DCPI 1973/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1973 OF 2009

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BETWEEN

HO FOON CHEUNG Plaintiff

and

SHUN YIP ENGINEERING COMPANY LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before: Deputy District Judge Victor Dawes in Chambers

Date of hearing: 10 January 2011

Date of handing down judgment: 18 January 2011

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REASONS FOR DECISION

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1. **Applications**
2. On 8 September 2010, I gave judgment and dismissed the Plaintiff’s claim (“**Judgment**”). I also made a costs order *nisi* that costs be to the Defendant, with certificate for counsel, to be taxed if not agreed.
3. On 10 January 2011, the following applications were heard by me:
4. The Plaintiff’s applications for stay of execution and leave to appeal against the Judgment.
5. The Defendant’s application to vary the costs order *nisi*.
6. At the commencement of the hearing, Mr. Tim Kwok who was instructed by Yeong & Co. for the Plaintiff informed me that we were unable to start because the Legal Aid Certificate for counsel’s assignment was not available yet. He was informed by his instructing solicitors that they were told by the officer of the Legal Aid Department responsible for this matter that the assignment of the case to Mr. Kwok was already approved and that the certificate would be available before the hearing. However, Mr. Kwok did not receive the certificate prior to the hearing. Since his instructing solicitors were late, I had to stand the matter down to wait for them.
7. Mr. Yeong (of Yeong & Co.), who arrived about 15 minutes later, informed me that he was told on 7 January 2011 that the certificate for the assignment of the case to Mr. Kwok would be available before the hearing. However, neither he nor Mr. Kwok received the certificate. He was also unable to locate the Legal Aid officer in charge of this matter.
8. I therefore stood the matter down again in order to allow them to make the necessary enquiry.
9. After another 20 minutes, I was informed that the Plaintiff’s solicitors were still unable to locate the officer of the Legal Aid Department responsible for this matter. I decided to proceed without further delay and excused Mr. Kwok’s attendance. Mr. Yeong took over the matter.
10. At the conclusion of the hearing, I made the following orders:
11. The costs order dated 8 September 2010 be varied as follows: (i) costs be to the Defendant to be taxed if not agreed save that the costs incurred as from 4 August 2010 be taxed on an indemnity basis; and (ii) the Plaintiff do pay the Defendant additional interest on costs at 4% above judgment rate as from 4 August 2010.
12. The applications for stay of execution and leave to appeal be dismissed.
13. Costs of the aforesaid applications be to the Defendant with certificate for counsel.
14. There be legal aid taxation of the Plaintiff’s own costs.
15. I now give my Reasons for Decision.
16. **Variation of the costs order *nisi***
17. In support of the Defendant’s application, the Defendant relied on the following letters:
18. By a letter dated 9 September 2009, the Defendant’s insurer wrote to the Plaintiff’s solicitors suggesting that the Defendant should not be liable to the Plaintiff for the accident. A number of reasons were set out in the letter and the Defendant submitted that some of them found their way into the Judgment. In the circumstances, the Plaintiff should have been aware that his claim was hopeless even before the commencement of these proceedings.
19. By a letter from the Defendant’s letters dated 7 July 2010, the Defendant made a Sanctioned Offer pursuant to Order 22 of the Rules of the District Court. The Plaintiff was invited to discontinue the claim with costs to be taxed if not agreed on a party and party basis. The Defendant also made it clear that they will claim costs against the Plaintiff on an indemnity basis if the claim is dismissed.
20. I agree that some of the arguments contained in the aforesaid letters did eventually find their way into the Judgment and I am also of the view that it should have been apparent to the Plaintiff that his case lacks merits. Although I am not prepared to award costs of the entire action to the Defendant, I am prepared to award costs on a higher basis for the costs incurred from 4 August 2010, i.e. the deadline for the Plaintiff to accept the Sanctioned Offer.
21. **Stay of Execution and Leave to Appeal**
22. No leave to appeal should be allowed unless the intended appeal has a reasonable prospect of success or there are issues which should in the interest of justice be heard by the Court of Appeal, see section 63A(2) of the District Court Ordinance. The grounds will have to be more than merely arguable. See *Wynn Resorts (Macau) SA v Mong Henry* [2009] 5 HKC 515.
23. In respect of the application for stay of execution, the relevant principles are set out in *Star Play Development Ltd v Bess Fashion Management Co Ltd* [2007] 5 HKC 84. The existence of an arguable appeal (i.e. an appeal with reasonable prospect of success) was said to be the minimum requirement.
24. In short, the Defendant argued that I have failed to consider the Defendant’s duty to provide safe access to work. It is said that this is the real issue and that I have failed to deal with this in the Judgment.
25. In paragraph 13 of the Judgment, I have dealt with the danger involved in walking over the pipes in question to reach the walls that required the paintwork. I have also highlighted the Plaintiff’s evidence that there were ways which would allow him to cross over the Pipes safely but the Plaintiff had simply failed to do so. I have also found that the accident was caused partly by the lack of concentration on the Plaintiff’s part which was admitted by him during cross-examination.
26. In light of the aforesaid, I see no basis for disturbing the findings and I am of the view that the intended appeal is simply unarguable. I therefore dismissed the two applications.

(Victor Dawes)

Deputy District Judge

Mr. Gary Yeong of Yeong & Co., for the Plaintiff

Mr. Ashok Sakhrani instructed by Messrs. W. K. To & Co., for the Defendant