#### DCPI 1389 / 2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1389 OF 2007

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| BETWEEN | LAU CHU WING | Plaintiff |
|  | and |  |
|  | LAW WAI SHING | 1st Defendant |
|  | UNDERWRITER SECURITY LIMITED | 2nd Defendant |
|  | ATL LOGISTICS CENTRE HONG KONG LIMITED | 3rd Defendant |
|  | and |  |
|  | LAW WAI SHING | 1st Third Party |
|  | UNDERWRITER SECURITY LIMITED | 2nd Third Party |

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##### Coram: His Honour Judge Thomas Au in Chambers

##### (open to public)

Date of Hearing: 3 June 2008

Date of Handing Down Judgment: 11 June 2008

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### DECISION

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I. Introduction

1. On 5 May I handed down a written judgment (“the earlier judgment”) in relation to the trial of the Plaintiff’s claims herein. This is the application by (a) the Plaintiff, the 1st Defendant (and 1st Third Party), and the 3rd Defendant to vary the costs order *nisi*, and (b) the 1st Defendant to amend paragraphs 4, 115 and 116 of the written judgment.
2. This decision should be read in conjunction with the earlier judgment.

II. The application to amend the earlier judgment

1. By a letter dated 15 May 2008, the 1st Defendant brought the Court’s attention to the following mistakes in the earlier judgment:
2. At paragraph 4 thereof, the reference to the word “ATL” should be “Underwriter”.
3. At paragraphs 115 and 116 thereof, the total damages payable to the Plaintiff by the 1st Defendant should be $38,965.00, instead of $49,885.00 as stated, since the Court should give full credit to the EC payment of $21,840.00 instead of subjecting that to the discount of 50% contributory negligence as set out in that part of the written judgment.
4. All parties agree that the above proposed amendments to the written judgment should be made.
5. I agree that the above are clear mistakes of the written judgment. I therefore further direct and order that paragraphs 4, 115 and 116 of the written judgment should be amended as follows:
6. Paragraph 4 should read as follows:

“4. The defendants all deny liability and dispute the quantum claimed. They also say the accident was caused by Mr Lau’s own negligence. Further, ATL has issued Third Party claims against Mr Law and Underwriter respectively for contribution or indemnity. At trial, by consent, ~~ATL~~ Underwriter and Mr Law served on each other contribution notice

1. Paragraphs 115 and 116 should read as follows:

“115. Taking into account of the EC payment ($21,840.00) Mr Lau has already received, and 50% contributory negligence, Mr Lau is thus entitled to damages in the sum of ~~$49,885.00 [($121,610.00 - $21,840,00) x 0.5]~~ $38,965.00 ($121,610.00 x 0.5 – 21,840.00.

116. For the reasons set out above, I hold that Mr Law shall be liable to Mr Lau damages in the total sum of $38,965.00 ~~$49,885.00~~. There would be interest on damages for PSLA at 2% p.a. from the date of writ, and interest on pre-trial loss of income and special damages at half judgment rate from the date of accident, to today. Interest thereafter is to accrue at judgment rate until full payment.”

1. A corrigendum reflecting the above amendments to the earlier judgment will be issued separately.

III. The applications to vary the costs order *nisi*

###### The relevant parts of the earlier judgment

1. To understand the parties’ respective applications to vary the costs order *nisi*, it is necessary for me to summarise the following conclusions of the written judgment:
2. I found that the 1st Defendant is negligent in causing the subject accident and liable to the Plaintiff for damages. However, there is 50% contributory negligence on the part of the Plaintiff. The Plaintiff also fails to prove any loss of future earning, which constitutes the largest part of his claim for damages. See: paragraphs 51, 54, 56, 97-104, 107-108 of the earlier judgment.
3. The Plaintiff has failed to establish any negligence on the part of the 2nd Defendant (as his then employer) and the 3rd Defendant (as the occupier of the premises where the Plaintiff worked when the accident occurred). His claims against the 2nd and 3rd Defendants are therefore dismissed. See: paragraphs 66 and 73 of the earlier judgment.
4. I have also concluded that, had the 2nd Defendant been found liable to the Plaintiff, the 1st Defendant would have been liable to make contribution to the 2nd Defendant’s liability. See: paragraph 67 of the earlier judgment.
5. As the Plaintiff’s claim against the 3rd Defendant is dismissed, I have therefore made no orders under the 3rd Defendant’s Third Party claim against the 1st Defendant (as the 1st Third Party) and the 2nd Defendant (as the 2nd Third Party). I have however made it clear in my judgment that, had I found that the 3rd Defendant were liable to the Plaintiff, the 1st and 2nd Third Parties would have been respectively liable to contribute and indemnify the 3rd Defendant’s liability towards the Plaintiff. See: paragraphs 75-76 of the earlier judgment.
6. In light of the above conclusions and findings, I made the costs order *nisi* that:
   1. The 1st Defendant shall pay the Plaintiff’s costs of the action against the 1st Defendant.
   2. The Plaintiff shall pay the costs of the 2nd and 3rd Defendants in defending his claims made against them.
   3. The 1st and 2nd Defendants shall pay the 3rd Defendant the costs of the Third Party claims made respectively against them.
   4. The 1st Defendant shall pay the 2nd Defendant the costs of the 2nd Defendant’s contribution notice.

See: paragraph 117 of the earlier judgment.

The Plaintiff’s application

1. The Plaintiff now applies to vary the costs order to the extent that there should be either a Sanderson costs order against the 1st Defendant in respect of the costs of the 2nd and 3rd Defendants.

*Applicable principles*

1. The principles governing whether the Court should exercise its discretion to grant a Sanderson costs order are well established. For the present purpose, it can be summarized as follows.
2. It is common ground that the Court in the right circumstances could grant a Sanderson, effectively to require the unsuccessful defendant to pay the costs of the successful defendants (instead of requiring the plaintiff to bear those costs), as this would be regarded as costs that have reasonably been incurred by the plaintiff in his claims. See: *Sanderson v Blyth Theatre Company* [1903] 2 KB 533, 539 *per* Romer LJ.
3. For the purpose of deciding whether the jurisdiction should be exercised, it should be shown that it was *reasonable* in all the circumstances for the plaintiff to join both (or more than one) defendants as defendants in the action for damages.
4. The plaintiff may be able to satisfy the Court that it was reasonable for him to join more than one defendant, if it can be shown that he was uncertain at the time of writ which of the defendants should be liable to him for his injury. Whether it is so is dependent upon the facts of each case. As said by Vaughan Williams LJ in *Besterman v British Motor Cab Company Ltd* [1914] 3 KB 181 at 186 and 187 (quoted with approval by the Court of Appeal in *Leung Lai-hai v Hon Sau-ling & another* [1993] 1 HKLR 86, 89:25-90:15) as follows:

“There had been a collision, and it took place under such circumstances that the injured person would, naturally, not have full information as to whose fault it was, but it took place under such circumstances that it might well have been the fault of one or other or of both of these people… The proper way is – do not join any defendant unreasonably; if the facts are such that it is reasonable to join them both and reasonable to be in a *state of uncertainty* as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame. *There is no rule in the manner; each case must turn upon its own circumstances,*…” (emphasis added)

1. The gist of a Sanderson or Bullock order or the rationale behind such an order is that the plaintiff was not certain before judgment was rendered after trial whether a particular defendant was liable for the wrong for which he was suing. See: *Lui Yin v Chan Lin-mui & another* (unrep., DCPI 44/2000, H H Judge A Cheung (as he then was), 21 August 2001) at para 6.
2. However, if the plaintiff’s uncertainty was only as to the law, generally that may not have been sufficient to bring him under the compass of a Sanderson or Bullock order. As explained by H H Judge A Cheung (as he then was) in *Lui Yin*, supra, at para 7 as follows:

“But in the present case, the situation is different. Whilst it might be said that before judgment, it was rather uncertain on the part of the lawyers representing the parties, and perhaps the court as well, as to whether the plaintiff was telling the truth or the 1st Defendant was telling the truth regarding how the accident happened, the uncertainty was that of the lawyers’, not the parties themselves’. In other words, even before judgment was rendered in the present case, the plaintiff must have known how the accident actually happened and based on my finding which must form the basis of my exercise of discretion today, the Plaintiff must have known the version or the account of how the accident happened given by the 1st Defendant was the correct one and based on that account, with good legal advice, the Plaintiff ought to have know that her claim against the 1st Defendant would fail. Perhaps I should add that any uncertainty as to whether the Plaintiff had a case against the 1st Defendant based on the 1st Defendant’s account or version of the accident would not be an uncertainty justifying the imposition of a Bullock or Sanderson order. So, as the older version of the White Book [the 1999 Supreme Court Practice] pointed out, *when the plaintiff’s doubt is as to the law, the court may decline to make a Bullock or Sanderson order. Such uncertainties would be present in almost every case before the court*.” (emphasis added)

1. Further when the causes of action are separate and distinct as against each of the defendants, the Court may refuse to make a Sanderson or Bullock order. In *Mulready v Bell Ltd* [1953] 2 QB 117 (CA), where an action for damages for personal injuries succeeded against the first defendant based on breach of the Building (Safety, Health and Welfare) Regulations 1948, but failed against the second defendant on an alleged breach of duty based on the Factories Act 1937, it was held that a Bullock or Sanderson order should not be made.

*Discussion*

1. Mr Cheung, counsel for the Plaintiff, submits that as it was reasonable in the circumstances for the Plaintiff to also brought a claim against the 2nd and 3rd Defendants, he should not be liable to their costs even though the Plaintiff has failed in his claims against them. Instead, the 1st Defendant, being the unsuccessful defendant, should be liable to pay the 2nd and 3rd Defendants’ costs.
2. Applying the above principles to the present case, I am not satisfied that this is an appropriate case to make a Sanderson costs order as submitted by Mr Cheung. My reasons are as follows:
3. The basis of the Plaintiff’s claim made against the 2nd and the 3rd Defendants are based on his allegations that (a) the 2nd Defendant was in breach of its duty as an employer in failing to provide adequate training and equipment to him, resulting allegedly in causing the accident, (b) the 3rd Defendant was in breach of its occupier’s duty in effectively the design of the traffic layout in the accident scene.
4. On the other hand, the claim against the 1st Defendant is premised on the manner in which the 1st Defendant drove the lorry, and his failure to have a proper lookout when he started to drive.
5. In my view, the claims made against the 2nd and 3rd Defendants are clearly separate and distinct causes of action, which are different from and independent of the one against the 1st Defendant.
6. Moreover, when the writ was issued, the Plaintiff was fully aware of the facts he relied on to support his claim against the 2nd and 3rd Defendants on their respective breach of duty. These facts are largely not disputed, and in any event, I have largely and materially found in favour of the Plaintiff’s version of the facts for these purposes. As such, any uncertainty as to whether the 2nd and 3rd Defendants should also be liable to the Plaintiff for the accident is one relating to the law (i.e, what is the scope of the duties).
7. Further, the material facts of alleged negligence relied on by the Plaintiff to support his claim against the 1st Defendant are quite different from those in support of the claims against the 2nd and 3rd Defendant. As such, it cannot be said that the Plaintiff was uncertain as to which of the defendants was liable by reason of the state of the facts.
8. In the circumstances, I do not find that costs have been reasonably incurred by the Plaintiff in joining the 2nd and 3rd Defendants, for the purpose of deciding whether those costs should also be borne by the 1st Defendant.
9. I therefore refuse the Plaintiff’s application to vary the costs order as sought.
10. However, I would still vary the costs order vis-à-vis the Plaintiff and the 1st Defendant to the extent that, the costs should be taxed at the High Court scale until 8 June 2007, and thereafter at the District Court scale, with certificate for counsel. This is so because:
11. The action was initially issued in the High Court against all the three Defendants.
12. It was only until 8 June 2007, and after the filing of the Statement of Damages on 11 September 2006, that by consent of all the parties, by an Order of Master B Kwan, the claim was transferred to the District Court.
13. There is no evidence before me to show that it was unreasonable for the Plaintiff to issue the claim in the High Court in the first place. Quite to the contrary, none of the Defendants considered it appropriate to apply to have the claims transferred to the District Court before 8 June 2007.
14. In the premises, I conclude that it is reasonable for the Plaintiff to issue the claim in the High Court, and thus any costs incurred before the order of transfer made on 8 June 2007 should be taxed in accordance to the High Court scale.
15. Further, none of the parties object to the grant of certificate for counsel, and I too find this an appropriate case to do so.

The 1st Defendant (1st Third Party)’s application

1. The 1st Defendant now applies to vary the costs order to the extent that the 3rd Defendant do pay the costs of the 1st Third Party in the third party claim against the 1st Third Party (ie., the 1st Defendant) at the High Court scale up to the date of the order of transfer on 8 June 2007, and thereafter at the District Court scale with certificate for counsel, to be taxed if not agreed.
2. Mr Chung, counsel for the 1st Defendant (1st Third Party), submits that as the 3rd Defendant failed to obtain any relief under the third party claim against the 1st Defendant, the 1st Defendant should be entitled to its costs.
3. I do not agree. As I mentioned above, the 3rd Defendant did not obtain any relief under the claim because he was successful in its defence against the Plaintiff. It is my conclusion in the earlier judgment that, had I found that the 3rd Defendant were liable to the Plaintiff, the 1st Defendant (as the 1st Third Party) would have been liable to contribute to the 3rd Defendant’s liability to the Plaintiff. In other words, the 3rd Defendant was successful in showing that grounds of contribution as against the 1st Defendant. At the same time, it is also not suggested to me that, at the time when the third party claim was issued against the 1st Defendant, it must have been clear to the 3rd Defendant that it would be successful in its defence against the Plaintiff, and thus it was unreasonable for the 3rd Defendant to issue the third party claim.
4. In the circumstances, I do not think it is fair and just in all the circumstances that the 3rd Defendant should either be deprived of its costs under the third party claim or even to pay the 1st Defendant’s costs thereunder.
5. I therefore refuse the 1st Defendant’s application to vary the costs order as suggested.

The 3rd Defendant’s application

1. The 3rd Defendant applies to vary the costs order to the extent as follows:
2. The Plaintiff shall pay the 2nd Defendant and the 3rd Defendant their costs in defending the Plaintiff’s claim at the High Court scale up to the date of the order for transfer on 8 June 2007, and thereafter at the District Court scale with certificate for counsel.
3. The 1st Third Party (i.e., the 1st Defendant) shall pay the 3rd Defendant its costs in the third party proceedings against the 1st Third Party at the High Court scale up to the date of the order for transfer on 8 June 2007, and thereafter at the District Court scale with certificate for counsel.
4. The 2nd Third Party shall pay the 3rd Defendant its costs in the third party proceedings against the 2nd Third Party on an indemnity basis at the High Court scale up to the date of the order for transfer on 8 June 2007, and thereafter at the District Court scale with certificate for counsel.
5. In gist, the 3rd Defendant is seeking to vary the costs order *nisi* by adding (a) that those costs should be taxed in accordance to the High Court scale before the claims (including the third party claims) were transferred to the District Court on 8 June 2007, (b) the costs against the 2nd Third Party be taxed on an indemnity basis, and (c) that there should be certificate for counsel.
6. For the reasons set out in paragraph 19 above, I find the 3rd Defendant’s application for taxation in accordance with the High Court Scale and the grant of certificate for counsel justified.
7. Further, given that clause 9 of the subject Service Agreement between the 3rd Defendant and the 2nd Defendant (as the 2nd Third Party) does provide that the 2nd Defendant shall indemnify the 3rd Defendant’s legal costs, and that Mr Andy Choi for the 2nd Third Party makes no objection to the 3rd Defendant’s application, I also find the application that costs of the third party proceedings against the 2nd Third party be taxed on an indemnity basis also justified.
8. I therefore allow the 3rd Defendant’s application.

IV. Conclusion

1. For the above reasons, I shall vary the costs order *nisi* set out in the earlier judgment, and instead make the following costs orders:
2. The 1st Defendant shall pay the costs of the Plaintiff in his claim against the 1st Defendant, to be taxed if not agreed, with certificate for counsel. Such costs should be taxed at the High Court scale until 8 June 2007, and therefore at the District Court scale.
3. The Plaintiff shall pay the 2nd Defendant and the 3rd Defendant their costs in defending the Plaintiff’s claim, to be taxed if not agree, with certificate for counsel. Such costs should be taxed at the High Court scale up to the date of the order for transfer on 8 June 2007, and thereafter at the District Court scale.
4. The 1st Third Party (i.e., the 1st Defendant) shall pay the 3rd Defendant its costs in the third party proceedings against the 1st Third Party, to be taxed if not agreed, with certificate for counsel. Such costs should be taxed at the High Court scale up to the date of the order for transfer on 8 June 2007, and thereafter at the District Court scale.
5. The 2nd Third Party shall pay the 3rd Defendant its costs in the third party proceedings against the 2nd Third Party on an indemnity basis, to be taxed if not agreed, with certificate for counsel. Such costs should be taxed at the High Court scale up to the date of the order for transfer on 8 June 2007, and thereafter at the District Court scale.
6. The 1st Defendant shall pay the 2nd Defendant the costs of its contribution notice.
7. I further order that costs of this application be part of the costs of the claims and the third party proceedings, as ordered above.

# (Thomas Au)

District Judge

Mr. Lawrence L.K. CHEUNG, instructed by Messrs. C.W. Yuen & Co. for the Plaintiff.

Mr. Gary CHUNG Ka Hong, instructed by Messrs. Lau, Chan & Ko

for the 1st Defendant and 1st Third Party.

Mr. Gidwani, Victor Tulsi, instructed by Messrs. Deacons

for the 2nd Defendant.

Mr. Daniel K.K.CHAN, instructed by Messrs. T.S. Tong & Co.

for the 3rd Defendant.

Mr. Andy Choi of Messrs. Andy Choi & Co.

for the 2nd Third Party.