DCPI235/2002

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 235 OF 2002

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BETWEEN

LEE SAU NGO Plaintiff

and

LAU OI LAI 1st Defendant

KINGSCAN DEVELOPMENT LIMITED 2nd Defendant

MIN XIN INSURANCE COMPANY LIMITED 3rd Defendant

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Coram : H.H. Judge Muttrie in Chambers

Date of Hearing : 29th January 2003

Date of Ruling : 14th February 2003

# Ruling

1. On 8 May 2001 the plaintiff was injured when a private car, owned by the 2nd defendant and driven by the 1st defendant collided with taxi in which she was a passenger. The plaintiff on 20 July 2002 issued her writ and statement of claim against the 1st and 2nd defendants and a notice to insurer to the 3rd defendant as the 2nd defendant’s insurer. The 1st defendant did not file any notice of intention to defend and interlocutory judgment was entered on 20 September 2002. Meanwhile, the 2nd defendant filed a defence on 12 August 2002, denying vicarious liability. After negotiation, the plaintiff’s action against the 2nd defendant was by consent discontinued with no order as to costs on 26 October 2002.

2. The 3rd defendant applied to be joined in the action and an order for this was made on 29 November 2002. On the same date directions were given at a check list review hearing. The matter was set down for assessment of damages in April 2003. The plaintiff filed a list of documents and a witness statement on 7 January 2003.

3. Meanwhile, on 18 December 2003 the 3rd defendant made a payment into court of $280,000.00. The plaintiff now applies for payment out in satisfaction of her claim and for the 3rd defendant to pay her the costs of the action including the costs of pursuing her claim against the 1st and 2nd defendants. The 3rd defendant resists this and says that the plaintiff is entitled to have her costs of proceedings against the defendants only up to 10 August 2002.

4. The plaintiff’s solicitors sent letters of claim to the 1st and 2nd defendants on 26 February 2002 and on 8 March 2002 solicitors for the 2nd defendant, Messrs. Charles Yeung Clement Lam Liu & Yip, denied vicarious liability, giving reasons. On 9 May solicitors for the 3rd defendant wrote to the plaintiff’s solicitors to the effect that the 3rd defendant had disclaimed liability on the ground of a breach of policy condition and that they were unable to verify the 2nd defendant’s reasons for denial of vicarious liability as well as asking for quantification of the plaintiff’s claim on a without prejudice basis.

5. On 30 July 2002, the 2nd defendant’s new solicitors, Messrs. Burke & Co., wrote to the plaintiff’s solicitors enclosing statements by the 1st and 2nd defendants as well as documents relating to actions raised by the taxi driver and the taxi owner against the two defendants. The taxi driver had instituted personal injury proceedings against the two defendants; the 3rd defendant had been joined as 3rd defendant in the taxi driver’s action and had admitted liability on behalf of the 1st defendant; the taxi driver had withdrawn his claim against the 2nd defendant. The taxi owner’s action was ongoing. The 2nd defendant’s solicitors suggested that the plaintiff’s claim against the 2nd defendant be withdrawn; if they plaintiff would agree, they would advise the 2nd defendant to agree that there be no order as to costs. With the letter were also enclosed statements by the 1st defendant and the 2nd defendant’s director to the effect that the 1st defendant had borrowed the car with permission and was driving it for her own purposes.

6. On 10 August the 3rd defendant’s solicitors wrote to the plaintiff’s solicitors a letter headed “without prejudice – without waiver – without admission” which contained the following:

In order to limit costs in this matter, we have instructions to invite your client to confirm whether she agrees to settle her claim for damages in the sum of $280,000 inclusive of interest plus costs to be taxed if not agreed. Due to the provisions under the Motor Vehicle Insurance (Third Party Risk) Ordinance, Cap. 272 and the Domestic Agreement, our client insurer may be obliged to satisfy any unpaid judgment debt. In order to secure our client insurer’s rights to seek recovery against the defendants and without prejudice to the rights afforded under the terms of the policy issued by our client insurer, our client insurer will not settle the damages payable by your client without the defendants’ prior consent. Accordingly in order to explore the chances of settling this matter without increasing further legal costs, we set out our views on your client’s claims as follows:-

(The letter goes on to set out the 3rd defendant’s solicitor’s views on quantum, with reference to decided cases, and continues):

*We shall be grateful if you could take your client’s instructions and revert. Please note that nothing herein shall be construed as a formal offer available for acceptance to your client until we have instructions from the defendants to agree to make such offer. We expressly reserve our client’s rights and no admission or waiver is to be construed by this letter.*

7. The plaintiff’s solicitors obtained the plaintiff’s written consent to accept this offer. They wrote to the 3rd defendant’s solicitors a letter dated 12 August 2002 and headed “without prejudice” which contains the following:

*It is clear that your client is liable to our client under the , your dealings with the defendants are not our concern.*

*In order to save costs, we are instructed by our client that she will accept your client’s offer as mentioned in your letter on the conditions that (1) your client will pay the sum within the next 14 days and (2) the 2nd defendant agrees to our withdrawing the claim against it with no order as to costs. We shall write to the 2nd defendant upon your acceptance of our counter-offer herein. Alternatively you may liaise with the solicitors for the 2nd defendant in this regard.*

8. No further correspondence passed between the solicitors until after the payment into court. The plaintiff’s solicitors on 2 January 2002 said that the plaintiff would accept the payment, but asked for the 3rd defendant to pay the plaintiff’s costs of the action as between the plaintiff and the 2nd defendant, estimated at $12,245.00. The 3rd defendant refused and refuses to pay this.

9. It is the evidence of the 3rd defendant’s solicitor that his firm never received the letter of 12 August. It bears to have been sent by fax and post, but bears the wrong fax number; and his firm’s mail register shows no entry to show that the postal copy was received. At the hearing of the summons for joinder and the check list review, the plaintiff’s solicitor made no mention of the plaintiff’s position. After that hearing, on 18 December 2002, the 3rd defendant made the payment into court. The plaintiff’s solicitor had been asked for proof of posting of the letter but had not provided it.

10. The plaintiff says that the letter of 10 August 2002 was not worded as a “Calderbank” offer that would protect the maker against subsequent costs incurred by the opposing party. Indeed it is not an offer at all; it is no even a conditional offer and even if it were, the condition was never fulfilled because the 3rd defendant’s solicitors never confirmed that the defendants had consented. It was an attempt to test the plaintiff’s views on quantum.

11. In the alternative, says the plaintiff, “without prejudice” letters are generally inadmissible in a question of costs. An exception is the “Calderbank” offer made “without prejudice save as to costs”. See **National Commercial Bank Ltd. v Kanishi (Far East) Ltd. & Ors.**, HCMP 5054 of 2000, unreported. So the letters of 10 and 12 August should both be taken as inadmissible and disregarded.

12. The defendant argues that the letter of 10 August is a “Calderbank” offer. Such an offer must be disregarded if the party making it could have protected his position by making a payment into court, but the 3rd defendant being not yet a party to the action could not protect itself in that way. There was nothing else it could have done.

13. The letter of 10 April is certainly not an offer made “without prejudice save as to costs”. Rather its tenor is that that the figure is put forward without prejudice to absolutely everything. The whole point of the reservation “save as to costs” is that it must be clearly expressed and brought to the attention of the recipient, if it is to be effective. See **Cutts v Head** [1984] 1 Ch. 290. It seems to me that the letter of August 2002 and indeed that of 12 August 2002 (whether the 3rd defendant’s solicitors received it or not) must be taken as inadmissible, and disregarded.

14. If I am wrong in this it is still difficult to see that the letter of 10 August 2002 is an offer of any sort rather than an attempt to sound out the plaintiff’s solicitors as to quantum. It says quite specifically that it is not to be construed as a formal offer, until the 3rd defendant had the agreement of the other defendants to make it; i.e. until it knew it would be able to go against them for indemnity. In effect the third defendant is saying “If we can protect ourselves by being able to preserve our rights against the 2nd defendant, we will be prepared to settle your claim at $280,000.00”. That is obviously how the plaintiff’s solicitors understood it, whether or not their letter of 12 August was received; they say, in terms “What is between you and your insured is not our concern; we will accept if we do not have to pay your insured any costs”. At best, everything was conditional. The 3rd defendant was not putting forward a definite offer on the basis of “We will pay $280,000.00 and costs now; if you want to take the matter further, it is at your risk as to costs” which is the basis both of payment into court and the usual Calderbank offer.

15. It must follow that the plaintiff’s costs cannot be restricted to the date of the letter. She will be entitled to costs against the 3rd defendant up to the date of the notice of acceptance of payment into court i.e. 2 January 2003.

16. I turn to the question of whether the the costs of the list of documents and witness statement filed on 7 January 2003. On 29 November 2002 she was ordered to file and serve her statement and list of documents within 28 days. The plaintiff’s solicitors were given no inkling at that time that settlement was in contemplation; the parties agreed to have a date fixed for assessment of damages. The payment into court came after 22 days. One could reasonably expect the plaintiff’s solicitors, acting diligently, to have their list of documents and witness statement prepared by then. It seems reasonable that the plaintiff should have the costs of their preparation. I do not see that she can have the costs of filing or serving the documents, however; that was unnecessary once the payment in had been accepted. In any event they were filed out of time.

17. I turn to the plaintiff’s own costs of proceeding against the 2nd defendant. The plaintiff was put on notice that the 2nd defendant denied vicarious liability on 8 March 2002, through its then solicitors, for the following stated reasons:

*1. The Driver was neither an agent nor a servant of our client at all material times.*

*2. The Private Car was being driven by the Driver for her own purpose which was wholly unrelated to our client at all.*

*3. The Drive was not driving the Private Car for our client’s purpose under a delegation of task or duty.*

*4. Our client has no control over the manner under which the Private Car was being driven by the Driver.*

18. The 2nd defendant’s position then was that the action against it would be strenuously defended. The plaintiff, knowing the position went ahead and sued the 2nd defendant. It seems to me that it must be taken to have done so at its own risk as to costs.

19. It is true that the plaintiff had no evidence in support of the 2nd defendant’s contentions at that stage, and that later the new solicitors sent them the witness statements. However, the position was no different. It was reasonable enough for the 2nd defendant to let the plaintiff out without paying its party and party costs but I cannot see why the 3rd defendant, as insurer, should bear the plaintiff’s own costs. They had nothing to do with the 3rd defendant. If the 3rd defendant had to pay those it would no doubt seek to recover them from the 2nd defendant. That would ultimately produce the illogical position of the 2nd defendant bearing the plaintiff’s solicitor and own client costs of suing it, when it had agreed to allow the plaintiff to withdraw the suit without paying any party and party costs.

20. There will accordingly be an order that the sum of $280,000.00 in court be paid out to the plaintiff in satisfaction of the cause of action in respect of which it was paid in, and that the defendant pay the plaintiff the costs of this action up to 2 January 2003, plus the costs of this application, all to be taxed if not agreed. The plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations.

G.P. Muttrie

District Judge

Mr. L. Ng of M/s Or, Ng & Chan for Plaintiff.

1st Defendant, acting in present, absent.

Mr. T. Ngar of M/s Munros for Defendant.