#### DCPI 1358/2013

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 1358 OF 2013

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BETWEEN

PAIJA URASH Plaintiff

and

NORMAN LIANG（梁立人）

trading as J. LIANG & SON Defendant

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##### Before: His Honour Judge Andrew Li in Court

Date of Hearing: 7 September 2015

Date of Decision: 7 September 2015

Date of Reasons for Decision: 20 October 2015

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REASONS FOR DECISION

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1. On 7 September 2015, I gave leave to the plaintiff to discontinue the above action on the first day of what would have been a 3 day trial. I said I would give my reasons for the decision in due course. Here are the reasons.

*Background*

1. This is not an unfamiliar scenario: an injured worker, often from an ethnic minority, who uses public money (in the form of the legal aid fund) to pursue an apparently rather weak, if not completely hopeless case. After legal aid certificate is discharged, often due to advice given by counsel after reviewing the evidence of the case, the litigant, usually with the help of some paralegals or lawyers behind the scene, would continue to pursue the matter in person. This is usually done in the hope that either the defendant or his insurers will pay them something in order to get rid of the action. Often the defendant or his/her insurer will do so due to nuisance value. This is one of those cases here.
2. The plaintiff’s present common law claim arose out of the injury allegedly sustained by him in an accident which occurred on 1 August 2010 (“the Accident”). It is not in dispute that the plaintiff was employed by the defendant as a general labourer at a construction site situated on Lamma Island at the time of the Accident. It is also not disputed that the plaintiff was instructed to act as an assistant to a welder employed by the defendant by the name of Chan Ah Cheung (“Chan”). At the time of the Accident, Chan and the plaintiff were constructing what they would call a “stand” (in Chinese it is called「掌」which literary means “a palm”). Without going into details of how it was made, it is sufficient for me to say that it is a simple process which does not involve any heavy lifting of weight or any dangerous manoeuvre. It is further not in dispute that the plaintiff was assisting Chan in the welding at the time of the Accident. It was Chan who was welding the rods while the plaintiff was holding a small metal plate of slightly less than 2.5 kg in weight and 20 cm x 20 cm x 1 cm in size only.

*DISCUSSION*

*The Accident*

1. What the plaintiff was required to do was to stabilize the metal plate while Chan would weld the plate and the rods together. They both needed to squat down during this process. However, while each “stand” would take 10 to 15 minutes to weld, the plaintiff did not have to squat down during the entire process. All that the plaintiff was required to do was to stabilize the metal plate while it was still being welded by Chan. After 1 to 2 of the metal rods were being welded in place, the plaintiff was no longer required to hold onto the plate anymore. Chan would finish the welding of other rods to the plate. By then, the plaintiff could stand up and move about. Therefore, for the construction of each “stand”, the plaintiff did not need to squat down to stabilize the plate for more than 10 minutes. Also, there would be sufficient rest for the plaintiff and Chan after completing the welding for each plate and before starting to weld a new one. As Chan would need to prepare the necessary materials for the welding of the next set of plate and rods, the plaintiff could definitely be able to take a rest in between.
2. Therefore, it is abundantly clear that the plaintiff’s task in the entire welding process was simple: he was only required to squat intermittently and held the metal plate (which weighed only about 2.5 kg) in place and for a short time only. In other words, the plate was not heavy, his position was not awkward and the task was not strenuous. In this regard, I entirely agree with the defendant’s counsel Mr Gary Chung’s submission that there was no inherent danger in handling such a relatively light weight for such a simple task. Nor squatting in my view was an inherently dangerous act. The plaintiff was left with the decision as to how to adjust the plate, including his body posture on the spot, when performing the relatively simple task.
3. It is also clear that, due to the simplicity of the task and the relatively light weight of the metal plate, no specific training or instruction would be required for the job. I agree with Mr Chung that holding a small metal plate in place is only a matter of common sense which would require no specific training or instruction: See *Wong Tai Wai David v Hong Kong Cable Television formerly known as Wharf Cable Limited*, unreported, HCPI 541/2001 (Deputy High Court Judge Fung; 13 August 2002) and *Ng Kong v Golden Caterers*, unreported, HCPI 206/2004 (Recorder Edward Chan SC; 3 February 2005).

*The common law claim*

1. As is apparent right from the word “Go”, the plaintiff does not have a case at all for the alleged negligence and/or breach of any duties of care owed to him by the defendant in his capacity as his employer. Therefore, save from the statutory employees’ compensation payable under the Employees’ Compensation Ordinance, Cap 282, of which the plaintiff had received a sum of $225,821.80, in my judgment, the plaintiff has no proper basis of claim against the defendant right from the beginning in this common law claim.
2. Despite of the above, not only the plaintiff managed to obtain legal aid, he was represented by the Director of Legal Aid’s assigned solicitors right up until the time when the legal aid certificate was discharged on 23 February 2015.
3. In my judgment, if it was not clear to the plaintiff or those representing him at the time of issue of the proceedings in this case, it must have become crystal clear to them when the witness statements were filed and the discovery of documents was complete that he had not had any meritorious case against the defendant. In my opinion, there is absolutely no good reason for the plaintiff or those who was then representing him, whether the assigned solicitor or counsel, to think that the plaintiff would still have an arguable case on liability against the defendant by this stage. I note that it took almost 6 months after the witness statement of Chan was filed before the legal aid certificate was finally discharged in this case.

*The plaintiff’s acts after discharge of legal aid*

1. What in my view is rather astonishing about this case is that, despite the discharge of the legal aid certificate, the plaintiff, through someone who must have legal knowledge, continued to pursue his claim by writing “without prejudice” letters to the defendant’s solicitors, initially asking for a sum of HK$120,000 plus costs in full and final settlement of the common law action, and later, when it became apparent that the defendant or his insurers would not yield to his request, that he would be allowed to discontinue the action on condition that “*there would be no order as to costs of the proceedings*” against him.
2. In my judgment, there was absolutely no basis for the plaintiff to ask for any amount as compensation by way of settlement in the present common law action at all. For as early as on 2 April 2013, 4 months before the writ was issued herein, the defendant’s solicitors had written to the then assigned solicitors, Messrs Fung & Fung, who were still representing the plaintiff at the time, and made it clear to them that in the defendant’s opinion the plaintiff’s case consisted of no merits at all. The defendant’s solicitors stated fully their reasons of why they thought so. The defendant’s solicitors even invited the plaintiff’s solicitors to drop his intended common law action before the writ was issued so as to avoid “wasting further time and costs”. They had specifically stated that they would reserve their right to produce the letter to the Court as and when the issue of costs arises.
3. After the writ was issued, again the defendant’s solicitors wrote to the plaintiff’s then assigned solicitors and invited them to drop the case so as to avoid incurring any unnecessary costs. However, both of those letters had met with complete silence on the part of the plaintiff’s assigned solicitors.
4. On 4 February 2015, another “without prejudice save as to costs” letter was sent to the plaintiff’s then assigned solicitors reiterating the defendant’s position made at their recent mediation that they would be prepared to accept a basis of “no order as to costs” by way of settlement if the plaintiff withdrew his claim within 7 days from the date of that letter. At the end of that letter, the defendant’s solicitors pointed out that if the plaintiff fails to establish liability against the defendant at trial, then the defendant would seek costs against him on an “indemnity basis”.
5. Again, the plaintiff’s then assigned solicitors had failed to respond to this offer in any constructive way, or in any way at all.
6. Instead, as we now know, the legal aid certificate of the plaintiff was discharged by the Director of Legal Aid about 3 weeks later, namely on 23 February 2015.
7. Then on 6 May 2015, a type-written letter in English, most likely prepared by a person with some legal knowledge who can speak and write English (as the plaintiff cannot), marked “without prejudice save as to costs” was sent to the defendant’s solicitors stating, inter alia, that *“in order to save time, costs and public funds to be incurred for full trial, I am prepared to accept HK$120,000 (net of ECC) plus costs to be taxed if not agreed in full and final settlement of the whole common law claim (inclusive interest) against your client ……”*. The letter was signed by the plaintiff and was not written under the letterhead of any law firm.
8. On the same day of receiving the “without prejudice” letter from the plaintiff, the defendant’s solicitors wrote to the plaintiff and firmly rejected the offer. They reiterated the defendant’s position, which had already been made very clear by their letters to the plaintiff’s former assigned solicitors dated 2 April 2013, 25 September 2013, 14 August 2014 and 4 February 2015, as well as at the mediation for this case held on 3 February 2015 (which the plaintiff apparently had attended with his then assigned solicitor). The defendant again stated that the plaintiff’s case, as they had repeatedly told him, was devoid of any merits. They said they would seek “indemnity costs” against the plaintiff in the event that he fails to establish liability against the defendant.
9. On 27 May 2015, another type-written letter in English prepared by someone with legal knowledge was sent by the plaintiff to the defendant’s solicitors with an offer that he would discontinue the action on condition that *“there be no order as to legal costs in above proceedings”*, which I understand to mean that both parties bear their own costs in the proceedings and cannot claim costs against each other.
10. This obviously was rejected by the defendant’s solicitors and a letter dated 8 June 2015 was sent to the Director of Legal Aid instead of the plaintiff. In this letter, it stated that the plaintiff wished to discontinue the action on condition that there would be “*no order as to costs of the whole action*”. The defendant however was only prepared to agree to “*no order as to costs from the date of discharge of legal aid but not otherwise*”. This is based on the reason that the defendant had already incurred a substantial amount of costs before the discharge of legal aid and, in their view, such costs would not have been incurred had the plaintiff withdrew his claim much earlier when he was invited to do so “*on a number of occasions*”. They invited the Director of Legal Aid to indicate whether they would agree to bear the defendant’s costs up to the date of the discharge of legal aid on 23 February 2015, with such costs to be taxed if not agreed.
11. A similar letter was sent to the plaintiff on 11 June 2015 by the defendant’s solicitors. In this letter, they reiterated their position that the defendant would seek costs against the plaintiff personally on an indemnity basis and enforce the judgment against him by appropriate means if he fails to establish liability at trial.
12. On 11 June 2015, the Director of Legal Aid, quite properly in my view, wrote to the defendant’s solicitors and stated that they were not in a position to comment on the plaintiff’s proposal, except to say that their liability on costs is governed by the Legal Aid Ordinance, Cap 91.
13. Yet the plaintiff refused to give up even at this stage when the parties’ respective position has become so clear. On 27 August 2015, the plaintiff, again in a letter written by someone with legal knowledge on his behalf, stated that he would only be prepared to discontinue the action on condition that *“there be no order as to legal costs in the whole proceedings”.* He also specifically stated in this letter that, *“I will* ***NOT*** *make any concession”* (sic). He threatened that if such proposal was not accepted by the defendant, he would attend the trial in September 2015 and leave the matter to be decided by the Court. He also reserved his rights to produce a letter to Court when the question of costs arises.
14. On 27 August 2015, the defendant’s solicitors wrote to the plaintiff and stated clearly that the position that *“at no time did we or have we ever made any settlement proposal as alleged or at all”*. In view of the threat of the plaintiff that he would attend the then upcoming trial in September 2015, the defendant said that they would proceed to instruct counsel and conduct their preparation for the trial. Again, their position on costs by seeking them on an indemnity basis against the plaintiff was repeated.

*Events just before the trial*

1. Then on Friday, 4 September 2015 at 1904 hours, a letter by fax by the plaintiff was sent to the Registry of this Court, stating that he now agrees to discontinue the action against the defendant and asked the Court to determine the issue on costs. The letter itself was dated Friday, 4 September 2015. As nobody worked in the Registry on Saturday at the time of the fax was transmitted, this letter was not brought to this Court’s attention until a few minutes before the commencement of the trial at 9:30 am on Monday, 7 September 2015.

*Costs Order made at the hearing on 7 September 2015*

1. After taking instructions from his client, Mr Gary Chung, who represented the defendant, informed me that they would be contended to have costs of the action up to 30 September 2014 to the defendant on a party and party basis, such costs to be taxed if not agreed and costs thereafter up to the date of the Order, ie 7 September 2015 be to the defendant on an indemnity basis with certificate for counsel. Further, the plaintiff’s own costs up to the discharge of the legal aid certificate dated 23 February 2015 will be taxed in accordance with the Legal Aid Regulations.
2. I so made that Order on the date of the hearing upon counsel’s suggestion.

*Revised Order*

1. However, upon mature consideration on the matter, I think a more appropriate order on costs to be made in this case should be as follows:-

“That the plaintiff should bear the costs of the action on a party and party basis up to 15 October 2014 (ie 1 month after the filing of Chan’s witness statement) and thereafter on an indemnity basis up to the date of the discharge of the legal aid certificate on 23 February 2015 and thereafter the plaintiff should be liable to pay the defendant’s costs on an indemnity basis. The above costs all to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs up to 23 February 2015 be taxed in accordance with the Legal Aid Regulations.”

1. The reason I have slightly adjusted the Order is that I consider it was only reasonable for the plaintiff’s previous assigned solicitors to have time to consider all the evidence, including the detailed witness statement filed by Chan in relation to the accident on 12 September 2014 and to report the matter to the Director of Legal Aid and to allow the Director sufficient time to make a decision as to whether to continue with the legal aid coverage. I consider one month would be more than sufficient for the purpose, given the fact that the defendant had made clear of their position on liability repeatedly both before and after the writ was issued in this case.
2. I further consider that, in this case, since the plaintiff, who is a manual labourer, is most likely unable to indemnify any costs of the defendant, therefore a costs order against him will most likely end up being unpaid and unsatisfied. In my judgment, that would not be fair neither to the defendant nor to his insurer.
3. I agree with all the observations made by defendant’s solicitors on the issue of merits in this case right from the threat of issue of this common law action by the plaintiff’s then solicitors. In my view, it is crystal clear that the plaintiff simply did not have a meritorious claim against the defendant, based on any common law causes of action at all. Since the plaintiff had already received a substantial amount by way of employees’ compensation arising out of the Accident, I simply do not see on what basis the plaintiff’s previous assigned solicitors considered that they had a case to commence, and later on to maintain (until legal aid certificate was discharged in February 2015), against the defendant. Regrettably, in my short experience sitting as a trial judge in this Court, I find such unmeritorious cases, particularly amongst certain ethnic minority groups and apparently with the help of some of their fellow countrymen and/or qualified lawyers, are quite prevalent. I would urge the Director of Legal Aid to be more vigilant in the monitoring of such cases in future. Otherwise, the precious resources of the Legal Aid Fund would be exploited by unmeritorious claims such as this one, with people who apparently have some legal knowledge, whether they are qualified or not, behind the scene in manipulating the situation and who would ultimately be financially benefited from such exercises.
4. I shall so make the order nisi according to the terms of the Revised Order and any party wishes to vary the same may do so by written application within 14 days from the date of this Decision. Otherwise, the revised order nisi will become absolute.
5. I would direct a copy of this Reasons for Decision be forwarded to the Director of Legal Aid for his consideration.
6. Lastly, I would like to thank Mr Chung for his very helpful assistance in this case.

# ( Andrew SY Li )

# District Judge

The plaintiff unrepresented and appeared in person

Mr Gary KH Chung, instructed by Winnie Leung & Co, for the defendant