DCPI 2047/2011 & DCEC 1267/2010

(Heard Together)

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2047 OF 2011

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BETWEEN

JIANG ZHONG (姜忠) Plaintiff

and

UP CHEER LIMITED 1st Defendant

YEUNG CHUN LEUNG formerly trading as 2nd Defendant

DREAM HOME WORKSHOP

CHENG KWOK WEI trading as 3rd Defendant

HON HING ENGINEERING COMPANY

EMPLOYEES COMPENSATION ASSISTANCE 4th Defendant

FUND BOARD (僱員補償援助基金管理局)

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**IN THE DISTRICT COURT OF THE**

HONG KONG SPECIAL ADMINISTRATIVE REGION

EMPLOYEES’ COMPENSATION CASE NO 1267 OF 2010

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IN THE MATTER OF AN APPLICATION BETWEEN

JIANG ZHONG (姜忠) Applicant

### and

YEUNG CHUN LEUNG (楊振良) formerly 1st Respondent

trading as DREAM HOME WORKSHOP

KWOK MAN LUNG (郭文龍) 2nd Respondent

(Discontinued)

UP CHEER LIMITED (皆昇有限公司) 3rd Respondent

CHENG KWOK WEI trading as 4th Respondent

HON HING ENGINEERING COMPANY

EMPLOYEES COMPENSATION ASSISTANCE 5th Respondent

FUND BOARD (僱員補償援助基金管理局)

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(Heard together)

Before: Deputy District Judge Elaine Liu in Court

Date of Hearing: 11 April 2016

Date of Reasons for Decision: 18 April 2016

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REASONS FOR DECISION

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*Introduction*

1. At the hearing, I varied the costs orders *nisi* made in the judgment handed down on 5 February 2016 (“Judgment”). I now give the reasons. In this decision, I adopt the abbreviations used in the Judgment.
2. By the Judgment, I ruled in favour of Jiang against Yeung in the EC Action and against both Up Cheer and Yeung in the PI action. The claims against Cheng (in both actions) and against Up Cheer (in the EC Action) were dismissed.
3. I also made orders *nisi* that the costs of Jiang and the Fund Board in the PI Action be paid by Up Cheer and Yeung, Jiang’s costs in the EC Action be paid by Yeung, the Fund Board’s costs in the EC Action be paid by Jiang and Yeung and there is no order as to Up Cheer’s costs in the EC Action.
4. The costs orders *nisi* were made on the basis of the well-established principle of costs generally follow the event, except in respect of Up Cheer’s costs in the EC Action, which I have explained in the Judgment.
5. Jiang applied to vary the costs orders *nisi* to:-
6. “the costs of the Applicant (Jiang) in the EC Action be paid jointly and severally by the 1st Respondent (Yeung) and the 5th Respondent (the Fund Board) and that the costs of the Fund Board in the EC Action (including the costs to be paid by the Fund Board in the EC Action , if any) be paid by Yeung.” and
7. “the costs of the Plaintiff (Jiang) in the PI Action be paid by the 1st Defendant (Up Cheer), the 2nd Defendant (Yeung) and the 4th Defendant (the Fund Board) (including the costs to be paid by the Fund Board to Jiang in the PI Action, if any) be paid by Up Cheer and Yeung jointly and severally.”
8. There are two aspects in Jiang’s applications for variation. Jiang was asking that:-
9. the Fund Board be jointly and severally liable with Yeung in the EC Action, and with Yeung and Up Cheer in the PI Action to pay Jiang’s costs, coupled with the Fund Board’s right to recover the costs so paid to Jiang from Yeung and Up Cheer respectively (as the case may be); and
10. the costs of the Fund Board in the EC Action be paid by Yeung solely.
11. I was informed by Jiang that Yeung and Up Cheer have not made any payment as ordered in the Judgment. Shortly after the Judgment, Up Cheer has taken out a second mortgage over the House to secure the indebtedness of a company named Speed Sourcing Group (Far East) Limited. According to the annual return of Speed Sourcing made up to 4 March 2015, its total amount of indebtedness registered with the Companies Registry was HK$103,255,070.

*The Legal Principles*

*Relevant Statutory Provisions on Costs*

1. The court has a wide and unfettered discretion on the decision of costs. Section 53(1) of the District Court Ordinance provides that:-

“The costs of and incidental to all proceedings in the Court … are in the discretion of the Court, and the Court has the full power to determine by whom and to what extent the costs are to be paid.”

1. The powers and discretion of the court as to costs under section 53 shall be exercised subject to and in accordance with Order 62 of the Rules of District Court (See Order 62 rule 2). The discretion shall be exercised judicially.
2. The relevant factors in Order 62 rule 5 that this court shall take into account are:-

“(aa) the underlying objectives set out in Order 1A, rule 1;

…

(e) the conduct of all the parties;

(f) whether a party has succeeded on part of his case, even if he has not been wholly successful”

1. The conduct of the parties include:-

“(a) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(b) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(c) whether a claimant who has succeeded in his claim, in whole or in party, exaggerated his claim; and

(d) conduct before, as well as during, the proceedings.”

(Order 62 rule 5(2))

*The Fund Board*

1. It is relevant to note the special features and legal principles in respect of the Fund Board’s involvement in the proceedings. Section 25A of the Employees Compensation Assistance Ordinance (“ECAO”) Cap. 365 provides three different scenarios in which the Fund Board may apply to be joined in the proceedings commenced to claim employee compensation and damages at employment related injury.
2. Section 25A(a) covers the situation where there is no policy of insurance, and where the employer is not present within the meaning of one of the following:-

“(i) the employer cannot be identified or, if identified, cannot be found;

(ii) the employer is insolvent;

(iii) the employer is dead or has been dissolved, wound up or struck off from register;

(iv) the employer, for any reason, cannot be served with the notice of proceedings; or

(v) at any time when the employer fails to attend the hearing, leaving the claim uncontested.”

1. Section 25A(b) covers the situation where there is no policy of insurance and the employer is present at the proceedings. Section 25A(c) deals with the situation where the insurer concerned is insolvent.
2. If the Fund Board applies to join in a set of proceedings under section 25A(a), the statutory provisions expressly require the Fund Board to “take over the defence as if it were the employer in the proceedings”, which “mean something over and above what a normal intervener would do … similar (but not entirely identical) to the situation where an insurer takes over from the insured the defence of a claim made against the insured” (*Tu Zhiqiang v Hap Sang Co (a firm)* [2012] 1 HKLRD 1075 at paragraph 39)
3. The Fund Board, if joins in under section 25A(b) and (c), is not required to “take over the defence as if it were the employer”. The Fund Board, under these subsections, would join in as an intervener. “A normal intervener … does not ‘take over’ anybody’s defence. He just joins in to contest the claim in whatever way that suits his interest.” (*Tu Zhiqiang, supra,* paragraph 39)
4. Another feature of ECAO is the provisions of section 16 and section 20A. Under section 16, a person who is unable to recover from the employer payment of an amount of the employee compensation can seek payment of that amount from the Fund Board. There are certain requirements to fulfil before the employee can seek payment from the Fund Board under this section. In gist, it requires that the employee shall have taken proceedings to recover the compensation from the employer, the principal contractor and the insurer (where applicable), in the manner as are reasonable in the circumstances and having regard to the likely cost of such proceedings, the resource available and the amount likely to be recovered from such proceedings.
5. Section 20A is similar to section 16 but it deals with the relief payment for an amount of damages payable pursuant to a judgment or an order.
6. Section 20B(3) provides that in determining the amount of a relief payment, interest and costs arising from proceedings in respect of any damages or compensation claim are excluded.
7. If the Fund Board joined in an action, took an adversarial role in defending the position of an employer and failed, it would face an adverse cost order. The usual order is to award costs against the Fund Board and the unsuccessful employer on a joint and several basis.
8. There is nothing in the statutory provisions governing the Fund Board that impacted on the court’s discretion to award costs. (*Kwan Kam Pui v Fung Man & ors* [2014] 6 HKC 361)
9. In light of the statutory power of subrogation, a costs order against the Fund Board in this situation will unlikely cause any unfairness or prejudice. (*Wong Kai Fun v Sun On Logistics Limited and another*, DCEC 5/2013, unreported, 20 May 2015)
10. For completeness, I also refer to other cases cited by Mr Chan to support his contention that the Fund Board and the unsuccessful employer shall be jointly and severally liable to pay the successful employee’s costs. These cases are *Wong Kai Fun v Sun On Logistics Limited & Employees Compensation Assistance Board, supra*, the dicta in *Chi Yuk Pui v Grace Mind Corp Ltd* [2015] 3 HKLRD 271, *Chan Ngan Fat v Lee King Heng & Employees Compensation Assistance Fund Board* DCEC 1382/2013, unreported, 7 October 2015, *Hussain Kamran v Khan, Amar formerly trading as Three Star Recycling Co (a firm) & Employees Compensation Assistant Fund Board* HCPI 953/2012, unreported, 13 November 2014 and *Lai Wing Shun (by his next friend) v Shun Shing Decoration Company Limited & Employees Compensation Assistance Fund Board*, DCEC 1918/2014, unreported, 22 February 2016.
11. The factual matrix of these decisions however differs from the present case. In the cases *Wong Kai Fun, Chi Yuk Pui, Hussain Kamran,* and *Lai Wing Shun,* the defendant employer did not appear at trial or did not file a notice of intention to defend. The Fund Board applied to join in these proceedings, stepped into the shoes of these absent employers and defended their cases. In the case of *Chan Ngan Fat,* the defendant employer has not purchased insurance. Although the defendant employer has appeared in the proceedings, the Fund Board joined in, took the same position of the defendant employer in disputing the liability and quantum. In each of these cases, the Fund Board took an active role in defending the defendant employer who has lost in the action. It follows that the Fund Board should also be ordered to pay the costs of the successful employee in those cases.

*Whether the Fund Board shall be ordered to pay the costs of Jiang*

1. In the present case, there were two alleged employers, Yeung and Cheng. Jiang successfully proved his case against Yeung, but failed against Cheng. Yeung has entered appearance in both actions and was legally represented. Cheng did not appear in the proceedings despite service and substituted service of the proceedings.
2. On considering the starting position: costs follow the events, the immediate question is the role of the Fund Board in the present proceedings. Whether the Fund Board joined in only to contest the case of Cheng (which was successful) but not the case of Yeung (which was unsuccessful), or the Fund Board joined in to protect its interest at large, covering the potential liability in the cases of both Cheng and Yeung. It is noted that Jiang was an illegal worker and there was no policy of insurance in force. Even though Yeung was represented in the hearing, the Fund Board would still have the possible risk of being required to make relief payment if Yeung failed.
3. The Fund Board’s applications to join in both sets of proceedings were made under section 25A(b) which covers the situation where the employer was present. The word “present” in section 25A(b) does not cover situation where an employer has been named in the proceedings as a respondent but has not yet been successfully served. (*Tu Zhiqiang, supra,* paragraph 35) When the Fund Board made the joinder applications, it has Yeung in its mind as Cheng was absent.
4. The affidavits in support of the joinder applications referred to both Yeung and Cheng. It also specifically stated that given the fact that there was no insurance policy in force and Cheng has not entered appearance, if judgment was entered against Cheng, the Fund Board would face potential application from Jiang for payment under section 16 of ECAO. While it may appear from the affidavits that the applications were made to enable the Fund Board to defend Cheng’s case, the applications and the orders granted were not limited to the defence of Cheng’s case. It was a general order allowing the Fund Board to join in the proceedings to safeguard its interests.
5. The pleadings filed by the Fund Board in both actions were not confined to defending Cheng’s liability. The Fund Board did take a position of non-admission in respect of the case against Yeung. By the non-admission, the Fund Board has required Jiang to a strict proof of his case against both Yeung and Cheng. As mentioned above, insofar as Yeung’s case was concerned, there was no insurance policy in force, the Fund Board was facing the risk of having to make the relief payment under sections 16 and 20A of the ECAO. The Fund Board acted to protect its interest in the pleadings. In the event that Yeung failed, the Fund Board could not wholly disassociate itself from it.
6. In regard to the conduct at trial, Mr Lim has fairly and wisely confined his case at trial to defending the claim against Cheng and has successfully demonstrated that Cheng was not the employer of Jiang.
7. As rightly pointed out by Mr Chan, in the exercise of discretion on the decision of costs, the court shall have regard to the conduct before and during the proceedings. The court could not only look at the conduct at trial, but should also consider the conduct before the trial, the basis on which the joinder applications was made and the pleadings filed by the Fund Board.
8. Taking into account the entire circumstances, it can fairly be said that at least before the trial, the Fund Board has not limited its case to only defending the claims against Cheng.
9. I exercised my discretion and varied the costs order to the effect that the Fund Board shall be jointly and severally liable for Jiang’s costs in both actions and the Fund Board has the right to recover the same from Yeung and Up Cheer (as the case may be).

*The Fund Board’s costs in the EC Action*

1. One of the factors to consider in the exercise of discretion on the decision of costs where there are more than one defendant is whether it is reasonable and proper for the plaintiff to join both defendants in the action. (*Besterman v British Motor Cab Company Limited* [1914] 3 KB 181)
2. It is also recognized that the plaintiffs could reasonably have felt doubts and uncertainties as to what would transpire at the hearing and commenced and maintained the proceedings against both defendants. (*Leung Li Ha and another v Hon Sau Ling and another* [1993] 1 HKLRD 86)
3. Bullock order and Sanderson order are options to be considered in situations where there are both successful and unsuccessful defendants. In *King v Zurich Insurance Company Limited* [2002] EWCA Civ 598, Lord Justice Keene has stated that:-

“The judge had to deal here with a not uncommon situation where a claimant was unsure which of the defendants would be held liable for his injury and where – in the event – he succeeded against one but failed against the other. In the days before the Civil Justice Rules came into effect this situation would often be met by a Bullock order (See Bullock v The London General Omnibus Company [1907] 1 KB 264) ordering the plaintiff to pay the successful defendant’s costs but ordering the unsuccessful defendant to pay those costs over the plaintiff. In cases where a plaintiff was legally aided the order would often be a Sanderson order (see Sanderson v Blyth Theatre Company [1903] 1 KB 533) whereby the unsuccessful defendant was ordered to pay the costs of the successful defendant directly. These decisions reflected the approach of the courts, namely that where a plaintiff had behaved reasonably in suing both defendants he should not normally end up paying cost to either party even though he succeeded only against one of the defendants.”

1. In *Michael Irvine v Commissioner of Police for Metropolis and others*, [2005] EWCA Civ 129 at paragraph 22, the English Court of Appeal considered that the jurisdiction to make a Bullock or a Sanderson order is useful and is:-

“designed to avoid the injustice that when a claimant does not know which of the two or more defendants should be sued for a wrong done to the claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful defendant eroded or eliminated by the order for costs against the claimant in respect of his action against the successful defendant or defendants. However, it must also be recognized that it is a strong order, capable of working injustice to the defendant against whom the claim has succeeded, to be made liable not only for the claimant’s costs of the action against that defendant, but also the costs of the other defendants whom the claimant has chosen to join but against whom the claimant has failed.”

1. The Court of Appeal in *Chong Ngan Seng v China Harbour Engineering Company Limited*, CACV 54/2012, unreported, 25 September 2013 has cited the following passage in the *Hong Kong Civil Procedure* paragraph 62/1/6:-

“A trial judge was entitled, without infringing the requirement that costs should generally follow the event to make a *Sanderson* order rather than a *Bullock* order where the judgment was given against a co-defendant who was insolvent; because a *Sanderson* order would spread the hardship caused by the co-defendant’s insolvency and consequent inability to meet the costs more fairly between the plaintiff and the other defendant, both of whom were innocent parties, than would a *Bullock* order. The choice between a *Bullock* order and a *Sanderson* order in such circumstances was a matter for the judge’s discretion.”

1. Mr Chan submitted that on the determination of costs, the court is not limited to choose between a Bullock order and a Sanderson order. I agree. The court has a wide discretion and shall decide the appropriate costs order having regard to the facts and features in each case.
2. With these principles in mind, I accept that it was reasonable and proper for Jiang to commence the EC Action against both Cheng and Yeung. Given the state of evidence before trial, Jiang could have reasonable doubt on the true identity of his employer, in particular when the authenticity of the alleged Contract between Hon Hing and Up Cheer was in doubt.
3. Ms Kwok, representing Up Cheer and Yeung, has no objection to a variation of the costs order to the effect that the Fund Board’s costs in the EC Action be paid by Yeung solely.

*Conclusion*

1. The costs order *nisi* in both actions were varied to be in terms of paragraph 1 of Jiang’s Summonses. I also ordered that the execution on the costs orders against the Fund Board be stayed for three months from the date of the order, during that period Jiang shall proceed with diligence to recover costs against Yeung and Up Cheer.

( Elaine Liu )

Deputy District Judge

DCPI 2047/2011

Mr Frederick Chan, instructed by Cheng & Wong, assigned by the Director of Legal Aid, for the plaintiff

Ms Kwok Hau Fung Dora, of Huen & Partners for the 1st and 2nd defendants

The 3rd defendant was not represented and did not appear

Mr Patrick Lim, instructed by Gallant Y T Ho & Co, for the 4th defendant

DCEC 1267/2010

Mr Frederick Chan, instructed by Cheng & Wong, assigned by the Director of Legal Aid, for the applicant

Ms Kwok Hau Fung Dora, of Huen & Partners for the 1st and 3rd respondents

The 4th respondent was not represented and did not appear

Mr Patrick Lim, instructed by Gallant Y T Ho & Co, for the 5th respondent