IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 35 OF 2001

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| BETWEEN | Chan Suk-ying, the administratrix of the estate of Fong Sze, deceased | Plaintiff |
|  | and |  |
|  | Cityplaza Holdings Limited | 1st Defendant |
|  | Swire Properties Management Limited | 2nd Defendant |
|  | Asis Build Limited | 3rd Defendant |
|  | China Link Construction Company Limited | 4th Defendant |

Coram: H H Judge Ian Carlson in Chambers

Date of Hearing: 30 April 2002

Present: Ms Tong, of Messrs Simmons & Simmons, for the 1st and 2nd Defendants

Ms Tong, instructed by Messrs Simmons & Simmons, for the 3rd Defendant

Mr Lincoln Huang, of Messrs Waller Ma Huang & Yeung, for the 4th Defendant

Date of Judgment: 2 May 2002

Present: Mr David Lau, of Messrs Simmons & Simmons, for the 1st and 2nd Defendants

Mr David Lau, of Messrs Simmons & Simmons, for the 3rd Defendant

Mr Lincoln Huang, of Messrs Waller Ma Huang & Yeung, for the 4th Defendant

R U L I N G

1. This application, in which the 4th defendant is claiming reimbursement of $336,476.38 from the 1st, 2nd and 3rd defendants, arises out of a consent judgment in the action by Judge Cheung dated 15 October 2001.
2. The matter comes about in this way: on 24 February 1998 Mr Fong Sze, the deceased, fell off a metal framework structure at City Plaza North, a shopping mall at Tai Koo Shing. He was killed instantly on impact with the ground. His widow, who is the plaintiff in this action, brought two sets of proceedings.
3. Firstly, an application for employees’ compensation against the 4th defendants in this action: the issue in that application was whether the deceased had died by accident in the course of and arising out of his employment (section 5(1), Employees’ Compensation Ordinance). The 4th defendants, as respondents in those proceedings, had no answer to that application. Compensation was agreed and they paid out to the widow the sum of $707,823.40 as compensation, together with costs of $64,300.
4. The widow has also brought this Fatal Accident’s claim for negligence and breach of statutory duty against all four defendants. She quantified her claim at a little over $1.13 million but, as she was bound to, gave credit for the amount that she had received in the Employees’ Compensation proceedings (see section 26, Employees’ Compensation Ordinance). This had the effect of reducing all the defendants’ potential liability in the action to $430,000, which brought the matter within the jurisdiction of this court.
5. All four defendants filed defences denying liability and/or alleging contributory negligence by the deceased. The 1st, 2nd and 3rd defendants also filed a contribution notice against the 4th defendant and the 4th defendant filed an identical notice against the 1st, 2nd and 3rd defendants.
6. That was how the battle lines were drawn between the parties. Thereafter the action settled in terms of the judgment of Judge Cheung. The order is in these terms:

(1) Damages payable by the 1st, 2nd, 3rd and 4th defendants to the plaintiff be agreed at $1,137,823.40, inclusive of interest and the plaintiff, having received $707,823.40, for which credit must be given to the 1st, 2nd, 3rd and 4th defendants, shall pay into court the sum of $430,000 being the balance of the said settlement sum within 14 days from the date hereof.

(2) The 1st, 2nd, 3rd and 4th defendants do pay the plaintiff’s costs of this action to be taxed on common fund basis under the District Court scale if not agreed and the plaintiff’s own costs to be taxed in accordance with the Legal Aid Department Regulations.

(3) Upon payment of the said sum of $430,000 in costs as aforesaid, the 1st, 2nd, 3rd and 4th defendants shall be discharged from all further liability in respect of all the plaintiff’s claim in this action.

(4) As between the defendants, the 1st, 2nd and 3rd defendants undertake to pay the said sum of $430,000 into court within the stipulated time of 14 days.

(5) Liability in respect of the agreed damages of $1,137,823.40 be apportioned at 70 per cent against the 1st, 2nd and 3rd defendants and 30 per cent against the 5th defendant.

(6) As between the defendants, the 1st, 2nd and 3rd defendants shall pay 70 per cent and the 4th defendant shall pay 30 per cent of the plaintiff’s costs herein.

(7) There shall be no order as to costs between the defendants in this action.

(8) The aforesaid apportionment be without prejudice to any of the defendants in respect of any other rights or liabilities of any of the defendants between themselves.

1. The amount of the judgment, $430,000, was paid out by the 1st, 2nd and 3rd defendants pursuant to paragraph 5 of the order. Subsequently, the amount of costs was also agreed and paid by the 1st, 2nd and 3rd defendants. The 4th defendants, who had already paid out $707,823.40 plus costs were, as a matter of accounting and by virtue of the apportionment of liability recited in paragraph 5 of the order as between the four defendants, “excused” from making any contribution to the agreed damages paid out under the order. As a matter of arithmetic, at all events they have overpaid $366,476.38 as between themselves and the other defendants.
2. Following payment of the damages and costs to the plaintiff, the 4th defendants’ solicitors wrote to the solicitors for the 1st, 2nd and 3rd defendants seeking payment of $366,476.38. This request was made pursuant to section 3(1) of the Civil Liability (Contribution) Ordinance, Cap. 377 which is in these terms:

“Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).”

1. For reasons which I must consider in some detail in a moment, these defendants declined to pay this amount to the 4th defendants. I should also mention that even before the deceased’s widow had started this action, which was in February 2001, the 4th defendants had in April 2000 started an action in the High Court (HCA3533/2000) with these three defendants as defendants claiming reimbursement of the sum of $772,123.40 (being $707,823.40 compensation and $64,300 in costs) paid to the widow in the Employees’ Compensation case.
2. This action is brought on the quite distinct basis of section 25(1)(b) of the Employees’ Compensation Ordinance which enables a respondent in an Employees’ Compensation application to seek reimbursement of what it has had to pay by way of employees’ compensation from any party that has caused the accident giving rise to the Employees’ Compensation claim.
3. In order to succeed in the High Court action, the 4th defendant must demonstrate that the accident was caused by these defendants’ negligence and/or breach of statutory duty and this is how the High Court action is pleaded. That action has been overtaken by events in the shape of this action by the widow, which has now been settled under Judge Cheung’s order. The High Court action has now been stayed pending the outcome of this application before me.
4. Mr Huang for the 4th defendant says that this is a straightforward enough matter. The quantum of the plaintiff’s claim has been agreed by all parties at $1,137,823.40. The plaintiff was bound by statute to give credit for what she had already received from the 4th defendant in the Employees’ Compensation case.
5. Having regard to the 70/30 per cent apportionment of liability to pay that agreed $1,137,823.40 quantum, the 1st, 2nd and 3rd defendants are bound to give effect to that admission and bear their 70 per cent of that gross amount. It matters not that the award under the judgment was for only $430,000. That was arrived at because credit had to be given for the payment already made by the 4th defendant in the Employees’ Compensation proceedings.
6. Miss Tong for the first three defendants has taken a number of points, which she submits justifies the stance adopted by them. The first point is an extremely narrow one to the effect that this court does not have the jurisdiction to hear the application. I say narrow because she draws attention to the summons itself which relies in part on Order 44 Rule 2 of the Rules of the District Court which clearly has no application to this matter, as Mr Huang readily accepts. He agrees that this is an oversight on his part.
7. The summons also relies on the court’s general ancillary jurisdiction and I have no doubt that an application of this sort does fall within that jurisdiction. Accordingly, I do have jurisdiction to hear this.
8. Her next ground relates to the 4th defendant’s notice of contribution. She submits that on its face the 4th defendants’ contribution notice does not claim a contribution in respect of the EC compensation which had already been paid out by the 4th defendants but only relates to the damages and costs payable in this action. That in my judgment is a false point, subject to what I will need to say about Miss Tong’s submission on section 3 of the Civil Liability (Contribution) Ordinance.
9. Firstly, the plaintiff’s claim was quantified at $1.13 million. She was statutorily bound to give credit to what she had already received under the EC application. As a result, the claim was now worth only $430,000. This was apportioned 70/30 per cent between the 1st to 3rd defendants on the one hand, and the 4th defendant on the other. This point, taken to its logical conclusion, if correct, would mean that the 1st, 2nd and 3rd defendants would only be liable to pay 70 per cent of $430,000 leaving the 4th defendant to pay the remaining 30 per cent.
10. The first three defendants have conceded this point by accepting that they had to pay the entire $430,000 and costs. The only basis upon which they did so, and in my view rightly so, was that the 70 per cent referred to the plaintiff’s gross claim of $1.13 million and not the balance of $430,000. It follows that had she not been statute barred she would have sued for the gross amount of $1.13 million. There is therefore nothing in the point.
11. Miss Tong’s next point concerns an allegation that this application amounts to an abuse of process. The law frowns on a multiplicity of actions and where the 4th defendants already have an extant earlier action in the High Court to recover this amount and indeed more, I should strike the application out as an abuse of process. For this she relies on two English cases, Buckland v Palmer [1984] 3 All ER 554 and Napp Pharmaceutical Group Limited v Asta Medical Limited [1999] FSR 370. Both are good authority in support of this proposition but the question that arises here is whether this application, taken together with the High Court action, gives rise to such a situation, in other words, a multiplicity of actions.
12. Mr Huang submits that in the High Court he relies on section 25 of the Employees’ Compensation Ordinance which would require him to show negligence by the first three defendants. In this matter he comes under section 3 and Judge Cheung’s order itself which already recites the admitted apportionment of liability.
13. The other matter which he relies upon is that the High Court action has been stayed so no question of multiplicity can arise. Such a point could only be taken if he sought to lift the stay on that action. The point might be taken on that application but not now. In any event, he says that if he succeeds here his clients would not seek to revive the High Court action.
14. For my part, as a matter of substance, the section 25 Employees’ Compensation Ordinance based action in the High Court and the section 3 Civil Liability (Contribution) Ordinance application now before me amount to much the same thing and so Miss Tong’s submission on abuse might well have succeeded but for the fact that the High Court action has been stayed. It is not a current action. Leave would be required to lift the stay. The matter is now only proceeding under section 3.
15. In such circumstances, this cannot amount to an abuse of process. There is no multiplicity of actions. For this reason I am against Miss Tong on this limb of her case.
16. Lastly, I come to what in my view is the strongest of Miss Tong’s arguments based on the proper construction of section 3. For this she relies on the English Court of Appeal decision of Howkins & Harrison v Tyler & Another [2000] WL 1027‑075 where the court was required to consider the identically worded English Civil Liability (Contribution) Act, 1978. The Vice Chancellor propounded the test to be applied in deciding whether a claim was capable of being one to which the act can apply. He expressed it as follows:

“It seems to me that a simple test should be applied to identify a claim capable of being one to which the 1978 act can apply. That test is this:

Suppose that A and B are the two parties who are said to be liable to C in respect of the same damage that has been suffered by C, so C must have right of action of some sort against A and a right of action of some sort against B. There are two questions that should then be asked:

If A pays C a sum of money in satisfaction or on account of A’s liability to C, will that sum operate to reduce or extinguish, depending upon the amount, B’s liability to C?

Secondly, if B pays C a sum of money in satisfaction or on account of B’s liability to C, would that operate to reduce or extinguish A’s liability to C?

It seems to me that unless both of those questions can be given an affirmative answer the case is not one to which the 1978 act can be applied. If the payment by A or B to C is not *pro tanto*, relieve the other of his obligations to C, there cannot, it seems to me, possibly be a case for contending that the non-paying party whose liability to C remains unreduced, will also have an obligation under section 1(1) to contribute to the payment made by the paying party.

The act was intended to deal with cases where the damage suffered by the victim could be remedied by a claim against one or other of two or more possible defendants and where the quantification of the damage to the victim for which a defendant would be liable would be affected by what the victim might recover or had recovered from one or other of the possible defendants. If that condition is not present it seems to me that the act was not intended to apply and cannot be applied.”

1. I intend to apply that test to these circumstances. Firstly, in this action both the 4th defendant and the 1st, 2nd and 3rd defendants are liable to the plaintiff in respect of the same damage that she has suffered. All the defendants were sued by her for the deceased’s death caused by their respective negligence and breach of statutory duty. The first hurdle has therefore been cleared.
2. The next question is this: if the 4th defendant paid a sum to the plaintiff to reduce or extinguish its liability to her, will that also have the effect of doing the same for the 1st, 2nd and 3rd defendants’ liability to her? In this case the amount was the $707,823.40 paid in the Employees’ Compensation Ordinance proceedings which by statute reduced all four defendants’ liability in this action to the plaintiff. This hurdle is also negotiated by the 4th defendant.
3. The last issue is whether any payment to the plaintiff by the 1st, 2nd and 3rd defendants would have had an identical effect to the 4th defendants’ liability to the plaintiff in this action. Again, the answer is resoundingly in the affirmative. The fact that the 4th defendant paid in the EC proceedings and not in this action is neither here nor there. Once the plaintiff was by statute bound to give credit for that payment that immediately reduced (by statute) the 1st, 2nd and 3rd defendants’ liability to her for which they must now make proper contribution to the 4th defendant.
4. Accordingly, the 4th defendant must succeed to the extent asked for in the summons and I would have thought, inevitably, together with an order for costs in the 4th defendants’ favour.
5. The order I propose is that the amount that the 4th defendants should be paid is the sum of $336,476.38. The costs of and incidental to this summons will be to the 4th defendants.

Ian Carlson

District Court Judge