#### DCPI 1528/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1528 OF 2008

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

|  |  |  |
| --- | --- | --- |
| BETWEEN | CHOW MANG KA NORMAN | Plaintiff |
|  | and |  |
|  | CHAN YUEN FAN  CHAN PAK CHUEN | 1st Defendant  2nd Defendant |

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

##### Coram: Deputy District Judge Bernard Mak in Chambers (open to the public)

Date of Hearing: 18th February 2009

Date of Ruling: 18th February 2009

Date of Handing Down Reasons for Ruling: 27th February 2009

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

###### REASONS FOR RULING

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

1. In this action the Plaintiff claimed against the Defendants for damages for personal injuries caused to him by an unleashed dog. The 1st Defendant was in direct control of the Dog at the material times and the 2nd Defendant was the registered keeper of the Dog. The 1st Defendant made payment into court. Instead of accepting the payment in accordance with O.22, r.3 RDC the Plaintiff applied, within 14 days after receipt of the notice of payment, by summons marked with the sidenote “O.22, r.4 RDC” asking for leave to accept the 1st Defendant’s payment, a stay of all further proceedings in this action in terms of O.22, r.3(4) RDC, and for an order that the 1st Defendant do pay the Plaintiff’s costs in prosecuting his claim against the 2nd Defendant. The 2nd Defendant in response took out summons, again marked with sidenote “O.22, r.4 RDC”, for an order that his costs in this action be paid by the Plaintiff.
2. At the end of the hearing I gave leave to the Plaintiff to accept the payment by the 1st Defendant in full and final settlement of his claim against the 1st Defendant with consequential orders. On costs, I ordered that the Plaintiff’s costs of his action against the 1st Defendant (including this application save and except the costs of the hearing), and half of the costs of the hearing with certificate for counsel, be paid by the 1st Defendant. I made no order as to costs of the Plaintiff’s claim against the 2nd Defendant (which was discontinued at the hearing), or as to costs of the 2nd Defendant’s summons. I indicated that I shall deliver reasons of ruling which I hereby do.

*The Plaintiff’s application*

1. Mr. Cheung, Counsel for the Plaintiff, referred to O.22, r.4(1)(a) RDC as a reason for not making a notice under O.22, r.3 RDC. That is probably a misreading of O.22 RDC. Rule 3 of O.22 RDC governs acceptance of the money whilst r.4 governs payment of the money accepted (see Hong Kong Civil Procedure 2009 22/3/1). The absence of an O.22, r.3 notice of acceptance means the statutory stay as provided by O.22, r3(4) is not automatically engaged; and it also means, because the payment was not accepted in accordance with O.22, r.3, O.22 r.4 is not engaged at all and the Plaintiff’s application should indeed be governed by O.22, r.5.

*The Defendants’ position*

1. At the outset of the hearing I got confirmation from Mr. Chai, Counsel for the Defendants, that the payment in was made by the 1st Defendant for full and final satisfaction of the Plaintiff’s claim against the 1st Defendant only. Mr. Chai did not object that the money paid in by the 1st Defendant be paid out to the Plaintiff in satisfaction of his claim against the 1st Defendant; he submitted that as the Plaintiff had not made an O.22, r.3 notice of acceptance, the Plaintiff should only be entitled to costs of his claim against the 1st Defendant up to the date of payment-in, which he submitted was the usual order under O.22, r.5. On behalf of the 2nd Defendant, at the hearing, Mr. Chai objected to the Plaintiff’s application for a stay of his claim against the 2nd Defendant.

The issues

1. In response to the 2nd Defendant’s opposition to the Plaintiff’s application for stay of his claim against the 2nd Defendant, the Plaintiff abandoned such stay application and sought leave to discontinue his claim against the 2nd Defendant under O.21, r.3 RDC with no order as to costs. The 2nd Defendant did not oppose to the discontinuance sought by the Plaintiff but Mr. Chai asked for costs of the 2nd Defendant to be borne by the Plaintiff.
2. Hence the matter boiled down to 2 questions: (1) how much of the Plaintiff’s costs of his claim against the 1st Defendant should be borne by the 1st Defendant; (2) whether the 2nd Defendant should have his costs of the action against the Plaintiff.

Discussion

1. On question (1), whilst the Plaintiff did not make an O.22, r.3 acceptance, the present application was made within the time in which a notice of acceptance could have been served. There was no question that the 1st Defendant had timely notice of the Plaintiff’s intention to accept the payment. In any event, even had an O.22, r.3 notice of acceptance been made, the Plaintiff would still have to come back to Court for payment out under O.22, r.4(1)(a) RDC as the payment was made by the 1st Defendant alone and the 2nd Defendant was sued jointly with her. In the circumstances, the 1st Defendant had no reason to proceed to prepare for the trial of the claim against her in light of the Plaintiff’s application. Hence, save and except the costs of hearing to which slightly different considerations might apply, I fail to see why the Plaintiff should not have the costs of his claim against the 1st Defendant, including the costs of his application. I wish to make clear that by so ordering I did not mean to approve the Plaintiff’s mode of dealing with the 1st Defendant’s payment into court. The Plaintiff sought to invoke O.22, r.4 RDC while it was not engaged; and whilst O.22, r.4(1)(a) RDC applies only when the non-paying Defendant was sued “jointly or in the alternative” with the paying Defendant, the Plaintiff sought to support his application for a Sanderson/Bullock Order against the 1st Defendant by relying on *General Accident Insurance Asia Ltd v Hampton, Winter & Glynn* [1999] 2 HKLRD 109 which provided guidance in cases where the paying Defendant and the non-paying Defendant were sued severally.
2. On question (2), Mr. Chai submitted to the effect that the Plaintiff was unreasonable in suing the 2nd Defendant or in maintaining the claim because such claim could never get off the ground. It was submitted that the 2nd Defendant as the owner of the Dog could not be liable for the incident because he did not know of any propensity to mischief particular to the Dog but not common to the species in general; further there was no factual basis upon which the 2nd Defendant could be vicariously liable for the 1st Defendant’s negligence. I do not find such propositions made out. Both Defendants have been jointly represented by the same firm of solicitors from the inception of this action. The Plaintiff has by pre-action letter informed the 2nd Defendant his intention to sue the 2nd Defendant on the basis of vicarious liability. In reply, the Defendants alleged contributory negligence on the part of the Plaintiff and did not seek to assert any circumstances upon which they contended that the Plaintiff had no reasonable cause of action against the 2nd Defendant. While the lack of propensity to mischief on the part of the Dog was pleaded in the Defence, the 2nd Defendant did not seek to assert any fact or matter to say that the 1st Defendant, who was the 2nd Defendant’s wife, could not have been his agent at the material time. In any event it was clear that the Plaintiff’s perception of his chance of success against the 2nd Defendant played no part in his decision to discontinue such claim. The reality of the situation was that after the Plaintiff’s acceptance of the 1st Defendant’s payment, the claim against the 2nd Defendant could not yield further benefit to the Plaintiff under the principle of full satisfaction. I find that the present case falls squarely within the exception set out in Hong Kong Civil Procedure 2009 21/5/11: “*The general rule that a defendant is entitled to costs when an action is discontinued may be departed from in a case where the discontinuance of the proceedings is due to the matter having become academic, rather than to any acknowledgement by the plaintiff of likely defeat …*”. I consider that it is just and proper in the circumstances to make no order as to costs in relation to the discontinuance of the Plaintiff’s claim against the 2nd Defendant; accordingly no order as to costs was made on the 2nd Defendant’s summons.
3. As to the costs of the hearing, whilst the Plaintiff should be considered the successful party in the applications before the Court, a certain portion of the time was spent on issues arising out of the Plaintiff’s claim for a Sanderson/Bullock Order which became irrelevant after all. I therefore gave only half of the costs of the hearing to the Plaintiff, with certificate for counsel.

# (Bernard Mak)

Deputy District Judge

Representation:

Mr. Albert Cheung instructed by Messrs K. Y. Woo & Co. for the Plaintiff.

Mr. Michael Chai instructed by Messrs Peter Lau & Co. for the 1st and 2nd Defendants.