. The evidence in paragraph 30 above supports the Court’s conclusion that it is within D’s reasonable contemplation that 3 or more participants would cross the Bridge at the same time for the duration of the Activity. The Court was making a finding on the reasonably contemplated general usage of the Bridge in the context of assessing whether the risk of the collapse of the Bridge was reasonably foreseeable. However, this should not be conflated with the issue at §46 of the Judgment which was the likely cause of the Bridge’s collapse. In determining this issue, it was necessary for the Court to base its finding on primary objective facts, as set out in that paragraph, but not on the Court’s other findings on the general expected usage of the Bridge during the whole duration of the Activity.
8. In other words, the Court’s finding that during the Activity, it was to be reasonably contemplated that 3 or more participants would cross the Bridge at the same time does not mean that 3 or more participants had in fact cross the Bridge at the same time before the accident. To establish the latter finding, direct factual evidence is necessary.
9. I am therefore of the view that this ground of appeal is not reasonably arguable.

*(E) Ground 5: Burden of proof*

1. D submitted that the Court has erred in placing the burden of proof on D of proving that the risk of the Bridge collapsing was not reasonably foreseeable, and that the combined weight of P, Wong and Tong was not the cause of the Bridge’s collapse.
2. It seems to me, from §20 of D’s written submissions dated 26 February 2020, that D’s real argument under this ground of appeal is the pleading point, which has already been dealt with in paragraphs 9-16 above.
3. In any event, it is clear from the Court’s reasoning in the Judgment that it has not placed the burden of proof on D. The Court correctly asked the question whether the risk of the Bridge’s collapse was reasonably foreseeable, and what the cause of the Bridge’s collapse was on the balance of probability. The Court did not require D to prove what was ultimately found and concluded in the Judgment.
4. This ground of appeal has no reasonable prospect of success.

*(F) Grounds 6-8: Social value, unduly heavy burden, and balancing exercise*

1. Grounds 6-8 can be considered together. D’s argument, directed at §38-44 of the Judgment, is that the authorities such as *Uren v Corporate Leisure (UK) Ltd and Anor*[2010] EWHC 46 (QB), [2011] EWCA Civ 66,*Blair-Ford v CRS Adventures Ltd*[2012] EWHC 2360 (QB)and*Tomlinson v Congleton Borough Council*[2004] 1 AC 46are concerned with whether the defendant had taken such are as in all the circumstances of the case was reasonable. However, the Court erred in law in treating the issue as one of imposition of a duty of care (see §43 of the Judgment).
2. In my view, this is merely a matter of semantics. The Court’s reasoning in the Judgment is clear. It concluded that (i) the risk of the Bridge collapsing with 3 participants standing on it was reasonably foreseeable, (ii) D had a duty of care to do what is reasonable to prevent such risk of harm, (iii) D had failed to discharge such duty of care because it did not test-walk the Bridge with 3 or more people, or impose measures to prevent more than 2 participants from crossing the Bridge at the same time.
3. §38-44 of the Judgment stated that the Court was asked to also take into account the social value of the Activity, as well as the unduly heavy burden which would be placed on D, and do a balancing exercise. The Court carefully did so, and concluded that because the Bridge was at a rather important place in the Activity, that justified the imposition of a duty of care on D to ensure the safety of the Bridge. In substance, this is no different from saying that the importance and location of the Bridge in the context of the Activity justified D’s taking of such care as found by the Court, ie test-walking the Bridge with 3 or more people, or imposing measures to prevent more than 2 participants from crossing the Bridge at the same time.
4. What matters in substance is not the characterisation of the issue as one of standard of care as opposed to the imposition of a duty of care in the first place, but the balancing exercise that the Court was asked to do. The Court has duly taken heed of the principles laid down in the leading authorities, especially the dicta of Lord Hoffman at *Tomlinson*. The conclusion that the importance and location of the Bridge outweighed the social value of the Activity and the potential burden on D was clearly explained at §43-44 of the Judgment.
5. D also challenged the result of the Court’s balancing exercise. It argued, as it did at trial, that the law of negligence does not require perfection and/or revisiting events with the benefit and wisdom of hindsight. D’s conduct should not be judged with a retrospective standard.
6. However, D did not address the “decisive points that tip in favour of P” set out at §43 of the Judgment. There, the Court was careful to point out the important status of the Bridge in the context of the Activity “as opposed to other places in the Area”. It is clear that the Court did not conclude that D had the same standard of care regarding each and every inch of the Area where the Activity was held. D was not required to leave no stones unturned in ensuring the safety of the whole Area. The Court’s conclusion on what D should reasonably have done was specific to the Bridge, and not “20/20 vision”. It was based on the reasonable foreseeability of the risk of harm to the participants arising from the collapse of the Bridge.
7. D has not demonstrated how the Court erred in its balancing exercise described above. I do not find that Grounds 6-8 are reasonable arguable.

*(G) Ground 9: Latent defect*

1. The final proposed ground of appeal is in relation to D’s case on latent defect.
2. D argues that the Court has erred in failing to appreciate the effects of, or overlooked the evidence of latent defect. The evidence relied on by D is essentially the same as those that it relied on to argue that the risk of the collapse of the Bridge was not reasonably foreseeable.
3. I dealt with the issue of latent defect at §50 of the Judgment. In short, I concluded that the cause of the collapse of the Bridge was due to overloading. In light of such a finding, the Court does not accept that the evidence relied on by D, which does not shed light on the status of the Bridge with more than 2 people standing on it, constituted sufficient evidence from which a latent defect could be inferred. Put in another way, given the Court’s finding that the Bridge collapsed because it could not bear the combined weight of 3 people, D could not ask the Court to infer that there was a defect which could not be discovered by reasonable care by showing e.g. that the Bridge did not collapse when there were 2 people standing on it. Such an inference may arguably be drawn if there was evidence, for example, that D had been informed by the AFCD that the Bridge could bear the weight of 3 people. But there was no such evidence.
4. I therefore do not accept D’s argument that the Court has misunderstood or failed to appreciate the nature of the evidence on latent defect. This final ground of appeal is also not reasonably arguable.

*(H) “Some other reason in the interest of justice”*

1. D argues that there does not appear to be any appellate level judgments in Hong Kong on negligence claim by participants of a socially desirable activities conducted in the open which carries some risk of injury. The Court is invited to grant leave to appeal pursuant to section 63A(2)(b) of the District Court Ordinance (Cap 336).
2. Under this ground, the Court may grant leave to appeal if it is of the view that an issue may be one which should in the public interest be examined by the Court of Appeal or, the case raises an issue where the law requires clarifying: see *Hong Kong Civil Procedure 2020, Vol 2*, at P4/63A/3.
3. I agree with P’s submissions that the issues raised in this case are fact sensitive, as was already emphasised at §11, 24, 26 and 33 of the Judgment. In particular, on the issue of balancing the social value of the Activity and burden imposed on D, there are in fact a number of authoritative English cases which already shed light on the matter. The balancing exercise is also fact sensitive.
4. I am therefore of the view that the Court should not grant leave to appeal based on the “interest of justice” ground.

*STAY OF EXECUTION*

1. As D recognised, the existence of a reasonably arguable appeal is the minimum requirement before a Court would even consider granting a stay: *Star Play Development Ltd v Bess Fashion Management Co. Ltd* [2007] 5 HKC 84 at §9. D does not satisfy this merits threshold.
2. Furthermore, as this case involves a monetary judgment, the Court will require evidence of an appreciable risk that the respondent to the proposed appeal would not be able to repay in the event of a successful appeal. There is no such evidence.
3. I would therefore dismiss the application for stay of execution.

*CONCLUSION*

1. For the reasons above, the Court is not satisfied that any of D’s proposed grounds of appeal has a reasonable prospect of success. The leave to appeal and stay of execution application is dismissed.
2. I also make an order that P’s costs of this application be paid by D on a party-to-party basis, to be taxed if not agreed, with a certificate for counsel and P’s own costs be taxed in accordance with the Legal Aid Regulations.
3. I thank Mr Lim and Mr Ismail for their valuable assistance to the Court.

( K C Hui )

Deputy District Judge

Mr Patrick D Lim, instructed by Li & Lai, assigned by the Director of Legal Aid, for the plaintiff

Mr Anthony Ismail, instructed by Clyde & Co, for the defendant

1. D has test-walked the bridge before the Activity with 2 people without any incident. [↑](#footnote-ref-1)