DCPI 1585/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1585 OF 2011

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BETWEEN

|  |  |
| --- | --- |
| POON CHING MAN | Plaintiff |
| and |  |
| LAM HOI PUN | Defendant |

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Before: Deputy District Judge Winnie Tsui in Chambers (open to public)

Date of Hearing: 3 March 2015

Date of Decision: 22 April 2015

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DECISION

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*INTRODUCTION*

1. I handed down a judgment in this action on 11 November 2014 (“the Judgment”), in which I dismissed the plaintiff’s action against the defendant and I made an order *nisi* that the plaintiff pay the defendant’s costs of the action.
2. The plaintiff now applies to:
   1. vary the costs order *nisi*; and
   2. seek leave to appeal against my decision dismissing the action.

See his summonses dated 8 and 9 December 2014 respectively.

1. I shall adopt below the defined terms used in the Judgment, unless otherwise stated. Further, I shall refer to and rely on the Judgment and shall not repeat its content below.

*COSTS APPLICATION*

1. The plaintiff applies to vary the costs order *nisi* to the effect that the defendant should be deprived of 50% of his costs and, further, that the defendant should pay 50% of the plaintiff’s costs.
2. Three issues fall to be determined in respect of the costs application:
   1. The plaintiff took out the application on 8 December 2014, that is, after the costs order *nisi* became absolute on 25 November 2014 by operation of RDC Order 42 rule 5B(3) and after the judgment was drawn up and sealed on 27 November 2014. In the circumstances, do I have jurisdiction or power to vary the costs order *nisi* in the first place? This issue concerns the principle of *functus officio*.
   2. If I do have jurisdiction, the plaintiff having been late (by 13 days) in taking out his application, should I should exercise my discretion to extend time under RDC Order 3 rule 5 so as to allow the plaintiff to proceed?
   3. If I do extend time, should I accede to the plaintiff’s request to vary costs, applying the principles expounded in *Re Elgindata (No 2)* [1992] 1 WLR 1207 and subsequent authorities?

*FIRST ISSUE ON COSTS – JURISDICTION*

*The defendant’s submission*

1. The defendant’s submission on the issue of jurisdiction is straightforward. Ms Candy Tang, counsel for the defendant, submitted that after the judgment was sealed on 27 November 2014, the court no longer has any jurisdiction over the case and it follows that I have no power to vary the costs order *nisi*, which was contained in the sealed judgment.
2. Ms Tang relied on the Court of Appeal decision in *Andayani v Chan Oi Ling* [2000] 4 HKC 233. Keith JA said (at 237C-E):

“There must, of course, come a time in any proceedings when the court must be regarded as having completed its task. When that time is reached, the court is said to be *functus officio*. Once that stage has arrived, the court has no further jurisdiction over the case. But when does that stage arrive? The answer given by the common law is when the judge’s order has been drawn up, entered or otherwise perfected.”

1. Ms Tang further relied on the Court of First Instance decision in *RTX Products Hong Kong Limited v Li Yiu Fai* HCA 1777/2009, 12 November 2014. That case concerns an application to vary a costs order *nisi* after that costs order had become absolute and after the judgment containing the costs order *nisi* had been sealed. The sequence of events is therefore the same as in the present case. Applying *Andayani*, Anthony Chan J held (at §7) that the court became *functus officio* such that it had no further jurisdiction over the case upon the perfection of the judgment. This was one of the bases on which the learned judge refused the application. He further said (at §9):

“The situation may be different if a judgment is perfected before the order *nisi* becomes absolute. It may be said that in such a case it is inherent in the judgment that the costs order has yet to become absolute and the door remains open to an affected party to make an application to have it varied, including an application for an extension of time to make the variation application. However, once the order has become absolute, I am inclined to the view that any disagreement will then have to be pursued on appeal. This is of course not the situation before this court.”

*The plaintiff’s submissions*

1. RDC Order 42 rule 5B(3) provides that where a judgment is handed down, the court “may make therein an order nisi as to costs and, unless an application has been made to vary that order, that order shall become absolute 14 days after the decision is pronounced”.
2. Ms Vivian Chih, counsel for the plaintiff, argued that under RDC Order 3 rule 5, the court does have jurisdiction to extend the 14-day period referred to above, even after that period has expired and after the judgment has been perfected. I quote below her written submissions in this regard:

“It is now settled law that the **Court does retain a wide discretion under O.3 r.5 and/or O.59 r.10 to grant extension of time** for any failure to comply with time provision laid down by statute or in court order, whether the application for extension of time is taken out **before or after the court order is sealed**, becomes absolute or a final judgment.” (original emphasis)

1. Ms Chih described the above as “the new modern approach of a wide discretionary power granted to Courts at all level to grant extension whether an order is sealed and becomes final” (emphasis added).
2. In support of the above proposition, Ms Chih cited a total of 16 cases, including both Hong Kong and English authorities. Some of these cases concern applications for extension of time and others concern applications to amend or alter the terms contained in a previous order. These cases, submitted Ms Chih, demonstrate that the court has the jurisdiction or power to revisit an order which has been made previously, even though the order in question has been sealed. (I should perhaps make clear at the outset my meaning when I use the word “revisit” in this judgment. By that word, I intend to refer to situations where the court re-considers, amends, supplements or otherwise alters the terms of the order, including any time limit imposed in that order.)
3. Amongst the cases cited by Ms Chih, I shall classify those which involve a court revisiting its previous order which had been sealed into four categories:
   1. where the court amends a previous order so as to reflect its original intention which is manifest as appearing from the body of the order or judgment – the “manifest intention” cases;
   2. where the court amends a previous order in order to correct a clerical error or accidental slip – the “slip rule” cases;
   3. where the court clarifies, amends or supplements a previous order under the “liberty to apply” provisions – the “liberty to apply” cases; and
   4. where the court, pursuant to applicable rules of court, amends a previous order, including but not limited to enlarging time specified in it – the “statutory rules” cases.

I shall return to these categories of cases in the “Analysis” section below.

1. Ms Chih submitted that the court should adopt this “new modern approach” in the present case. It therefore follows that even though the present judgment has been sealed, the court retains the power under RDC Order 3 rule 5 to extend the 14-day period from 25 November 2014, ie, the date when the costs order became absolute, to 8 December 2014, ie, the date of the plaintiff’s costs application, such that, once so extended, the court can vary the costs order *nisi* as it sees fit.
2. On *Andayani*, Ms Chih’s submission was that that case was not a costs order case and did not involve any issue of extension of time and in her written submissions, she said:

“in any event the **numerous English Court of Appeal cases, HK Court of Appeal cases and HK Court of Final Appeal cases** (cited above) decided after the decision of Andayani **should now stand as the governing judicial principle** in respect of the residuary power of the Court to grant extension of time under O.3 r.5 or pursuant to its inherent jurisdiction under O.59 r.10” (original emphasis)

1. While her written submissions were somewhat vague on the correctness or applicability of *Andayani*, Ms Chih was more explicit in her oral submissions when she said that in the context of costs orders *nisi*, *Andayani* has now been overruled by the actual decision in *Tang Man Kit v Hip Hing Timber Company Limited* CACV 137/2002, 8 June 2006. I have understood her to be saying that therefore I should not feel bound to follow *Andayani* in the present case and hence the principle of *functus officio* should not deter me from varying the costs order *nisi*.
2. On *RTX*, Ms Chih argued that since the party applying to vary the costs order in that case was not legally represented and none of the authorities which she now relies on were cited to the learned judge, his decision on the jurisdiction point “must be held per incuriam”.

*Analysis*

1. I should at once point out that I do not accept Ms Chih’s submission that *Andayani* should not be followed in the present case. The decision has been cited in, relied on, followed and applied in many subsequent cases without any court at any level casting any doubt on its correctness. For instance, Ms Tang referred me to the Court of Appeal decision in *Kwan Chui Kwok Ying v Tao Wai Chun* CACV 194/2002, 13 December 2002 in which the court applied the *Andayani* principle – see §§15, 17 and 30. For a more recent example of such application, see Kwan JA’s decision in *CEP Ltd v 無錫市佳誠太陽能科技有限公司*CACV 97A/2014, CACV 97/2014, 29 October 2014 at §2.
2. In fact, in none of the 16 cases, including *Tang Man Kit* (which was expressly relied on as regards this point), cited by Ms Chih was *Andayani* referred to or discussed, let alone being doubted. Needless to say, *Andayani* is a decision binding on me in any event. I consider that the principle of *functus officio* enunciated in the decision is well-settled and, where applicable, should be followed.
3. Accordingly, I do not accept that there is now a “new modern approach” as advocated by Ms Chih (see §§10 to 12 above) under which the court enjoys a general and seemingly unlimited power to revisit any previous order which it has made and which has since been perfected.
   1. First, this goes directly contrary to *Andayani*. Despite her long list of authorities, Ms Chih had cited no authority which expressly discusses or endorses the presence of such wide power.
   2. Secondly, as will be seen below, where the court does have jurisdiction or power to revisit a previously perfected order, such power is to be exercised for specific and limited purposes only and subject to well-defined parameters. On the contrary, the wide power now advocated by Ms Chih seems to be subject to no limit and without any qualification. To the extent that such power is not without limitation, Ms Chih did not specify under what circumstances the power would arise under the “new modern approach”. As such, one cannot determine with any certainty whether and, if so, the basis on which this approach should apply to a costs order *nisi* context.
4. Having rejected the “new modern approach”, it is, however, sufficiently clear from the authorities that there are indeed discrete categories of situations in which the court has the power to revisit its previous order which has been sealed – see the categories of cases identified in §13 above. It is equally clear that in those discrete situations, the power is to be exercised within well-settled confines (as opposed to the broad or blanket power as argued by Ms Chih). And, on a careful analysis of the relevant authorities, it will be seen that the presence of such power in those discrete situations does not violate the principle of *functus officio*.
5. I shall go through the four categories of cases in turn. I would, however, state at the outset that the first three categories are in fact not directly relevant to the present context, which will therefore be briefly dealt with. The only category of cases which is of direct relevance is the fourth category, namely, the “statutory rules” cases.
6. First, in respect of “manifest intention” cases, it is well settled that the court has an inherent or implied discretionary power to amend, vary or clarify an order to reflect the court’s original intention in making that order if the court’s intention appearing from the body of judgment is manifest: *Man Ping Nam v Man Fong Hang (No 2)* (2007) 10 HKCFAR 140 at §10; *Lai Hoi Ping v Persons Occupying Portions of Nathan Road etc*  HCA 2104/2014, 21 November 2014 at §17; and *Re Creeney’s Estate* [1988] NI 167.
7. In such cases and subject to the satisfaction of the “manifest intention” condition, the court is allowed to revisit a previous order. Even though the order may have been sealed, that is not inconsistent with the principle of *functus officio*. Ribeiro PJ explained in *Man Ping Nam* as follows (at §11) :

“In the absence of any prejudice to the other party (in which event discretionary considerations may come into play), it matters not that an application for such clarification is made after the Court’s order has been sealed since it operates to make plain what the Court has in fact already decided. It does not involve the Court acting when *functus officio*.” (emphasis added)

1. Secondly, in respect of “slip rule” cases, it is well settled that where there is a clerical mistake in a judgment or order, or an error arises as a result of any accidental slip or omission, the court has the power to correct such mistake or error under either the inherent jurisdiction of the court or pursuant to RDC Order 20 rule 11: see *Hong Kong Civil Procedure 2015* at Notes 20/11/1 and 20/11/2. Further:

“The correction can be made by the Court “at any time”, so the fact that correction is sought after the appellants had the Order sealed is not an obstacle.” *per* Ribeiro PJ in *Man Ping Nam* at §20

1. Similar to the “manifest intention” cases, the court’s power is limited to making correction and such correction does not involve the court acting when *functus officio* since the court is merely giving effect to what it has already decided.
2. Thirdly, in respect of “liberty to apply” cases, generally speaking, “liberty to apply” is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court: *Cristel v Cristel* [1951] 2 KB 725 at 728.
3. Accordingly, the court’s power to revisit an order pursuant to “liberty to apply” is for the sole purpose of working out the order. Somervell LJ said (at 728):

“Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.”

1. And, for that reason, this does not involve the court acting when *functus officio*: *Lai Hoi Ping* at §13.
2. It would be immediately apparent that the above three categories do not assist the plaintiff’s case as none of the discrete situations discussed above in which the court may revisit a previously perfected order applies here. On the other hand, I consider that the principle discussed in the fourth category of cases, namely, the “statutory rules” cases, would be directly relevant to the present case. The relevant authority is the Court of Appeal decision in *Re Good Idea International Investment Limited* [2012] 4 HKLRD 186 (affirming the decision at first instance by Harris J: HCMP 1526/2010, 1 December 2011).
3. The facts are simple. By a consent order (which had the effect of finally disposing of the proceedings in which it was made), the applicant in that case was given three days to hold an Extraordinary General Meeting. But, as it turned out, he was one day late in holding the meeting. He applied to the court for a retrospective extension of time under RHC Order 3 rule 5. The consent order had been sealed prior to this application.
4. One of the arguments put forward by counsel for the opposing respondent was that the court did not have jurisdiction to extend time as it had been rendered *functus officio* by the consent order (see §3). Cheung CJHC rejected this argument and stated (at §8):

“[W]e take the view that O.3 r.5(1) is wide enough to cover stipulations as to time contained in final judgments. Order 3 r.5 expressly refers to “judgment”, without differentiating between a final judgment and an interlocutory judgment.”

1. The Court of Appeal affirmed Harris J’s decision to extend time in that case. The 3-day timeframe stated in the consent order which had been sealed was enlarged pursuant to RHC Order 3 rule 5.
2. It seems sufficiently clear that the principle underlying the decision is that the court may revisit a previous order, even after sealing, if a power is conferred on it to do so under the applicable rules of court. In *Re Good Idea*, the applicable rule of court was RHC Order 3 rule 5. In such an instance, the court’s power to revisit stems not from its original jurisdiction over the case, which has come to an end upon sealing (applying the principle of *functus officio*), but from a “fresh” power to act conferred on it by the statute. Such power is of course to be exercised strictly in accordance with the provisions of the applicable rule.
3. Another example of the court exercising its power to amend an order by way of enlarging time after its sealing, pursuant to a power conferred by the rules of court, is to be found in *Omega Engineering Inc v Omega SA* [2003] EWHC 1482 (Chancery). The case was considered to be directly on point and followed by Harris J in *Re Good Idea* at first instance (see §15).
4. Analysed this way, where the court exercises its power to amend pursuant to the slip rule, as provided for under RDC Order 20 rule 11, it can also be regarded as an instance where the power to amend arises from an express statutory provision such that the court may amend “at any time”, ie, before and after the sealing of the order – see §25 above.
5. I also draw support from the Supreme Court decision in *Re L and B (children) (care proceedings: power to revise judgment)* [2013] UKSC 8. The judgment, given by Lady Hale SCJ, with whom the other four justices agreed, contains a detailed discussion of the principle of *functus officio*. I consider that the position adopted by the Hong Kong courts in respect of the power to revisit (as discussed in §34 above) is consistent with the view expressed in that decision.
6. I should, however, make two preliminary observations.
7. First, while the case is a family case concerning care proceedings governed by the Children Act 1989, it is sufficiently plain from the body of the judgment that the principle of *functus officio* and the issue of jurisdiction to revisit a previous order were discussed and analysed in the context of civil proceedings in general, rather than being confined to the family context – see §§1, 16 to 19. It is only when the discussion proceeded to consider whether and how the court should exercise the discretion to revisit (on the basis that there was indeed jurisdiction) that specific family law considerations came into play. These considerations are of course not relevant, and do not apply, to the present case. However, the general discussion on jurisdiction does, in my view, shed light on the issues which fall to be determined here.
8. Secondly, the relevant rules of court in *Re L and B* were of course the Civil Procedure Rules, which are different from our RDC in many respects. However, it is equally plain from the judgment that the principle governing jurisdiction, as opposed to that governing the exercise of the discretion, is not affected by the passing of the CPR – see §§16 to 19. Hence the discussion of the jurisdiction principle can apply to the Hong Kong context without much qualification (whereas the discussion of the principle on how the discretion should be exercised is of much less relevance in the present context).
9. The facts of *Re L and B* are rather unusual. In the course of care proceedings in relation to a child, a fact-finding hearing took place to determine whether it was possible to identify which of the parents had inflicted serious injuries to the child (it being common ground that the only possible perpetrators were the mother and the father). The family judge initially gave an oral judgment finding that the father was the perpetrator. Two months later, to everyone’s surprise, the judge delivered a written judgment stating that she had reconsidered the evidence and as a result she had reached a different conclusion, namely that it could have been either of the parents who injured the child. It subsequently transpired that the order reflecting the first decision (ie the father being the perpetrator) was sealed only shortly after the second decision was delivered. The issue in this case was therefore “whether and in what circumstances a judge who has announced her decision is entitled to change her mind” (see §1). The issue was further subdivided into (1) whether the family judge had jurisdiction to change her mind; and (2) if so, whether she should have exercised it on the facts of the case. The Supreme Court’s discussion of the first sub-issue is relevant to the present case whereas that of the second sub-issue is not.
10. On the first issue, Lady Hale engaged in a detailed study of the historical development of the principle of *functus officio*, making references to the Judicature Acts 1873 and 1875 and the subsequent English authorities establishing the principle, including *Re St Nazaire Co* (1879) 12 Ch D 88, *Re Suffield and Watts, ex p Brown* (1888) 20 QBD 693 and *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717. It is of note that these three cases were in fact the same authorities cited in and relied upon by Keith JA in *Andayani* (at 237D-F) (see §7 above). Lady Hale said (in §16) that “[i]t has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected” and she further referred to *Re St Nazaire Co* (in §18) which held that a court had no power to re-consider a matter once the order has been drawn up and perfected.
11. These statements are of course consistent with the decision of *Andayani*.
12. Furthermore, the following passages are pertinent to the present case:

“Thus there is jurisdiction to change one’s mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (r 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one’s mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it.” (§16) (emphasis added)”

…

“But the CPR and FPR make it clear that the court’s wide case-management powers include the power to vary or revoke their previous case-management orders: see CPR 3.1(7) and r 4.1(6) of the Family Procedure Rules 2010, SI 2010/2955. This may be done either on application or of the court’s own motion: CPR 3.3(1), FPR 4.3(1). It was the absence of any power in the judge to vary his own (or anyone else’s) orders which led to the decisions of *Re St Nazaire Co* (1879) 12 Ch D 88 and *Re Suffield and Watts, Ex p Brown* (1888) 20 QBD 693, [1886-90] All ER Rep 276. Where there is a power to vary or revoke, there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is proper to vary the order.” (§37) (emphasis added)

1. The above passages echo the position adopted by the Hong Kong courts in the “statutory rules” cases. They explain in clear terms that the basis of the court’s jurisdiction to revisit a previously sealed order lies in the express power given by the rules of court. In *Re Good Idea*, the basis was RHC Order 3 rule 5 whereas in *Re L and B*, hypothetically the basis would have been the relevant CPR and FPR cited in the above passage if the first decision had instead been sealed before (rather than after) the delivery of the second decision (see §40).
2. Having considered the authorities at some length, I now return to how the principle established in the “statutory rules” cases should be applied to the plaintiff’s application to vary the costs order *nisi* in this case. But for the reason stated in §§48 to 50 below, I would be inclined to hold that the court does have jurisdiction, which it derives from the express power given under RDC Order 3 rule 5, to extend the 14-day time limit stipulated in the order (by operation of RDC Order 42 rule 5B(3)) so as to bring the plaintiff’s application to vary within time. I would be inclined to treat it as an instance of the court exercising a power conferred on it by the applicable rules of court to revisit a previous order, namely, to vary a time limit imposed in that order, just as in *Re Good Idea*.
3. I pause here to address Ms Chih’s submission on the Court of Appeal decision in *Tang Man Kit*. Ms Chih argued that this decision supports the plaintiff’s position that I do have power to extend time in the present case. I do not agree with the submission. While the case is relevant, I do not think that the decision assists the plaintiff in the way submitted by Ms Chih. It is true that the case concerns the same subject-matter as the present case, ie, an application to vary a costs order *nisi* out of time. It was held there that the court does have power to extend the 14-day time limit prescribed by RHC Order 42 rule 5B(6) (which is the same as RDC Order 42 rule 5B(3)) even after that time has expired. However, the issue of whether such a power is present if the relevant costs order has been sealed was not discussed at all in that case. That is the very issue which is before this court.

*Decision*

1. Notwithstanding my view as stated in §§34, 45 and 46 above, I am mindful of the Court of First Instance decision in *RTX*, a case heavily relied on by Ms Tang. As mentioned in §8 above, this case concerns an application to vary a costs order *nisi* out of time, such application having been taken out only after the costs order had become absolute and after the sealing of the order. Hence the subject-matter and the relevant facts are indistinguishable from the present case and I agree with Ms Tang that the case is directly on point. In *RTX*, Anthony Chan J came to a different conclusion, namely, the court had no further jurisdiction over the costs order *nisi* in that case. He explained (at §7) that the order in that case had become absolute pursuant to RHC Order 42 rule 5B(6) at the time when the judgment was perfected.
2. Under the rule of stare decisis, decisions of the Court of First Instance are binding on the District Court: see, eg, Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd ed, 1998) at p 86 and *The Incorporated Owners of Tropicana Gardens v Tropicana Gardens Management Limited* LDBM 374/1998, 18 September 2001, *per* Acting Registrar Simon Kwang (as he then was) at §10.
3. *RTX* is on all fours with the present case. Its decision is therefore binding on me.
4. For that reason, I conclude that in the present case, the court has no jurisdiction to revisit the costs order *nisi* upon the sealing of the order on 27 November 2014.
5. Having decided against the plaintiff on the issue of jurisdiction, it is strictly not necessary to deal with the remaining two issues on the costs application. However, in case I am wrong on the issue of jurisdiction, I set out below my views on them.

*SECOND ISSUE ON COSTS – DISCRETION TO EXTEND TIME*

1. The plaintiff was 13 days late in taking out the costs application.
2. The plaintiff had been on legal aid throughout the course of the proceedings. His explanation for the delay is that he needed to apply for an extension of legal aid to cover the intended costs application. The chronology of events, as confirmed by Ms Chih at the hearing, is as follows:
   1. On 12 November 2014, ie, the day after the handing down of the Judgment, the plaintiff applied for an extension of his legal aid coverage.
   2. In the meantime, the 14-day period for taking out the application expired on 25 November 2014.
   3. On 1 December 2014, the plaintiff’s solicitors were informed of the approval of the extension application but the Notice of Amendment of Legal Aid Certificate was only received by them on 4 December 2014 (Thursday).
   4. On 8 December 2014 (Monday), the plaintiff took out the summons to vary the costs order *nisi*.
3. It seems to me that while the plaintiff was late, he (through his solicitors) had acted with such reasonable diligence as was feasible given the need for him to seek legal aid extension. At the hearing, the defendant did not seriously resist the application to extend time or allege any prejudice. In the circumstances, I would have exercised my discretion to extend time so as to allow the plaintiff to proceed with the costs application.

*THIRD ISSUE ON COSTS – DISCRETION TO VARY*

1. At trial, there were five main issues which required adjudication:
   1. At the time of the accident, was the plaintiff an employee of the defendant (the plaintiff’s case) or his partner (the defendant’s case)?
   2. Did the accident happen in the way as alleged by the plaintiff? In particular, did the tailboard tilt as alleged?
   3. If the answers to the questions in (b) were yes, was the defendant negligent in causing the accident?
   4. If the answer to the question in (c) was “yes”, was there any contributory negligence on the plaintiff’s part?
   5. If liability was established, what would be the quantum of damages?
2. On (a), I accepted the plaintiff’s case and found that he had been the defendant’s employee. On (b), I rejected the plaintiff’s version of events and held that there was no tilting as alleged by him. This finding meant that no liability could be established against the defendant and the action must be dismissed. It was therefore unnecessary for me to consider the question in (c). But for completeness I considered in the Judgment certain evidence regarding the maintenance of the tailboard. On (d), on a hypothetical basis (ie, if liability had been established), I found that there was no contributory negligence on the plaintiff’s part. And, lastly, on (e), similarly on a hypothetical basis, I assessed the total award of damages in the sum of $823,548, which was lower than the sum of $1,000,000 claimed by the plaintiff but higher than the sum of just under $300,000 put forward by the defendant.
3. On costs, I provisionally ordered that the defendant should have costs of the action.

*The basis of the plaintiff’s application*

1. The plaintiff’s application is twofold.
2. First, he says that the defendant should be deprived 50% of his costs because the defendant had raised issues on which he failed, and that had caused a significant increase in the length and cost of the proceedings. These issues are:
   1. He alleged that the plaintiff was his business partner, not his employee.
   2. He claimed that if he was liable for negligence, the plaintiff was contributorily negligent.
   3. He disputed quantum.
3. Secondly, the plaintiff says that the defendant had raised issues improperly or unnecessarily and that the court should make a positive order that the defendant do pay 50% of the plaintiff’s costs. These issues are:
   1. The partnership allegation (as above);
   2. The contributory negligence claim (as above);
   3. The allegation that he had himself taken steps to maintain the Vehicle on a regular basis.

*Legal principles*

1. The general legal principles governing costs are not in dispute.
   1. Costs are in the discretion of the court.
   2. They should follow the event, except when it appears that in the circumstances of the case some other order should be made: RDC Order 62 rule 3(2).
   3. The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.
   4. Where the successful party raises issues or makes allegations improperly or unnecessarily, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party’s costs: RDC Order 62 rule 7(1).

See *Re Elgindata (No 2)* at 1214A-C; *Wang Din Shin v Nina Kung* CACV 460/2002, CACV 67/2003, 19 April 2005 at §39.

1. RDC Order 62 rule 5(1) sets out a number of factors which the court should take into account when exercising its discretion. I set out below those factors which I consider to be relevant to the present case:
   1. the underlying objectives set out in RDC Order 1A rule 1;
   2. the conduct of all the parties; and
   3. whether a party has succeeded on part of his case, even if he has not been wholly successful.
2. RDC Order 62 rule 5(2) elaborates on the factor concerning the conduct of the parties. It includes whether it was reasonable for a party to raise, pursue or contest a particular issue and the manner in which he has done so.
3. I shall first deal with the first part of the plaintiff’s application.

*Should the defendant be deprived of 50% of his costs?*

1. Of the three alleged failed issues, I accept that the issues of employment and quantum are discrete issues in the action, which can be isolated from the rest of the case, in terms of preparation of pleadings and adducing of evidence, both in the form of written witness statements and oral evidence adduced at trial. In my view, they are discrete issues on which the defendant pursued but failed or, in the case of quantum, substantially failed.
2. On the other hand, in my view, the defendant cannot properly be said to have ‘lost’ on the contributory negligence claim for present purposes. In the Judgment, I rejected the plaintiff’s version of events as to how the accident had happened. It necessarily follows that the issue of contributory negligence became a non-issue. The finding I made in §73 of the Judgment was purely hypothetical and I think it would not be correct to say that the defendant failed on the contributory negligence issue. In any event, the evidence adduced on this issue overlapped with that adduced on the issue of how the accident happened. In that sense, it is not a discrete issue and it is not quite feasible for me to identify the time spent on it alone.
3. I therefore would proceed on the basis that there are only two failed issues which are relevant for present purposes.
4. In support of her submission that the failed issues led to a significant increase in the length and costs of the action, Ms Chih compiled no fewer than nine tables in her skeleton submissions, seeking to compute the percentages of time spent on the three failed issues, by reference to, eg, such number of pages in the written submissions, such number of authorities, such number of pages in the witness statements and such amount of time spent on the oral evidence, in each case, as devoted to those issues. In the end, she came to the conclusion that the proper percentage of time spent on the alleged failed issues is around 50%.
5. I do not accept that 50% is a fair figure. I give no weight to the tables compiled by Ms Chih. They contain a number of apparent errors, as I pointed out to Ms Chih at the hearing, which render the figures inaccurate and unreliable. For instance, one of the tables would suggest that there was no time spent at all on the issue of whether there was tilting of the tailboard. This was of course a crucial issue in the action, on which the plaintiff’s case was premised and much time was spent on this topic. Upon being pressed on this point, Ms Chih was so bold as to suggest that the issue of tilting accounted for a mere 5% of the total time spent. This is clearly wrong. Further, there is, in my view, no rational basis on which the figures were arrived at in these tables.
6. That said, however, having considered the time spent, and costs incurred, on the two failed issues applying a rough and ready approach, in my judgment, it can be said that the two failed issues did indeed lead to a significant increase in the time and length of the proceedings. In reaching this conclusion, I have applied the approach adopted by Mr Recorder Fok SC (as he then was) in *Chan Lan v Shing Kei* HCA 1206/2006, 16 June 2008. He said (at §16):

“It seems to me that the phrase “a significant increase in the length or costs of the proceedings” simply requires the court to be satisfied that the increase is one that can be estimated as a more than trifling proportion of the total costs.”

1. From a review of the pleadings, the witness statements, the documents disclosed by the parties and the time spent on cross-examination on the failed issues, in particular, the employment issue, it can safely be said that a “more than trifling portion” of the total costs were incurred in respect of the failed issues. This is clearly a factor which goes in favour of reducing a portion of the defendant’s costs.
2. On the other hand, I consider that there are a number of other factors which I should take into account and which go against making any adverse costs order against the defendant.
3. First, as submitted by Ms Tang, the defendant was the “winner” of the action. I have to say that this reflects my feeling about the case too. The plaintiff lost because he failed on the crucial issue on the tilting of the tailboard. The tilting allegation formed the crux of the plaintiff’s claim. Ms Chih’s own submissions at trial confirmed this – see §66 of the Judgment. If there had been no tilting, there would have been no action for the plaintiff to bring in the first place. The defendant succeeded in refuting the allegation and hence liability. In my view, in practical terms, he won the case.
4. Further, in this action, the plaintiff claimed against the defendant for damages amounting to $1,000,000, having waived the excess over the District Court’s monetary jurisdiction. It seems to me that, it is a significant claim in money terms to the defendant. (On the materials before me, he was a businessman running a modest transportation business.) Also, the claim was brought in respect of an accident of which the defendant had no first-hand knowledge. In the action, the defendant proceeded to pursue, amongst other issues, the employment issue in order to dispute liability as well as disputing quantum. Ultimately, I made factual findings against the defendant on the two failed issues on the balance of probabilities. (The employment issue was a mixed question of fact and law – see my respective findings in §§38 and 39 of the Judgment.)
5. In my view, it was reasonable for the defendant to pursue those two issues. I am also of the view that the defendant conducted the litigation in a responsible manner and was being reasonably selective as to the points he took in the action. “Not being selective” is one of the pitfalls which the court wishes litigants to avoid and that is the basis on which the court nowadays feels more ready than before to depart from the “follow the event principle”: see, eg, *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1523A; *Zhuhai International Container Terminals (Jiuzhou) Ltd v Lo Tong Hoi* CACV 181/2011, 31 July 2012 at §33, *per* Kwan JA. But in this case I do not think that the defendant can be accused of not being selective in pursuing the issues of employment and quantum.
6. I am of course mindful that it is not necessary for a party to have acted unreasonably or improperly for him to be deprived of his costs of a particular issue on which he has failed: see, eg, recent statements made by Kwan JA in *Zhuhai* at §33 and *Pfeiffer GmbH v Cheung Hay Kit* CACV 245/2013, 29 October 2014 at §20. However, the conduct of the defendant in this case, namely, that it was reasonable for him to pursue the issues of employment and quantum is a factor that I am entitled to take into account: see RDC Order 62 rule 5(2).
7. Secondly, certain conduct of the plaintiff in these proceedings are relevant factors which go against any deprivation of the defendant’s costs. I set out below the relevant matters:
   1. Mr Sham’s U-turn on his evidence on whether he saw the tailboard tilt (see §46 of the Judgment). Mr Sham was a key factual witness on this point. Notwithstanding the clear evidence in his witness statement that he saw the tilting, he retracted that and testified during cross-examination that he in fact saw nothing of the sort. I agree with Ms Tang that this drastic change of position should be taken into account for present purposes.
   2. Unduly long examination-in-chief of the plaintiff’s witnesses. Ms Tang submitted that the plaintiff’s witnesses were all subject to lengthy examination-in-chief. This should not have happened since the additional evidence should have been adduced in advance by way of supplemental witness statements. I agree and consider that it is a fair criticism of how the plaintiff’s case was conducted.
   3. Excessive citation of authorities by counsel. At trial, Ms Chih cited a total of 50 authorities. The present action being a straightforward personal injuries action and the factual and legal issues which it presented not being complex in nature, I consider that to be excessive and unnecessary. I further agree with Ms Tang that a number of cases cited were plainly irrelevant to the case.
8. In conclusion, there are both factors which are in favour of and against depriving the defendant’s costs of the action. When the matter is looked at in the round, I consider that the “for” factors are far outweighed by the “against” factors and therefore the appropriate thing for me to do in the circumstances is not to deprive the defendant of any of his costs.
9. I would add lastly that if anyone could be said to have left no stone unturned in the conduct of the action, I would have no hesitation in concluding that it was the plaintiff, rather than the defendant.

*Should the defendant pay 50% of the plaintiff’s costs?*

1. As regards the three issues stated in §61 above, I do not accept the plaintiff’s submission that they were raised by the defendant improperly or unreasonably (or unnecessarily).
   1. In respect of the employment issue, I refer to §§75 and 76 above.
   2. In respect of the contributory negligence issue, the plaintiff’s complaint relates to §11 of the defendant’s Supplemental Witness Statement in which he suggested that there were two alternative safe methods in which the Goods could have been loaded onto the tailboard. Given that the defendant accepted during opening submissions that if the plaintiff had moved the Goods in the way he said he had, that would have been a safe method, it was clear that the alleged alternative methods were no longer relevant to the issues in dispute. While it can be said that the “alternative methods” point was unnecessarily raised in the witness statement, this must be placed in the overall context of the evidence. This point was a relatively small point, when viewed against the totality of the evidence. I do not consider it appropriate to make any positive costs order based on this factor alone.
   3. In respect of the maintenance point, similarly, I consider that to be a narrow factual point. I rejected the defendant’s evidence that he had kept the tailboard under proper maintenance on a regular basis. I made this factual finding on a balance of probabilities. It is true that the defendant failed on this factual dispute. But it does not necessarily mean that the point was raised improperly or unnecessarily (or unreasonably). I do not find it to be so.

*Decision on application to vary*

1. By reason of the conclusion which I have reached in §§79 and 81 above, I would have dismissed the plaintiff’s application to vary the costs order *nisi*.

*CONCLUSION ON COSTS APPLICATION*

1. As I have determined the issue of jurisdiction against the plaintiff, his application to vary the costs order *nisi* is dismissed.
2. I next turn to the plaintiff’s second application, namely, leave to appeal from my substantive decision in the action.

*LEAVE TO APPEAL*

1. The principle governing the threshold for granting leave to appeal is not in dispute. The applicant needs to show that 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: section 63A(2) of the District Court Ordinance (Cap 336).
2. On the “reasonable prospect of success” limb, “an applicant is required to show more than just an arguable case, but an appeal that has merits and ought to be heard, although he does not have to demonstrate that the appeal will probably succeed”: *Wynn Resorts (Macau) SA v Mong Henry* [2009] 5 HKC 515 at §19, *per* Chu J (as she then was).
3. At the hearing, Ms Chih put forward three proposed grounds of appeal.

*First ground – failure to consider evidence regarding tilting fairly and properly*

1. First, Ms Chih submitted that I had failed to consider the evidence fairly and properly before making the finding that there was no tilting of the tailboard.
2. I considered and evaluated the evidence on the issue of titling and set out my reasoning in §§40 to 65 of the Judgment. I do not consider that I fell into any of the errors contended for by Ms Chih.
3. One of Ms Chih’s complaints was that I had erred in deciding whether there was tilting of the tailboard before I examined the question of whether the tailboard had been faulty due to lack of maintenance. There is no merit in this complaint.
   1. In coming to the factual finding that there was no tilting as alleged by the plaintiff, I had considered all the evidence adduced in this regard. Amongst the evidence, I considered that two matters were of “critical importance”, namely, Mr Sham’s evidence that he did not see the tilting and the plaintiff’s failure to mention the tilting afterwards – see §53 of the Judgment.
   2. Theoretically speaking, if there had been satisfactory evidence showing that the tailboard was faulty, whether due to lack of maintenance or otherwise, it could have been a matter relevant to the issue of whether the alleged tilting took place or not.
   3. But that is not the case here. I dealt with such evidence in §§69 to 71 of the Judgment. The undisputed evidence was that the Vehicle passed the annual government inspection just the day before the accident. Other than that, I was not able to come to any further finding as to whether the tailboard was faulty or not, given that I was not giving any weight to Mr Lai’s evidence (that the tailboard was not individually checked during such inspection) and I rejected the defendant’s claim that he himself took steps to maintain the tailboard.
   4. In the circumstances, there was no adequate evidence before me in support of a finding that the tailboard was faulty. This point, therefore, had no bearing on the issue of tilting.
4. In my view, the plaintiff has not demonstrated any merit in this ground of appeal and I conclude that it has no reasonable prospect of success.

*Second ground – res ipsa loquitur*

1. Secondly, Ms Chih submitted that since there was a sudden skidding of the Goods over the tailboard, which was an “unusual event” and that the tailboard was provided by the defendant, the doctrine of *res ipsa loquitur* came into play. The burden of proof should then have shifted to the defendant and it was for him to explain the sudden skidding. He had failed to do so as I held that the Improper Method as alleged by him was not made out on the evidence.
2. In my view, there is no merit in this submission, which is bound to fail on appeal. At the time of the accident, the Goods, the hand pallet truck and the tailboard were under the control of the plaintiff and Mr Sham, rather than the defendant. One of the conditions for invoking the doctrine, namely the thing which inflicted the damage should have been under the sole control of the defendant or his agent, is not satisfied. (For a discussion of the required conditions: see, eg, *Clerk & Lindsell on Torts* (21st ed, 2014) at §8-184.) This is simply not a case where the doctrine of *res ipsa loquitur* could have any application.

*Third ground – failure to consider the defendant’s duty of care even if no tilting*

1. Thirdly, Ms Chih submitted that notwithstanding my factual finding that there was no tilting, I should have proceeded to consider the defendant’s duty of care as an employer and whether he had committed any breach of such duty that might have caused the accident.
2. Clearly, there is no merit in this submission, which is bound to fail. The plaintiff’s case was premised upon the allegation that the tailboard tilted and as a result he fell from it – see §§66 and 67 of the Judgment. My finding that there was no such tilting determined the claim conclusively against the plaintiff. The issue of causation simply did not arise.
3. In view of the above, none of the grounds of appeal put forward by the plaintiff has any chance of success. Accordingly, I dismiss the plaintiff’s application for leave to appeal.

*DISPOSITION AND ORDERS*

1. Accordingly, I make the following orders:
   1. the plaintiff’s summons dated 8 December 2014 be dismissed; and
   2. the plaintiff’s summons dated 9 December 2014 be dismissed.
2. I make an order *nisi* that the plaintiff pay the defendant’s costs of each of these two summonses, to be taxed if not agreed, with certificate for counsel and that the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

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|  |  | (Winnie Tsui) |
|  |  | Deputy District Judge |

Ms Vivian Chih, instructed by Godwin Chan & Co., assigned by the Legal Aid Department, for the plaintiff

Ms Candy Tang, instructed by Littlewoods, for the defendant