DCPI 1068/2019

[2020] HKDC 523

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1068 OF 2019

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BETWEEN:

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| TO KA WONG (杜家旺) | Plaintiff |
| and |  |
| WORLD GOLD INTERNATIONAL LIMITED (威金國際有限公司) | 1st Defendant |
| EMPLOYEES COMPENSATION ASSISTANCE FUND BOARD | 2nd Defendant |

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| Coram: | His Honour Judge Harold Leong in Chambers (by paper disposal) |
| Date of Decision: | 10 July 2020 |

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DECISION

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1. This is a personal injury case with the Employees Compensation Assistance Fund Board intervening as the 2nd defendant on 2 May 2017. The court, having assessed the damages of this case at HK$1,030,532.40 plus interest in a judgment dated 3 October 2019, made an order *nisi* for the costs of the action be to the plaintiff to be taxed if not agreed with certificate for counsel.
2. On 17 October 2019, the 2nd defendant has made an application to vary the costs order as follows:
3. there be no order as to costs” between the plaintiff and the 2nd defendant; and
4. the 1st defendant do pay the plaintiff’s and the 2nd defendant’s costs of this action with certificate for counsel, to be taxed if not agreed at the District Court scale.
5. In view of the recent Court of Final Appeal decision in *Wo Chun Wah v. Chau Kwei Yin and Ors* [2019] HKCFA 48. The court has invited the parties to make respective supplemental submissions.
6. The parties have also agreed for the summons to be dealt with by way of paper disposal.

*Legal principles*

1. The CFA judgment of *Wo Chun Wah* (“the Judgment”) essentially affirmed the general power of the court to make costs orders in all civil proceedings, including ordering costs for or against the Board as a joinder in civil claims for damages.
2. However, in exercising its discretion:

*“…the court should not adopt as its starting-point the “costs following the event” criteria and should not equate the Board with an employer conducting adversarial proceedings against the employee…The Ordinance plainly requires the Board to be proactive in ensuring that the Fund’s resources are properly applied and not subject to abusive or unjustified claims…”* (paragraph 43 of the Judgment)

*“……such recognition dictates that where the Board has been joined as a party and properly carries out its “filtering” or monitoring functions, the appropriate starting-point should generally be no order as to costs, irrespective of whether the Board sought to test the case as to liability, quantum of both.”* (paragraph 46 of the Judgment)

*“…One naturally expects that, having intervened, the Board will behave in a responsible manner but if, in what will hopefully be a rare case, its conduct is unreasonable or misconceived or unjustifiably antagonistic, unnecessarily prolonging its intervention, or otherwise untoward, the court may, in the exercise its discretion, consider the Board to pay the plaintiff’s costs…”* (paragraph 47 of the Judgment)

*Application of this case*

1. The 2nd defendant made much of the fact that the plaintiff’s claim was for HK$2,732,401.16 which was grossly exaggerated as the court only awarded HK$1,030,532.40.
2. However, one should not only look at the bare figures of the claim and the award to assess the “reasonableness” of each party’s handling of the case. One needs to look at all the facts.
3. Of note was that the 2nd defendant had made a without prejudice offer on 13 June 2019 for a sum of HK$280,000 with no order as to costs between the plaintiff and the 2nd defendant.
4. The severity of the injury was not controversial in this case. In fact, the experts acting for the plaintiff and the 2nd defendant were in broad agreement in terms of both the extent of injury and recovery. As such, this offer, if based on a reasonable assessment, would not even cover the damages for PSLA: even the 2nd defendant herself put PSLA at HK$400,000 at trial. The offer was clearly only a “try-on” attempt and not a serious offer for settlement.
5. By way of reply, the plaintiff made a counter-offer of HK$1,000,000 on 30 July 2019 and another of HK$600,000 on 2 September 2019, albeit that both offers were for the 2nd defendant to pay the plaintiff’s costs of the action from the date of the intervention.
6. The first counter-offer was well within the ball park of (and actually slightly below) the court’s award. The second counter-offer was clearly very favourable to the 2nd defendant: the 2nd defendant would have conceded that PSLA should be at least HK$400,000, and even if the sum under the claim of loss earnings was being disputed, the 2nd defendant should reasonably be aware that there must be some awards (given the severity of the injury) and even a small award under this head could easily push the total above HK$600,000 (even taken into account of the credit given to the EC award of HK$273,800).
7. As such, one would expect any reasonable party to jump at the chance to settle.
8. The 2nd defendant did not. The argument now submitted was that it was disputing costs. However, no such disputes were raised to the plaintiff in form of any further counter-offers. In any case, if this was the only dispute, I see no reason why the 2nd defendant could not “settle” on quantum leaving the issue of costs to be determined by the court.
9. The 2nd defendant further argued that even if there was a “settlement”, the amount of plaintiff’s costs would not necessarily be much lower: prior to the *Wo Chun Wah* judgment, it was thought that even if the Board “settled” with the plaintiff on the damages, it was still necessary for the plaintiff to secure a judgment and to make the appropriate application for payment.
10. I do not agree with this argument. I would think that even if the thought at the time was that the trial must proceed with or without a “settlement”, as a party to the action and in fulfilling its role to “scrutinise” and “filter” the claim, the Board could, depending on the evidence before it, attempt to seek a timely agreement on any non-controversial items of claim so as to save court’s time in the actual assessment hearing.
11. Given that the experts’ opinion were in broad agreement in this case, the disputes that might actually be significant in affecting quantum were limited. There was no reason why some “agreed items before trial” could not serve as an addition (or even as an alternative) to the “settlement”.
12. For example, in this case, the parties were clearly not miles apart regarding the claim under PSLA: the severity of the injury was not controversial. Further, by giving a counter-offer of HK$600,000 (and given the experts’ opinion on the plaintiff’s recovery), the plaintiff must have given some concession as to the time length of the loss of earnings claim. This might be another area for potential agreements.
13. In fact, I would think that attempting to narrow down the areas in dispute is something that even adversarial parties should do before a trial. As a “filtering”, “scrutinising” but “non-adversarial” party, I would expect more efforts from the Board.
14. Thinking that not much costs might be saved should not mean that a reasonable attempt should not be made. Any such attempt would have shown the court that the 2nd defendant was acting reasonably in order to minimise costs and time of its intervention as far as possible.

*Order*

1. Given my findings above, I would give the following orders:
2. The costs of the action be to the plaintiff with the 2nd defendant paying the plaintiff’s costs from the date of intervention on 11 April 2017 (including all costs reserved) to be taxed on a party and party basis if not agreed, with certificate for counsel.
3. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Harold Leong)

District Judge

Miss Josephine Tjia, instructed by Cheung Fung & Hui, for the plaintiff

The 1st defendant is not represented and did not appear

Miss Susanna Leong, instructed by P C Woo & Co, for the 2nd defendant