DCPI 2370/2014

[2020] HKDC 165

**IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.2370 OF 2014

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BETWEEN

YAU PO SHAN Plaintiff

and

THE EXPRESS LIFT COMPANY LIMITED 1st Defendant

SYNERGIS MANAGEMENT SERVICES 2nd Defendant

LIMITED

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Before: Deputy District Judge S.H. Lee

Dates of Plaintiff’s Submissions: 9 January, 3 February & 19 March 2020

Dates of 1st Defendant’s Submissions: 23 January & 19 March 2020

Date of 2nd Defendant’s Submissions: 10 January 2020

Date of Judgment: 27 March 2020

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**JUDGMENT ON COSTS**

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*Introduction*

1. Following a 3-day trial of this action from 25 to 27 Feb 2019, I reserved my judgment. All parties then agreed that submissions on costs be made after my judgment is handed down.
2. By my judgment handed down on 8 Nov 2019 (**the Judgment**)[[1]](#footnote-1), I enter judgment in favour of plaintiff (**P**) against the 1st defendant (**D1**) in sum of $206,610 together with interest[[2]](#footnote-2) and I dismiss P’s claim against the 2nd defendant (**D2**)[[3]](#footnote-3). And I find it unnecessary in the Judgment to decide on contribution proceedings issued by D2 against D1 (**the Contribution Proceedings**)[[4]](#footnote-4).
3. I direct in the Judgment that parties concerned do endeavor to agree on costs of main action and on disposition of, and costs of, the Contribution Proceedings.
4. By parties’ joint letter to court dated 11 Dec 2019, P and D1 agreed that, in the main action, P is entitled to costs from D1 with certificate for one counsel.
5. All parties have thereafter made written submission on outstanding issues in line with court directions dated 16 Dec 2019. D1 and D2 agreed later that there be no order on the Contribution Proceedings by way of its disposition.

*Outstanding Issues*

1. What remains to be decided by this court are 3 issues, namely, whether or not: -
2. D1 is liable to pay P’s costs of main action on indemnity basis and/or with interest(and also enhanced intereston judgment P obtained againstD1) as contended by P for alleged sanctioned offers made by P to D1 and allegedly beaten by P after trial (**Issue 1**);
3. D2’s costs of main action should, as contended by P, be paid by D1 by way of a Sanderson order (D2 being neutral on that) or such other order this court sees fit to make, or should be borne and paid for by P as contended by D1 (**Issue 2**);
4. D2’s costs of the Contribution Proceedings should, as contended for by D2, be paid by D1 with certificate for counsel or that there should be no order as to costs of the Contribution Proceedings as submitted by D1 (**Issue 3**).
5. This 2nd judgment on costs is my paper disposal of Issues 1 to 3 pursuant to consent of the parties concerned. Unless otherwise stated, abbreviations in the Judgment shall be adopted here. Affidavit evidence has been filed by parties concerned on Issues 1 to 3 and they shall be referred to below as and when it is necessary.

*Submissions on Issue 1*

1. In support of her claim, P relies on her solicitors’ letter dated 23 Mar 2018 marked “sanctioned offer” (**the 1st Letter**) making an offer of $200,000 (inclusive of interest) “plus costs and disbursements to be taxed if not agreed” in full and final settlement of her whole claim (**the 1st Offer**) which D1 did not respond.
2. P next relies on another letter of her solicitors dated 14 May 2018 also marked “sanctioned offer” (**the 2nd Letter**) making a reduced offer of $160,000 (inclusive of interest) “plus costs and disbursements to be taxed if not agreed” in full and final settlement of her whole claim (**the 2nd Offer**) which D1 did not respond.
3. P contended the 1st and 2nd Offers are valid sanctioned offer under O.22, Rules of District Court, Cap.336H[[5]](#footnote-5), that P did better than them after trial, and, pursuant to O.22 r.24, she shall be entitled to indemnity costs, enhanced interest on judgment and interest on costs as from expiry of the respective deadlines of their acceptance without requiring the leave of the court.
4. P asks this court for
5. interest on damages awarded at 6% above judgment rate from 21 Apr 2018 to 11 June 2018, and at 10% above judgment rate from 12 June 2018 to 8 Nov 2019;
6. costs on indemnity basis from 21 Apr 2018; and
7. interest on costs at 2% above judgment rate from 21 Apr 2018 until full payment.
8. D1 submitted that the 1st and 2nd Offers are not valid sanctioned offers for following reasons.

(1) They contained the same costs term of “plus costs and disbursements to be taxed if not agreed”.

(2) They were jointly made and addressed to D1 & D2, with a draft Consent Order to be signed by all 3 parties annexed to the 2nd Letter. Acceptance of the 1st and 2nd Offers could happen, D1 argued, if and only if both defendants (which had competing interest and were separately represented) reached an agreement on them, including on their respective proportion of payment. D1, it was said, could not have agreed to them on behalf of D2. And D1 could not itself have protected D1’s position on costs as D2’s consent was required.

(3) There was, said D1, uncertainty regarding costs as between P and D2, whether D2 agrees to pay P’s costs and the proportion of P’s costs each defendant agrees to pay.

1. P had not, D1 also argued, done better than the 1st and 2nd Offers as the 2 offers required D2 to pay P’s costs while the Judgment means that it is not necessary for D2 to pay P’s costs.
2. D1 further submitted that it is unjust to award indemnity costs as sought by P because, on the dates of the 1st and 2nd Letters, D1 thought that (and that is information, argued D1, then available to the parties) Wong would give evidence for it, but Wong has by trial left D1 and was no longer willing to testify for it.
3. D1 submitted that it is also unjust to award indemnity costs as P had exaggerated her claim in terms of quantum with this court awarding her in the Judgment total damages at a sum less than 1/3 of her total claim in RSOD.
4. If additional interest on award is called for, a rate of about 2% above judgment rate may, D1 submitted, be considered and it shall only be up to judgment.

*Discussions on Issue 1*

1. D1 relied on *Wong Yim Man Anthea v Wong Ho Ming Felix* [2016] 3 HKLRD 249 to submit that the 1st and 2nd Offers, containing the costs terms as they did, are not valid sanctioned offer within O.22. I disagree.
2. *Wong Yim Man Anthea*, supra, can, I think, be distinguished as defendant’s offer therein proposing “**no order** **as to costs of this action**” effectively *prevents* the costs consequences on its acceptance specified under O.22 r.20[[6]](#footnote-6). An offer with such a costs term therefore cannot be accommodated in O.22 regime by reason of its *irreconcilable* conflict with O.22 r.20(1)[[7]](#footnote-7).
3. *Wong Yim Man Anthea*, supra,is not authority for the proposition that a valid sanctioned offer can never include a term as to costs *as such*. It is only if the term as to costs *conflicts* with the costs consequence prescribed by some rule(s) in O.22 that the sanctioned offer will be rendered invalid: “*Xin Nan Tai 77*”, unreported, HCAJ 48/2011, 30 November 2017, para 28 & 29.
4. The costs term of ““**plus costs and disbursements to be taxed if not agreed**” in the 1st and 2nd Offers can, I think, readily be construed and should be construed to validate the 2 offers to refer to costs consequences specified under O.22 r.21(1) on acceptance of plaintiff’s sanctioned offer i.e. P is entitled to her costs of the proceedings up to the date upon which the defendant serves notice of acceptance: see *Dutton v Minards* [2015] EWCA Civ 984, para 28-34; *Neave v Neave* [2003] EWCA Civ 325, para 19, 20 & 32.
5. There is, I think, no irreconcilable conflict of the said costs term of the 1st and 2nd Offers with O.22 r.21(1) or the regime of O.22 in terms of costs.
6. It appears that D1 also relied on *Wong Yim Man Anthea*, supra, to argue that the 1st and 2nd Offers are invalid sanctioned offer as they are made to D1 and D2 *jointly* requiring their *joint* *acceptance*. Such argument by reference to *Wong Yim Man Anthea*, supra, is, I think, misplaced. On its facts, the case was never so decided to suggest such proposition now advanced by D1.
7. Significantly, D1 refers to no order, no rule and no other authority to seek to persuade this court that a sanctioned offer cannot be made by a plaintiff to more than one defendant *jointly*, or that such an offer conflicts with any particular rule of O.22 and cannot be accommodated within the regime of O.22.
8. I tend to agree with P that a valid sanctioned offer can be made by a plaintiff to more than one defendant *jointly* but I would leave that for future decision if it is really required.
9. The reason is that, irrespective of the position of the 2nd Offer, I am satisfied that the 1st Offer contained in the 1st Letter was not an offer made to D1 and D2 *jointly* as contended by D1 and thus D1’s objection to the 1st Offer on such ground has no basis at all.
10. Though the 2nd Letter contained “for your consideration and comments” a draft consent order, whose contents require both D1 and D2 to pay P settlement sum and to pay P’s costs of the action in order to obtain both their discharge and whose body requires it to be signed by all 3 parties, the 1st Letter contained no such draft consent order.
11. By the 1st Letter, P’s solicitors were, I think, simply making the same 1st Offer to D1 and D2 at the same time by addressing their respective solicitors on the same occasion. P’s solicitors nowhere wrote in the 1st Letter that it was a term of the 1st Offer that it must be accepted by both defendants *jointly*. At its 2nd last paragraph, P’s solicitors used, I note, the *singular* word of “client” after the word “respective” to indicate that *either* D1 *or* D2 could have accepted the 1st Offer on its own within time or out of time.
12. Hence, the 1st Offer can, I think, readily be construed and should be construed to validate it (if required at all) as a sanctioned offer of the same terms made on the same occasion of the 1st Letter to D1 and D2 *separately* and open to *either* acceptance. In other words, D1 could have, I think, *without* any consent from D2, agreed to the terms of, and accepted, the 1st Offer on its own as the 1st Offer was *also* made in the 1st Letter to D1 *separately*.
13. Had D1 itself accepted the 1st Offer on its own within time, the costs consequences specified under O.22 r.21(1) shall automatically, I think, apply as between P and D1.
14. O.22 r.13 will, I think, also come into play to require D1 to serve its notice of acceptance of the 1st Offer on D2 at the same time of serving it on P, such that D2 could apply for directions as to any question of costs between it and D1 and for other directions relating to the said acceptance.
15. And such stay arising from D1’s acceptance of the 1st Offer does not affect the power of the court to deal with any question of costs relating to the proceedings: see O.22 r.22(5)(b).
16. Thus, there is, I think, no question of uncertainty regarding costs as between P and D2, between D1 and D2, or respective proportion of payment by each defendant as contended by D1.
17. I therefore find the 1st Offer a valid sanctioned offer.
18. Contrary to D1’s suggestion, on my construction of the 1st Offer made to D1 and D2 *separately* on the same occasion of the 1st Letter, this sanctioned offer does not require D2 to pay P’s costs (or damages to P) on D1’s acceptance of it.
19. Moreover, the words “judgment” and “held liable” in O.22 r.24(1) connote what the trial judge holds or decides on the *substantive* issues in the case as distinct from the *ancillary* issue of *costs* to be determined after the substantive issues are decided: *Sunbeam Investment Ltd v IO Villa Veneto* [2011] 1 HKC 86, 96D-E, H, 98G-H.
20. Disregarding the ancillary issue of costs in line with *Sunbeam Investment Ltd*, supra, I enter a judgment of $206,610 with interest against D1 in the Judgment. This “judgment” must, I think, be “more advantageous” to P than (and D1 has certainly, I think, been “held liable” for more than) the proposal of $200,000 (inclusive of interest) contained in the 1st Offer as per the wordings of O.22 r.24. Putting aside interest, P has, I think, beaten the 1st Offer by $6,610.
21. In my views, O.22 r.24 is thus triggered by the 1st Offer, if not also by the 2nd Offer.
22. By O.22 r.24(4) & (5), this court shall make the orders in r.24(2) & (3) unless it considers it unjust to do so after taking into account all the circumstances of the case, including 4 matters specified in r.24(5)(a)-(d).
23. Regarding unavailability of Wong as D1’s witness at trial, Mr Lo appearing for D1 at trial informed this court on day 1 that Wong left D1 as early as in July 2016 and that D1’s solicitors were recently advised by Wong that he was no longer willing to testify for D1[[8]](#footnote-8).
24. So, on the date of the 1st Offer i.e. 23 Mar 2018, I think D1 had (or ought to have) already known of Wong’s departure and the risk of him not giving evidence for it voluntarily at trial. Moreover, D1 could, if it so desires, apply for subpoena to be issued to ensure Wong giving evidence for it at trial.
25. In any event, this risk of Wong not coming forward as D1’s witness at trial is, I think, *ordinary* litigation risk that every litigant faces (and that D1 ought to have taken this risk into account in assessing the 1st Offer made by P).
26. This issue of Wong giving evidence for D1 is, I think, entirely an *internal* affair of D1 and there is absolutely no question of P withholding any material information from D1. Considering the progress of this action by the date of the 1st Offer[[9]](#footnote-9), D1 had by then, I think, adequate information at its disposal to evaluate the 1st Offer.
27. Regarding the quantum of damages awarded to P in the Judgment, Mr Lung appearing for P at trial had, I think, sensibly reduced P’s PSLA claim from $350,000 in RSOD to $180,000 to $220,000 at trial. This court at the end of the day allowed $180,000 and rejected D1’s suggestion of $100,000[[10]](#footnote-10). Mr Lung also sensibly, I think, abandoned P’s claim for costs of future surgery[[11]](#footnote-11).
28. It is true that this court has reduced P’s claim for special damages[[12]](#footnote-12) and dismissed P’s claim for loss of earning capacity[[13]](#footnote-13). But this court also rejected D1’s submissions against P’s entitlement to recover consultation fee she paid Dr Chang in Mar 2012 and such sums she spent in chiropractic treatment[[14]](#footnote-14).
29. In terms of time spent at trial, the evidence of P was, I think, relatively short and P’s case was finished within day 1. Hence, notwithstanding the above matters urged by D1, the time of this court at trial was not wasted (indeed, this action was finished within 3 days of its 4-day fixture time). And this court nowhere in the Judgment found P a malingerer[[15]](#footnote-15).
30. It is true that P recovered in the Judgment by way of total damages at a sum less than 1/3 of that she sought in RSOD. But, what is important, I agree with the similar analysis in *Ng Yuek Lang Sophia v Chiu King Wa* [2019] 4 HKLRD 364, 369-371, is that my total award to P (after so many reductions and deductions above) still exceeds the 1st Offer by no small margin and that D1 had never accepted the 1st Offer to avoid trial (indeed, D1 did not make any counter-offer or sanctioned payment on the affidavits filed before me).
31. All the circumstances of the case, including all such matters above urged by D1, having been considered, I do not find it unjust to make the orders sought by P under O.22 r.24(2) & (3).
32. All thing considered, I order D1 to pay P: -
33. interest on damages of $206,610 awarded to P at 6% above judgment rate from 21 Apr 2018 until the Judgment;
34. P’s costs of the main action after 21 Apr 2018 on indemnity basis; and
35. interest on P’s costs in (2) above at 5% p.a. from 21 Apr 2018 until this 2nd judgment on costs.

*Submissions on Issue 2*

1. P submitted that a Sanderson order is appropriate as it was reasonable in all the circumstances of this case for her to join D2 to these proceedings for the following reasons.

(1) D2 plainly owed common duty of care to P as occupier of the Lift and was an obvious defendant.

(2) Despite letters in 2014 to D1, D2 and D2’s insurer, P could not obtain relevant document on internal arrangement between D1 and D2 on the Lift, and P did not know that the Lift failed in the Accident because of KVAB Relay failure.

1. It is, further submitted by P, reasonable for her to continue her claim against D2 for the following reasons.

(1) D1 denied liability and refused to accept P’s offers.

(2) There is, argued P, real risk that D1 can rely on technical arguments to defend the issue on liability.

(3) D1 also shifted the blame on D2 in its Amended Defence in the Contribution Proceedings.

(4) In view of the 5 Incidents that happened shortly before the Accident, CP Wong also agreed at trial that a responsible manager would undertake a thorough examination of the Lift.

1. At all stages of these proceedings, there existed, argued P, sufficient uncertainty and doubt in the evidence that it was reasonable for P to claim against D2.
2. If P is to bear D2’s costs, her entire award, it was argued, will most likely be applied for that purpose and justice demands that a Sanderson order be made so that damages awarded to her would truly go to compensate her loss as a result of the Accident.
3. If this court is not minded to make a Sanderson order, P asks that a Bullock order be made against D1.
4. D1 submitted that it had never put any blame on D2 in its Amended Defence. In its Amended Defence in the Contribution Proceedings, D1 had just reiterated P’s allegations against D2 and did not make any new allegation on its own.
5. There is, argued D1, no evidence to suggest any real risk that D1 may either be absolved from liability or unable to satisfy any judgment that P may obtain against it, as D1 was insured under its maintenance contract in relation to the Lift.
6. D1 submitted that the evidence indicated that D2 had already fulfilled its duty such that P should not have joined D2 to these proceedings. P should, said D1, pay for her wrong decision to sue D2.
7. D1 should not, argued D1, be penalized for D2’s early failure to disclose documents to P and, after such documents were made available, P should have analyzed her case and discontinue her claim against D2. D1 should not be asked to pay for P’s wrong decision to continue suing D2.

*Discussions on Issue 2*

1. For the applicable principles on this issue, I refer to *Chong Ngan Seng v China Harbour Eng Co Ltd & others*, unreported, CACV 54/2012, 25 Sept 2013, para 6 & 7, which say: -

“In deciding whether to make a Sanderson or Bullock order and, if so, which of the two orders to make, the court is exercising its discretion… in deciding whether to exercise that discretion, the court looks to see whether it was reasonable in all the circumstances of the case for the plaintiff to join the successful defendant in the action…”

1. Another recent restatement of the principles is, I think, para 6 of the judgment of Bharwaney J. in *Fung Chun Man v Hospital Authority*, unreported, HCPI 1113/2006, 20 Feb 2012, which reads: -

“The classic case where a Sanderson or Bullock order is made is where the unsuccessful defendant blames the successful defendant and causes the plaintiff either to join the successful defendant or to continue the proceedings against the successful defendant. However, even absent such circumstances, it may be reasonable for the plaintiff to join the unsuccessful defendant, in cases where the plaintiff is faced with a denial of liability by the unsuccessful defendant and the real risk that the unsuccessful defendant may either be absolved from liability or unable to satisfy any judgment that may be obtained against him. In such circumstances, if the plaintiff is in possession of evidence that can implicate the successful defendant, evidence that is neither tenuous nor speculative nor far-fetched, it would be reasonable for the plaintiff to join or to proceed against the successful defendant and the court, at the conclusion of such a case, may, in the exercise of its discretion over costs, make a Sanderson or Bullock order”

The above restatement was recently quoted at para 27 of *Lai Yau Tai v Moral Accord Ltd & others* [2019] HKDC 1316 cited by D1.

1. In deciding on the question of reasonableness, the court must not lose sight of the uncertainties that surround a case at its earlier stages prior to trial or capitulation: *Leung Lai-ha & another v Hon Sau-ling & another* [1993] 1 HKLR 86, 91.
2. Focusing on the earliest stage of these proceedings up to P’s filing of Statement of Claim in Aug 2015, I agree with P’s submissions that P was uncertain about the cause of the Accident and the internal arrangement between D1 and D2 regarding the Lift and that it was reasonable for her to join D2 to these proceedings for the following reasons.
3. As a passenger within the Lift at the time of the Accident and absent any investigation report on the cause of the Accident[[16]](#footnote-16), P could not tell, and did not know about, the cause of the Accident.
4. On affidavit evidence before me, D1, D2 and D2’s insurer had not responded to P’s solicitors’ pre-action letters all made in Oct 2014 to give any clue on the uncertainties above and below.
5. Neither did D2 respond to P’s discovery request by P’s solicitors’ letter in Oct 2014 for records of system and/or regulation adopted by, inter alia, D1 on maintenance inspection of the Lift, and records of regular checks of the Lift carried out by, inter alia, D1, covering the date of the Accident.
6. Looking at the writ issued in Oct 2014 and Statement of Claim filed in Aug 2015, P’s legal team, I think, apparently did not know about the correct internal arrangement of the Lift as between D1 and D2 (if any) and was laboring under the mistake that D1 was the *contractor or agent of D2* in maintaining the Lift, for whose fault D2 was *vicariously* liable[[17]](#footnote-17).
7. As manager of the Estate including Block 6, D2 arguably, I think, owed common duty of care under OLO to passengers of the Lift and residents of Block 6 using the Lift[[18]](#footnote-18) and was arguably in breach of it in the Accident, especially against the background of the 5 Incidents that happened shortly before the Accident[[19]](#footnote-19).
8. The case then presented by P’s Statement of Claim against both D1 and D2 was, one notes, based on the same factual circumstances of the Accident and the same particulars of negligence and breach of common duty of care against them.
9. The 5 Incidents are, I agree with P, material evidence in her possession that can implicate D2. Though the 2nd ground raised by Mr Lung on them[[20]](#footnote-20) failed after trial, I do not consider it tenuous, speculative or far-fetched before trial.
10. Moving on with time, I agree with D1 that D1 had not in its Defence filed in Sept 2015 put any blame on D2. Such blame on the successful defendant by the unsuccessful defendant has been described as “weighty” and observed to be “significant” in the making of Sanderson or Bullock order according to the Court of Appeal in *Chong Ngan Seng*, supra. But its absence is, I observe, no bar to their making if otherwise appropriate according to Bharwaney J. in *Fung Chun Man*, supra.
11. Thereafter, by list of documents filed by D1 in Sept 2015, list of documents filed by D2 in Feb 2016 and witness statement of Wong filed by D1 in May 2016, I also agree with D1 that P came to know more of the Accident and the maintenance of the Lift, including the contactor problem of its KVAB Relay on the day of the Accident, by way of pertinent documents disclosed by D1 like the Logbook[[21]](#footnote-21) and the Test Report[[22]](#footnote-22).
12. However, I disagree with D1’s submissions that P should discontinue her claim against D2 at this stage or, indeed, before trial. For such uncertainty, reasons and further development below, I think it reasonable for P to continue pursuing D2 to trial.
13. Uncertainty, I think, persisted until trial as to the *underlying* cause leading to the contactor problem of the KVAB Relay of the Lift on the day of the Accident[[23]](#footnote-23) (Wong did not explain so in his witness statement).
14. Uncertainty, I think, persisted until trial as to the *actual* manner of maintenance of the KVAB Relay of the Lift, if at all, shortly before the Accident[[24]](#footnote-24) (Wong did not elaborate on that in his witness statement).
15. It was, I think, very difficult to tell or predict before trial what could be revealed upon cross-examination of Wong and of CP Wong (whose witness statement was made in Apr 2016) at trial. It could well be the case that cross-examination of Wong at trial could advance P’s case against D2.
16. D1 persisted to deny its lability to P. With no expert evidence at her disposal, P cannot, I think, be assured of proving her case against D1 at trial even after cross-examining Wong. There was, I think, a real risk before trial that D1 may escape from liability[[25]](#footnote-25).
17. While this court absolved D2 from liability after trial, P had, I think, an arguable case before trial to go after D2 for reasons stated above. P’s case against D2 was not, I think, doomed to fail as D1 now submits with the benefit of hindsight.
18. Thereafter, circumstances developed (or actions were taken by D2 and D1 later) in P’s favour below such that there was, I think, further reason to keep D2 to these proceedings until trial should D1 persist to deny liability.
19. In Apr 2017, D2 changed its solicitors and D2’s new solicitors took out the Contribution Proceedings against D1.
20. In May 2017, the supplemental witness statement of CP Wong was filed by D2. CP Wong pointed at para 8 thereof D1 was under obligation to inspect and maintain, specifically, KVAB Relay of the Lift under the provisions of the 2011 Contract[[26]](#footnote-26).
21. In June 2017, in its Defence filed in the Contribution Proceedings, D1 made admissions about KVAB Relay of the Lift and repeated P’s particulars of negligence made against D2 in P’s Statement of Claim in the main action[[27]](#footnote-27).
22. In July 2017, in answer to the Interrogatories served by D2, D1 filed the Affidavit made by its field manager, who made valuable admissions about KVAB Relay[[28]](#footnote-28) and also disclosed for the first time the Report (with D1 recognizing problems with KVAB Relay with the lifts of the Estate and suggesting their renewal before the Accident[[29]](#footnote-29)), thus allowing Mr Lung to run the 1st Ground against D2 at trial[[30]](#footnote-30) and allowing P more evidence to go after D1 at trial.
23. In Mar 2018, D1 repeated its admissions made about KVAB Relay in the pleadings of the Contribution Proceedings in its Amended Defence filed in the main action[[31]](#footnote-31).
24. Against the above background of new development, there was, I think, every reason for P’s legal team to believe before trial that there could be some in-fighting between D1 and D2 at trial to P’s advantage one way or another. CP Wong could, for example, give evidence under cross-examination or otherwise in P’s favour at trial against D1.
25. Hence, P has satisfied me in all the circumstances of this action that it was reasonable for her to join D2 to these proceedings and to continue pursuing D2 to trial.
26. All circumstances considered and to avoid any unnecessary taxations and/or risk of P’s award being used to pay costs, I exercise my discretion to make a Sanderson order to direct D1 to pays D2’s costs of the main action to D2 directly.

*Submissions on Issus 3*

1. D2 submitted that D2 is effectively the winner of the Contribution Proceedings, as this court dismissed P’s claim against D2 and upheld P’s claim against D1. Costs should, argued D2, follow the event.
2. By finding that P succeeded against D1, this court, submitted D2, effectively also found that D2 was successful in showing its ground of contribution against D1. It is thus neither fair nor just to deprive D2 its costs of the Contribution Proceedings.
3. D2 also submitted that D1 had failed to beat D2’s numerous reasonable offers made both before and after commencement of the Contribution Proceedings. But for, D2 argued, D1’s unreasonable refusal to accept D2’s reasonable offers, the parties would not have embarked on a full trial.
4. D1 submitted that it is quite clear that P could not claim against D2 and thus D2 should not, or needed not, have initiated the Contribution Proceedings against D1. D1 stressed that D2 has the Logbook in its possession and that D2 should have known that P could not have sued it successfully.
5. The settlement offers made by D2 to D1, argued D1, are quite irrelevant.

*Discussions on Issue 3*

1. I agree with D2 that D2 emerged after the Judgment as the winner of the Contribution Proceedings and that costs of the Contribution Proceedings should follow this event.
2. In the Judgment, I find in D2’s favour that it was not in breach of its common duty of care towards P under OLO on the 1st and 2nd Grounds[[32]](#footnote-32) for the Accident and that makes D2, I think, the winner: see also *Lau Yau Tai*, supra, para 50 & 51.
3. Moreover, as I find D1 liable in negligence to P in the Judgment[[33]](#footnote-33) for the same damage she sustained in the Accident that P also pursued D2 for breach of common duty of care under OLO, I also agree that D2 had established its right to seek contribution from D1 under the Civil Liability (Contribution) Ordinance, Cap.377.
4. In other words, had D2 been held liable in the main action for the same damage sustained by P (or but for D2’s successful defence in the main action), this court would have ordered D1 to make contribution to D2 in the Contribution Proceedings.
5. I disagree with D1 that it was unnecessary for D2 to take out the Contribution Proceedings against D1 as it did.
6. I repeat herein my analysis of the state of parties’ pleadings and evidence, including witness statements and documents, and their uncertainty before trial in my discussions of Issue 2 above. P had, I think, an arguable case to sue, and go after, D2 and its end result was so uncertain before trial that it was, I think, reasonable for D2 to issue the Contribution Proceedings against D1. Such submissions to the contrary by Mr Poon now instructed for D1 were, I think, made with the benefit of hindsight of the Judgment.
7. Hence, for similar reasons given at para 20-24 of *Lau Chu Wing v Law Wai Shing & Others*, unreported, DCPI 1389/2007, 11 June 2008, I find it neither just nor fair to deprive D2 its costs of the Contribution Proceedings as contended for by D1, which borne, on the Judgment, the *ultimate* responsibility in causing the Accident, this action and, I think, the Contribution Proceedings by its *fault*.
8. Though it is not strictly necessary for my decision on this issue, I also deal briefly below with D2’s submissions on its settlement offers to D1.
9. I disagree with D1’s submissions that these offers from D2 are irrelevant. They are, I think, relevant to the issue of costs and are admissible as written offer of contribution under O.16 r.10[[34]](#footnote-34) (and O.62 r.5(1)(a)) and/or written offers marked “without prejudice save as to costs” under O.62 r.5(1)(d), as O.22 does not apply as between co-defendants and D2 could not have protected its position as to costs by means of sanctioned offer: see *Hong Kong Civil Procedure 2020*, Vol.1, para 16/10/1 & 22/1/23.
10. I therefore agree with D2 to take these offers into my consideration on this issue. They are found in “without prejudice” correspondences passing between D2’s former and current solicitors and D1’s solicitors exhibited as “FKLK-01”[[35]](#footnote-35) and “PWHY-2”[[36]](#footnote-36). I adopt summary of them helpfully prepared by Mr Lai instructed for D2 at para 7 & 8 of his written submissions.
11. Prior to issue of the Contribution Proceedings in Apr 2017, D2 started offering to bear 10% liability in May 2016 and it was increased to as much as 50% liability in Mar 2017. D2 once offered to D1 in Oct 2016 to make joint sanctioned payment of $224,000 to P with D2 bearing 30%.
12. After the issue of the Contribution Proceedings, D2 had increased its offer to D1 to agree to bear as high as 75% liability by July 2017. In Oct 2017 and Apr 2018, D2 further offered to D1 to make joint sanctioned payments of the respective sums of $160,000 and $180,000 to P with D2 bearing 75%.
13. In the Judgment, I find D2 not liable to P at all after trial. By the 2nd Offer made in May 2018, P was prepared to accept as little as $160,000 (inclusive of interest) plus costs from D1 and D2 in settlement of her whole claim as evidenced from the draft consent order annexed to the 2nd Letter.
14. I cannot but agree with D2 that its offers to D1 above are more than reasonable. D1 had, I think, unreasonably declined to accept them. In so far D1 was concerned with D2’s costs of main action and of the Contribution Proceedings, it could, as D2 then reasonably suggested and I agree, be left to be determined by court. Had D1 adopted a reasonable attitude to these reasonable offers from D2, I consider it most likely that the Contribution Proceedings and this disproportionately costly 3-day trial could both have been avoided.
15. For this reason of settlement offers from D2, I would also have found against D1 on this issue and ordered D1 to pay D2 the costs of the Contribution Proceedings.

*Dispositions*

1. Therefore, on top of those at para 192 & 193 of the Judgment, I make further orders in the main action as follows: -

(1) D1 shall pay P further interest on the total damages of $206,610 awarded to P in the Judgment at 6% above judgment rate from 21 Apr 2018 until the Judgment;

(2) D1 shall pay P’s costs of main action (inclusive of all reserved costs and the cost of the trial, together with certificate for one counsel) to P on party-to-party basis up to 20 Apr 2018 and on indemnity basis as from 21 Apr 2018, to be taxed if not agreed;

(3) D1 shall pay P interest on P’s costs of main action as from 21 Apr 2018 at 5% p.a. from 21 Apr 2018 until this 2nd judgment on costs;

(4) D1 shall pay D2’s costs of main action (inclusive of all reserved costs and the cost of the trial, together with certificate for counsel) to D2, to be taxed if not agreed; and

(5) P shall draft, file and serve all these orders made in the main action on D1 and D2.

1. And I further make orders in the Contribution Proceedings as follows: -

(1) D1 shall pay D2’s costs of the Contribution Proceedings (inclusive of all reserved costs and the cost of the trial, together with certificate for counsel) to D2, to be taxed if not agreed;

(2) Save for costs order in (1) above, there be no order in the Contribution Proceedings; and

(3) D2 shall draft, file and serve all these orders made in the Contribution Proceedings on D1.

*Costs orders nisi in favour of P & D2*

1. I make an order nisi that costs of and incidental to P’s submissions on matters covered by this 2nd judgment on costs be paid by D1 to P as part of P’s costs of the main action ordered above.
2. I make another order nisi that costs of and incidental to D2’s submissions on matters covered by this 2nd judgment on costs be paid by D1 to D2 as part of D2’s costs of the main action and of the Contribution Proceedings ordered above.
3. It remains for me to thank all counsels for their written submissions.

(LEE Siu-ho)

Deputy District Judge

Written Submissions by Mr Leon Ho (instructed by Messrs. K. H. Teh & Co.) for the Plaintiff

Written Submissions by Mr Jackson Poon (instructed by Messrs. Huen & Partners) for the 1st Defendant

Written Submissions by Mr Alex Y.H. Lai (instructed by Messrs. Li & Partners) for the 2nd Defendant

1. [2019] HKDC 1495 [↑](#footnote-ref-1)
2. Para 192 of the Judgment. Interest runs on PSLA award of $180,000 at 2% p.a. from the date of service of the writ to the date of the Judgment and also on special damages in sum of $26,610 at half judgment rate from the date of the Accident to the date of the Judgment [↑](#footnote-ref-2)
3. Para 193 of the Judgment [↑](#footnote-ref-3)
4. Para 161 of the Judgment [↑](#footnote-ref-4)
5. Unless otherwise stated, all references to rules of court below are to Rules of District Court. Some of the cases cited below are cases commenced in the Court of First Instance with Rules of High Court, Cap.4A, applicable but the said rules have no material difference with RDC in so far this 2nd judgment on costs is concerned. [↑](#footnote-ref-5)
6. Para 15-18 therein [↑](#footnote-ref-6)
7. Para 38-39 therein [↑](#footnote-ref-7)
8. Para 41 of D1’s written opening submissions dated 21 Feb 2019 reads: “Unfortunately, Mr. Wong left D1’s employment years ago in 2016. Mr Wong has recently informed D1 that he is unwilling to testify at trial”. [↑](#footnote-ref-8)
9. This action was set down for trial in July 2018. Most trial preparation had been completed by all parties by the 1st Offer in Mar 2018. [↑](#footnote-ref-9)
10. Para 177-179 of the Judgment [↑](#footnote-ref-10)
11. Para 167 of the Judgment [↑](#footnote-ref-11)
12. Para 188-190 of the Judgment [↑](#footnote-ref-12)
13. Para 184 of the Judgment [↑](#footnote-ref-13)
14. Para 185-187 of the Judgment [↑](#footnote-ref-14)
15. Unlike the case of *Pak Siu Hin Simon v JV Fitness Ltd*, unreported, HCPI 574/2014, 25 Oct 2017, cited by D1 and in which no sanctioned offer issue was raised [↑](#footnote-ref-15)
16. Para 5 of the Judgment [↑](#footnote-ref-16)
17. See e.g. para 1(b) & 4 of the statement of claim [↑](#footnote-ref-17)
18. Para 121 & 122 of the Judgment [↑](#footnote-ref-18)
19. Para 46 of the Judgment [↑](#footnote-ref-19)
20. Para 9(2) & 137 of the Judgment [↑](#footnote-ref-20)
21. Para 41 of the Judgment [↑](#footnote-ref-21)
22. Para 39 & 40 of the Judgment [↑](#footnote-ref-22)
23. And it remained unresolved after trial: para 90 of the Judgment. [↑](#footnote-ref-23)
24. Such evidence was still not forthcoming at trial: para 114 & 118 of the Judgment [↑](#footnote-ref-24)
25. And there is no affidavit evidence adduced before me that D1 was insured regarding the Accident involving the Lift. [↑](#footnote-ref-25)
26. Para 37(5) of the Judgment [↑](#footnote-ref-26)
27. Para 9 & 10 thereof. See also para 68(3) of the Judgment [↑](#footnote-ref-27)
28. Para 68(1) & 114(5) of the Judgment [↑](#footnote-ref-28)
29. Para 19-22 of the Judgment [↑](#footnote-ref-29)
30. Para 9(1) & 126 of the Judgment [↑](#footnote-ref-30)
31. Para 68(2) of the Judgment [↑](#footnote-ref-31)
32. Para 160 of the Judgment [↑](#footnote-ref-32)
33. Para 120 of the Judgment [↑](#footnote-ref-33)
34. Such offer of contribution to a specified extent can be made at any time after one acknowledges service of the writ. [↑](#footnote-ref-34)
35. Affidavit of Fung Kwan Ling Kelshjade filed 10 Jan 2020. See para 14 & 15 thereof. [↑](#footnote-ref-35)
36. 2nd affidavit of Wang Ho Yin Patrick filed 23 Jan 2020. See para 3 to 18 thereof. [↑](#footnote-ref-36)