## DCPI 1237/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1237 OF 2005

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##### BETWEEN

LAM KEI FUNG Plaintiff

### and

THE INCORPORATED OWNERS OF YUE TIN COURT 1st Defendant

HONG YIP SERVICE COMPANY LIMITED 2nd Defendant

HONG KONG HOUSING AUTHORITY 3rd Defendant

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Coram : Her Honour Judge Mimmie Chan

Dates of hearing : 27 May 2008

Date of handing down Decision : 5 June 2008

# DECISION

**Background**

1. On 2 April 2008, I entered judgment against the 1st, 2nd and 3rd Defendants and awarded a net sum of $157,899.49 in favor of Mr. Lam by way of damages. The 3 Defendants were held to be equally to be blamed and liability was apportioned amongst them on equal basis. An order nisi was also made that the costs of the action be paid by the Defendants to Mr. Lam.

**Application for variation**

1. The 1st and 2nd Defendants have now applied to vary the costs order nisi, for the Plaintiff's and the 1st and 2nd Defendants' costs incurred **after 5 February 2008** to be paid by the 3rd Defendant. They rely on a "without prejudice save as to costs" letter of that date ("**5 February 2008 Letter**") sent by the 1st and 2nd Defendants' solicitors to the 3rd Defendant's solicitors, whereby the 1st and 2nd Defendants indicated that they were prepared to shoulder two-thirds of the Plaintiff's damages and costs, if the 3rd Defendant would bear the remaining one-third, and that there be no order as to costs between the Defendants.
2. On the 3rd Defendant's part, it seeks to vary the costs order nisi, for the costs incurred by the Plaintiff and the 3rd Defendant **after 29 August 2007** to be paid by the 1st and 2nd Defendants. It relies on a "without prejudice save as to costs" letter of the that date ("**29 August 2007 Letter**") from the 3rd Defendant's solicitors to the solicitors acting for the 1st and 2nd Defendants, whereby the 3rd Defendant proposed, inter alia, a contribution of 33% of the liability to the Plaintiff for damages and costs, and for the 1st and 2nd Defendants to bear 67% of the liability.
3. Counsel for the 1st and 2nd Defendants seek the variation of the costs order on the basis of Order 62 rule 5 (a) and (d). Order 62 rule 5 provides as follows :

"The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account –

* + 1. any such offer of contribution as is mentioned in Order 16, rule 10, which is brought to its attention in pursuance of a reserved right to do so;

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* + 1. any written offer made under Order 22, rule 14, provided that the Court shall not take such offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under Order 22."

1. Pursuant to Order 16 rule 8, Notices of Contribution had been filed in these proceedings and served on behalf of the 1st and 2nd Defendants against the 3rd Defendant, and on behalf of the 3rd Defendant against the 1st and 2nd Defendants, each side claiming contribution towards the damages which may be recovered by the Plaintiff against the other side.
2. It is clear from the 5 February 2008 Letter that the 1st and 2nd Defendants had offered in writing to contribute to two-thirds of the Plaintiff's damages and costs, with a reservation of the right to bring such offer to the trial judge when the issue of costs arises after liability has been decided. It is clearly a matter which can be taken into consideration when the court exercises its discretion as to costs, pursuant to Order 62 rule 5 (a). If the offer made in the 5 February 2008 Letter was accepted by the 3rd Defendant, the time and costs spent at trial in determining the apportionment of liability amongst the 1st, 2nd and 3rd Defendants would have been saved.
3. Counsel for the 3rd Defendant argued that Order 62 rule 5 (d) is not applicable in the present case, because the 1st and 2nd Defendants issuing the 5 February 2008 Letter could have protected their position as to costs by means of a payment into court under Order 22.
4. I accept that the 1st and 2nd Defendants could have protected their position as to the Plaintiff's costs by means of a payment into court under Order 22. By this, I mean that they could have made a payment into court of the entire sum of $250,000 proposed in the 5 February 2008 Letter, stating that the payment is in satisfaction of all the Plaintiff's causes of action against the 1st and 2nd Defendants. The Plaintiff could then have, if so advised, accepted the sum paid into court and, if considered necessary, continue his claim against the 3rd Defendant. Alternatively, the Plaintiff could have accepted the sum paid into court by the 1st and 2nd Defendants and abandon his claims against the 3rd Defendant. In either of these situations, the question of contribution remained to be determined by the Court pursuant to the Notices of Contribution, amongst the 1st, 2nd and 3rd Defendants.
5. Since I accept that a payment into court under Order 22 is possible to protect the 1st and 2nd Defendants' position as to costs in relation to the Plaintiff's claims made against them in the action, I am not prepared to vary the costs order nisi so far as it affects the 1st and 2nd Defendants' liability for the Plaintiff's costs after 5 February 2008.
6. However, it is clear that Order 22 relating to payment into court does not apply to or affect joint contributors towards any debt or damages. The express provisions of Order 22 rule (1) refer to a *defendant* paying into court a sum or sums of money in satisfaction of the cause of action in respect of which the *plaintiff* claims, or in satisfaction of any or all of 2 or more causes of action joined in the action. Paragraph 22/1/23 of the Hong Kong Civil Procedure makes it clear that Order 22 relates only to payment in as between the plaintiff and defendant; it does not apply as between co-defendants, referring to offers of contribution as between co-defendants under Order 16 rule 10 instead.
7. Paragraph 16/10/1 of the Hong Kong Civil Procedure also states that Order 22 does not apply to or affect the liability of joint contributors towards any debt or damages. Hence, Order 16 rule 10 provides the procedure and framework to enable a party liable to make contribution towards any debt or damages recovered against a co-party, whether in tort or contract, to make a written offer to another party in the action to contribute to the specified extent, and for such offer to be considered by the judge when making an order as to costs in the action - including any order as between tortfeasors.
8. Since the 1st and 2nd Defendants cannot, by a payment into court under Order 22, protect their position as to costs so far as they relate to the question of liability amongst the Defendants, the 8 February 2008 Letter is necessary and relevant in the consideration of costs incurred by the 1st and 2nd Defendants after 8 February 2008 : whether under Order 62 rule (5)(a) or 5(d). It accordingly is proper for me to consider whether, in refusing the offer in the 8 February 2008 Letter, the 3rd Defendant was acting unreasonably.
9. Counsel for the 3rd Defendant submits that if I should rule that the machinery of payment into court has no application, then the 3rd Defendant would also rely on the 29 August 2007 Letter. The 3rd Defendant contends that it was unreasonable for the 1st and 2nd Defendants to have rejected the offer of apportionment made by the 3rd Defendant in the 29 August 2007 Letter.
10. In the 29 August 2007 Letter, the 3rd Defendant proposed apportionment of liability amongst the Defendants to the extent that the 1st and 2nd Defendants should bear 67%, and the 3rd Defendant bears 33% of the damages, interest and costs recoverable by the Plaintiff. However, a term imposed on such offer was that the 1st and 2nd Defendants should pay 67% of the compensation paid by the Plaintiff's employer, Vinci, in employee compensation proceedings, as well as the costs and disbursements paid by Vinci and by the Plaintiff in such employee compensation proceedings.
11. I accept the submissions of the 1st and 2nd Defendants that since Vinci is not a party to the present proceedings, and in view of the fact that the 3rd Defendant had never made any claim in these proceedings for indemnity of its costs and disbursements incurred in relation to be employee compensation proceedings, it was not unreasonable for the 1st and 2nd Defendants to have rejected the offer made in the 29 August 2007 Letter.
12. As I consider that it was not unreasonable for the 1st and 2nd Defendants to reject the offer made in the 29 August 2007 Letter, it was unreasonable for the 3rd Defendant to reject the offer made in the 5 February 2008 Letter for the reason that the 1st and 2nd Defendants did not offer to pay the 3rd Defendant its costs from 29 August 2007 to 5 February 2008.
13. As to the argument made by Counsel for the 3rd Defendant that the sum of $250,000 proposed in the 5 February 2008 letter is higher than the sum ultimately ordered in favor of the Plaintiff, I do not consider that to be a reasonable ground to reject the offer for apportionment of liability amongst the Defendants. The offer of apportionment of liability made in the 5 February 2008 Letter was not tied up with the proposed joint payment into court of $250,000. It was clearly stated in the 5 February 2008 Letter that only if the Defendants can reach agreement and settlement on the apportionment of liability to the extent of two-thirds/one-third as proposed, the 1st and 2nd Defendants then suggest a joint payment into court of $250,000 to settle the Plaintiff's action. The 3rd Defendant could have accepted the apportionment of two-thirds/one-third to protect the 3rd Defendant's position of costs vis-a-vis the 1st and 2nd Defendants, and then propose a lower sum for the joint payment into court in respect of the Plaintiff's claim, but it did not do so.
14. The question is whether the trial and in particular time spent on apportionment of liability amongst the Defendants could have been avoided if the offer made in the 5 February 2008 Letter had been accepted by the 3rd Defendant. In my judgment, a lot of time spent in trial could and would have been avoided if the 3 Defendants had agreed that if the Plaintiff can establish his case, liability will be shared amongst the 3 Defendants equally, with each defendant bearing one-third of such liability. Properly analyzed, this would have meant that the Plaintiff would have to establish, at trial, that he had sustained injury as a result of the presence of water in the staircase during his patrol of the carpark, and that each of the 3 Defendants is responsible for this either in negligence, or as occupier of the staircase where the accident occurred. As highlighted in paragraph 31 of the Judgment dated 2 April 2008, the issue in dispute between the 1st and 2nd Defendants on the one part and the 3rd Defendant on the other part at trial was whether the subject staircase where the accident occurred forms part of the carpark which is owned by the 3rd Defendant, or whether it is a common part of Yue Tin Court which the 1st and 2nd Defendants were under a duty to maintain. Many days of the trial and a substantial part of the arguments made in submissions focused on this central issue.
15. If the 3rd Defendant had accepted the offer made in the 5 February 2008 Letter and agreed that they were one-third to be blamed, it would not have been necessary for the Defendants to spend all the time which was in fact employed in distinguishing whether the staircase is a common part or a part of the carpark owned by the 3rd Defendant; whether the 3rd Defendant had the exclusive right to use, occupy and control the staircase; whether the staircase was within the management responsibilities of either the 1st and 2nd Defendants, or the 3rd Defendant; and whether the 1st Defendant should be the sole party liable to Mr. Lam under s.16 of the Buildings Management Ordinance. These finer issues would not have made any material or practical difference at all, if the Defendants had agreed, and informed the Plaintiff that they had agreed, on their sharing liability equally. They would have to be established by the Plaintiff to show that all the Defendants were liable, but I believe that these matters would not have been as finely argued as they were by the 1st, 2nd and 3rd Defendants. I accept the submissions made by Counsel for the 1st and 2nd Defendants that although the parties had not spent time arguing the actual percentage of liability to be apportioned to each Defendant, the evidence was largely introduced and argued for the purpose of distinguishing and apportioning the liability amongst the Defendants.
16. As for Counsel's argument that the 1st and 2nd Defendants should not be allowed the costs attributable to the arguments spent on the architectural design and the estate management history of Yue Tin Court in the context of whether the staircase is a common part, I am not satisfied that the 1st and 2nd Defendants had acted improperly or unreasonably in raising these two arguments (the test applied in *In re Elgindata Ltd*. *(No. 2)* [1992]1 WLR 1207). The architectural design in particular and the estate management history are part of the factual matrix of the matter, which includes the background of the execution of the Deed of Mutual Covenant, and the handover of the management of Yue Tin Court from the 3rd Defendant to the 1st Defendant, and assisted the Court's understanding of the situation of the staircase where the accident occurred. These were relevant to the determination of whether the staircase was a common part of Yue Tin Court, which was ultimately an issue which had to be decided at trial.

**Conclusion**

1. For the above reasons, I will vary the costs order nisi made on 2 April 2008, to the extent only that the costs incurred by the 1st and 2nd Defendants after 5 February 2008 on the question of apportionment of liability amongst the Defendants are to be paid by the 3rd Defendant, with certificate for counsel, to be taxed if not agreed. The part of the original order nisi, that the Plaintiff's costs of the action be paid by the Defendants to Mr. Lam, with certificate for counsel, and for Mr. Lam's own costs to be taxed in accordance with the Legal Aid Regulations, remains unchanged.
2. It is difficult to precisely break up the number of trial days spent on apportionment of liability only. The matter should best be decided on taxation, but to assist in this respect, I estimate that 2 1/2 days of the 7 1/2 days of trial were spent on the Plaintiff's evidence and submissions made by Counsel for the Plaintiff. Of the balance of 5 days, my impression is that half of such time at least could have been avoided if the parties had agreed on the Defendants sharing liability equally.
3. It follows from this that the 3rd Defendant is to pay the costs of the Summons issued by the 1st and 2nd Defendants dated 15 April 2008, and the Summons issued by the 3rd Defendant dated 16 April 2008 (which is dismissed), with certificate for Counsel. To the extent that the Plaintiff has incurred any costs as a result of these 2 summonses, they are to be borne by the 3rd Defendant, with the Plaintiff's owned costs to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Mr. Samuel Chan, instructed by Woo, Kwan, Lee & Lo, for the 1st & 2nd Defendants*

*Mr. K. C. Chan, instructed by Tang & Lee, for the 3rd Defendant*