## DCPI 1495/2015

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1495 OF 2015

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BETWEEN

OR SIU LUNG,

the person appointed to represent the estate of

LAM CHOI CHING（林賽貞）, deceased Plaintiff

and

FU HONG HOME FOR THE ELDERLY COMPANY

LIMITED trading as

FU HONG HOME FOR THE ELDERLY Defendant

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Before: Deputy District Judge Eric Tam (in Chambers)

Dates of Written Submissions: 29 December 2016 and 12 January 2017

Date of Decision: 22 February 2017

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DECISION

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1. The plaintiff applied for leave to appeal and the application be determined by way of paper disposal.
2. On 17 January 2017, it was ordered that the application be determined by way of paper disposal.

*Grounds for leave to appeal and plaintiff’s submissions*

1. The grounds stated in the draft notice of appeal were as follows: -

“The learned Judge erred at paragraphs 10 to 13 of the Judgment in holding that the death of the original plaintiff was not a special circumstance. In particular:

(Ground 1)

1. The learned Judge failed to give any or sufficient consideration to the fact that the death of Lam (as defined in the Judgment) was independent of the injuries she suffered in the Accident, and was unknown to her when the defendant made the sanctioned payment on 17/7/2015.

(Ground 2)

1. The learned Judge erred in holding that the death of Lam in those circumstances was a contingency inherent in litigation.

(Ground 3)

1. The learned Judge erred in holding that it was unreasonable to deprive the defendant of the protection of the sanctioned payment.

Had the learned Judge applied the correct test in considering the death of Lam as a matter establishing special circumstances in which the plaintiff sought leave to accept the defendant’s sanctioned payment, he would have held that the Court ought to depart from the usual costs order in allowing the plaintiff to accept the sanctioned payment, and that the Court should award costs of the action to the plaintiff.”

1. In the written submissions, Mr Cheng, counsel for the plaintiff, submitted that: -

“4. This court, in the decision, held that premature, unexpected death of the Deceased was not special circumstances such that the usual costs order under O. 22 r. 15(3) should be departed from. Further, it was held that the Deceased’s death was a contingency inherent in the litigation, should that it should be contemplated by the Deceased when she decided to reject the sanctioned payment.

1. P respectfully submits that it is an error of law to refuse to find that Deceased’s death as special circumstances justifying a departure from the usual costs order. Hence, there is a reasonable prospect that CA will intervene in this Court’s exercise of discretion.
2. With respect, this court erred in thinking that since there was a possibility for the Deceased to die earlier than her life expectancy, it must be something that she must take into account when she considered whether D’s sanctioned payment ought to be accepted.
3. Whilst P agrees that every person knowingly faces the risk that he may live shorter than his life expectancy, it is important to recognize that that person cannot tell whether and when the risk would materialize. P submits that this Court erred by ignoring the fact that the Deceased was not in a position to properly evaluate the risk. It is unreasonable to require a plaintiff to take into account this unknown risk when assessing the value of a sanctioned payment. With respect, the logical extreme of the Decision is that plaintiffs should accept a sanctioned payment once it covers all the past loss, because there is always a risk that they would not live the next day. This cannot be a workable mechanism for O. 22.
4. Further, P respectively submits that the age of the Deceased could not be a relevant factor.

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10.3 As submitted at the hearing, it was reasonable for the Deceased to expect damages of more than $380,000 in August 2015, on the basis that her life expectancy was 6.69 years ……

12. As shown by the party’s submissions at the previous hearing, there appears to be no direct authority on whether the premature, unexpected death of a plaintiff should be considered as special circumstances when the court exercises its discretion under O. 22 r. 15(3). Given the novelty of the issue, P should be permitted to test her case at the CA, such that the question can be authoritatively determined.”

*The defendant’s submissions*

1. As I agree with defendant’s counsel Mr Ngai’s submissions. His submissions are recapitulated in details as follows: -

“2. Leave to appeal shall not be granted unless the appeal has a reasonable prospect of success, or there is some other reason in the interests of justice why the appeal should be heard. Reasonable prospect of success involves the notion of reasonableness and therefore is more than fanciful, but does not have to be probable. It also requires the intended appellant to show more than just an arguable case.

3. Further, as the intended appeal is against the costs order in the Decision, it is against an exercise of the Court’s discretion. The threshold for granting leave to appeal is therefore higher. An appellate court will not interfere with the exercise of discretion unless it is shown that the decision is plainly wrong (i.e., it is outside the generous ambit within which a reasonable disagreement is possible), the judge has erred in law or in principle, or has taken into account matters which he should not have taken into account, or has not taken into account matters which he should have taken into account. It is not sufficient to merely show that the appellate court would prefer a solution which the judge had not chosen.

4. The aforesaid well-established principles have recently been applied in *Jiang Zhong v. Up Cheer Limited and others*, DCPI 2047/2011, 10th November 2016, at paras. 7-11; and *北京橙天嘉禾影視製作有限公司 v. 張承勷*, HCMP 2666/2016, 11th November 2016, at para. 6.

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7. Judging from the grounds of appeal as stated in the draft notice of appeal, it is submitted that the intended appeal has no reasonable prospect of success whatsoever.

8. First, the complaint that the Court did not take into account 2 relevant matters is plainly unsubstantiated. To start with, paragraph 3 of the Decision lists out the relevant facts, one of which is that “17/2/2016 Lam passed away as a result of bronchopneumonia which was unrelated to the accident.”. It is difficult to see how it can be shown that the Court failed to give any consideration of this fact.

9. Besides, it is implicit from paragraphs 6, 8, 10 and 11 of the Decision that these 2 relevant matters were taken into account by the Court. At the last hearing, the contention by the Plaintiff was that it was reasonable for Madam Lam not to accept the sanctioned payment within time: see paragraphs 27 to 31 of the Plaintiff’s written submissions dated 13th October 2016. The basis of this contention is that at the time of the sanctioned payment, Madam Lam could not have known that she would pass away suddenly about 6 months later because of an illness unrelated to the accident. So when the Court opined at paragraph 11 of the Decision that “reasonableness is one the factors to be considered but it is not determinative”, the Court must have had these 2 matters (amongst others) in mind.

10. In any event, there is nothing in the Plaintiff’s written submissions dated 29th December 2016 (“**P’s Written Submissions**”) elaborating on this particular complaint.

11. As regards the alternative ground that the Court failed to give sufficient consideration of these 2 matters, it is submitted that this is simply not a ground of appeal against an exercise of discretion at all. When a court does take into account relevant matters into consideration, a complaint that the court fails to give sufficient consideration is tantamount to saying that another court would have made a different determination based on the same factors. As submitted above, this does not constitute a ground of appeal.

12. Second, the Plaintiff complains that the Court erred in “holding that the death of [Madam Lam] was not a special circumstance”, and erred in “holding that the death of [Madam Lam] in those circumstances was a contingency inherent in litigation”. They are, it is submitted, two sides of the same coin. The issue at the last hearing was whether the death of Madam Lam was a special circumstance justifying a departure of the usual costs order. When it was argued by the Defendant at the last hearing that Madam Lam’s sudden death was only a contingency inherent in litigation, it was just another way of saying that this was not a special circumstance.

13. By the same token, the complaint that the Court erred in “holding that it was unreasonable to deprive the Defendant of the protection of the sanctioned payment” does not add anything extra as a ground of appeal. When the death of Madam Lam was not a special circumstance, the logical conclusion must be that it was unreasonable to deprive the Defendant of the costs protection under the usual costs order.

14. With the above in mind, it is unclear what the Plaintiff’s ground of appeal is really about. The Plaintiff has to show how and in what ways (based on the aforesaid established principles on grounds of appeal against exercise of discretion) it is alleged that the Court erred (e.g., was the Decision plainly wrong? Or did the Court take into consideration irrelevant matters?). From paragraph 5 of P’s Written Submissions, it is submitted by the Plaintiff that “… it is an error of law to refuse to find the Deceased’s death as special circumstances justifying a departure from the usual costs order”. It appears that the real complaint is an error of law.

15. This, it is respectfully submitted, is completely without basis. The applicable legal principle for late acceptance of sanctioned payment is stated in paragraphs 4 and 5 of the Decision. There is nothing in P’s Written Submissions to suggest that the Court applied the wrong principle in the exercise of discretion.

16. Third, the Plaintiff states in the draft notice of appeal that “had the learned Judge applied the correct test in considering the death of Lam as a matter establishing special circumstances…, he would have held that the Court ought to depart from the usual costs order”. Again, it is unclear why and how this could have been a ground of appeal. As mentioned above, the issue at the last hearing was whether the death of Madam Lam was a special circumstance justifying a departure of the usual costs order. There is no “test” or “correct test” to speak of in deciding this issue.

17. In this regard, paragraphs 6 to 10 of P’s Written Submissions appear to be the Plaintiff’s arguments as to why the Court erred in its exercise of the discretion. However, they are more like submissions on why the Court should have exercised the discretion in favour of the Plaintiff rather than arguments substantiating the Plaintiff’s grounds of appeal.

18. In any case, paragraphs 6 to 10 of P’s Written Submissions do not assist the Plaintiff in this application at all. The gist of the Plaintiff’s argument is that the Court erred in requiring Madam Lam to take into account the risk of her passing away earlier than expected when considering the sanctioned payment. In other words, the Court (allegedly) erred in finding the conduct of Madam Lam unreasonable. This complaint is unfounded, and is contrary to what paragraph 11 of the Decision says, i.e., “*It was not submitted by either part[y] that the other party was acting unreasonably*.” As a matter of fact, it was never the submission of the Defendant at the last hearing that Madam Lam was unreasonable in not accepting the sanctioned payment within time.

19. The rationale of the Plaintiff’s argument is that it is unreasonable to require a plaintiff to take into account an unknown risk (i.e., whether one would live shorter than his life expectancy) when assessing the value of a sanctioned payment. It follows that (so the Plaintiff seems to suggest) any sudden death would be a special circumstance justifying a departure of the normal costs order. With respect, there is no logic in this argument. To start with, life expectancy should not be equated with mathematical certainty. Why should a 90 year-old who is a chain-smoker and one who has never smoked for his whole life share the same life expectancy in that they shall both live 6.69 years more? It cannot be gainsaid that how long one can live depends on a lot of factors. As such, it is not special at all that one would live shorter than his life expectancy, just as it is not special at all that a trial judge (to the disappointment of a plaintiff) quantify general or special damages modestly.

20. Second, this so-called unknown risk works both ways, as it also affects a defendant making a sanctioned payment. If a defendant makes a sanctioned payment covering only past loss, he or she risks the payment being bettered after trial (and hence it defeats the whole purpose of making the sanctioned payment). This is exactly the reason why the Defendant has been all along making the submission that the death of Madam Lam is a contingency inherent in litigation.

21. The Plaintiff also submits that the age of Madam Lam could not be a relevant factor, and the Court (allegedly) erred in paragraph 12 of the Decision in thinking that because Madam Lam was already 90 years old, there was more reason for her to think that she would die earlier than her life expectancy. This contention, it is submitted, is wholly without merits. First, this cannot be a “fair reading” of paragraph 12 of the Decision. As submitted above, the Court did not ever say Madam Lam was acting unreasonably. What is stated in paragraph 12 of the Decision is no more than common sense. As such, there is nothing improper for the Court to consider the matters stated therein in the exercise of his discretion.

22. Further, the argument in paragraph 9 of P’s Written Submissions is untenable. The Plaintiff says it is not the case that the older the person, the lesser chance he will not live to his life expectancy. For one thing, there is no expert evidence adduced. Regardless, this contention is not supported by the statistics provided by the Plaintiff. The *Life Tables* have a column showing “probability of dying between exact age x and age x+1”. Invariably, the higher the age, the higher the probability of dying.

23. For the matters aforesaid, the Plaintiff’s intended appeal has no reasonable prospect of success.”

*My decision*

1. I agree with Mr Ngai’s submissions and would like to add the following. As to Ground 1 of the draft notice of appeal, that is, the court failed to give any or sufficient consideration to the fact that the death of Lam was independent of the injuries she suffered in the accident, and was unknown to her when the defendant made the sanctioned payment on 17 July 2015. As submitted by Mr Ngai, such fact was listed out in paragraph 3 of the decision and was considered. The suggestion of insufficient consideration of the fact has no merits in the intended appeal. Rogers VP (as he then was) said in paragraph 2 in Sun Focus Investment Limited v Tang Shing Bor and other (HCMP 2251/2009) as follows: -

“It should be stated at the outset that since the orders made by the recorder were matters of discretion the argument that the recorder did not give “adequate” consideration is not one which gives ground for appeal. The weight which a judge gives to matters in his discretion are a matter for him and the Court of Appeal will not interfere with the exercise of discretion by a judge unless it can be shown that he failed to take into account relevant considerations or took into account irrelevant considerations or that his decision was clearly wrong. The fact that a judge does not specifically refer to a matter does not mean that he did not take it into consideration provided it is clear from his judgment that it is not something which can be said that he must have clearly overlooked.”

All the circumstances of the case have been taken into consideration and no single factors should be regarded as determinative.

1. It is only common sense that Lam’s demise was unknown to her. But for a lady of 90 years old, her death should be within contemplation. The defendant did not submit that the plaintiff was acting unreasonably. She may be optimistic but not unreasonable. But still her death can be the vicissitudes of life.
2. Ground 2 is merely a repetition of the conclusion of the court. No particulars were given to support any errors in law.
3. Ground 3 is similarly a repetition of the decision. Mr Cheng failed to substantiate that there were any errors in law.
4. It seems Mr Cheng is suggesting that the correct test was not applied. But he did not state what the correct test was. In exercising the discretion on costs, the court should take into consideration all the circumstances of the case.
5. In respect of paragraphs 4 and 5 of the plaintiff’s submissions, it is just a repetition of the decision and no argument has been advanced.
6. In respect of paragraph 6 of the submissions, there was no allegation that the deceased was acting unreasonably because she failed to contemplate her own death. She may be optimistic and there is nothing wrong about it. As correctly pointed out by Mr Ngai, in paragraph 11 of the decision, it was not submitted by either party that the other party was acting unreasonably and reasonableness was only one of the factors to be considered.
7. In respect of paragraph 7 of the submissions, I do not accept Mr Cheng’s submission. A risk is something that one could not know whether it would materialize or not. Before such materialization, one could not tell. A risk is always unknown. It is reasonable for a plaintiff to take into account all the risks in litigation. In this case, one does not know what risks the deceased had considered. Again, it is not my decision that the deceased was acting unreasonably in refusing to accept the sanctioned payment. Any person is entitled to be optimistic.
8. In respect of paragraph 8 of the submissions, all the circumstances of the case should be taken into consideration, including the age of the plaintiff. It is rejected that as a matter of general principle that the premature, unexpected death of a plaintiff could never be a special circumstance under O 22 r 15(3). It is a matter of discretion when dealing with costs and all the circumstances have to be taken into consideration. It is likely more weight for consideration should be given for the sudden death of a young plaintiff whose damages relating to the future earning capacity and expenses will be greatly affected. The sudden death of a plaintiff could not automatically amount to a special circumstance to vary the usual costs order under O 22 r 15(3).
9. I do not agree with paragraph 9 of the submissions. Life expectancy of course is age neutral. The argument does not assist the plaintiff at all. There is nothing in paragraph 12 of the decision to suggest that the deceased would die earlier than her life expectancy. It only stated that the plaintiff was 90 years old and her death was not unusual.
10. In respect of paragraph 10 of the submissions, Mr Cheng was just repeating some of the arguments in the hearing and such arguments had been dealt with in the decision. I would like to add that it is totally unreasonable for the plaintiff to ask for costs in the present case.
11. Each case should be decided on its own merits, particularly in the matter of costs. As stated in paragraph 6 of the*北京橙天嘉禾影視製作有限公司 v 張承勷*, HCMP 2666/2016:

“It need hardly be emphasized that generally, an appeal court will not interfere with a judge’s exercise of discretion unless the judge has misunderstood the law or the evidence or the exercise of discretion was plainly wrong that it was outside the generous ambit within which a reasonable disagreement is possible.”

1. I find that the plaintiff failed to identify any errors in law and the application has no reasonable prospect of success. In the exercise of discretion for the award of costs, each case turns on its own facts. The Court of Appeal should not be troubled by a case with no merits. The plaintiff is legally aided, she should not spend costs to pursue the matter. There is no other reason in the interest of justice to grant leave.

*Conclusion*

1. It is ordered as follows: -
2. The plaintiff’s application for leave to appeal be dismissed;
3. There be costs order nisi that the defendant should have costs of the application, with certificate for counsel, to be taxed if not agreed. The costs order will become absolute unless application for variation is made within 14 days from the date hereof. The plaintiff’s own costs to be taxed in accordance the Legal Aid Regulations.
4. I thank counsel for their assistance.

( Eric Tam )

Deputy District Judge

Written submissions by Mr Alfred C P Cheng, instructed by Cheng, Yeung & Co, for the plaintiff

Written submissions by Mr Lawrence L K Ngai, instructed by Wong & Associates, for the defendant