## DCPI 2723/2018

[2020] HKDC 204

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2723 OF 2018

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##### BETWEEN

LIU WEI GANG Plaintiff

and

LI KENG KO 1st Defendant

ALPHA BUILDING CONSTRUCTION LIMITED 2nd Defendant

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Before: Her Honour Judge Phoebe Man in Chambers (by paper disposal)

Date of Defendants’ Submission: 6 March 2020

Date of Plaintiff’s Submission: 11 March 2020

Date of Defendant’s Submission in reply: 16 March 2020

Date of Decision: 9 April 2020

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DECISION

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*Variation of Costs*

1. By a judgment dated 14 January 2020 (the “Judgment”), I ordered the 1st and 2nd defendants to pay damages in the sum of HK$1,331,866.60 to the plaintiff in a personal injuries action. I made the following costs order *nisi* in the Judgment:-

“*the 1st and 2nd defendants do pay the plaintiff his costs of the action (including all costs reserved, if any) to be taxed, if not agreed, with certificate for Counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations*.”

1. By a summons dated 22 January 2020, the defendants applied to vary the costs order *nisi,* asking for an order that there be no order as to costs on the ground that the plaintiff was found to be a malingerer.
2. In his written submissions, the plaintiff did not dispute the court had found in the Judgment that he had been evasive, unreliable and dishonest as a witness. However, the plaintiff said that despite such finding, it was not appropriate to vary the costs order.

*Legal Principles*

1. The usual starting point in the award of costs is costs following the event except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs: Order 62 Rule 3(2) of the Rules of the District Court. It operates to shift to the unsuccessful party the burden of showing why a different approach should be adopted on the fact of the particular case.
2. In exercising the court’s discretion, the court shall consider the special matters to be taken into account as set out in Order 62 Rule 5. Of relevance to the present case are: (a) the underlying objectives set out in Order 1A, Rule 1; (b) any payment of money into court and the amount of such payment; (e) the conduct of all the parties; and (g) any admissible offer to settle made by a party.
3. Further, in considering the “conduct of the parties”, the court shall take into account (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 its case or issue, (c) whether a claimant who has succeeded in his claim exaggerated his claim and (d) conduct before, as well as during, the proceedings: Order 62, Rule 5(2).
4. Parties agree that where a successful plaintiff exaggerated his claim, the court may consider depriving him of costs. The burden rests on the unsuccessful party to show why costs should not follow the event [[1]](#footnote-1).
5. It is thus clear that it is within the power of the court to deprive a successful party of his costs, when it is appropriate to do so. Each case differs on its own facts and there can be no single formula to determine the question. As noted by Judge Winnie Tsui in the case of *Chang Lok Kuan Rocky v German Pool Kitchen Equipment Ltd[[2]](#footnote-2)*, the impact of the exaggeration on the progress of the proceedings and the extent of the exaggeration would be relevant factors.

*Relevant Considerations*

1. In considering whether the costs order should be varied in the present case, I took into account the following:
   1. Liability having been admitted, the sole issue at trial was the quantum of damages.
   2. The plaintiff sought damages in the amount of HK$2,411,028.01, the defendant offered at HK$682,794 (net of EC payment) whilst the court awarded HK$1,331,866.60. During settlement negotiations, the defendant could have offered a higher sum and the plaintiff could have offered a lower sum. Just from looking at the numbers and both sides’ offers of settlement prior to trial, it cannot be said one party had behaved more reasonably than the other.
   3. The plaintiff’s counsel submitted that the plaintiff’s exaggeration of his injuries was not significant. It is also submitted that the “practical impact” of the plaintiff’s malingering is not significant, and hence the usual costs order should not be disturbed. I do not agree that this is conclusive. The fact that there was no substantial reduction of the total damages awarded (which is not agreed, more than HK$1 million of the claim was disallowed), or that the trial would have been proceeded with in any event cannot be determinative of the question of whether a plaintiff should have been deprived of his costs because of fraudulent malingering. The court needs to look at all the circumstances of the case.
   4. I do not agree that the exaggeration was insignificant. In the Judgment, I had ruled against the plaintiff on the issues of 1) walking with a limp, 2) ankle pain, 3) ability to squat in both legs, 4) neck pain, 5) back pain, 6) arms pain and 7) chest pain. The defendant’s counsel had to go through the medical records and cross-examined on all these areas one by one. Substantial cross-examination was necessary to show malingering on the plaintiff’s part.
   5. Whenever the plaintiff was asked difficult questions that he did not have an answer to, he would either say he forgot, or he could not remember or he did not know. He would use these answers interchangeably with no differentiation. The manner in which he answered questions had significantly extended cross-examination.
   6. Thus, unlike the case in *Chang Lok Kuan Rocky* (*supra*), I am of the view that in the present case, the plaintiff’s exaggeration was significant and had lengthened cross-examination significantly.
   7. Despite the fact that the court eventually awarded HK$866,353.30 for loss of post-trial earnings, this does not reflect that the plaintiff’s representation of his psychiatric state was accepted. To the contrary, I found that there was malingering on the part of the plaintiff and he was only suffering from mild psychiatric symptoms. I found the plaintiff to have been able to focus and stay alert even during the stressful process of cross-examination. But for the fact that he worked as a construction worker at construction sites which are potentially dangerous if one does not have enough concentration, there would have been minimal post-trial loss of earnings. Again, this aspect required extensive cross-examination. Although the defendant’s cross-examination did not lead to the conclusion of zero or minimal post-trial loss of earnings, suffice to say the court found that there was malingering on the part of the plaintiff on his psychiatric state. The cross-examination was in any event necessary for the court’s reasoning and determination.
   8. The plaintiff suggested that the defendant had acted unreasonably during the course of the trial, including: failed to give a reasonable offer, raised irrelevant matters during cross-examination and unreasonably disputed the plaintiff’s average monthly income. As such, he says such conduct should “offset” the effect of malingering. Suffice to say that I do not consider such conduct in defending a personal injuries claim to be so unreasonable or so out of the ordinary as to “offset” the effect of the plaintiff’s malingering behaviour in considering whether the court should deviate from the usual costs order.
2. Consequently, I agree that the plaintiff’s exaggeration of his injuries in the action had unnecessarily prolonged the proceedings and increased the costs. Such malingering behaviour on the part of a plaintiff should also be deterred. I therefore allow the defendants’ application to vary the costs order *nisi* in the Judgment, to the following costs order:

“The defendants do pay 50% of the plaintiff’s costs of the action, including all costs reserved (if any), (except the costs of the Summons dated 22 January 2020), to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations”

1. In view of the result, I make an order *nisi* that the plaintiff is to pay the defendants’ costs of and occasioned by the Summons dated 22 January 2020, to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

( Phoebe Man )

District Judge

Lincoln Cheung, Council instructed by B Mak & Co, assigned by the Director of Legal Aid, for the plaintiff

Leon Ho, Council instructed by Au & Associates, for the 1st and 2nd defendants

1. *Pak Siu Hin Simon v JV Fitness Ltd* [2017] 6 HKC 110, *Yau Wang Ngai v Win Elite International Limited*, DCEC 1536/2013, 8 May 2017 [↑](#footnote-ref-1)
2. [2018] 4 HKLRD 660 [↑](#footnote-ref-2)