IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 44 OF 2000

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| BETWEEN | Lui Yin | Plaintiff |
|  | and |  |
|  | Chan Lin-mui | 1st Defendant |
|  |  |  |
|  | Ming Kong International Trading Company Limited  trading as  Lucky Restaurant | 2nd Defendant |

Coram: H H Judge Andrew Cheung in Court

Date of Hearing: 21 August 2001

Date of Judgment: 21 August 2001

Present: Mr H Lok, of Messrs Fung & Liu, for the Plaintiff

1st Defendant, in person

Ms V Yeung, instructed by Anthony Kwan & Co., for the 2nd Defendant

J U D G M E N T

1. This is an argument over costs.
2. On 2 August 2001, I gave judgment in this action. In my judgment, I found that the Plaintiff’s claim, based on negligence against the 1st Defendant for spilling water over her body, failed. In my judgment, I preferred the evidence given by the 1st Defendant to the evidence given by the Plaintiff as to how the accident exactly happened and I found in my judgment that according to the 1st Defendant’s account of the accident, which I accepted, no negligence was involved on the part of the 1st Defendant. Therefore, judgment was given by me for the 1st Defendant against the Plaintiff with costs.
3. As regards the position of the 2nd Defendant, I found in favour of the Plaintiff, finding that the 2nd Defendant was in breach of its duty as occupier of the restaurant premises where the accident took place and was in breach of its duty of care under the law of negligence. I therefore gave judgment in favour of the Plaintiff against the 2nd Defendant together with costs.
4. Today, the Plaintiff, by solicitor, came back before me asking me to vary the costs order nisi which I made as part of my judgment, and arguing that the costs of the successful 1st Defendant (after payment by the Plaintiff as ordered by me) should be reimbursed by the 2nd Defendant. In other words, the Plaintiff asked for a Bullock order following the well-known English Court of Appeal decision in Bullock v The London General Omnibus Company [1907] 1 KB 264.
5. Both sides agreed that I have a full discretion in the matter in relation to costs but a discretion has to be exercised along good and established principles. In this regard, I bear in mind the relevant principles as set out in Hong Kong Civil Procedure 2001, paragraphs 62/38 and 62/39, as well as a somewhat fuller passage in The Supreme Court Practice 1999, Volume 1, para. 62/B/124. As pointed out in the latter passage, a typical case for a Bullock order is when the plaintiff was a passenger injured in a vehicle involved in a collision with another vehicle and the plaintiff, being a passenger, did not have full information as to which of the two drivers involved in the collision was responsible for the collision, and a typical case would be where each driver was blaming the other for causing the accident. In those circumstances, the authorities established that it would be reasonable for the plaintiff to join both drivers as defendants in his claim for compensation and although at the end of the day he might only have succeeded against one driver but not both, he would be entitled to the costs against both drivers by means of either a Bullock order or a Sanderson order (named after another well-known Court of Appeal decision in Sanderson v Blyth Theatre Co. [1903] 2 KB 533).
6. I note that the gist of such an order or the rationale behind such an order is that the plaintiff was not certain before judgment was rendered after trial whether a particular driver or particular defendant was liable for the wrong for which he was suing and therefore it was reasonable for him to join both defendants as defendants in the action for compensation.
7. But in the present case, the situation is different. Whilst it might be said that before judgment, it was rather uncertain on the part of the lawyers representing the parties, and perhaps the court as well, as to whether the plaintiff was telling the truth or the 1st Defendant was telling the truth regarding how the accident happened, the uncertainty was that of the lawyers’, not the parties themselves’. In other words, even before judgment was rendered in the present case, the Plaintiff must have known how the accident actually happened and based on my finding which must form the basis of my exercise of discretion today, the Plaintiff must have known that the version or the account of how the accident happened given by the 1st Defendant was the correct one and based on that account, with good legal advice, the Plaintiff ought to have known that her claim against the 1st Defendant would fail. Perhaps I should add that any uncertainty as to whether the Plaintiff had a case against the 1st Defendant based on the 1st Defendant’s account or version of the accident would not be an uncertainty justifying the imposition of a Bullock or Sanderson order. So, as the older version of the White Book pointed out, when the plaintiff’s doubt is as to the law, the court may decline to make a Bullock or Sanderson order. Such uncertainties would be present in almost every case before the court.
8. Another important factor to bear in mind in the present case is that neither in the pleadings nor at the trial did the 2nd Defendant, the restaurant, ever lay the blame for the accident on the shoulders of the 1st Defendant. So, unlike many typical cases where a Bullock or Sanderson order was made, there was no in-fighting between the co‑defendants as to which the Plaintiff had no way to decide who was telling the truth. In the present case, throughout the 2nd Defendant never said that the 1st Defendant was at fault in the accident, so it was at the trial solely a contest between the Plaintiff and the 1st Defendant as to how the accident happened and the legal consequences following from how the accident happened.
9. So, in my judgment, the circumstances of the present case are very different from those cases where a Bullock or Sanderson order was made. Apart from a collision case, a typical case for the making of a Bullock or Sanderson order would be where a contracting party sued a defendant for breach of a contract entered into through an alleged agent and the alleged contracting party denied the authority of the alleged agent in entering into the contract for and on its behalf, whilst the agent claimed that he was so fully authorised. In that sort of situation, it would be reasonable for the plaintiff to join both in the alternative in its claim for breach of contract and it would not be within the knowledge of the plaintiff as to whether the agent was really fully authorised to enter into the contract in question. The matter would be within the peculiar knowledge of the two defendants.
10. Unlike those situations, how the accident happened in the present case must have been within the peculiar knowledge of the Plaintiff herself, although not within the knowledge of those representing her in this action and at the trial. As I said, any uncertainty was that of the lawyers’, not the client’s.
11. So for all these reasons, I see no justification for granting a Bullock order in the present case. In other words, in my judgment, given the peculiar knowledge which the Plaintiff must have had regarding how the accident happened, it was not reasonable for her to institute the claim against the 1st Defendant. If she did not know that according to the account of the accident given by the 1st Defendant, or in other words, how the accident actually happened, she had, as a matter of law, no good claim against the 1st Defendant, she would only have herself to blame for, quite obviously, the true account of the accident was not related to those representing her, resulting in proper advice as to the chance of success against the 1st Defendant not having been rendered to her in this action.
12. So for all these reasons, I refuse the application of the Plaintiff to vary the costs order nisi. In other words, in my judgment, the costs of the successful 1st Defendant should be borne by the Plaintiff who is not entitled to obtain reimbursement of the costs from the 2nd Defendant.

(Submissions on costs)

1. Having heard Mr Lok, solicitor for the Plaintiff’s argument which was basically that before today’s application they had written to the 2nd Defendant for their response to their intended application but received no reply, I am of the view that regardless of the response of the 2nd Defendant, the responsibility for taking out today’s unsuccessful application must lie with the Plaintiff. Any response from the 2nd Defendant could not have lessened the responsibility of the Plaintiff for today’s hearing and the costs thereof.
2. At the end of the day, as the 2nd Defendant was right in opposing this application, costs must follow the event and, therefore, I also order that the costs of today’s application be paid by the Plaintiff firstly to the 1st Defendant which I assess at HK$200 because the 1st Defendant only appeared in court for a very short period of time before Mr Lok clarified that he was only seeking a Bullock order which therefore would not affect the position of the 1st Defendant at all; and secondly, to the 2nd Defendant to be taxed if not agreed. I also order that the Plaintiff’s own costs of this application be taxed in accordance with the Legal Aid Regulations.

Judge Andrew Cheung

District Court Judge

I/we certify that to the best of my/our ability and skill, the foregoing is a true transcript of the audio recording of the above proceedings.

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Liz Shore

23 August 2001