# DCPI 3783/2019

[2021] HKDC 1336

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 3783 OF 2019

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BETWEEN

GURUNG DIL BAHADUR Plaintiff

and

FULCRUM ENGINEERING & CONSTRUCTION 1st Defendant

LIMITED

PENTA-OCEAN CONSTRUCTION CO., LTD. 2nd Defendant

and CHINA STATE CONSTRUCTION

ENGINEERING (HONG KONG) LTD. and

DONG-AH GEOLOGICAL ENGINEERING CO.,

LTD. trading as PENTA-OCEAN – CHINA STATE

– DONG-AH JOINT VENTURE

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Before: His Honour Judge Andrew Li in Court

Dates of Hearing: 9 September 2021

Date of Decision on Costs: 27 October 2021

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DECISION ON COSTS

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*INTRODUCTION*

1. This is a decision regarding costs at the end of the case which was withdrawn by the plaintiff at the adjourned hearing of the assessment of damages (“the AOD”) on 9 September 2021.
2. At the adjourned hearing of the AOD, the plaintiff’s solicitors, namely, Messrs WT Law Offices (“the plaintiff’s solicitors”), even though it was officially still the solicitors on record, did not turn up. The plaintiff was left to deal with the case on his own. After hearing the parties’ submissions, I allowed the plaintiff to withdraw his claim in these proceedings with costs in favour of the 1st and 2nd defendants. However, I reserved the issue of costs and the exact order on costs to be dealt with by way of a written decision which I said I would hand down in due course. This is the decision in relation to those costs.

*BACKGROUND*

1. This is originally a simple personal injury case involved an industrial accident at a construction site in Chek Lap Kok which happened on 28 September 2017. The plaintiff was employed by the defendants as a general labourer on the site (“the Accident”).
2. This case first came before me on 29 June 2021 when the defendants’ solicitors took out a summons to apply for the 2nd defendant’s main witness, who was a Korean national, to testify remotely from overseas via video conferencing facilities (“VCF”) in the technology court of the District Court at the trial. After hearing the parties on the matter, I granted leave to the 2nd defendant to allow the witness to give evidence via VCF during the trial. Further, I transferred the case to the fixture list to be tried before me commencing on 25 August 2021 with an estimated length of 3 days (with 26 and 30 August 2021 reserved). At that stage, both the issues of liability and quantum were being contested.
3. I further directed the defendants’ solicitors to arrange with the clerk of the court a Korean/English interpreter at the trial and ordered the parties to lodge the trial bundles and the opening submissions well before the commencement of the trial. The case was also removed from the running list at the same time.
4. However, just a couple of weeks before the commencement of the trial, the parties by way of a consent summons dated 10 August 2021 agreed interlocutory judgment on liability be entered in favour of the plaintiff against the defendants with damages to be assessed. The costs on the liability of the action have been agreed to be paid by the defendants to be taxed if not agreed.
5. Hence, the remaining issue for the court to deal with was on quantum only. The court therefore decided to make use of the dates originally reserved for the trial commencing on 25 August 2021 for the hearing of the AOD, with a revised estimated length of 2 days.
6. On 19 August 2021, the plaintiff’s solicitors lodged the trial bundles with the registry. Although it was lodged out of time and in breach of the court’s order dated 29 June 2021, the court was prepared to accept the slight delay as it did not want to jeopardize the trial dates.
7. However, it was found that the trial bundles had not been properly prepared which required the court to send out directions to the plaintiff’s solicitors on 20 August 2021 to ask them to re-arrange the trial bundles and have them re-lodged with the court by 5:00 pm on 23 August 2021, ie 2 days before the commencing of the AOD. The revised trial bundles were re-lodged by the plaintiff’s solicitors before the deadline.
8. Thus, the case was ready to proceed to the AOD on 25 August 2021.
9. However, on the day before the AOD, completely out of the blue, the plaintiff’s solicitors issued an inter-parte summons (against the plaintiff only) under O67 r6(1) of the Rules of the District Court, Cap 336H (“RDC”) seeking a declaration that they should cease to be the solicitors acting for the plaintiff in this action (“the Summons”). The plaintiff’s solicitors originally tried to fix the Summons before me, without first consulting the listing office or my clerk, for a 3-minute hearing (with a request for abridgment of time for the service) at 9:30 am on the first day the AOD hearing. However, the listing office considered that it was inappropriate for me to hear the Summons as I was going to be the trial judge for the AOD and it might prejudice my position to hear the AOD once I hear the Summons. Hence, the Summons was fixed by the listing office before one of the PI Masters, namely, Master Catherine Cheng (“Master Cheng”) for hearing at 9:30 am on the date of the AOD, as is common in such applications. The daily cause list published on that day reflected such change.

*DISCUSSION*

*Events happened on the first day of the AOD*

1. Mr Tsui of the plaintiff’s solicitors appeared before me at the commencing of the AOD on 25 August 2021 fully expecting me to deal with the Summons, despite of the fact that the Summons was not listed before me on that day under the daily cause list. I pointed this out to him and directed him and the plaintiff (who was the respondent in the Summons) to appear before Master Cheng in another court room in the same building in order to deal with the Summons.
2. However, I noted that the plaintiff’s solicitors had not arranged a Nepali interpreter for the plaintiff to attend the AOD and he was relying on a friend who was accompanying him to court to translate for him. This clearly was not satisfactory.
3. I would also like to note here that up to this stage, the defendants and their legal representatives, including the defendants’ counsel who was instructed to appear before me at the AOD, had no inkling at all about the fact that the plaintiff’s solicitors were going to make such an application. The first time they were aware of this was at the commencement of the AOD before me.
4. I therefore stood down the case for Mr Tsui and the plaintiff to appear before Master Cheng to deal with the Summons. For the record, I had not read the affirmation in support of the plaintiff’s solicitors’ application to cease to act which was put inside a sealed envelope. I therefore did not know the grounds on which the plaintiff’s solicitors tried to make last minute application.
5. When the plaintiff and Mr Tsui returned to my court room at around 11:40 am, I was informed by Mr Tsui that Master Cheng had adjourned the Summons to 31 August 2021 at 9:30 am for arguments before her. The main reason for that adjournment was due to the fact that the Summons had not been served on the plaintiff as required under O67 r6(1) of the RDC.
6. I therefore had no alternative but to adjourn the AOD to a later date pending the decision of Master Cheng on the Summons. Hence, the AOD was adjourned to 9 September 2021 at 9:30 am in my court with an estimated length of 2 days (with 10 September 2021 reserved). I also reserved the issue of costs on that day and directed a Nepali interpreter to be arranged by the court to appear at the adjourned AOD.

*Result of the Summons*

1. According to the court’s record, at the end of the hearing on 31 August 2021, Master Cheng made an order that *“upon compliance with the requirements of Order 67 rule 6(1) of the Rules of the District Court, Messrs. WT Law Offices cease to be the Solicitors for the Plaintiff in this action and there be no order as to costs of this application.”.*
2. O67 r6(1) of the RDC requires the solicitors who make a cease to act application to do the following three things before they can officially come off the record as the solicitors acting for a party. They are:-

“(a) serves on every other party to the cause or matter (not being a party in default as to acknowledgment of service) a copy of the order; and

(b) procures the order to be entered in the Registry; and

(c) leaves at the Registry a copy of the order and a certificate signed by him that the order has been duly served as aforesaid,

…”

*Events at the adjourned AOD*

1. At the adjourned AOD on 9 September 2021 before me, the plaintiff’s solicitors did not show up. Only the plaintiff had turned up in person. On this occasion, a qualified Nepali interpreter was arranged by the court to interpret for the plaintiff.
2. At the outset of the hearing, the plaintiff indicated to the court that he wished to withdraw his claim and did not want to proceed further in the case. He understood that by doing so, he would be liable for the legal costs involved as a result of the aborted hearing.
3. At this juncture, Mr David Yuen, the defendants’ counsel, informed the court that they had never been served a copy of Master Cheng’s Order given by her on 31 August 2021. The last document received by the defendants was on 27 August 2021 when the plaintiff’s solicitors enclosed the medical receipts of the plaintiff. Thereafter, Mr Yuen informed the court that they had not received anything else from the plaintiff’s solicitors.
4. Upon the court’s enquiry, the plaintiff also confirmed that he had not been served a copy of Master Cheng’s Order in relation to plaintiff’s solicitors’ cease to act application.
5. Incidentally, upon checking the court’s files, it has also been confirmed that the plaintiff’s solicitors had failed to file a copy of Master Cheng’s Order dated 31 August 2021 with the registry and served a signed certificate of the same in accordance with O67, r6(1)(c) of the RDC.
6. According to Mr Yuen, the defendants’ position is that if they had been served with the Order, then most likely his attendance would not be required at the adjourned AOD. Mr Yuen therefore submitted that two hearings were wasted as a result of the plaintiff’s solicitors’ very late application to apply to cease to act for the plaintiff and their failure to serve the Order of Master Cheng given on 31 August on the defendants. He therefore submitted that the costs of the defendants should be paid by either the plaintiff and/or the plaintiff’s solicitors.
7. Mr Yuen further submitted that the plaintiff’s solicitors had all along led the defendants to believe that that they would appear on behalf of the plaintiff at the AOD. First, they had filed the written opening submission on behalf of the plaintiff in accordance with the court’s directions. Then they had prepared and served the trial bundles on 19 August 2021. It was only at the original scheduled date of the AOD on 25 August 2021 that the defendants had first been notified that the plaintiff’s solicitors wished to cease to act for the plaintiff. Besides, that application was taken out on the day before the AOD only. Mr Yuen submitted that if the plaintiff’s solicitors’ ground to apply for ceasing to act was in order to obtain costs on account from the plaintiff, then they would have plenty of opportunities to do so before the AOD itself. Instead, they proceeded to set down the case for trial without ensuring there was sufficient funds on account. According to the plaintiff, it was only a couple of days before the original date of the AOD on 25 August 2021 that the plaintiff’s solicitors had asked him to pay the counsel’s fees and put money as costs on account.
8. After standing down the case for a little while in order to allow Mr Yuen to take instructions from his clients, Mr Yuen returned to court and suggested that the following split costs order to be paid by the plaintiff and the plaintiff’s solicitors:-
9. from the commencement of proceedings up to 21 March 2021, ie before the case was set down for trial on the Running List, the costs should be borne by the plaintiff personally; and
10. from 22 March 2021 (ie the date when the plaintiff’s solicitors filed the application to set down for trial) up to date of the adjourned AOD on 9 September 2021, the costs should be borne by the plaintiff’s solicitors personally.
11. Upon checking the court’s record, it was found that the case was actually set down for trial on 26 April 2021, and not on 22 March 2021 as stated by Mr Yuen.
12. The plaintiff made it clear to the court that he is not in the position to pay any of the costs in this case as he is not on legal aid. He has a manual labour job and with a heavy family responsibility. He asked the court to allow him to withdraw the claim without any penalization on the issue of costs.

*Order of the court*

1. As of the date of the adjourned AOD, the plaintiff’s solicitors were officially still as the solicitors of the plaintiff on record in this case as they had failed to observe the 3 requirements under O67, r6(1) of the RDC which had been specifically mentioned in the Order of Master Cheng on 31 August 2021.
2. For the sake of minimizing the costs in this case and to avoid further attendance of the defendants’ lawyers, I allowed the plaintiff leave to withdraw his claim in these proceedings with costs in favour of the 1st and 2nd defendants. However, I also made an order at the same time that the issue of costs would be dealt with at a later date by way of paper disposal.
3. Having heard the defendants’ submissions, I shall make an order nisi that the defendants’ costs should be borne by the plaintiff and his solicitors in the following manner:-
4. from the commencement of proceedings up to 25 April 2021, ie before the case was set down for trial, the costs to be borne by the plaintiff; and
5. from 26 April 2021, ie the date on which the case was set down for trial and up to the date of the adjourned AOD on 9 September 2021, the costs to be borne by the plaintiff’s solicitors personally.

*Costs directions*

1. Given the above circumstances, it is plain that the plaintiff’s solicitors had attempted to make a last minute application to cease to act on behalf of the plaintiff on the first day of the AOD only. In my view, there is no reason why the plaintiff’s solicitors could not have made such an application well before the AOD or at the latest when the case was set down for trial.
2. Subsequently, despite the Order made by Master Cheng on 31 August 2021 to allow the plaintiff’s solicitors to cease to act on behalf of the plaintiff, they have still failed to observe the specific requirements under O67 r6(1) of the RDC. Hence, officially, they are still the solicitors on record. As officers of the court, they have a duty to explain to the court why they did not turn up at the adjourned AOD on 9 September 2021. Further, they also have to explain why they had only made the application to cease to act on the first day of the AOD. However, before the court is going to decide whether it should order the costs to be partially borne by the plaintiff’s solicitors as suggested by the defendants’ counsel as mentioned above, I am going to allow the plaintiff’s solicitors the opportunity to explain themselves and to show cause as to why they should not be at least ordered to bear part of the costs of the proceedings in this case.

1. In order to make it more costs effective and to avoid another unnecessary hearing, I would like to deal with this matter by way of paper disposal. I shall therefore direct the plaintiff’s solicitors to show cause within 21 days in writing as to why they should not be liable to pay at least part of the costs of the defendants as stated above. They should do so by way of lodging a written submission with the clerk of this court within 21 days from the handing down of this decision with copy served on the defendants and the plaintiff. The defendants will have chance to reply to those submissions within 14 days thereafter by way of written submission also. They should lodge it with the clerk of this court with copy served on the plaintiff’s solicitors and the plaintiff. The court will hand down its decision on costs in writing after having the chance to read the written submissions to be lodged by the parties.

( Andrew SY Li )

District Judge

Mr W Tsui of WT Law Offices, for the plaintiff (who did not appear at the hearing)

Mr David Yuen, instructed by Kim & Company, for the 1st and 2nd defendants