# DCPI 1665/2011

[2020] HKDC 1249

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1665 OF 2011

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BETWEEN

LEE CHUI YING 1st Plaintiff

(Discontinued)

CHEUNG MAN KOK 2nd Plaintiff

and

CHAN YEE LING ELAINE（陳綺玲） Defendant

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##### Before: Deputy District Judge Kam KL Cheung in Chambers (Paper disposal)

Dates of Defendant’s Written Submissions: 21 May & 14 June 2019

Date of 2nd Plaintiff’s Written Submissions: 4 June 2019

Date of Decision: 30 December 2020

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## DECISION

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1. In dismissing both the 2nd plaintiff’s claim and the defendant’s counterclaim, I made an order *nisi* that there be no order as to costs. Following the disclosure to the Court of the parties’ pre-trial attempts to settle the matter, the costs order *nisi* was so varied that:-
2. The costs of these proceedings, including any reserved costs, incurred by the 2nd plaintiff from 29 November 2014 be paid by the defendant to the 2nd plaintiff, to be taxed on an indemnity basis if not agreed with certificate for one counsel;
3. Interest on those costs above to be at 2% above judgment rate;
4. Costs of the 2nd plaintiff’s summons and the defendant’s summons (including costs of the hearing) be to the 2nd plaintiff with certificate for counsel (“the Costs Order”).

*The Application*

1. The main reason for the Costs Order was that the October 2014 Sanctioned Payment made by the 2nd plaintiff ought to have been taken into account in determining the parties’ costs liability. The defendant now applies for leave to appeal against the Costs Order.

*The principles*

1. Section 63A(2) of the District Court Ordinance, Cap 336 provides as follows:

“(2) Leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that …

(a) the appeal has a reasonable prospect of success;

(b) there is some other reason in the interests of justice why the appeal should be heard.”

1. The test governing applications for leave to appeal is well-established. “Reasonable prospect of success” involves the notion that the prospects of appeal must be reasonable and more than fanciful, without having to be probable: *Wing Tat Haberdashery Co Ltd v Elegance Development & Industrial Co Ltd*, unreported, HCMP 357/2011, 8 July 2011.

1. Costs is of course a matter of discretion. It is trite law that the Court of Appeal will not interfere with the judge’s exercise of discretion unless it is satisfied that the judge failed to exercise the discretion, or exercised it on a false principle, or did not exercise it judicially, or the exercise of discretion was demonstrably flawed: *Lee Yui Kai v TD Co Ltd v Others* [2019] HKCA 256, at §35. Hence, the Court of Appeal will not interfere with a costs order merely because it would have exercised the discretion differently: See *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191.

*The Draft Grounds of Appeal*

1. The defendant has put forward 5 grounds of appeal. I shall now deal with them one by one.

*Grounds (1) and (2)*

1. Both grounds (1) and (2) concern the validity of the October 2014 Sanctioned Payment made by the 2nd plaintiff and can be dealt with together.

1. To recap, before the 2nd plaintiff made the October 2014 Sanctioned Payment, she had made 4 offers to settle. For various reasons (the readers of this Decision are referred to my earlier Decision dated 20 March 2019), those offers were ineffective and unable to serve their intended purpose. As for the October 2014 Sanctioned Payment, there was no serious dispute that it was validly made. In fact, the defendant did not raise any objection to the validity of the October 2014 Sanctioned Payment in counsel’s written submissions or during the substantive hearing. In any event, the defendant now seeks to argue that it was irregular and that it was supposed to confine to the settlement of the counterclaim of the defendant. The irregularity, according to the defendant, arises from the fact that the 2nd plaintiff’s offer to settle by way of the October 2014 Sanctioned Payment should be considered an offer to settle the counterclaim and not the whole of the action. If the 2nd plaintiff wished to settle the entire action (including her own claim), she should have made a sanctioned offer under Order 22 rule 4 rather than using the prescribed Form 23 and making a sanctioned payment under Order 22 rule 8. In other words, only a defendant can make an effective sanctioned payment.

1. The defendant further argues that the October 2014 Sanctioned Payment was unclear and led to confusion. In particular, the defendant argues that one can be confused whether the October 2014 Sanctioned Payment also covers the 2nd plaintiff’s claim against the Defendant.
2. I have no sympathy for the defendant’s arguments. First, by definition, a counterclaim is a claim and a defendant to a counterclaim (though also suing in his original capacity as a plaintiff) is considered a defendant. The 2nd plaintiff, as a defendant to counterclaim, is certainly entitled to offer to settle the counterclaim by making a sanctioned payment under rule 8. Secondly, there can be no confusion over the effect of the October 2014 Sanctioned Payment, which is clearly entitled:

No.23

NOTICE OF SANCTIONED PAYMENT

ORDER 22 RULE 8(2)

1. Further, aside from stating that “*the 2nd Plaintiff CHEUNG MAN KOK has paid $50,000 into court in settlement of the whole of your claim”* (ie the defendant’s counterclaim), it is also stated in the Form that it “*takes into account all (part) of the following counterclaim or set off”* and that “*[t]he 2nd Plaintiff’s claim of HK$100,000 made herein shall be wholly discontinued and set off against the Defendant’s counterclaim made herein, upon the Defendant’s acceptance of this payment in court …”.*

1. The terms and conditions under which the October 2014 Sanctioned Payment were made are plain and clear. There is no basis for the saying that the sanctioned payment in question only serves to “settle the opposite side’s claim and not otherwise” (§20 of the defendant’s written submissions).

1. Counsel for the defendant has made lengthy reference to the case of *Montrio Ltd v Tse Ping Shun David* (unreported, HCA 757/2009, 29 November 2011) in the written submissions for the defendant. Suffice it to say the case stresses the importance of strictly following the rules in making a sanctioned offer. There is nothing in it that supports the notion that a defendant to a counterclaim cannot make a sanctioned payment.
2. Grounds (1) and (2) are in my view unmeritorious.

*Ground (3)*

1. The gist of ground (3) is that the defendant was able to do better than the October 2014 Sanctioned Payment.

1. It is not understood how it can be said that the defendant did better than the settlement offer at the end. In considering whether the defendant was able to beat the October 2014 Sanctioned Payment, one must not lose sight of the fact that the 2nd plaintiff in making the sanctioned payment offered to (a) pay $50,000 to the defendant, and (b) discontinued her own claim. Plainly, the defendant was not awarded more than she had been offered.

1. The defendant further argues that “*…this is a special case to which the names of the parties matter… and the outcome [of the trial] vindicates her name.”* and thus she should be considered a winner(§40 and 41 of the defendant’s written submissions).

1. In this case, there has been no attempt by this court to “vindicate” the name of anyone. After all, this is a personal injury action, and it is not the concern of the court to restore the reputation of either party. In any event, both the claim and counterclaim were dismissed after trial and there was no finding (which is of course unnecessary) that the defendant was more believable than the 2nd plaintiff, or vice versa. There simply does not exist any basis for the contention that the defendant “won” after trial.

1. The defendant seems to have suggested that the 2nd plaintiff was the “aggressor”, and she was somehow innocently dragged into prolonged litigation (§§44-45 of the defendant’s written submissions). Suffice it to say that the defendant was the one who made an over HK$1 million counterclaim for damages for personal injuries, malicious prosecution and aggravated damages for false imprisonment when facing a much smaller claim. And, it was the 2nd plaintiff, not the defendant, who had been making serious attempts to settle.

*Ground (4)*

1. Ground (4) hinges entirely on grounds (1) to (3) (§7 of the draft Notice of Appeal. As grounds (1) to (3) carry no merits. Ground (4) is liable to fail.

*Ground (5)*

1. Ground (5) reads “… *the 2nd Plaintiff is the principal partner of the firm of solicitors representing her where a genuine concern exist as to whether there were payment of legal costs to the said firm of solicitors which would justify the said compensatory order.*” .
2. It should be noted that the defendant did raise her concern (which is again a suspicion not founded in evidence) in her written submission or during the substantive hearing of the variation of costs application. In any event, the so-called concern belongs to same category of unsubstantiated allegations against the 2nd plaintiff like “*she caused P1 to sue me”*, *“she sued me to gain profits for her firm”*,and so forth.

1. Ground (5) is in my view equally unarguable.

*Conclusion*

1. In my view, all the proposed grounds of appeal are without merits. I therefore dismiss the defendant’s application for leave to appeal with costs to the 2nd plaintiff with certificate for counsel.
2. I thank both counsel for their assistance.

(Kam KL Cheung)

Deputy District Judge

Ms Fiona Chong, instructed by Christine M Koo & Ip, Solicitors & Notaries LLP for the 2nd plaintiff

Mr Wong Chao-wai Brian, instructed by Wai & Co, Solicitors for the defendant