## DCPI 2315/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2315 OF 2008

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| BETWEEN | O’BRIEN TSE SHUK CHUN SANDRA | Plaintiff |
|  | and |  |
|  | LO HOI YIN | 1st Defendant |
|  | LEE CHI MING | 2nd Defendant |
|  | THE MOTOR INSURERS’ BUREAU OF HONG KONG | 3rd Defendant |

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Coram : Her Honour Judge Mimmie Chan in Court

Date of hearing : 29 June, 2010

Date of handing down Judgment : 6 July, 2010

# JUDGMENT ON COSTS

**Background**

1. On 24 June 2010, I handed down Judgment in these proceedings, whereby the 2nd Defendant ("**Mr. Lee**") was found to be liable in negligence in respect of the injury sustained by the Plaintiff ("**Mrs. O'Brien**") in a collision. The issue of costs was left for further argument, which took place on 29 June 2010.
2. The Writ in these proceedings was issued on 31October 2008. Mrs. O'Brien sought damages of $120,000. On 13 January 2009, the 1st Defendant ("**Mr. Lo**") through his solicitors openly admitted liability. Interlocutory judgment was entered against Mr. Lo on 24 February 2009.
3. On 19 January 2009, Mr. Lee had issued a notice of contribution/indemnity against Mr. Lo, and on 9 March 2009 (as reflected in the Order of Master K. Lo made on the same day), Mr. Lo conceded to judgment in the contribution proceedings in favor of Mr. Lee, thereby agreeing to indemnify Mr. Lee fully for any damages for which Mr. Lee may be held liable to pay to Mrs. O'Brien.
4. The quantum of Mrs. O'Brien's claim for damages was agreed on 11 June 2010 at $50,000. The parties have agreed that Mr. Lo and the 3rd Defendant, the Motor Insurers' Bureau (“**MIB**”), will pay: (1) Mrs. O'Brien's costs on the issue of Mr. Lo's liability up to 24 February 2009 (when interlocutory judgment was entered against Mr. Lo), and (2) her costs on the issue of quantum up to 11 June 2010.
5. The parties have failed to agree on the issue of Mrs. O'Brien's costs of proceeding with the action against Mr. Lee after 9 March 2009 (when Mr. Lo consented to judgment in the contribution proceedings) and up to trial on 17 June 2010.
6. The applicable legal principles are as set out in *In re Elgindata Ltd*. (No.2) [1992] 1 WLR 1207 and in *Wang Din Shin v. Nina Kung* CACV No. 460/2002 and CACV 67/2003, 19 April 2005. Costs are in the discretion of the court, and should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made, as where the successful party raised issues or makes allegations improperly or unnecessarily.
7. As I have indicated at the commencement of trial when arguments on costs were first raised, a plaintiff is in law entitled to commence proceedings against two or more defendants who are jointly and severally liable in negligence, and to pursue judgment against any of these defendants, notwithstanding that some other defendant has conceded liability or consented to judgment. However, if it can be established that a party is guilty of unreasonable or unnecessary conduct in proceeding with the action, such party may be at its own peril as to costs.

**The question of conduct**

1. I agree that Mrs. O'Brien has the right to pursue to judgment against Mr. Lee on the basis of his joint and several liability in negligence. However, with Mr. Lo having consented to judgment against him on liability and having agreed quantum, the trial on Mr. Lee's liability was unnecessary and the costs of such trial could have been saved. Mrs. O'Brien has not explained the need for a judgment against Mr. Lee.

1. Moreover, Counsel for Mr. Lo has drawn attention to a letter dated 12 March 2009 ("**12 March 2009 Letter**") from the solicitors then acting for Mr. Lo to Mrs. O'Brien's solicitors. By this time, these solicitors had already confirmed on 13 January 2009 that Mrs. O'Brien could enter judgment against Mr. Lo for damages to be assessed. On the other hand, Mr. Lee's liability was throughout denied by both Mr. Lee and by Mr. Lo.
2. In the 12 March 2009 Letter, Mr. Lo's solicitors proposed that Mrs. O'Brien should discontinue the action against Mr. Lee and leave the outstanding issue of costs to be determined by the Court. This offer was not taken up by those acting for Mrs. O'Brien.
3. When correspondence resumed about 9 months later, Mrs. O'Brien's costs of her action against Mr. Lee remained the bone of contention amongst the parties, but they were able in June 2010 to agree on quantum at $50,000 inclusive of interest.
4. Ultimately, at the commencement of trial on 17 June 2010, Mrs. O'Brien proceeded with her case against Mr. Lee on liability, and two morning sessions were spent in total for calling Mrs. O'Brien and Mr. Lee to give evidence and to be cross-examined, and for opening and closing submissions to be made by Counsel.
5. The Court's approach to determining costs without trial is helpfully summarized in the decision of Mr. Recorder Jat SC in *Graham M. Morley v. Kwan Wo San & Ors.* HCA 4366/2003, 30 December 2009. It is open to the court to make an order for costs without a full trial or determination of the substantive issues in dispute between the parties. The hands of the court are not tied as to what evidence it should or should not receive and what findings it should or should not make in a particular case for the purpose of adjudicating on costs. It is up to the parties to put forward such evidence as is helpful to their case for the purpose of seeking adjudication on the costs issue.
6. The facts and evidence in this case are not complicated. Mr. Lee did not dispute many aspects of how the collisions of the vehicles concerned took place. Miss Loh, Counsel for Mr. Lo, argued that on the question of costs, the issue of whether Mrs. O'Brien had acted reasonably in joining Mr. Lee as a defendant could have been determined even without calling Mrs. O'Brien and Mr. Lee, on the basis of the documents and essentially the police statements disclosed. The costs of the examination and cross-examination of Mrs. O'Brien and Mr. Lee and the submissions on their evidence could have been avoided on this basis.
7. Whether the course suggested by Miss Loh (or some other appropriate course) is adopted, I am satisfied that if the proposal made in the 12 March 2009 Letter was accepted, a substantial part of the costs of the two morning sessions in Court and the costs of the preparation of Counsel's submissions on the evidence regarding Mr. Lee's liability could have been saved. The Court could have been able to decide on the costs of Mrs. O'Brien's action against Mr. Lee without hearing evidence, or on a "broad brush" approach as described in *BCT Software Solutions Ltd. v. C Brewers & Sons Ltd* [2003] EWCA Civ 939, and/or on the basis of the available documentary evidence.
8. I find therefore that the trial on the issue of Mr. Lee's liability in June 2010 was unnecessary, and further, that Mrs. O'Brien had been unreasonable in failing to accept the proposal made on behalf of Mr. Lo in the 12 March 2009 Letter. This is particularly so bearing in mind the small amount of Mrs. O'Brien's claim ($120,000), the settlement figures negotiated ($49,000 proposed in January 2009 and $50,000 agreed in June 2010), and the underlying objectives of the Civil Justice Reform with emphases on cost effectiveness, procedural economy and proportionality.

**Costs Order**

1. As between Mrs. O'Brien, Mr. Lo and MIB, I order that: as agreed, Mr. Lo and MIB shall pay Mrs. O'Brien's costs on liability up to 24 February 2009 and her costs on quantum up to 11 June 2010; and that there be no order as to Mrs. O'Brien's costs after 11 June 2010.
2. Following from my finding on the possibility of dealing with the question of costs without the necessity of a full trial on liability, I do not agree that Mr. Lo should be entitled to recover from Mrs. O'Brien the costs of the attendance of his counsel and his solicitors at trial in June 2010. Those acting for Mrs. O'Brien had made it clear to the solicitors acting for Mr. Lo and MIB on 14 June 2010 that their attendance at the trial on Mr. Lee's liability would not be necessary. Notwithstanding that, those acting for Mr. Lo and MIB chose to attend the trial on the basis that the evidence was relevant to the determination of the costs issue.
3. As between Mrs. O'Brien and Mr. Lee, I order that: as agreed, Mr. Lee is to pay Mrs. O'Brien's costs up to 9 March 2009, which costs are to be paid by Mr. Lo and MIB; and Mrs. O'Brien is to pay Mr. Lee's costs on liability after 9 March 2009, including the costs of trial, which costs were unnecessary and incurred as a result of Mrs. O'Brien's unreasonable conduct.
4. All costs include certificate for counsel.

**Scale of costs**

1. Mrs. O'Brien's claim for $124,460 was ultimately settled at $50,000 inclusive of interest. It was argued that she should only be entitled to costs in accordance with the scale of costs applicable to the Small Claims Tribunal.
2. On the question of whether Mrs. O'Brien should be entitled to her costs on the District Court scale, I bear in mind that the injuries are not very serious (expiration to herlaceration to her to her eyebrow and abrasion to her left knee), the expenses she incurred were not substantial, and as she has not suffered any loss of earnings, the main claim was for pain and suffering. Bearing in mind the authorities to which I have been referred on the likely amount of award of damages for Mrs. O'Brien 's injuries (*Cheung Yu Tin v. Ho Hon Ka* [2006] 2 HKLRD 674 and *M Beraha & Co Ltd v. Ng Wai Lun* [2004] 3 HKC 535), I am not entirely satisfied that at the time when the Writ was issued in the District Court in October 2008, it was then obvious that properly assessed, there was **no** reasonable prospect of her recovering an award exceeding the monetary jurisdiction of the Small Claims Tribunal. It was reasonable for Mrs. O'Brien and those advising her to take the course of the District Court, being the usual forum for small personal injury actions, with the expectation of an award just above the ceiling of the Small Claims Tribunal. I will allow her costs on the District Court scale.

(Mimmie Chan)

District Judge

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

*Miss Phillis Loh, instructed by Messrs. Deacons, for the 1st & 3rd Defendants*