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DCPI 22/2015

[2019] HKDC 1316

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO. 22 OF 2015**

BETWEEN:

LAI YAU TAI

Plaintiff

and

MORAL ACCORD LIMITED

1st Defendant

LUNG TANG TAK FAT
LOGISTICS LIMITED

2nd Defendant

RICHFAIR ENGINEERING LIMITED

3rd Defendant

Coram: His Honour Judge Harold Leong in Chambers

Date of Hearing: 13 September 2019

Date of Decision: 2 October 2019

DECISION

1. This is a hearing for an application by the plaintiff and an application by the 1st and 2nd defendants, both dated 30 August 2019, to vary the cost order *nisi* that I gave on 16 August 2019. In that order, I awarded 40% of the plaintiff's costs to be paid by the 3rd defendant and for the plaintiff to pay the costs of the 1st and 2nd defendants.

2. The plaintiff is applying to vary the costs order for the 3rd defendant to pay both the plaintiff's and the 1st and 2nd defendants' costs of the action, with the latter by way of a *Sanderson* Order.

3. The 1st and 2nd defendants are applying to vary the costs order for the 3rd defendant to pay the 1st and 2nd defendants' costs in the contribution proceedings (which was not dealt with in the order *nisi*) and also a certain percentage of the 1st and 2nd defendants' costs in the main action (a sort of "partial" *Sanderson* Order). A split of 60:40 between the plaintiff and the 3rd defendant was suggested.

4. This is not an easy case to apportion costs when one considers what is reasonable and fair between the parties.

5. Firstly, the plaintiff failed in establishing the facts in his case against the 1st and 2nd defendant when it should be clear to him (and he was the only person who must know this) that he was himself in breach of the safety regulations of the 1st defendant in the first place. On top of this, much of the plaintiff's allegations against the 1st and 2nd defendants were cumbersome and repetitive (much trial time was spent on dealing with them). Further, given that the plaintiff must know that he had himself breached the safety regulations, he must know that the allegations against

the 1st and 2nd defendant (and there are plenty of them) must largely be irrelevant.

6. Secondly, the 3rd defendant also failed to establish part of his evidence in defence. The court found that he was 40% liable, with the plaintiff's contributory liability at 60%.

7. Thirdly, there is a contribution proceeding between the i) 1st and 2nd defendants, and ii) the 3rd defendant. The 3rd defendant did put the blame on the 1st and 2nd defendants but he has based this on the plaintiff's own allegations against those defendants.

8. Fourthly, the quantum was agreed at HK\$120,000 shortly before the trial. The plaintiff originally pleaded HK\$357,500 plus interest. Either way, it must be obvious to the parties that this would not be a big claim and that proportionality of costs would be an issue.

The legal principle

9. Order 62 r.3(2) of the RDC provides, "*If the Court in the exercise of its discretion sees fit to make any order as to 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 be made as to the whole or any part of the costs.*"

The plaintiff's costs of the action

10. Mr. Lim, now being instructed as Counsel for the plaintiff, helpfully referred the court to the case of *Seepersad v Persad* [2004] UKPC 19. In that Privy Council case, Lord Carswell held:

“The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed to on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs...An issue for these purposes must be something so distinct and separate in itself that the decision of it constitute an “event”.”

11. Mr. Lim quoted various precedents which showed that the mere finding of contributory negligence, even to a greater degree on part of the plaintiff, does not mean that there should be any deviation of the general rule of costs following events, and the plaintiff was, in such cases, awarded the costs of the whole action. He suggested that the issue of liability and contributory negligence is one single issue.

12. However, I am not entirely with Mr. Lim here. This is a more complicated case because it involved multiple defendants.

13. Whilst I agree that the issue of liability and contributory negligence as between the plaintiff and the 3rd defendant is certainly one single issue, here, the plaintiff was clearly holding separate cases against the 1st and 2nd defendants (alleging failures of various safety / training / supervision provided by the employer to the plaintiff) and the 3rd defendant (alleging unsafe operation of the crane, including the failure to raise the container to a proper height). As such, plaintiff was maintaining two sets of allegations which were entirely distinct and so was capable of incurring costs entirely separately: the plaintiff, if he so chooses, could have sued either the 1st and 2nd defendants without suing the 3rd defendant or the other way round.

14. These two sets of allegations must therefore be regarded as “*a distinct and separate event*” incurring costs separately.

15. In the case of *Kwong Ka Yin v Cheung Hing Worldwide Ltd & Anor* [2018] HKCFI 2351, the plaintiff failed to prove the core of her factual contentions, and although the learned judge found for the plaintiff on the basis of the defendant’s (2nd defendant’s) case, she awarded only 50% of the costs to the plaintiff payable by the 2nd defendant on the basis that the plaintiff’s factual contentions “*were subject of a not insignificant part of the pleadings, statement evidence and trial/re-trial hearings*”.

16. The *Kwong* case was slightly different from the current case: the “*not insignificant*” costs were spent on the allegations the plaintiff raised against the 2nd defendant. I think the current case is even more clear cut as to whether there is “*a distinct and separate event*”: there was no objection to costs issues regarding the case between the plaintiff and

the 3rd defendant, rather, the dispute concerned the “*not insignificant costs*” spent by the plaintiff against 1st and 2nd defendant, which failed completely, and one must ask whether it would be reasonable that the 3rd defendant should be ask to fund this “*event*”.

17. One must also look at the conduct of the parties in order to aim to achieve some degree of fairness.

18. As I have observed previously, on the findings of facts by the court, one must logically conclude that the plaintiff could not have believed that the container was swinging or spinning all along: it must have been clear to him that he had crossed into the path of the container which was against the 1st defendant’s safety regulations (which was signed by the plaintiff) prohibiting such practice.

19. Under such circumstances, I would think that any allegations of failure on the part of the 1st and 2nd defendant in safety training, supervision etc. must be irrelevant given that the plaintiff has clearly chosen not to abide to the *one* safety regulation which would have prevented the accident entirely.

20. One might question why the plaintiff should commence action against the 1st and 2nd defendants at all. But even if the plaintiff did so as a sort of “safety net”, once proper investigations had revealed the paucity of evidence supporting the “spinning container allegation”, and once the safety regulations signed by the plaintiff was disclosed, the plaintiff, and those advising him, should have reasonably concluded that the claim against the 1st and 2nd defendants would not be sustainable,

especially given that the claim was relatively small and there should be a sense of proportionality.

21. I am also minded of the fact that the plaintiff has spent half of the first day of trial in an attempt to amend the allegations against the 1st and 2nd defendants. All these efforts were futile. The plaintiff would have obtained exactly the same judgment should he sue only the 3rd defendant.

22. As for the 3rd defendant, one might have some sympathy with its difficult position: it sought to negotiate an apportionment of liability with the 1st and 2nd defendants based on the plaintiff's allegations against them, but it was not a party to the employment of the plaintiff thus perhaps not in a position to verify the strength of such allegations. It was unsurprising that such efforts were doomed to fail.

23. However, it must also be clear to the 3rd defendant (or at least its witness, Mr. Sin) that the accident would not have occurred had the container been raised to the proper height (see the argument as stated in the judgment). So one must also logically conclude that Mr. Sin knew that the container was not raised properly all along. The 3rd defendant would not be found free of liability in any case.

24. I therefore agree with Mr. Lim's submission that the 3rd defendant could have taken advantage of provisions of O.22 r.5(4) of RDC to make a sanctioned offer to the plaintiff to accept liability up to a certain proportion to protect itself on costs instead of maintaining a denial of liability. I also note that Mr. Gidwani, Counsel for the 3rd defendant,

did submit in both his opening and closing submissions that the plaintiff's contributory negligence should be 60%.

25. Having considered all the circumstances, I would vary the order concerning the plaintiff's cost in that the 3rd defendant shall bear 70% of the plaintiff's costs of the action with certificate for counsel.

The 1st and 2nd defendant's costs in the main action

26. The 1st and 2nd defendants are the successful defendants in this case. The plaintiff and the 1st and 2nd defendants are seeking to vary the costs order for a *Sanderson* Order so that the 3rd defendant, as the unsuccessful defendant, should pay the costs of the successful defendants.

27. The legal principle has been stated by Bharwaney J in *Fung Chun Man v. Hospital Authority HCPI 1113/2006*:

"The classic case where a Sanderson or Bullock order is made is where the unsuccessful defendant blames the successful defendant and causes the plaintiff to either join the successful defendant or to continue the proceedings against the successful defendant. However, even absent such circumstances, it may be reasonable for the plaintiff to join the successful defendant, in cases where the plaintiff is faced with a denial of liability by the unsuccessful defendant and the real risk that the unsuccessful defendant may either be absolved from liability or unable to satisfy any judgment that may be obtained against him. In such circumstances, if the plaintiff is in possession of evidence that can implicate the

successful defendant, evidence that is neither tenuous nor speculative nor far-fetched, it would be reasonable for the plaintiff to join or to proceed against the successful defendant and the court, at the conclusion of such a case, may, in the exercise of its discretion over costs, make a Sanderson or Bullock order.”

28. In *Chong Ngan Seng v China Harbour Engineering Co. Ltd.* CACV 54/2012, the Court of Appeal stated that the fact that the unsuccessful co-defendant puts blame on the successful defendant is a “significant” or “weighty” factor in the consideration of a *Sanderson* or *Bullock* Order:-

“22....In any event, we note that Peter Gibson LJ, when analysing the jurisdiction to make a Sanderson or Bullock order, indicated that whether one defendant puts the blame on another defendant is a “significant factor”. That was a factor that was present in this case and, in our judgment, was a weighty factor.”

29. In this case, the 3rd defendant has certainly denied liability and put the blame on the 1st and 2nd defendants.

30. However, in putting the blame, the 3rd defendant did not raise any new allegations of its own but was entirely relying on the plaintiff’s allegations against the 1st and 2nd defendants, stating that “*the 3rd defendant shall rely upon the particulars...as pleaded by the plaintiff...*” (see paragraphs 9.1, 9.3, 9.4 and 9.5 of the Amended Defence of the 3rd Defendant). Separately, in paragraph 9.2, the 3rd defendant made the allegation that “*the 1st and 2nd defendant negligently assigned*

the plaintiff to perform the duties of both a rigger and a signalman... ”.

But this was also not a new allegation as it was already pleaded by the plaintiff under paragraph 8 (A)(3)(a1) of the Re-Amended Statement of Claim.

31. I think this is an important distinguishing factor.

32. A *Sanderson* or *Bullock* Order, as stated by Bharwaney J, should apply to situations when “*the unsuccessful defendant blames the successful defendant and **causes** the plaintiff to either join the successful defendant or to continue the proceedings against the successful defendant.*”, or in situations “*in cases where the plaintiff is faced with a **denial of liability** by the unsuccessful defendant and **the real risk that the unsuccessful defendant may...be absolved from liability**...*”

33. The rationale behind this is that it must be fair for the eventual unsuccessful co-defendant to fund the costs of the eventual successful co-defendant **if its blames and/or denial of liability causes the plaintiff to join and continue the action against the successful co-defendant.** There are circumstances that the plaintiff cannot reasonably take the risk that, if the “blames” can be established but the plaintiff has not join the party being blamed, he will be left with no judgment.

34. In my view, there is nothing new in this rationale other than an application of usual “costs following the event” principle, that is: “if a party **causes** costs to be incurred by other parties which it could not eventually vindicate, that party has to pay such costs (to the extent that such are reasonably incurred).”

35. Thus, the operative word of this principle is “**causes**”.

36. Bharwaney J was clearly envisaging the situation, say for example, when a patient sued a doctor for negligence, and the doctor denied liability but blamed it on the failure of his medical equipment. Clearly, this blaming would **cause** the plaintiff to join the manufacturer of the medical equipment. The “blame” is a new allegation with supportive facts and evidence raised by the doctor (and **not** by the patient), and if the doctor establishes such, he will be absolved from liability, and if the plaintiff has not joined the manufacturer, he will be left with nothing.

37. This is a situation where there is a “daisy chain of passing of liability”: A blames B and B blames C. In this case, A, as the claimant, clearly “*does not know which of the two or more defendants should be sued for a wrong done to the claimant*” (per *Irvine v Commissioner of Police for the Metropolis* [2015] 3 Costs LR380) It is reasonable under the circumstances for A to join and maintain its action against C. Of course, if B subsequently fails to establish its “blames”, it would be appropriate for the court to consider giving a *Sanderson* or *Bullock* Order: clearly, it was B who created this situation which has caused C to be sued and costs to be incurred, so it is only fair that B should pay the costs of C.

38. However, the current case is entirely different: it does not concern a “daisy chain of passing of liability”.

39. Instead, as stated above, the plaintiff has two independent sets of allegations against the 1st and 2nd defendants vis-a-vis the 3rd defendant.

40. The 3rd defendant's "blames" against the the 1st and 2nd defendants were nothing more than reiterations of the allegations already raised by the plaintiff against the 1st and 2nd defendants. The 3rd defendant did not make any new allegations on his own.

41. These two sets of allegations are factually and causatively independent of each other. In other words, establishing the 3rd defendant's "blames" / the plaintiff's allegations against the 1st and 2nd defendants would not absolve the 3rd defendant of his own liability.

42. Further, as the 3rd defendant's "blames" were entirely the plaintiff's own allegations, the plaintiff himself would know the evidential strength of such allegations: he, not the 3rd defendant, was in the position to assess safety measures, trainings, supervisions etc. which were matters arising out of the employer / employee relationship to which the 3rd defendant was not a party to.

43. As such, it was entirely within the plaintiff's knowledge and judgment to decide whether to commence and continue the claim against the 1st and 2nd defendants. Indeed, the plaintiff had commenced proceedings against all three defendants right at the beginning, well before the 3rd defendant put in any "blame" in its defence against the 1st and 2nd defendants.

44. Therefore, in this case, the 3rd defendant's "blames" against the 1st and 2nd defendants could not have **caused** the plaintiff to **join** nor **continue** the action against the 1st and 2nd defendants.

45. It would be grossly unfair to the 3rd defendant if a *Sanderson* or *Bullock* Order is given. For the plaintiff, it would be a "heads I win, tails you lose" scenario: if he established his allegations against the 1st and 2nd defendants, he would obtain judgment, but if he failed, the 3rd defendant would "foot the bill". Thus, the plaintiff would have taken a "free ride" in his action against the 1st and 2nd defendants, all because the 3rd defendant has adopted the plaintiff's allegations against the 1st and 2nd defendants.

46. This is the situation discussed in the *Irvine* case:

"31...the fact that one defendant blames another does not in itself make the joinder of the other reasonable. It must depend on the fact available to the claimant, and in particular whether the claimant can sustain a claim against the other defendant. Defendants frequently blame each other when things go wrong, but it does not follow that the claimant is thereby given liberty to sue the others at the expense of the defendant against whom the claimant succeeds."

47. In this case, all the facts on whether the plaintiff should join and sustain the claim against the 1st and 2nd defendants were clearly available to the plaintiff: those were his own facts.

48. It would have been a completely different scenario if the 3rd defendant has raised his own allegation in defence that, say, the crane was unsafe because of some equipment defect, thus passing on the liability. The plaintiff might then have to join the manufacturer of the crane as the 4th defendant. It must be noted that in this scenario, the “blame” was an allegation raised by the 3rd defendant who was in the position to know the facts and to assess the strength of such allegation. The plaintiff would not know anything about the crane or its operation. And if the 3rd defendant failed to prove his allegation against the 4th defendant, it must follow that the court should consider a *Sanderson* or *Bullock* Order for the 3rd defendant to pay the 4th defendant’s costs.

49. Thus, there is no reason why the court should vary the costs order regarding the costs of the 1st and 2nd defendants in the main action.

Contribution proceedings

50. The court has ruled that the 1st and 2nd defendants have not breached their duties at all so between the co-defendants, the 1st and 2nd defendants are the winners.

51. There is no reason why costs should not follow the event so the 3rd defendant should pay the costs of the 1st and 2nd defendants in the contribution proceedings.

Order

52. I would therefore make the following costs order absolute:

i) 70% of the costs of the action be to the plaintiff payable by the 3rd defendant with certificate for counsel, to be taxed if not agreed;

ii) the costs of the 1st and 2nd defendants in the main action be payable by the plaintiff with certificate for counsel, to be taxed if not agreed; and

iii) the costs of the 1st and 2nd defendants in the contribution proceedings be paid by the 3rd defendant with certificate for counsel, to be taxed if not agreed.

Costs of the applications

53. As each party's argument prevailed only partially, I think that it is just and reasonable for the court not to make any order as to costs in the current applications.

(Harold Leong)
District Judge

Mr Patrick Lim, instructed by Kenneth W Leung & Co, for the plaintiff
Mr Martin Ho leading Miss Karen Chan, instructed by John C H Suen & Co, for the 1st and 2nd defendants
Mr Victor Gidwani, instructed by Lau, Chan & Ko, for the 3rd defendant