#### DCPI1323/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1323 OF 2006

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| BETWEEN | NG CHO SHING (the Administrator of the estate of WU HEUNG LIN, the deceased) | Plaintiff |
|  | and |  |
|  | CHAN YUNG CHI  WONG SHUN CHEONG  賴欽強trading as 強記運輸公司 | 1st Defendant  2nd Defendant  3rd Defendant |

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##### Coram: H H District Judge Marlene Ng in Chambers (open to the public)

Date of Hearing: 26th November, 2008

Date of Decision: 26th November, 2008

Date of Handing Down Reasons for Ruling: 28th November, 2008

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REASONS FOR RULING ON COSTS

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###### I. Introduction

1. On 3rd November 2008, I handed down my reasons for decision (“Reasons”) to set aside an “unless” order granted on 5th June 2008 (“Unless Order”) and the judgment on liability entered against the 1st and 2nd Defendants on 14th July 2008 (“Judgment”) on the basis of the Unless Order. In my Reasons, I also granted a costs order *nisi* in favour of the 1st and 2nd Defendants for the costs of their summons dated 22nd October 2008 (ie their application to set aside the Judgment and to lift the legal aid stay) in any event to be taxed if not agreed.
2. This is the Plaintiff’s application to vary the costs order *nisi.* By his Summons dated 11th November 2008 (“Costs Summons”), the Plaintiff applied for an order that the 1st and 2nd Defendants do pay the Plaintiff costs of their summons dated 22nd October 2008 as well as the costs of the application for variation of the costs order *nisi* to be taxed if not agreed.
3. The 1st and 2nd Defendants were absent at the hearing of the Costs Summons. However, the Plaintiff has filed affirmation of service of the Costs Summons, and I see no reason not to proceed with the hearing.

###### II. Reasons

1. The Unless Order provides *inter alia*  as follows :

“除非第一被告人及第二被告人於收到本命令14天內將有關本案的文件副本送交法院存檔及送達對方及將第一被告人關於事實方面的證人陳述書及第二被告人關於事實方面證人陳述書送交法院存檔及與對方交換，否則法庭將判原告人勝訴，而第一被告人及第二被告人須支付原告人損害賠償，數額有待法庭評估。”

1. The 1st and 2nd Defendants did not file/serve copies of documents or file/exchange witness statements, so the Judgment was entered against them.
2. In my Reasons, I held that whilst the court has power to strike out a defence and enter judgment on liability if a defendant fails to comply with a court order for filing and serving/exchanging list of documents and/or witness statements, the Judgment was irregular and liable to be set aside as of right since the Plaintiff entered Judgment without seeking and obtaining an order to strike out the Defence respectively filed by the 1st and 2nd Defendants. It should be noted that such Defence denied the Plaintiff’s claim both on liability and quantum, and pleaded material facts as to their case (see paragraphs 22 and 23 of the Reasons).
3. I also held there was no difference in the legal rationale for a default judgment on liability and a judgment on liability entered pursuant to an “unless” order because in either case there is no trial on the merits, and such judgment on liability is necessarily premised on implied admission of the plaintiff’s pleaded claim. Such rationale would have required any substantive Defence to be struck out before a judgment on liability could be entered otherwise a judgment on liability standing together with a substantive Defence going to the merits would be irregular and embarrassing.
4. I refer to the Reasons which set out in greater detail my reasons for decision, which I shall not repeat here. For consistency, I shall adopt the same abbreviations used in the Reasons.

###### III. Costs

1. Irregular judgments are liable to be set aside as of right for the court will not lend its process to maintain an irregular judgment (see paragraph 84 of the Reasons). Normally, on the usual principle that costs follow event, the party who has obtained an irregular judgment and who has unsuccessfully resisted the application to set aside such judgment should bear the costs of the application.
2. Mr Sun, solicitor for the Plaintiff, submitted that despite the usual principle referred to above, the court has a residual discretion on costs. I agree. Indeed, Order 62 rule 3(2) of the Rules of the District Court (“RDC”) provides as follows :

“If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, *except when it appears to the Court that in the circumstances of the case some other order should be made* as to the whole or any part of the costs.” (my emphasis)

However, the court’s discretion on costs must be exercised judicially, and there must be “circumstances of the case” which would persuade the court to exercise the discretion to order the “successful” party to pay the costs of the “unsuccessful” party.

1. Mr Sun made three points in support of the Costs Summons. First, he argued that since the Unless Order was permissible under Order 24 rule 16 of the RDC, the Judgment entered pursuant thereto was not irregular. Order 24 rule 16(1) of the RDC provides that :

“If any party who is required by any order or direction to make discovery of documents or to produce any documents for the purpose of inspection or for any other purpose or to supply copies thereof fails to comply with that order or direction, *the Court may make such order as it thinks just including, in particular,* an order that the action be dismissed or, as the case may be, *an order that the defence be struck out and judgment be entered accordingly*.” (my emphasis)

Mr Sun submitted that it was not a must for the court to strike out the Defence before entering judgment. He argued that the phrase “including, in particular” in Order 24 rule 16(1) of the RDC showed that this was just one of the possible orders the court could have made, but the court was only required to make an order “that it thinks just”.

1. First of all, this is not an argument that is open to the Plaintiff on an application for variation of the costs order *nisi* for I have found that the Judgment was irregular, and that the Defence filed by the 1st and 2nd Defendants still stood and had not been struck out. Further, even if (a) the matter is considered substantively and (b) a “just” order is to enter judgment against the offending parties, it must be trite that the exercise of the court’s discretion under Order 24 rule 16(1) of the RDC is for the purpose of facilitating the entry of a regular and not an obviously irregular judgment. If one should not enter judgment pursuant to an “unless” order for too much or prematurely or without service of the order to the other party (which are examples of irregularity), then there is no arguable reason for allowing a judgment being irregular on any other basis to stand. Still further, if the Defence of the 1st and 2nd Defendants were not struck out, the effect of the Judgment on liability cannot be an implied admission of the Plaintiff’s pleaded claim since the Defence joins issue with the Plaintiff’s pleaded claim. Mr Sun has not explained what is the nature and effect of the Judgment in those circumstances.
2. Mr Sun next argued (I assume on a further and/or alternative basis) that it is implicit from the Unless Order that the Defence of the 1st and 2nd Defendants would be struck out when Judgment was entered. First, this is not an argument that is open to the Plaintiff on an application for variation of the costs order *nisi* for I have found that the Defence filed by the 1st and 2nd Defendants still stood and had not been struck out. Secondly, even if the matter is considered substantively, I am also not with Mr Sun. Any court order must be taken seriously and obeyed, which means that the court order must state clearly and in sufficiently exact terms so that the parties required to comply with the order know precisely what they must or must not do, and what are the consequences of doing or not doing the things set out in the order. Here, the effect of the Unless Order is draconian for it provides for the entry of judgment on liability if there is non-compliance, ie it will put a final curtain on the issue of liability for the 1st and 2nd Defendants. I am persuaded there is no room in the Unless Order for any implicit order for striking out the Defence of the 1st and 2nd Defendants and they should not be left to guess what is the precise scope of the consequence of non-compliance.
3. Mr Sun then argued that notwithstanding that the Judgment was set aside, costs should be to the Plaintiff because the inaction and dilatory attitude of the 1st and 2nd Defendants in failing to attend the Check List Reviews, to make discovery and to file/serve witness statements was the root cause of the whole saga, and the irregularity of the Judgment was merely a technical point. Even if the irregularity is technical (which I do not agree) and the 1st and 2nd Defendants have been inactive, the irregularity does not arise from the conduct of the 1st and 2nd Defendants for they did not play any role in framing the terms of the Unless Order. Besides, I raised this very issue with the Plaintiff at the PTR and invited the Plaintiff’s solicitor to address on the regularity of the Judgment (see paragraph 73 of the Reasons), but the Plaintiff, well knowing such issue, still chose to support the Judgment at the hearing of 1st and 2nd Defendants’ summons to set aside the same. I have come to a decision on the merits after the Plaintiff had due notice of the relevant issue.
4. I fail to see why costs should not follow event. I have therefore at the hearing ordered that the Costs Summons be dismissed, which meant that the costs order *nisi* set out in paragraph 90 of the Reasons is made absolute. I also directed that there be no order as to costs of the Costs Summons.
5. I have instructed my clerk to send copies of this Ruling to the 1st and 2nd Defendants and to inform them by letter that (if they so require) a court translator will be arranged to verbally translate these Reasons for Ruling on Costs into punti language for them at the Wanchai Law Courts at a mutually convenient date and time.

# (Marlene Ng)

District Court Judge

Representation:

Mr P Sun of Messrs Huen & Partners for the Plaintiff.

The 1st Defendant in person and absent.

The 2nd Defendant in person and absent.