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

DREAM HOME WORKSHOP 2nd Defendant

CHENG KWOK WEI trading as

HON HING ENGINEERING COMPANY 3rd Defendant

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD

(僱員補償援助基金管理局) 4th Defendant

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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 trading as

DREAM HOME WORKSHOP 1st Respondent

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

HON HING ENGINEERING COMPANY 4th Respondent

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD

(僱員補償援助基金管理局) 5th Respondent

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(Heard together)

Before: Deputy District Judge Elaine Liu in Court

Date of Hearing: 20 October 2016

Date of Decision: 10 November 2016

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DECISION

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*the application*

1. This is an application made by the Employees Compensation Assistance Fund Board[[1]](#footnote-1) (“Fund Board”) for leave to appeal against certain part of the costs orders made by this Court on 11 April 2016 in DCEC 1267 of 2010 (“EC Action”) and DCPI 2047 of 2011 (“PI Action”).
2. Specifically, the Fund Board sought leave to appeal against the following costs order:-

(1) in the EC Action, the costs of Jiang[[2]](#footnote-2) be paid by Yeung[[3]](#footnote-3) and the Fund Board jointly and severally, and that the Fund Board’s own costs including the costs to be paid by the Fund Board to Jiang be paid by Yeung;

(2) in the PI Action, the costs of Jiang be paid by Up Cheer[[4]](#footnote-4), Yeung and the Fund Board jointly and severally, and that the Fund Board’s own costs including the costs to be paid by the Fund Board to Jiang be paid by Up Cheer and Yeung jointly and severally.

1. There was no complaint about the order that Yeung (in both actions) and Up Cheer (in the PI Action) shall be ultimately responsible for paying the Fund Board’s costs, including the costs that the Fund Board are to be paid to Jiang. The challenge was on the order against the Fund Board to bear Jiang’s costs jointly and severally with Yeung and Up Cheer (as the case may be) notwithstanding that such costs are recoverable from Yeung and/or Up Cheer.
2. The background of these two proceedings was set out in the Judgment handed down on 5 February 2016 and the Reason for the Decision on Costs handed down on 18 April 2016.

*PROPOSED GROUNDS OF APPEAL*

1. The Fund Board has submitted a 10-page draft Notice of Appeal in the PI Action and a 6-page draft Notice of Appeal in the EC Action. In sum, the Fund Board’s proposed grounds of appeal were two:-

(1) Jurisdictional Ground – it was contended that this Court was wrong in relying on *Kwan Kam Pui v Fung Man & Ors* [2014] 6 HKC 361 and was wrong to hold that the provisions in Employees Compensation Assistance Ordinance (“ECAO”) did not impact on the Court’s discretion to award costs against the Fund Board in a common law claim. The Fund Board contended that the Court has no jurisdiction to order costs against the Fund Board in the PI Action.

(2) Discretion Ground – it was contended that even if this Court has the jurisdiction to award costs against the Fund Board, the discretion was wrongly exercised, or that this Court had failed to exercise the discretion judicially. The Fund Board mainly relied on the affirmations in support of its joinder application and contended that this Court has wrongly came to the view that the Fund Board did not join in the proceedings for the defence of Cheng only.

1. The Fund Board relied on both grounds in the PI Action, and only the Discretion Ground in the EC Action.

*LEGAL PRINCIPLES ON GRANTING LEAVE TO APPEAL*

1. The legal principles on granting leave to appeal are well established and are not disputed by the parties.
2. Under section 63A(2) of the District Court Ordinance, leave to appeal shall not be granted unless this Court is satisfied 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.
3. The test of “reasonable prospect of success” will be met if an applicant can show that there is more than just an arguable case, it is an appeal that has merits and ought to be heard. The test of reasonable prospect of success involves the notion of reasonableness and therefore is more than ‘fanciful’, but does not have to be ‘probable’. (See: *Wynn Resorts (Macau) SA v Mong Henry* [2009] 5 HKC 515, *per* Chu J (as she then was); *Ma Bik Yung v Ko Chuen* [2009] 3 HKC 359, *per* Leong JA; *KNM v HTF*, unreported, HCMP 288/2011, 7 September 2011, *per* Fok JA (as he then was), *Wing Tat Haberdashery Co Ltd v Elegance Development & Industrial Co Ltd* [2011] 5 HKC 474 *per* Fok JA (as he then was))
4. The threshold for granting leave to appeal against an exercise of discretion is higher, and was described by Mr Wong SC (appearing with Mr Phang), counsel for the Fund Board, as “not easy to meet”.
5. The award of costs is a matter of discretion for the trial judge. An appellant court will not interfere with the exercise of discretion unless it was shown that the decision was plainly wrong, 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. (See: *Lakhan v Wu Wing Tat & Anor* [1987] 3 HKC 54, 58-59, citing *Alltrans Express v CVA Holdings* [1984] 1 WLR 394; *RK v YS*, unreported, HCMP 1969/2012, 1 November 2012, CA) It is not sufficient to merely show that the appellant court would prefer a solution which the judge had not chosen. (*Hong Kong Civil Procedure 2016* Vol 1 §59/2A/4)

*JURISDICTIONAL GROUND*

1. The proposed ground of appeal on jurisdiction only relates to the PI Action. This is the first occasion when the Fund Board raised this jurisdictional challenge in the present proceedings. This point has never been raised at trial or at the hearing on costs.
2. The Fund Board’s major criticism was that this Court should not follow the comments of Mr Justice Bharwaney in *Kwan Kam Pui,* which was *obiter dicta*, and that *Kwan Kam Pui* was wrongly decided. The Fund Board submitted that the effect of section 20B(3) of ECAO is that the Court does not have jurisdiction to order costs against the Fund Board in the PI Action.
3. Section 20B(3) of ECAO defines the meaning of “relief payment” that an eligible person may apply to the Fund Board under section 20A for compensation in a claim for common law damages. Interest and costs were excluded from the definition of “relief payment”.
4. Mr Wong SC for the Fund Board argued that taking into account the history of ECAO, the amendments thereto in 2002, the specific provisions in section 20B(3) of ECAO as well as the legislative intent to encourage the Fund Board to intervene in proceedings, the ECAO ought to be interpreted as having the effect of insulating the Fund Board from any adverse costs order in an employee’s claim for common law damages. The Court thus, he contended, has no jurisdiction to order costs against the Fund Board in a common law claim when the Fund Board chose to join in as a party under section 25A of ECAO. This, however, does not affect the Fund Board’s right to have costs awarded in favour of it if the Fund Board intervenes or be sued under sections 25 and 25A of ECAO.

*Reasonable prospect of success*

1. Mr Wong SC accepted that his arguments on this proposed ground was a rehash of the arguments made at the hearing before Mr Justice Bharwaney in *Kwan Kam Pui[[5]](#footnote-5)*. In *Kwan Kam Pui*, Mr Justice Bharwaney has enunciated his rejection of these arguments with detailed reasons[[6]](#footnote-6).
2. In *Kwan Kam Pui*, the Learned Judge has considered, *inter alia*, the history of ECAO, the circumstances leading to the amendments in 2002, the proper construction of sections 20A and 20B in regard to relief payment, the proper construction of section 25A which specifies that the Fund Board was to join in as a party in accordance with Order 15 rule 6 of the Rules of High Court or District Court, as well as the different role of the Fund Board when considering an application for relief payment (which was quasi-judicial) and when joining in as a party (which was adversarial). The Learned Judge came to the view that the reference to intervention being governed by Order 15 rule 6 reinforces the conclusion that section 25A does not seek to curtail the power of the Court in the conduct of the proceedings and the discretion to award costs. In the context of considering section 29 of ECAO[[7]](#footnote-7), the Learned Judge commented that it would be an incongruous state of affairs if the Fund Board could take advantage of a section in the ECAO and could obtain costs in its favour by making a written without prejudice save as to costs settlement offer, but was not liable to pay any costs if the plaintiff succeeded in obtaining a judgment sum higher than the written offer.
3. The Learned Judge came to the conclusion that the statutory provisions in ECAO did not fetter the Court’s wide discretion in the award of costs, including the award of costs against the Fund Board when it chose to join in as a party in a common law claim.
4. Mr Chan, counsel for Jiang, argued that the Fund Board’s construction of ECAO was not proper nor reasonable and could not be the intention of the Legislature. In the context of Order 15 rule 6, Mr Chan referred to *Wong Chun Leong Tony v Ada Ltd* [1991] 1 HKC 86 in which the Court of Appeal has held that it could not be right for the Court when ordering a party to be joined under Order 15 rule 6 of the then Rules of Supreme Court, to order preemptively at the same time that the newly joined party would be precluded from asking costs in any proceedings in the action.
5. The same jurisdictional arguments were made by the Fund Board (not represented by Mr Wong SC) before Madam Justice Bebe Chu in *Chak King Por v Wong Chun Fai* [2016] 2 HKLRD 1076. Madam Justice Bebe Chu considered the arguments independently, came to the same conclusion reached by Mr Justice Bharwaney, and held that the ECAO does not immune the Fund Board from any adverse costs order. The Fund Board has confirmed (through Mr Wong SC) that there was no appeal against Madam Justice Bebe Chu’s decision in *Chak King Por*.
6. Although the decision of *Chak King Por* was handed down one day after this Court’s decision on costs, it was not disputed that the legal propositions held therein are binding on this Court.
7. In *Hussain Kamran v Khan Amar and Anor*, unreported, HCPI 953/2012, 13 November 2014, Master Chow of the Court of First Instance agreed with Mr Justice Bharwaney on the point of jurisdiction but she refused to exercise her discretion in ordering costs against the Fund Board. The plaintiff appealed against Master Chow’s exercise of discretion on costs. The Fund Board did not take out any respondent notice to raise a challenge on the jurisdictional issue. The Court of Appeal[[8]](#footnote-8) allowed the plaintiff’s appeal against Master Chow’s exercise of discretion, and awarded costs against the Fund Board.
8. In the present application, Mr Wong SC submitted that *Kwan Kam Pui* was wrongly decided, and explained that the Fund Board has not lodged an appeal in that case as the result was in favour of the Fund Board.
9. The Fund Board also contended that this Court has failed to give any or sufficient regard that Mr Justice Bharwaney’s comments in *Kwan Kam Pui* were *obiter,* and was not binding on this Court. It is clear from the judgment in *Kwan Kam Pui* that the comments were *obiter*. This Court has not lost sight of this fact when making the costs order. These comments from the High Court Judge, albeit *obiter*, was highly persuasive. In any event, after the decision of *Chak King Por*, the proposition was binding on this Court.
10. I have carefully considered the Fund Board’s arguments on the Jurisdictional Ground, not only from the perspective of *stare decisis* principle*,* but also independently free from any *stare decisis* consideration. I agree with Mr Justice Bharwaney in *Kwan Kam* *Pui* (albeit *obiter*)that the ECAO does not fetter the Court’s jurisdiction and discretion to award costs against the Fund Board in a common law claim, and his reasons for it. In particular, it is of note that section 20B(3) which excludes the recovery of costs from the Fund Board was in regard to an application for a relief payment under section 20A. Intervention by the Fund Board as a party was governed by section 25A in which it was expressly provided to be governed by Order 15 rule 6 of Rules of High Court or District Court. There was no express provision in section 25A to the effect that the Court’s power to award costs against the Fund Board was curtailed.
11. I am not satisfied that a reasonable prospect of success was shown on this proposed ground of appeal.

*“Other reason in the interest of justice”*

1. Mr Wong SC then invited this Court to grant leave on the “other reason in the interest of justice” limb for the public importance of this issue and the potential impact that this jurisdictional issue may have on all parties to the proceedings in which the Fund Board has intervened.
2. It was submitted that the arguments made in *Kwan Kam Pui* have rarely been tested and reviewed by the Court. Apart from *Char King Por* and the present case, the other cases cited or mentioned the case of *Kwan Kam Pui* were not of direct relevance to the jurisdictional challenge as these cases are either on employees’ compensation claims or did not engage the jurisdictional point. These cases are *Mohammed Shakeel v Wong Kin Yu and Ors*, unreported, DCPI 2441/2011, 5 November 2015; *Wong Kai Fun v Sun On Logistics Limited and Anor*, unreported, DCEC 5/2013, 20 May 2015; *Chan Ngan Fat v 李敬恆 and Anor*, unreported, DCEC 1382/2013, 7 October 2015; *Lai Wing Shun v Shun Shing Decoration Company Limited and Anor*, unreported, DCEC 1918/2014, 22 February 2016; *Chi Yuk Pui v Grace Mind Corp Ltd* [2015] 3 HKLRD 271; *Kong Hoi Lam v Cheung Yuk Kwan and Ors* [2016] 3 HKC 38.
3. Mr Chan, counsel for Jiang, submitted that if this Court is minded to grant leave to appeal on the “other reason in the interest of justice” limb, conditions should be imposed to protect Jiang from the exposure on costs. Under section 63A(1)(b) of the District Court Ordinance, the Court can impose necessary conditions on the granting of leave to appeal to secure the just, expeditious and economical disposal of the appeal. It was noted that the total damages awarded to Jiang in both actions are HK$359,727. Jiang was still trying to enforce and recover the judgment award from Yeung and Up Cheer. Mr Chan was concerned that the costs that may incur on appeal will quickly eat up the entire amount of compensation. Although Jiang was on legal aid, his compensation was subject to a first charge in favour of the Director of Legal Aid.
4. While the jurisdictional issue is a matter that affects all parties to the proceedings in which the Fund Board has intervened and is a matter having a wide effect, the same arguments have been tested before the Court on more than one occasion and were all rejected. The Fund Board decided not to take this issue on appeal in the other cases, including *Hussain Kamran* and *Char King Por,* although there might be other reasons for such decision and this Court will not speculate*.* It was decided in the present application that the test of reasonable prospect of success was not met in this proposed ground of appeal. In the circumstances, I am not satisfied that leave to appeal should be granted under this limb.

*DISCRETION GROUND*

1. In exercising the discretion to award costs against the Fund Board, this Court has considered the role of the Fund Board in the proceedings[[9]](#footnote-9) and came to the conclusion that the Fund Board joined in these proceedings to protect its interest and its potential liability at large. Viewed within the context of this case, the Fund Board was not only exposed to the liability that Cheng might have. As Yeung had not taken out any insurance policy in regard to the employment of Jiang, in the event that Yeung failed in these actions, the Fund Board could not wholly disassociate itself from it.
2. This was evident from the Fund Board’s application to join in the proceedings. The Fund Board, with legal advice, had applied for and obtained an order to join in as a party generally, enabling it to defend Cheng and Yeung. The Fund Board’s summons for joinder which was drafted by its legal representatives, asked to join in as a party generally. The order for joinder granted accordingly was a general order to enable the Fund Board to safeguard its interest in the proceedings at large, covering the positions of both Cheng and Yeung.
3. If the Fund Board’s only intention was to defend Cheng in this proceedings, the Fund Board should have reflected this intention in the terms of the order it sought in the joinder summons. Quite the contrary, the Fund Board sought a general order to join in but not a specific and restricted order to defend only Cheng. The conduct of the Fund Board prior to trial, including the pleadings, did not support the contention now made by the Fund Board that they only came in to defend the potential liability faced by Cheng.
4. This Court has also given considerations to the Fund Board’s conduct at trial and allowed the Fund Board to recover its costs (including those to be paid to Jiang) from Yeung and/or Up Cheer (as the case may be).
5. The exercise of discretion shall be premised on the evaluation and consideration of *all* the matters before the Court but not the fragmented approach as the Fund Board has adopted in its attack on the exercise of discretion and its reliance solely on the affirmations in support of the joinder application, without viewing the entire conduct in context.
6. The Fund Board’s application for leave to appeal under the Discretion Ground in both the EC Action and PI Action is dismissed.

*Conclusion*

1. The Fund Board’s applications for leave to appeal in both actions are dismissed with costs order *nisi* that the costs of this application with certificate for counsel be paid by the Fund Board to Jiang. Jiang’s own costs be taxed in accordance with the Legal Aid Regulations. This costs order *nisi* shall become absolute unless there is an application to vary the same within 14 days from this decision.
2. I thank counsel for both sides for their assistance in this application.

( 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

The 1st and 2nd defendants were not represented and did not appear

The 3rd defendant was not represented and did not appear

Mr Horace Wong SC and Mr Roger Phang, instructed by Gallant, for the 4th defendant

DCEC 1267/2010

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

The 1st and 3rd respondents were not represented and did not appear

The 4th respondent was not represented and did not appear

Mr Horace Wong SC and Mr Roger Phang, instructed by Gallant, for the 5th respondent

1. The Fund Board is the 5th respondent in the EC Action and the 4th defendant in the PI Action. [↑](#footnote-ref-1)
2. Jiang is the applicant in the EC Action and the plaintiff in the PI Action. [↑](#footnote-ref-2)
3. Yeung is the 1st respondent in the EC Action and the 2nd defendant in the PI Action. [↑](#footnote-ref-3)
4. Up Cheer is the 3rd respondent in the EC Action and the 1st defendant in the PI Action. [↑](#footnote-ref-4)
5. *Kwan Kam Pui, supra,* at §§17-24, 41 [↑](#footnote-ref-5)
6. *Kwan Kam Pui, supra*, at §§25-65 [↑](#footnote-ref-6)
7. Section 29 of ECAO provides that where the Fund Board (after joined in a proceedings as a party) makes a written without prejudice save as to costs offer to any other party in the proceedings, the court shall take into account any such offer in deciding the question of costs. [↑](#footnote-ref-7)
8. unreported, CACV 255/2014, 5 October 2016 [↑](#footnote-ref-8)
9. Decision on Costs §26 [↑](#footnote-ref-9)