DCPI 987/2017

[2023] HKDC 885

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 987 OF 2017

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BETWEEN

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| SINGH KULBIR | Plaintiff |
| and |  |
| JARDINE AIR TERMINAL SERVICES LIMITED | Defendant |

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| Coram: | His Honour Judge Harold Leong in Chambers |
| Date of Hearing: | 7 June 2023 |
| Date of Decision: | 6 July 2023 |

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| DECISION |

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1. This is the plaintiff’s Summons taken out on 17 January 2023 to set aside the Certificate of taxation by Master W.Y. Ho dated 6 January 2023 with costs of the application be in the cause (“the Summons”).

**Background**

1. This is a Personal Injury claim (“the PI claim”) which was made in parallel to an Employees Compensation claim (“the EC claim”).
2. On 6 December 2018, the PI claim was settled for HK$262,037.12 with costs of the action to the plaintiff. This was at the stage when the PI claim has been set down for trial in the Running List.
3. On 26 June 2019, the defendant made a costs offer of HK$179,000 and a sanctioned payment of HK$1,000 which was rejected by the plaintiff.
4. The taxation hearing was held on 15 April 2021 and Master Ho allowed HK$116,204.17 and HK$31,246 for profit costs and disbursement respectively (totalling HK$147,450.17) out of the plaintiff’s claim of HK$490,002.86 for profit costs plus disbursement and costs of taxation (totalling HK$563,535.84).
5. The plaintiff sought a taxation review and Master Ho did not change his assessment. He also awarded the costs on taxation to the Law Costs Draftsman for the paying party (the “LCD”) for the taxation process in the sum of HK$98,000.

**Legal Principles for a review of taxing master’s certificate by a judge under Order 62 rule 35**

1. It is clear that the judge is not required to conduct a taxation *de novo* in such a review hearing:

*“The parties to taxation proceedings already enjoy a right of review before the taxing master under O 62, rr33 and 34. On such review the taxing master may “exercise all the powers which he might exercise on an original taxation” (O 62, r 34(2)). The aggrieved party cannot apply for a review before a judge unless he has requested the taxing master, in accordance with r34(4), to state the reasons for his decision in respect of that item or part (O 62, r35(1)). O 62, r34(4) requires the taxing master to state in writing the reason for his decision on the review and any special facts and circumstances relevant to it. These provisions support the conclusion that the judge, on his second review of the matters of compliant, is not required to conduct a taxation de novo but to consider the reasons for the taxing master’s decision on his review, in order to ascertain whether he erred in principle, or took into account irrelevant matters, or failed to take into account relevant matters.”* (*Bharwaney J, Chan Yin Na v Union Medical Centre Limited* [2011] 5 HKC 158)

1. Mimmie Chan J has succinctly summarised the court’s approach under paragraph 6 of her decision in *Wong Chi Ching v Bocom International Holdings Company Limited*:

*“…the Court will not generally interfere with the decision of a taxing master on a question relating to fact, or to the amount of costs, subject to the following exceptions:*

*(1) a question of principle is involved;*

*(2) the taxing master has not had reasonably sufficient material before him;*

*(3) the taxing master has taken into consideration irrelevant matters;*

*(4) the taxing master has not taken into account relevant matters; or*

*(5) the taxing master acted upon a wrong principle, or adopted the wrong approach.”*

1. The general principle applied in costs on the party and party basis is that:

*“…there are to be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action.” (Paragraph 90.2696 Halsbury’s Law of Hong Kong)*

1. Of course, the taxation assessment must also be subject to the underlying objectives under O 1A, r 1 of the Rules of District Court, Cap. 336H, for example, that the court should increase *“cost-effectiveness”*, *“promote a sense of reasonable proportion and procedural economy as is reasonably practicable”* and *“ensure fairness between the parties”* etc.
2. In this case, we have the benefit of the transcript of both the taxation and the review hearing (including the Learned Master’s reasons for decision) before the court so there is no dispute that the court can properly consider *the reasons for the taxing master’s decision*.

**The plaintiff’s submission**

1. Mr. Sun of Messrs Yu Sun Yau Mak & Lawyers, solicitors for the plaintiff, went through the history of the settlement of the PI claim, arguing that even the defendant’s initial costs offer (HK$179,000) exceeded the sum allowed by Master Ho.
2. I am of the view that the court cannot get into the mind of the parties during negotiation and is not required to. Thus whatever the defendant offered during the negotiation is not relevant to the question of whether the taxing master has erred in principle or took into account irrelevant matters etc. during the taxation procedure.
3. Mr. Sun’s also attempted to compare the costs of taxation awarded to the defendant’s LCD (HK$98,000) to the taxed costs allowed (HK$116,204.17). Mr. Sun suggested that his argument was based on the principle of “proportionality”: the costs of taxation involved proceedings at the very end of the case but the legal costs incurred by the plaintiff’s solicitors in the main case was over a much longer time involving, for example, preparation and perusal of many documents etc., not to mention that the hourly rate of the LCD would be a fraction of the hourly rate of the plaintiff’s solicitors.
4. I am of the view that a comparison of costs incurred in two periods of time during a legal proceeding is irrelevant to the “proportionality” principle under O 1A, r1. That principle deals with the underlying objective to promote time and costs economy in the conduct of legal proceedings which means that, for example, the costs must be reasonable proportional to the nature of that particular legal proceedings.
5. Further, Mr. Sun is not comparing “apples to apples”: the whole taxation procedure has required some four days of hearing in court and a substantial part of taxation costs would be based upon objective and recorded time spent in court. Therefore, it would likely incur more costs over a shorter period of time compared with the main action. I also understand that the plaintiff did not beat the sanctioned offer so the costs of taxation was taxed on an indemnity basis.
6. More importantly, this comparison is again not relevant to the question of whether the taxing master has erred in principle or took into account irrelevant matters etc. during the taxation procedure.
7. By seeking to set aside the certificate, Mr. Sun is objecting to all disputed items in the taxation (some 39 items). From paragraph 11 of his submission, Mr. Sun has set out his “grounds for review”. I need not repeat the grounds for each single item but I can group them under i) failing to give reasons ii) failure to take into account / consider certain facts iii) no basis to conclude / wrongful conclusion.
8. First of all, I agree with Mr. Ho, counsel for the defendant, that this was a simple industrial accident: the plaintiff claimed shoulder and arm injuries when he and his co-worker were carrying a wooden box and the co-worker dropped the box suddenly.
9. Further, it is not disputed that the parallel EC Claim was handled by the same plaintiff firm. It is clear that the issue of duplication has been canvassed by the parties at some length during the taxation hearing before Master Ho (e.g. pages 102 to 105 of the Hearing Bundle). The Learned Master has clearly considered the arguments before him and commented, inter alia, that:

*“...if there are documents that have overlapped in the two proceedings, you are not entitled to charge double. So if, for example, you’ve considered one document for the EC proceedings and you were allowed 60 minutes, you cannot then charge 60 minutes on the PI proceedings.”*

*“That’s a principle of taxation, you are not allowed double recovery.”*

1. I also noticed that the plaintiff did not object to this principle at the time and has not raise that Master Ho has applied a wrong principle as a specific ground of review now.
2. Instead, the plaintiff has submitted to this court the same argument he raised before Master Ho that, in summary, that there were different considerations regarding the PI Claim as compared to the EC Claim. The Learned Master clearly heard such arguments before coming to his assessment.
3. In fact, it was clear from the transcript that the Learned Master has given ample opportunities for both parties to submit on each disputed item during the taxation hearing: e.g. whether “fresh information / instructions” needed to be obtained for the PI Claim (Hearing Bundle page 104), whether certain matters needed to be re-considered from a PI Claim and / or expert evidence perspective (Hearing bundle page 104-105, 112), whether extra time was needed for translation between English and Punjabi (Hearing Bundle page 98), whether the plaintiff being not a very sophisticated person required more time to seek instructions from (page 99 and 104-105 of Hearing Bundle), whether certain paragraphs when drafting certain documents were essentially a “copy and paste” process (Hearing Bundle page 104 and 111-112), whether there was a need for “intellectual input” of the lawyer even for “short letters” (Hearing page 101), whether the documents were of similar nature as in the EC Claim or were in “standard” formats (Hearing Bundle page 105, 108, 155-156 etc.) etc.
4. Similarly, during the review hearing, the Learned Master has also allowed both parties ample opportunities to make further submissions: e.g. duplication and “copy and paste” point regarding the witness statement (Hearing Bundle page 172 – 174 with Master Ho’s reasons given on page 174) and the Revised Statement of Damages (Hearing Bundle page 175- 176, with Master Ho’s reasons given on page 176) etc.
5. More importantly, the Learned Master did give his reasons for the decision at the end of the review hearing (Hearing Bundle page 179): he reiterated the principle that:

*“…the paying party is only liable to pay costs necessary and properly incurred”*

*“When considering the proper time to allow, the court considers the claimed fee earner’s experience, the background of the case, the complexity of the case, whether there were any previous proceedings which may cause overlapping or duplication of documents in the present proceedings, and any other matters which are peculiar to the lay client which may cause the legal representatives to spend more time than usual.”*

*“Time spent by a senior partner in drafting a document is inevitably less than someone of seven years’ experience. A senior partner is expected to be experienced and is expected to work efficiently. He is not expected to undertake all clerical work or other works which can be delegated to the junior associate. If he chooses to undertake such work, that is his choice, but he is not entitled to bill for that time; or rather, such time is substantially reduced to reflect that such tasks could have been done in a more cost-efficient manner.”*

1. The Learned Master then went on to summarise his reasons for decision:

*“I have previously, through discussions with solicitors this morning, and in my discussions or comments made at the last taxation hearing, made it very clear why I have taxed the items in the manner that I did…In short, I accepted most of Mr. Leung’s submissions on the duplication of work, the insubstantial amendments and the unnecessary time spent on certain items.”*

*“I am of the view, and I have stated the same during the last taxation hearing, that the bill of costs is overly exaggerated and the time claimed by the senior partner is grossing excessive, if not unreasonable.”*

1. Here, the Learned Master has stated the principles he was following in the taxation process which are entirely correct and not disputed by the plaintiff. There is no question of the Learned Master having acted *upon a wrong principle, or adopted the wrong approach* (per Paragraph 6(5) of the Wong Chi Ching case as above).
2. Further, the Learned Master has made his reasons very clear: he has heard submissions from both sides and accepted most of the submissions from the defendant on the duplication of work etc. There is clearly no basis to the plaintiff’s ground that there was “a failure to give reasons”.
3. As for the remaining “Grounds for Review” (i.e. failure to take into account / consider certain facts and no basis to conclude / wrongful conclusion etc.), Mr. Sun is taking on the grounds that *the taxing master has taken into consideration irrelevant matters* or that *the taxing master has not taken into account relevant matters* (per Paragraphs 6(3) and 6(4) of Wong Chi Ching as above)
4. However, I am of the view that Mr. Sun may have misconceived the nature of this application.
5. When both sides of an argument were heard by the taxing master, the fact that the master accepted one side over the other would not mean that the losing side could simply “appeal” on the grounds that “my submission was relevant but yet the court has not taken it into account”, or that “the other side’s submission was irrelevant but yet the court has taken that into consideration”. Instead, the “appellant” would need to specify what those matters were and illustrate why they were “irrelevant” or “relevant”: for example, there was a certain passage in the decision which showed that the master has taken into consideration evidence which was not placed before the court.
6. Instead, much of what Mr. Sun submitted to the court as grounds for review were exactly what the plaintiff had argued before the Learned Master. Mr. Sun is effectively seeking to re-argue the plaintiff’s case before a Judge, a third bite at the cherry, simply because his arguments were not accepted on the first two occasions.
7. Finally, Mr. Sun also sought to argue that Master Ho applied the wrong principle of “proportionality” when he stated in his reasons for decision in the review:

*“The PI case only lasted for one year; only 30 documents were filed into court and the case was settled eventually at HK$262,037.12. I fail to see how the bill of costs claiming a total of HK$563,535.84 can be said to be reasonable and proportionate in all the circumstances.”*

1. Mr. Sun was perhaps suggesting that the Learned Master has assessed the cost purely on the basis of taking a “proportion” of the sum of settlement (say, if the ruling was that the legal costs should be 40% of the settlement sum) without considering any other matters. That would have been the wrong principle.
2. Mr. Sun was clearly taking the passage out of context as this was not what the Learned Master had meant, because he went on to state:

*“Having considered the submissions of the receiving party and the objections raised, I maintain my assessment at the last taxation hearing. I failed to see any merit raised which could warrant a review of my decision.”*

1. This passage is near the conclusion of the reasons for decision and the Learned Master was simply reinforcing that his assessment on cost (based on listening to all the arguments) was reasonable and proportionate even when one looked at circumstances of the case like the length, documents filed and settlement sum. I see nothing wrong with that.

**Order**

1. In paragraph 2 of the Summons, the plaintiff sought the Reasons for Decision to be provided by the Taxing Master. However, I note that the Learned Master has allowed leave for the whole transcript of the taxation and the review hearing (including his Reasons for Decision at the review hearing) to be released so the court does not need to deal with this application.
2. As such, I order that paragraph 1 of the Summons be dismissed with costs of the application be to the defendant. If there is no agreement on costs, the defendant shall lodge and serve a summary bill of costs within 21 days and the plaintiff shall lodge and serve a summary list of objections 21 days thereafter. The costs shall be assessed summarily on paper.

(Harold Leong)

District Judge

Mr Michael Sun Po, of Messrs Yu Sun Yau Mak & Lawyers, for the plaintiff

Mr Leon Ho, instructed by Messrs Mayer Brown, for the defendant