#### DCPI 78/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 78 OF 2006

------------------------

BETWEEN

|  |  |  |  |
| --- | --- | --- | --- |
|  | LAI WING SUN | | Plaintiff |
|  | and | |  |
|  | | HIGH LINK TECHNOLOGY LIMITED  SHUN WO ENGINEERING CONSULTANT SERVICES LIMITED formerly known as SHUN WO TECHNICAL SERVICES LIMITED  WU KWOK MAN  NIPPONKOA INSURANCE COMPANY (ASIA) LIMITED  and  WU KWOK LEUNG | 1st Defendant  2nd Defendant  3rd Defendant  4th Defendant  Third Party |

------------------------

##### Coram: H H Judge Marlene Ng in Chambers (Open to the Public)

Date of Hearing: 30th July 2008

Date of Decision: 30th July 2008

Date of Handing Down Reasons for Ruling: 4th August 2008

------------------------

REASONS FOR RULING ON COSTS

------------------------

###### I. Background

1. On 14th January 2006, the Plaintiff commenced the present claim for damages for personal injuries against the 1st, 2nd and 3rd Defendants as a result of an alleged accident on 18th January 2003 (“Accident”). However, the Writ of Summons was only served in November 2006.
2. In November 2006, the Plaintiff also served Notice to Insurer on *inter alia* Nipponkoa Insurance Company (Asia) Limited (“Nipponkoa”), the present 4th Defendant, in relation to an insurance policy issued by Nipponkoa covering the 2nd Defendant (“Policy”).
3. At that time, the 1st, 2nd and 3rd Defendants were unrepresented. On 1st December 2006, prior to filing and service of the Statement of Claim, each of them filed/served his/its home-made Defence in the Chinese language. In a nutshell,
4. the 1st Defendant averred that the Plaintiff was the business partner of the 2nd and 3rd Defendants and/or worked for a Wu Kwok Leung (ie the present Third Party);
5. the 2nd Defendant averred that the Plaintiff “並非本公司工人” and “該工程是本人與[the 3rd Defendant]是合作形式處理工作”; and
6. the 3rd Defendant averred that the Plaintiff was employed by or was a partner of Wu Kwok Leung.
7. The Statement of Claim was served on the 1st, 2nd and 3rd Defendants on 12th December 2006. By the Statement of Claim, the Plaintiff claimed that 1st Defendant was the principal contractor for the relocation work project (“Project”) at the site where the Accident occurred (“Site”), the 2nd Defendant was the 1st Defendant’s sub-contractor for part of the Project (“Works”), and 3rd Defendant was the 2nd Defendant’s sub-contractor in respect of the Works at the Site. The Plaintiff further pleaded that he was employed by the 3rd Defendant as a renovation worker carrying out the Works at the Site, or alternatively both the 3rd Defendant and the Plaintiff were employed by the 2nd Defendant as renovation workers carrying out the Works at the Site.
8. Quite apart from allegations of breach of statutory duties and negligence, the Plaintiff averred in the Statement of Claim that (a) at all material times the 2nd or the 3rd Defendant owed him a duty under the implied terms of the contract of employment, and (b) the Accident was caused *inter alia* by breach of implied terms of contract on the part of the 2nd or 3rd Defendant.
9. On 13th January 2007, Nipponkoa’s solicitors wrote to the Plaintiff’s solicitors to explain that the Policy was an employees’ compensation policy which only covered the 2nd Defendant against liability at law, including liability under the Employees’ Compensation Ordinance (“Ordinance”), if any employee in the 2nd Defendant’s immediate employ shall sustain injury by accident arising out of and in the course of his employment, but the Policy did not cover the 2nd Defendant in respect of injury sustained by its sub-contractor’s employees and/or the principal contractor. It was said that Nipponkoa was not on risk under the Policy at the time of the Accident, and the Plaintiff was urged to withdraw the Notice to Insurer.
10. On 5th February 2007, Nipponkoa’s solicitors chased the Plaintiff’s solicitors for a reply. There was no response.
11. On 21st February 2007, Nipponkoa issued a summons (“Joinder Summons”) seeking *inter alia* the following reliefs :
12. Nipponkoa be joined as the 4th Defendant in the present action pursuant to Order 15 rule 6(2)(b)(i) and/or (ii) of the Rules of the District Court (“RDC”);
13. the Writ of Summons and all pleadings in this action be amended by adding the name of Nipponkoa as the 4th Defendant; and
14. leave to the 4th Defendant to file and serve a Defence within 14 days from the date of the order to be made.
15. Nipponkoa’s solicitors filed a supporting affirmation confirming that the nature of the Policy as described in paragraph 6 above. It was argued that the 4th Defendant was not on risk under the Policy since the 2nd Defendant by its Defence denied having employed the Plaintiff at the time of the Accident. Further, Nipponkoa claimed it only became aware of the Accident upon receipt of the Notice of Insurer, and the 2nd Defendant was in breach of the policy condition by failing to report the Accident to Nipponkoa. Nipponkoa applied to be joined in the present action as an “interested” party since it was possible that pursuant to section 43 of the Ordinance the Plaintiff might enforce against Nipponkoa any judgment it might obtain in the present action.
16. On 28th February 2007, the 3rd Defendant’s solicitors filed Notice to Act.
17. At the hearing of the Joinder Summons on 7th March 2007 at which all parties were present, H H Judge Lok granted *inter alia* the following directions (“Order”) :
18. “根據區域法院規則，第15號命令第6(2)(i)及(ii)條規則，加入申請人[Nipponkoa]在本訴訟中為第四被告人”;
19. “本訴訟中的傳訊令狀及所有狀書，須作出修訂，將申請人加入為第四被告人”; and
20. “第四被告人獲得許可，於本命令日期起14天內，將答辯書存檔及送達原告人”.
21. For the purpose of the hearing before me, there was some contention between the Plaintiff and the 4th Defendant as to whether the Order was made by consent or not. I note the Order was perfected and filed on 16th March 2007, and there was no indication on its face that it was made by consent. No application has been made for rectification or variation, so I am not prepared to go behind the perfected Order.
22. It is plain from the Order that the court granted leave to the 4th Defendant to join in the present action pursuant to Order 15 rule 6(2)(b)(i) and (ii) of the RDC, ie on the basis that the 4th Defendant :
23. “ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon” (Order 15 rule 6(2)(b)(i) of the RDC); and
24. was “a person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter” (Order 15 rule 6(2)(b)(ii) of the RDC).
25. On 15th March 2007, the 3rd Defendant’s solicitors filed a formal Defence in the English language. In such Defence, the 3rd Defendant averred that the Plaintiff and the 3rd Defendant himself were employed by Wu Kwok Leung trading as Sam Tung Construction Co, and denied the Plaintiff was employed by the 2nd Defendant.
26. On 21st March 2007, the 1st Defendant filed an Amended Defence claiming that the Plaintiff was employed by Wu Kwok Leung. On the same day, the 4th Defendant by its solicitors (ie Nipponkoa’s solicitors) filed its defence specifically denying that the 3rd Defendant and the Plaintiff were employed by the 2nd Defendant.
27. On 22nd March 2007, the 2nd Defendant’s solicitors filed a formal Defence in the English language. The 2nd Defendant claimed that in early or mid-January 2003 it sub-contracted certain works to Wu Kwok Leung and the Plaintiff as partners. Alternatively, the Plaintiff was the sub-contractor of Wu Kwok Leung in undertaking such sub-contracted works. The 2nd Defendant denied there was any employment relationship between himself and the Plaintiff.
28. The 1st, 2nd and 3rd Defendants filed their respective List of Documents on 21st and/or 22nd March 2007.
29. At the Check List Review hearing on 16th April 2007, Master K W Wong granted extension of time of 21 days for the Plaintiff to file and serve (a) the Amended Writ of Summons to reflect the joinder of the 4th Defendant in the present action, and (b) the Amended Statement of Claim and Statement of Damages (“Time Order”).
30. On 7th May 2007, the Plaintiff filed the Amended Writ of Summons that not only reflected Nipponkoa as the 4th Defendant, but also included amendments to the general indorsement of claim that added a claim for damages against the 4th Defendant on the following basis :

“The Plaintiff’s claim is for damages for personal injury, loss and damage sustained in the course of his employment arising out of the negligence and/or breach of statutory duty and/or breach of common duty of care of the ~~1~~~~st~~~~, 2~~~~nd~~, and/or 3rd and/or 4th Defendants its servants or agents at [the Site] on the 18th day of January 2003.”

1. On the same day, the Plaintiff filed the Amended Statement of Claim not only reflecting Nipponkoa as the 4th Defendant, but adding the following pleaded averments :
2. the 4th Defendant was the insurer of the 2nd Defendant under the Policy (paragraph 1(e));
3. “[by] reason of the matters pleaded above, if the 2nd Defendant is held to be an employer of the Plaintiff and being liable for the Plaintiff’s claims herein, the 4th Defendant is obliged under Section 43 of the [Ordinance] to pay the damages, interest, and costs that the Plaintiff is entitled to herein, notwithstanding anything to the contrary in the Policy” (paragraph 12).
4. On 16th May 2007, the 3rd Defendant filed his Amended Defence by not admitting paragraphs 1(e) and 12 of the Amended Statement of Claim.
5. On 5th June 2007, the 4th Defendant filed its Amended Defence by not admitting paragraphs 1(e) and 12 of the Amended Statement of Claim, and expressly repeating that the Plaintiff was not employed by the 2nd Defendant.
6. On 20th June 2007, the 1st Defendant filed his Re-Amended Defence by maintaining that the Plaintiff was employed by Wu Kwok Leung and not admitting paragraphs 1(e) and 12 of the Amended Statement of Claim.
7. On 6th July 2007, the 2nd Defendant filed its Amended Defence by admitting paragraph 1(e) and not admitting paragraph 12 of the Amended Statement of Claim.
8. Parties exchanged their respective witness statements on 13th August 2007.
9. At the Check List Review hearing on 20th May 2008, the Personal Injuries Master set the case down for trial in the fixture list on 12th September 2008 at 9:30am at Court No.29 with 4 days reserved.

*II. Plaintiff’s Summons*

1. On 9th May 2008, the Plaintiff applied by summons for *inter alia* the following reliefs (“Summons”) :
2. leave for the Plaintiff to discontinue the action against the 4th Defendant; and
3. there be no order as to costs of this action including the costs of such application between the Plaintiff and the 4th Defendant.

The adjourned hearing of the Summons came before me on 30th July 2008.

*III. Plaintiff’s evidence and submissions*

1. According to the 2 affidavits of the Plaintiff’s solicitor, Ms Lai Lai Shan Esther, filed in support of the Summons, when the Plaintiff’s solicitors first received instructions to act for the Plaintiff, they issued an originating summons against the 1st, 2nd and 3rd Defendants to seek pre-action discovery of the relevant insurance policy. The Plaintiff obtained information about 2 insurance policies, ie a policy issued by AXA General Insurance Hong Kong Limited (“AXA”) and the Policy issued by the 4th Defendant. The Plaintiff’s solicitors were handicapped by the fact that there was no detailed investigation by the police or the Labour Department, so as a matter of prudence they issued Notice to Insurer to both AXA and the 4th Defendant in November 2006.
2. Ms Lai claimed the Plaintiff was not in a position to ascertain the 4th Defendant’s potential liability when Nipponkoa’s solicitors invited the Plaintiff to withdraw the Notice to Insurer. She said that at that time the Defendants’ Defence had not been filed, discovery had not been made and witness statements had not been exchanged.
3. In my view, this is not quite correct because all Defendants have filed and served their home-made Defence long before the Order. Indeed, solicitors’ correspondence revealed that the Plaintiff’s solicitors did send a copy of the 2nd Defendant’s home-made Defence to Nipponkoa’s solicitors on 13th January 2007. The stance of the 2nd and 3rd Defendants that Wu Kwok Leung was the Plaintiff’s true employer/ partner was firm and consistent throughout the present action. In any event, even up till now (upon the eve of the trial and when the Plaintiff’s investigation of the 4th Defendant’s liability should have been complete), the Plaintiff still stood on the Notice to Insurer to Nipponkoa.
4. Ms Lai went on to say that counsel advised the 4th Defendant should not have been joined as a defendant and the action against the 4th Defendant should be discontinued with no order as to costs for the following reasons :
5. if the court at trial finds the 2nd Defendant liable as a contractor responsible for the Site as a result of breach of statutory duties and/or negligence, there is no role for the 4th Defendant to be joined as a defendant;
6. if the 4th Defendant does have an interest in the proceedings, there is no reason for the 4th Defendant not to take over the proceedings from the 2nd Defendant instead of causing the Plaintiff to incur additional and unnecessary legal costs by becoming an additional defendant.
7. It was further argued that the 4th Defendant need not be a defendant in the present action because :
8. if the 4th Defendant wished to obtain any information in order to assess the 2nd Defendant’s potential liability, it could have obtained the same from the 2nd Defendant or the Plaintiff, and the Plaintiff’s solicitors had duly answered their queries;
9. if the 4th Defendant thought the Policy was on risk, it would have been able to exercise its right of subrogation to take up the case for the 2nd Defendant;
10. once the 4th Defendant chose to join in the present action, it would have to bear the cost consequences if it turned out that the Policy was not on risk;
11. it is unreasonable for the Plaintiff to bear the 4th Defendant’s costs as the Plaintiff never applied to join the 4th Defendant as a party to the proceedings.
12. Therefore, Ms Lai argued the general rule that a defendant would be entitled to costs when an action was discontinued should be departed from in the present action “where the discontinuance …… is due to the claim against the 4th Defendant having become academic, rather than to any acknowledgment by the Plaintiff of likely defeat. The claim against the 4th Defendant is not initiated by the Plaintiff. The Plaintiff has not sued the 4th Defendant in the Writ of Summons in this action. It was the 4th Defendant who made its own application to join in as a Defendant in this action.” The Plaintiff therefore asked for leave to discontinue the action against the 4th Defendant with no order as to costs save that costs of the adjourned hearing for argument before me should be to the Plaintiff.
13. The written submissions of the Plaintiff’s solicitors argued that even if it were reasonable and appropriate for the 4th Defendant to apply to join in the present action, it could have invited the Plaintiff to discontinue the proceedings at an earlier stage. On 22nd March 2007, the 2nd Defendant (then legally represented) filed a Defence pleading that it was not the Plaintiff’s employer. At that time, the 2nd Defendant could properly defend their own interests as well as the 4th Defendant’s interest in the present proceedings. It was not necessary for the 4th Defendant to proceed with the case any further, and could have invited the Plaintiff to discontinue the proceedings against them at that time.
14. In short, the Plaintiff’s contention that the 4th Defendant should not be a party to the present action rested on 2 limbs, ie it was not reasonable and appropriate for the 4th Defendant (a) to be joined as a defendant in the first place and/or (b) to maintain its status as a defendant thereafter.

*IV. 4th Defendant’s evidence and submissions*

1. The 4th Defendant maintained it should remain as a defendant in the present action. The position was put succinctly in the affirmation of the Defendant’s solicitor, Leung Fung Chi. The 4th Defendant was not in a position to take over the conduct of the present action on behalf of the 2nd Defendant because, as already explained in the affirmation in support of the Joinder Summons, (a) the 4th Defendant was not on risk under the Policy, and (b) the 2nd Defendant was in breach of the policy condition. The 4th Defendant has therefore declined liability under the Policy, so the interests of the 2nd to 4th Defendants were different.
2. However, should the court find the 2nd Defendant to be the employer of the Plaintiff at the time of the Accident on the Plaintiff’s alternative plea, and the 2nd Defendant fails to pay the judgment debt, it is possible that the Plaintiff may pursuant to section 43(1) of the Ordinance enforce against the 4th Defendant any judgment it may obtain in the present action against the 2nd Defendant even though the 2nd Defendant was in breach of the policy condition.
3. The 4th Defendant claimed it had a legitimate interest in joining and taking part in the present action through to its conclusion. If the Plaintiff considered the 4th Defendant ought not to have joined in the present action as a defendant, he ought to have raised such objection at the hearing of the Joinder Summons. It was further suggested that had the Plaintiff acceded to the 4th Defendant’s request for withdrawal of the Notice to Insurer, the 4th Defendant would not have applied to the court for joinder. The 4th Defendant claimed that in the circumstances it should remain as a defendant in the present action to protect its interests pursuant to section 43(1) of the Ordinance because to date the Plaintiff has not withdrawn the Notice to Insurer, and still maintains his alternative plea that the Plaintiff was employed by the 2nd Defendant.

###### V. Propriety of the present application

1. It is evident from the aforesaid narration of the Plaintiff’s evidence and submissions that he intends to remove the 4th Defendant as a party to the present action. Given such objective, the Summons is misconceived.
2. The 4th Defendant became a defendant to the present action in March 2007 not because of any then claim by the Plaintiff against the 4th Defendant, but because H H Judge Lok acceded to the 4th Defendant’s Joinder Summons. By the Order, H H Judge Lok found that the 4th Defendant was “a party who ought to have been joined or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon” as well as a person between whom and any party in the present action “there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed [herein] which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter”.
3. The Order has been granted, perfected and sealed, and there has been no appeal therefrom. Further, the above chronology of the present action shows that the parties have acted on the Order. In the circumstances, the Order is binding on all parties to the present action.
4. I cannot see how an application by the Plaintiff to discontinue his claim or his action (if any) against the 4th Defendant can cause the 4th Defendant to cease to be a party to the present action given that the Order is binding on both the Plaintiff and the 4th Defendant.
5. The appropriate mode of application to remove the 4th Defendant as a defendant herein, if there are sufficient grounds to support the same, is an application under Order 15 rule 6(2)(a) of the RDC which provides that the court may “order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be party”.
6. No such application has been made. The Summons is confined to an application to discontinue the Plaintiff’s claim or action (if any) against the 4th Defendant. When this was pointed out to Ms Chow, solicitor appearing on behalf of the Plaintiff before me, she rightly conceded she would not ask for an order that the 4th Defendant cease to be a party.

###### VI. Issue estoppel

1. Had the Plaintiff made an application under Order 15 rule 6(2)(a) of the RDC, I still do not see any merit in the suggestion that the 4th Defendant was not reasonably and appropriately joined as a defendant in the present action in the first place.
2. As explained above, the Order is binding on the parties and as such it constitutes issue estoppel on the subject of whether the 4th Defendant was a necessary or appropriate party to be joined as a defendant in the first place. It is simply not open to the Plaintiff to mount the argument in the above paragraph as a backdoor attempt to subvert the Order without lodging any appeal against the same.

*VII. Application for discontinuance*

1. There is no dispute that the Plaintiff did not sue the 4th Defendant in the Writ of Summons in the present action, and the joinder application was made by Nipponkoa who became the 4th Defendant pursuant to the Order. The question is whether after the Order and by now there is any claim by the Plaintiff against the 4th Defendant that can be the subject of the application for discontinuance.
2. The Order and Time Order required the Writ of Summons and all pleadings in the present action to be amended by adding Nipponkoa as the 4th Defendant. The Plaintiff could have followed this strictly without adding any claim against the 4th Defendant, thereby leaving the 4th Defendant to plead any defence arguments it considered necessary to protect itself against any contingent liability under section 43 of the Ordinance. But the Plaintiff went further by voluntarily adding a claim for damages against the 4th Defendant in the Amended Writ of Summons and Amended Statement of Claim (see paragraphs 19 and 20 above). In such circumstances, there is in fact subject-matter for the application for discontinuance.
3. Ms Chow confirmed at the hearing before me that the Plaintiff wished to discontinue such claim or action against the 4th Defendant, and Ms Leung, solicitor appearing for the 4th Defendant before me, had no objection subject to preservation of the 4th Defendant’s status as defendant in the present action. So at the hearing I granted leave to the Plaintiff to discontinue the whole of the Plaintiff’s claim in the present action against the 4th Defendant, and for the avoidance of doubt made clear that such discontinuance is without prejudice to the Order. I further directed that the Plaintiff do within 7 days thereof file and serve his Re-Amended Writ of Summons and Re-Amended Statement of Claim to reflect the aforesaid discontinuance of his claim against the 4th Defendant.

###### VIII. Costs

1. Not unexpectedly, Ms Leung asked for costs. Ms Chow disputed liability for costs on the basis that the 4th Defendant should prior to the issuance of the Summons have applied on own motion to cease to be a defendant in the present action or to invite the Plaintiff to discontinue the claim against them.
2. I find such argument wholly misconceived. It lies ill in the mouth of the Plaintiff to make such argument when the Order is binding on the parties and when there is no application before me for the 4th Defendant to cease to be a party to the present action.
3. Further, as explained above, the Plaintiff could have complied with the Order by adding the 4th Defendant as a party in the Amended Writ of Summons and Amended Statement of Claim. But he took the initiative to add a claim for damages against the 4th Defendant. The 4th Defendant never invited such claim. It joined the present action as an “interested” party to protect its interests in light of its contingent liability under section 43(1) of the Ordinance.
4. Since the Plaintiff made a claim against the 4th Defendant, the 4th Defendant was bound to defend the same if it were to avoid default judgment should the Plaintiff elect to enter judgment on liability on his alternative plea. A defendant does not choose to be sued, and I do not see any duty or obligation on the part of the 4th Defendant to request the Plaintiff to discontinue the Plaintiff’s claim against it. I also do not see how the 4th Defendant with an extant claim against it by the Plaintiff can apply to cease to be a party.
5. Procedural considerations aside, there is also no viable substantive basis for suggesting that the 4th Defendant should cease to be a defendant in the present action. There has been no change of circumstances since the Order. Indeed, the 2nd and 3rd Defendants maintained a consistent stance throughout the present action that the Plaintiff was not employed by the 2nd Defendant; it was never a case of the Plaintiff’s claim against the 4th Defendant “becoming” academic in the course of the proceedings as suggested by the Plaintiff’s solicitors.
6. The 4th Defendant could hardly have taken up conduct of the proceedings on behalf of the 2nd Defendant when the coverage under the Policy is limited to *employees* of the 2nd Defendant. Secondly, the breach of policy condition of failing to report the Accident to the 4th Defendant makes clear that the interests of the 2nd and 4th Defendants are different.
7. To suggest that the 4th Defendant could have subrogated and taken up the present action on behalf of the 2nd Defendant is to ignore the aforesaid policy restriction and/or obvious conflict arising from breach of the policy condition. The 4th Defendant is not required to conduct of the present action on behalf of the 2nd Defendant and thereby risk possible waiver of such policy restriction or breach.
8. However, it cannot be disputed that the 4th Defendant is under a contingent liability pursuant to section 43 of the Ordinance. On such basis, I do not see any reason why the 4th Defendant should not be allowed to join in the present action as an “interested” party who has a legitimate legal or financial interest in the outcome of the issues in dispute, or why (when the 4th Defendant’s interests are necessarily different from the 2nd Defendant vis-à-vis the Policy) the 4th Defendant should left to rely on the 2nd Defendant to represent its interests or provide it with information.
9. Ms Chow relied on my ruling on costs in *Ernst Eduard Sprecher on behalf of himself and the other dependants of Matthias Sprecher deceased v Zingrich Cabletrans Gmbh* DCEC1498/2006 (unreported, 28th November 2007). The factual matrix of that case is wholly different. In that case, the employees’ compensation policy covered employees of the insured’s sub-contractors so both the 1st and 2nd Respondents were covered (see paragraph 48 of the ruling). The insurer in that case intervened to join in the proceedings because it did not receive cooperative response from the respondents, who did not appear to defend the employees’ compensation claim. When the respondents instructed solicitors to resist the applicant’s claim, the insurer intervener withdrew the joinder application because from that point on its interests and those of the respondents were the same. This means that, unlike the present case, there was no determination as to whether it was necessary or appropriate for the insurer intervener to join in the proceedings. It is therefore logical that in considering costs the court had to consider whether it was appropriate for the insurer to intervene and later to withdraw the joinder application.
10. Here the issue of joinder of the 4th Defendant as a defendant has been determined and resulted in the Order. There is also no application for the 4th Defendant to cease to be a party. In the circumstances, I see no basis for the Plaintiff to argue it should not bear costs on the basis that the 4th Defendant should self-apply to cease to be a party and leave the 2nd Defendant to resist the Plaintiff’s claim.
11. As explained in paragraph 34 of my ruling in *Ernst Eduard Sprecher*, an insurer of an employees’ compensation policy under Part IV of the Ordinance is under a contingent and direct liability to the applicant irrespective of the policy terms between the insurer and the employer insured, and this forms the jurisdictional basis for joinder as a defendant in the relevant proceedings. I added in paragraph 64 of my ruling that the insurer cannot exercise the right of subrogation if the interests of the insured and the insurer are different, eg where the insurer disclaims liability under the policy. I therefore have no hesitation in coming to the conclusion that the 4th Defendant has a right to be heard in respect of its potential liability under section 43(1) of the Ordinance (see *Sami’an Sutinah v Katrina Leung Wai-kuen & anor* [2002] 2 HKC 706, *Chu Yuen-wah v Lee Kwok-lee & anor* [1995] 2 HKLR 280 and paras.37-40 of my judgment in *Ernst Eduard* *Sphrecher*).
12. In conclusion, I see no arguable basis for not applying the usual order for costs. In a nutshell, the 4th Defendant was and remains a necessary party in order to ensure all matters in dispute are effectively and completely determined and adjudicated upon, and in reality the Plaintiff by the present application is merely seeking to discontinue the claim which he chose to add against the 4th Defendant. I have therefore granted an order at the hearing that costs of and occasioned by the Summons including all costs reserved be paid by the Plaintiff to the 4th Defendant to be taxed if not agreed, and there be legal aid taxation for the Plaintiff’s own costs.
13. Subsequent to the hearing but on the same day, the solicitors for the 4th Defendant wrote to the court (with copy to the Plaintiff’s solicitors) to seek clarification as to whether the costs order was inclusive of the 4th Defendant’s costs of defending the Plaintiff’s claim in this action.
14. The solicitors for the 4th Defendant are quite right to point out the lacuna in relation to this aspect of costs. Given the discontinuance of the whole of the Plaintiff’s claim against the 4th Defendant, final disposal of such costs is necessary and appropriate. In light of the logic of my reasons for the ruling on costs, such costs should also be in favour of the 4th Defendant. I therefore grant a costs order *nisi* that the Plaintiff do pay the 4th Defendant costs incurred in defending the Plaintiff’s claim against the 4th Defendant in any event to be taxed if not agreed, and there be legal aid taxation of the Plaintiff’s own costs.
15. I note that this case will be warned for trial in mid-September 2008. It is hoped that the parties will focus on brining the matter to trial, and avoid further tactical skirmishes that do not advance any party’s case but may add to costs.

# (Marlene Ng)

District Court Judge

Representation:

Ms Chow Wing Yin of Messrs Deacons for the Plaintiff

Ms Winnie Leung of Messrs Winnie Leung & Co for the 4th Defendant