DCPI 577/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 577 OF 2008

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BETWEEN

CHIU PING CHEONG Plaintiff

and

CHAN HONG YAU 1st Defendant

AXA GENERAL INSURANCE

HONG KONG LIMITED 2nd Defendant

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Coram: His Hon Judge Leung in chambers (open to public)

Date of hearing: 11 September 2009

Date of decision: 15 September 2009

**D E C I S I O N**

1. This is review of taxation of costs in a personal injury case. Briefly, on 29 November 2006, **Chiu**, the Plaintiff, and **Chan**, the 1st Defendant, were driving along adjacent lanes in opposite directions. Chan suddenly drove his car from his lane into Chiu’s lane thus causing a head on collision. As a result, Chan was charged with and convicted of dangerous driving and driving a motor vehicle with alcohol concentration in breath exceeding the prescribed limit. Chan received, among others, a suspended imprisonment sentence.
2. In March 2008, Chiu commenced this action for damages against Chan for injuries sustained in the accident. **AXA**, the 2nd Defendant and insurer of Chan, joined as the 2nd Defendant. Messrs Huen & Partners (“**HP**”) act for Chiu.
3. In July 2008, the action was concluded by Chiu’s acceptance of AXA’s payment into court.
4. Failing to agree on costs, the parties proceeded to taxation. The first taxation hearing was held on 28 November 2008. As the taxed costs were less than that offered by AXA, AXA applied for the costs of the taxation. Chiu also applied for review of taxation.
5. Upon review on 7 April 2009, the Master dismissed Chiu’s application and allowed AXA’s application. Chiu was ordered to pay AXA forthwith costs which were summarily assessed at the sum of HK$23,253.
6. Not satisfied with the result of the review, Chiu took out the present summons for the following orders:
   1. Chiu has leave to further review;
   2. the order of the Master on 7 April 2009 be varied; and
   3. the execution of the order of the Master be stayed pending the result of this application.
7. The summons was supposed to be heard by H H Judge Wong on 28 April 2009. But it transpired that Chiu had yet to request the Master to state the reasons for his decision in the review of taxation. The hearing of the summons was therefore adjourned pending the availability of the Master’s certificate and reasons.
8. The Master gave his reasons for decision on 2 June 2009 (“**the Reasons**”). Hearing of the above summons was resumed before this court.
9. Mr Kwong for AXA submitted that the application for leave to review under paragraph 1 of the summons was misconceived as leave is not required under O.62, r.35(1) of the Rules of the District Court. The fact was that I was hearing the substantive application and there was no need for the parties to dwell on this point.
10. Mr Sun appearing for Chiu put in lengthy written submissions. It is not difficult to sense from the submissions his (i.e., Mr Sun’s) strong sentiment against the Master. He submitted that the Master was biased and unfair to his side from the outset. At one point during this hearing, he categorised the Master’s taxation as an insult to him as the handling solicitor. He criticised the Master for being too stringent in what is required of a reasonably prudent solicitor.
11. After all, what this court has to consider is whether the Master was wrong in exercising his discretion. It is trite that the court will not lightly interfere with the Master’s exercise of discretion in taxation unless the Master, in exercising his discretion, erred in law or failed to take into account relevant matters or took into account irrelevant matters: see *余國英對麥紹棠*, FACV 4/2004; *林哲民經營日昌電業公司訴特佳機械廠有限公司*，CACV 633/2001 (citing *Bank of China (Hong Kong) Limited v Villa King Enterprises Limited*, HCMP 5727/1999 & HCA 15005/1999); *Paul Y-ITC Construction Ltd v Kin Shing Co Ltd* [1999] 1 HKC 511.
12. HP’s bill of costs was annexed to the Appointment to Tax dated 11 August 2008. In question are 5 items which were listed in the schedule to the present summons. Only the first item was completely taxed off.

Items for review The Master’s ruling

Page 12, items A1-4; A1-5 Taxed off

Page 25, item E1-5 Taxed off 3 hours, allowed 1 hour

Page 26, item E1-9 Taxed off 2 hours, allowed 2 hours

Page 26, item E1-10 Taxed off 3 hours, allowed 1 hour

Page 28, item E2-1l Taxed off 6 hours, allowed 1 hour

1. Before considering each of the above items, I would deal with Mr Sun’s criticism of the Master’s reference in the Reasons to the test of “necessary and proper” in respect of taxation of costs on party and party basis (para.5 of the Reasons). Mr Sun submitted that the Master erred because the correct test is “necessary or proper”.
2. Mr Sun’s reference to the wordings under O.62, r.28(2) is correct. But when taxing off items A1-4 and A1-5, the Master actually considered that they were *neither necessary nor proper*. Whether it was “and” or “or” in the Master’s reference to the test did not make any real difference.
3. The Master also elaborated the test, saying that it depends on the time taken by a reasonable and prudent solicitor and not the actual time spent (para.5 of the Reasons). This is correct.
4. Mr Sun also criticised the Master for considering himself bound to consider the separate items collectively and globally which, he argued, deviated from the usual practice for taxation. While the Master, and I think rightly, did state that the court should not *just* consider the disputed items individually but should *also* consider the connected items collectively and globally (para.7 of the Reasons), it is unfair to suggest that the Master considered himself unnecessarily bound by such approach.

**Page 12, items A1-4 and A1-5**

1. Item A1 of HP’s bill relates to “Instruction” under “General Preparation Item” and includes 9 conferences held. Sub-items 4 and 5 were respectively the 4th and the 5th conferences held on the same day 12 February 2008.
2. In the 4th conference, “explaining contents of client’s draft witness statement to client and taking instructions to make necessary amendments thereto” by the legal executive took 1 hour. This was followed by the 5th conference held by Mr Sun “explaining and advising on the finalised witness statement to client and advising on further conduct of the proceedings” which took 25 minutes. The Master taxed them off entirely.
3. The crux of the Master’s decision in respect of these 2 conferences was that the time spent on them was neither necessary nor proper. He referred to the 3 preceding conferences already held by then:
   1. “27.12.06: Taking instructions on the personal background of the client; the cause of the accident; injuries; treatment received; loss of earning, etc. and advising on documentary evidence to be provided by client for next(?)”;
   2. “26.4.07: Taking instructions to act for the client; advising on quantum briefly and preparing authorisation letters for client to sign; advising on merits of common law claim and steps needed to be taken before Writ of Summons could be issued and going through all documents provided by the client”; and
   3. “17.9.07: Reporting progress of proceedings to client; going through further evidential documents provided by client; taking instructions to prepare client’s witness statement”.
4. The first 3 conferences took a total of 150 minutes. The Master allowed 120 minutes. HP somehow sought to finalise his client’s statement by holding the 4th and the 5th conferences before the 1st checklist review hearing and/or in the absence of any order on the exchange of witness statements. The Master considered this as premature (para.9 of the Reasons).
5. Mr Sun disagreed and submitted that it was necessary to explain to his client and to get his client to finalise his statement so as to enable his firm to file accurate pleadings. He submitted that this is the proper practice of solicitors. For the following reasons, I disagree.
6. After the 3 preceding conferences, HP sent to Chan a letter before action dated 25 September 2007 to Chan, the 1st Defendant. In that letter, HP already set out (i) the circumstances of the accident; (ii) particulars of negligence and/or breach of statutory duties on the part of Chan; (iii) brief description of Chiu’s injuries as appearing from the list of Government hospital reports enclosed with the letter; (iv) Chiu’s pre-accident monthly income. HP also enclosed the result of the criminal prosecution of Chan as a result of the accident.
7. There is before this court a draft witness statement of Chiu with some minor amendments written by hand on it and the apparent date of 11 January 2008, i.e., before the 2 conferences in question. On 25 January 2008, HP sent a “without prejudice” letter to AXA, this time quantifying the amount of claim. In that letter, HP set out in detail: (i) the injuries, treatment received, permanent disabilities and prognosis of his client; and (ii) the description, calculation and amount of each head of claim. As the Master noted, the minor amendments to Chiu’s draft statement mentioned above were also reflected in this letter from HP dated 25 February 2008 before the 2 conferences were held on 12 February 2008 (para.10 of the Reasons).
8. Mr Sun confirmed that these letters to Chan and AXA were prepared and sent after his client has confirmed their accuracy. In other words, Mr Sun’s present argument was that notwithstanding all of the above that his firm has managed to do by the end of January 2008, his firm was however not in a position to prepare and to file accurate pleadings without yet another 2 conferences to finalise his client’s draft statement.
9. By looking at the statement of claim and the statement of damages subsequently filed on 14 March 2008, I say the contents of the statement of claim were essentially similar to HP’s letter to Chan dated 27 September 2007 and Chiu’s draft statement mentioned above. The substantial similarity is even more apparent when one compares HP’s letter to AXA dated 25 January 2008 and the statement of damages. The Master was clearly aware of that when he discussed the next item of review (para.11 of the Reasons).
10. There should be no real argument against the prudent practice of obtaining full instruction and preparing proof of evidence or a statement of lay client prior to the commencement of action. But I cannot accept, in principle or practice, that it is necessary or proper for the solicitors to finalise his client’s statement before pleadings could be filed. I also do not accept such argument as a matter of fact in the present case. The Master was right in his conclusion.

**Page 25, E1-5**

1. Item E1 of HP’s bill relates to drafting of documents. Item E1-5 is drafting of Chiu’s witness statements. 4 hours were claimed. The Master allowed 1 hour.
2. Mr Sun suggested that the Master was inconsistent. I do not see how. What the Master considered as objectionable was not the drafting of Chiu’s statement but the holding the 4th and the 5th conferences to finalise the draft in the circumstances as explained above.
3. The Master applied the same reasoning that while a statement may be drafted, having it finalised would be premature (para.11 of the Reasons). He allowed time for drafting.
4. Mr Sun emphasized that the statement had to be drafted in Chinese and that much skill and thought were required in the drafting process. He complained that the time allowed would not suffice even for typing out the document.
5. I do not agree that the time allowed for this item of work reflects the Master’s disregard of what was required of a reasonably prudent solicitor to prepare a draft statement like that. I am not satisfied that the Master erred in exercising his discretion when assessing this item.

**Page 26, items E1-9 and E1-10**

1. These are for drafting the statement of claim and the statement of damages. Each was billed for 4 hours. The Master allowed 2 hours for drafting the former and 1 hour for drafting the latter.
2. The Master referred to the detailed instructions that HP had obtained by then and the 2 letters before action that HP had managed to prepare in considerable detail by the time of preparing the pleadings as well as the time he allowed for such drafting work (para.12 of the Reasons). Again, Mr Sun suggested that the Master has unreasonably underestimated the skill and thought required for the drafting the pleadings.
3. Considering the nature and facts of this case, I do not share Mr Sun’s projection of the degree of skill and thought required of a reasonably prudent solicitor to prepare the pleadings as distinct from the letters before action mentioned above. The question is whether what was required for drafting the pleadings in the present case is adequately reflected by the time allowed by the Master. The answer is in my view yes.

**Page28, item E2-ll**

1. E2 of HP’s bill relates to considering and perusing documents. Item E2-1l was perusing and considering “bundle of medical records issued by Princess Margaret Hospital”. For this sub-item alone, 6 hours were billed and the Master allowed 1 hour.
2. Mr Sun argued that he had the duty to study these records and notes from the hospital. Some had to be studied in detail while some were illegible. All these took time.
3. For the perusal and consideration of the documents under E2-1, the Master allowed over 6 hours, including the hour for E2-1l. Among them were the numerous more important medical reports from the hospitals. The parties have also engaged their respective orthopaedic experts who actually produced their joint report dated 19 May 2008. In the circumstances, the Master considered that unlike *reports*, ancillary documents like the *notes and records* from the hospital did not require extensive reading and study as Mr Sun suggested. The bundle of notes and records were also before this court. In my view, the Master was right.
4. Mr Sun also argued that perusal includes not only the first reading but also constant review, for instance, upon drafting court documents. But the medical notes and records related mainly to the question of quantum. As pointed out by Mr Kwong, time for reviewing the files for quantification of the claim before drafting the statement of damages was in fact another item in the bill (page 33, F3-4 & 5) that the Master has allowed.

**Conclusion and order**

1. In my view, HP fails to show that the Master erred in his exercise of discretion in the taxation and its review.
2. Chiu’s present summons is dismissed and the Master’s decisions in taxation and review of taxation stand.
3. I make a nisi order that AXA shall have the costs of and occasioned by this application. The nisi order shall become absolute in the absence of appointment within 14 days to argue costs.
4. Upon the order becoming absolute, costs, if not agreed, should be summarily assessed. For such purpose, AXA should submit to this court the necessary documents within 14 days. Chiu has 14 days thereafter to put in succinct skeleton submissions, if any, on the assessment of such costs.

**Remark**

1. I should make known my observation about the bundle for this hearing.
2. The contents of the hearing bundle are actually identical to the one used in the last hearing before H H Judge Wong who adjourned the present summons as explained above. Mr Sun explained that he wanted to ensure that this court had the hearing bundle. But the fact was that the previous bundle was neither retrieved from nor returned by the court. Mr Sun must know that. All he should have done, if he was really so concerned, was to confirm with this court prior to this hearing. The preparation of the new bundle was totally unwarranted and waste of costs. I do not expect to see that the costs of and incidental to the preparation of this new bundle should fall on the shoulder of his client.
3. The new bundle also served no purpose of updating the materials relevant to this court’s determination since the last hearing. Notwithstanding the obvious relevance of the 2 letters before action mentioned above, HP did not include copies of them in the bundle. It was Mr Kwong for AXA who supplied them to this court. HP did not even include a copy of the Reasons in the new bundle.

Simon Leung

District Judge

Mr P SUN of Messrs Huen & Partners for the Plaintiff

Mr Ringo KWONG of Messrs Winnie Leung & Co for the 2nd Defendant