DCEC 2554/2019

[2021] HKDC 271

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

EMPLOYEES' COMPENSATION CASE NO. 2554 OF 2019

IN THE MATTER OF AN APPLICATION BETWEEN

TABASSAM RAHEEM	Applicant
and	
CHUN HUNG ENGINEERING LIMITED	1st Respondent
YEUNG BOR KEE WORKS COMPANY LIMITED	2nd Respondent

Coram: His Honour Judge H. Au-Yeung (Paper Disposal)

Date of the Applicant's Submissions: 29 January 2021

Date of the Respondents' Submissions: 5 February 2021

Date of the Applicant's Submissions in Reply: 10 February 2021

Date of Decision: 4 March 2021

DECISION

THE APPLICATION

1. This is the applicant's application for interim payment made pursuant to his summons filed on 27 May 2020.

LEGAL PRINCIPLES

2. In *Top One International (China) Property Group Company Limited & Another v Top One Property Group Limited & Others* (CACV 269/2011, unreported, 20 July 2012), Bharwaney J had the following to say:

> "15. …Before making an order for interim payment, the court must be satisfied, on a balance of probabilities, that the plaintiff will succeed in obtaining judgment on liability and, in addition, that he will obtain an award of substantial damages. However, where, as in this case, interlocutory judgment for damages has already been entered, the court must approach the matter, as the learned deputy judge rightly did, by having regard to the provisions of RHC O.29, r.11 which state:
>
> > '(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied --
> >
> > (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed…
> >
> > the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.'
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> 16. There is no better statement of the correct approach than that of O'Conner LJ in *Newport (Essex) Engineering v Press & Shear Machinery* 24 BLR 71 at pp.76-77:

'The power to make or refuse an order is discretionary so that this court will only interfere on the well established principles. An interim payment is defined by rule 9 as

> 'a payment on account of any damages the defendant may be held liable to pay to the plaintiff'.

Rule 11(1) provides that the payment on account is not to exceed

> 'a reasonable proportion of the damages which, in the opinion of the court, are likely to be recovered by the plaintiff'.

Lastly, if the court decides to make an order, the amount is to be such

> 'as it thinks just'.

The court has to make an estimate of the damages which are

> 'likely to be recovered';

that is, when the issue is finally determined. The ease or difficulty in making such an estimate will vary enormously from case to case. In some cases it is quite impossible to make a useful estimate without hearing the case out. Are plaintiffs in such cases to be excluded from obtaining an interim payment? I think not, for, on the material available to the court hearing the application, the court may be in a position to say

> 'the plaintiff should recover at least £x and is likely to recover more or a great deal more'.

In such a case, I do not think it would be wrong to say that £x itself is a reasonable proportion. In contrast, if the court can say

> 'the plaintiff should recover at least £x, but is unlikely to recover more',

then £x itself becomes the likely award and a reasonable proportion should be something substantially less than £x.

I do not think it desirable that applications for interim payments should turn into long drawn out investigations into the very issues which are to form the subject matter of a future hearing. The wide discretion given to the court, coupled with the safety net for the defendants in rule 17, show that these applications should be decided on a fairly broad approach, with a minimum of expense to the parties.'

> 17. The statement by Recorder J Leong, that the court has to make an "educated guess", is a colloquial way of expressing the task of the court that has to undertake, namely, to make an estimate of the damages that are likely to be awarded, which it must do by judiciously weighing the evidence presented to it, giving it such weight that it deserves, and remembering that it is not to conduct an assessment of the damages to be awarded, which the function of a future court. Once the court has made that estimate, it must award a reasonable proportion of that estimate, taking into account the financial ability of the plaintiff to repay any overpayment should it transpire, after the assessment of damages has been concluded, that the estimate was wrong, and taking into account the hardship to the defendant from having to make an immediate payment and from being unable to recover any overpayment.
>
> 18. To suggest that the court has to approach the task of estimating the damages that are likely to be awarded, by making findings on the evidence "on a balance of probabilities", is to confuse the role of the court on an application for interim payment and the court of the court conducting the assessment of damages. On an application for interim payment, the court must adopt a fairly broad approach, with minimum expense to the parties, and make an estimate, on the evidence that has been adduced, of the likely award of damages and award a reasonable proportion of that estimate. Of course, the court will decline to award any interim payment if it is not satisfied that the plaintiff is likely to obtain an award of substantial damages."[1]

3. The applicant relied on the following commentary *in Hong Kong Civil Procedure 2021*, Vol.1, at paragraph 29/11/5, and submitted that the appropriate starting point for the amount of interim payment is two-thirds of the amount sought:

> "In *Waddington Ltd v Chan Chun Hoo Thomas* (unrep., CACV 10/2014, [2017] HKEC 1066), the applicant relied on the 'general rule' in *Re Lehman Brothers Securities Asia Ltd (No 1)* (2010) 1 HKLRD 43, which espoused that the appropriate starting point for the amount of interim payment is two-thirds of the amount sought. The court held that this only goes towards

[1] The "statement of Recorder J Leong" referred to by Bharwaney J in paragraph 17 of the Judgment was the statement which the learned Recorder made in *Sony Computer Entertaining Inc and Another v Lik Sang International Limited and Others* (HCA 3583/2002, unreported, 11 April 2003) in which she stated in paragraph 62, among other things, that "Any amount of interim payment is, to an extent, an educated guess which, if wrong, can be corrected by adjustment at the assessment stage."

> determining the quantum but does not relate to whether an order for interim payment should be made in the first place."

4. With greatest respect, I do not agree that the "general rule" or "starting point" mentioned in *Re Lehman Brothers Securities Asia Ltd (No 1)* (*supra*) is applicable to the present case, because the *Lehman Brothers* case related to a claim made by provisional liquidators for interim payment of the costs of liquidation incurred, and the consideration therein was quite different from that which is before the court herein. I echo what Chow J observed in *Waddington Ltd v Chan Chun Hoo Thomas* (HCA3291/2003, unreported, 25 May 2017):

> "…*Re Lehman Brothers Securities Asia Ltd (No 1)* related to a claim by provisional liquidators, being a well-known accountancy firm, for interim payment whom it was said had a proven track record showing that their claims could be relied upon as being generally reasonable. At paragraph 31 of the judgment, Barma J said that 'the general level of recovery in other cases provides a certain level of comfort' (see paragraph 31)…"

5. The "general rule" which Barma J (as his Lordship then was) referred to the *Lehman Brothers* case was originated from the case of *Re Independent Insurance Company Ltd (No. 2)* [2003] BPIR 577, which is also a case in which joint provisional liquidators sought to have interim payment of the costs of liquidation incurred, wherein it was held by Ferris J that as a general rule, authorization to draw remuneration should be limited to two-thirds of the amount estimated. The situation here is plainly different.

JURISDICTION OF THE COURT

6. The court has jurisdiction to make an order for interim payment if one of the limbs under Order 29 rule 11(1) of the Rules of the District Court (Cap.336H) (**"RDC"**) is satisfied.

7. Order 29 rule 11(1) of the RDC provides that:

> "If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied --
>
> (a) that the defendant against whom the order is sought (in this paragraph referred to as ***the respondent***) has admitted liability for the plaintiff's damages; or
>
> (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or
>
> (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are 2 or more defendants, against any of them,
>
> the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

8. In the present case, judgment on liability had been entered in favour of the applicant on 4 May 2020 with the amount of compensation to be assessed. Order 29 rule 11(1)(b) is therefore satisfied.

AMOUNT OF COMPENSATION LIKELY TO BE RECOVERED

9. The next question which the court has to consider is the amount of compensation which is likely to be recovered by the applicant. To recap, although this court should weigh the evidence placed before me and estimate the amount of compensation which is likely to be awarded, it must be borne in mind that a fairly broad approach should be adopted, as it is not the function of this court to do a final assessment of compensation at this stage.

Section 9 compensation

10. The applicant was 30 years old at the time of the accident. The applicable multiplier is therefore 96.

11. It is undisputed that the monthly earnings for the purpose of section 9 of the Employees' Compensation Ordinance (Cap.282) (**"the Ordinance"**) should be taken to be $19,710.

12. The only differences between the parties as far as section 9 compensation is concerned is the percentage of the applicant's permanent loss of earning capacity. According to the Form 7 dated 10 December 2020, such loss was assessed by the Employees' Compensation (Ordinary Assessment) Board (**"the Board"**) to be 1.5%.

13. While the respondents have not lodged any appeal against the aforesaid assessment, the applicant has filed an appeal.

14. The applicant contends that the *Hong Kong Paper Mills* formula should be adopted, and that assuming the applicant may work as a security watchman as suggested by Dr Wong Chin Hong (the applicant's expert), the permanent loss of earning capacity would amount to 39.12%. So calculated, the applicant suggested that the amount of section 9 compensation should be $740,160.

15. Even if the *Hong Kong Paper Mills* formula is not adopted, relying on Dr Wong's expert opinion, the applicant argued that his permanent loss of earning capacity would still amount to 5%.

16. On the other hand, the respondents relied on the expert opinion of Dr Ngai Wai Kee Wilkie and submitted that there is a high possibility of symptoms exaggeration in this case, and that the applicant should be able to resume his pre-accident job as a general labourer in construction sites. According to Dr Ngai, the applicant's permanent loss of earning capacity should only be 1.8%. In coming to this final figure, Dr Ngai had taken into the applicant's pre-existing lumbar spondylosis, and assessed that out of 1% which was caused by such a condition, 80% of which should be attributed to the accident.

17. As far as the question of apportionment is concerned, it has been held by the Court of Final Appeal in *LKK Trans Ltd v Wong Hoi Chung* [2006] 1 HKLRD 980 that:

> "…there is no basis for requiring apportionment to reflect the existence of a pre-existing disease as a concurrent cause of the employee's incapacity." (at paragraph 48)

18. Hence, if Dr Ngai's assessment that the applicant had 1% impairment of the whole person in relation to his back condition is accepted, coupled with the 1% loss in relation to the applicant's left shoulder, the permanent loss of earning capacity should amount to 2%, rather than just 1.8%.

19. Having taken into consideration the injuries suffered, the undisputed opinion of Dr Ngai that Waddell's signs were all positive, Dr Wong's view that the applicant's "tenderness and limitation in movement of his lower back were somewhat more severe than expected"[2], and the medical experts' respective opinion on the applicant's permanent loss of earning capacity, I hold the view that the amount of section 9 compensation which is likely to be recovered by the applicant would be in the sum of $37,843.20 ($19,710 x 96 x 2%) and that it is unlikely that the applicant will recover more than that amount.

Section 10 and section 10A compensation

20. A total of 477 days of sick leave (from 14 June 2019 to 4 December 2020) had been endorsed by the Board. If the entirety of such a period of absence from duty is accepted by the court, section 10 compensation would be assessed at $250,711.20 ($19,710 x 4/5 x 477/30).

21. In relation to medical expenses, taking into account the daily maximum of $300 as provided in the Third Schedule of the Ordinance, the total amount of section 10A compensation which the applicant is likely to recover will be in the sum of $2,130.

[2] Paragraph 65 of the Joint Expert Report dated 20 October 2020

22. If the above figures are accepted by the trial judge, the total amount of sections 10 and 10A compensation will be $252,841.20.

23. According to Schedule 3 attached to the respondents' written submissions, the respondents have made advance payments in the total sum of $319,695.00. This is not disputed in the applicant's written submissions in reply.

24. It may be because there is little doubt that the total advance payments made would be more than the combined total of sections 10 and 10A compensation that the applicant had not made any submission on the likely amount of compensation recoverable under these sections.

25. I agree that given the total amount of advance payments, it is not necessary to consider further the likely amount of compensation recoverable under sections 10 and 10A despite the respondents' section 18 appeal against the Board's endorsement of the sick leave, as there would be an overpayment of $66,853.80 even if the appeal is unsuccessful.

Advance payments

26. The respondents argued that the advance payments are more than enough to cover the section 9 compensation, and as a result the applicant will not be able to recover any amount of compensation at the end of the day.

27. The said argument was made despite the respondents' recognition that it had been held by the Court of Appeal in *Kan Wai Ming v Hong Kong Airport Services Ltd* [2011] 3 HKLRD 497 that an employee's compensation for temporary incapacity under section 10 and his compensation for permanent incapacity under section 9 should be kept separate and distinct, and that in case an employee is entitled to both, they cannot be set off against each other. The respondents submitted that the advance payments made in this case were made as "employees' compensation and medical expenses", and it was said that the issue whether the overpayment from such advance payments can be set-off against section 9 compensation is still open for argument.

28. Pausing here, it is noted that the respondents further submitted that this court should be slow to make a finding on this point in the interlocutory stage. It is surprising indeed for the respondents to make such a submission, for this court will not be able to form any view on the likely award of compensation (which the respondents expressly agreed that this is one of the issues to be considered herein) without considering whether the section 9 compensation can be set-off as such.

29. Coming back to the nature of the advance payments, I am of the view that it is important to bear in mind the wordings of section 10(4) of the Ordinance, which provides that:

> "In the event of death or permanent incapacity following a period of temporary incapacity whether total or partial, no periodical or lump sum payments **paid or payable** under this section shall be deducted from any amount of compensation payable under section 6, 7, 8 or 9." (emphasis added)

30. It is clear that right question to ask is not only whether the advance payments were **paid** under section 10 of the Ordinance but also whether they were **payable** thereunder.

31. The following facts are in my view important:

(1) it can be seen from the receipts of advance payments placed before this court that the advance payments were made on a monthly basis;

(2) the daily rate of advance payments was $720, which is exactly 80% of $900, which in turn was the daily rate of wages earned by the applicant according to the employment contract entered into between the applicant and the 1st respondent on 4 September 2018;

(3) according to the Whatsapp messages exhibited as "TCY-2", the respondents decided not to make further advance payments to the applicant because of the applicant's failure to produce sick leave certificates.

32. On the basis of the aforesaid, I am of the view that the advance payments were paid under section 10 of the Ordinance. This would be so even though "section 10 of the Ordinance" was not expressly referred to when the payments were made. In any event, such advance payments were payable under section 10.

33. Hence, the overpayment of $66,853.80 cannot be used to set off the section 9 compensation.

34. As a result, the amount of compensation which is likely to be recovered by the applicant remains $37,843.20.

Substantial damages?

35. Relying on the case of *Top One International (China) Property Group Company Limited & Another* (*supra*), the respondents submitted that if the amount of compensation which the applicant may be able to obtain is not substantial, the present application should be dismissed.

36. I do not agree that that is the correct understanding of the authority. In my view, where judgment has already been entered against the respondent, it is not a pre-requisite that the applicant for interim payment has to establish that he/she would be awarded substantial amount of compensation against the respondent.

37. First of all, if one reads Order 29 rule 11(1), it can be seen that the phrase "the plaintiff would obtain judgment for substantial damages" only appears in sub-paragraph (c). It cannot be found in sub-paragraph (a) or (b). As aforesaid, rule 11(1)(b) is applicable to the present case.

38. Secondly, it can be seen in paragraph 15 of the Judgment in *Top One International (China) Property Group Company Limited & Another* (*supra*) (which I have quoted above) that Bharwaney J had clearly

indicated that where interlocutory judgment for damages has already been entered, the application for interim payment should be approached differently. My reading of what his Lordship meant is that, subject to paragraph (2), the Court should exercise its discretion pursuant to the main body of paragraph (1). "Substantial amount of compensation" is not mentioned therein.

39. It is true that his Lordship did, in paragraph 18 of the Judgment, state that:

> "Of course, the court will decline to award any interim payment if it is not satisfied that the plaintiff is likely to obtain an award of substantial damages."

40. However, bearing in mind what his Lordship stated in paragraph 15 of the Judgment, I am of the view that his Lordship must be having Order 29 rule 11(1)(c) in mind when he made the said comment.

41. This can be illustrated by looking at the case of *Newport (Essex) Engineering v Press & Shear Machinery* 24 BLR 71, which was cited by Bharwaney J in his Judgment. His Lordship described what O'Conner LJ stated in *Newport* as "no better statement of the correct approach". In this English Court of Appeal case, judgment had already been entered against the defendant prior to the time when the application for interim payment was made by the plaintiffs therein who relied on Order 29 rule 11(1) of the Rules of the Supreme Court which was identical to our corresponding provision in the RDC. In O'Conner LJ's discussion, which was quoted extensively by Bharwaney J in his Judgment, the question of whether substantial amount of damages would be recoverable was not brought up at all.

42. Therefore, even though the amount which the applicant is likely to recover ($37,843.20) is not substantial, I am of the view that this is not fatal to the applicant's application.

Reasonable proportion of the estimated award

43. I have ruled above that the amount of section 9 compensation which is likely to be recovered by the applicant would be in the sum of $37,843.20 and that it is unlikely that the applicant will recover more than that amount.

44. Adopting the approach explained in the *Newport* case, only a reasonable proportion thereof should be awarded as interim payment, and this figure should be "substantially less than"[3] $37,843.20.

45. Having considered the financial circumstances of the applicant, I am of the view that the level of interim payment, if an order is made, should be set at $25,000.

46. This is a very modest amount. I do not think it would cause any hardship to the respondents for having to make this immediate payment.

47. I note that the applicant has commenced a personal injuries claim in the Court of First Instance against the respondents and is claiming for more than $5.25 million. However, despite such a large claim, it is

[3] *Newport (Essex) Engineering v Press & Shear Machinery* 24 BLR 71 at 77

pleaded by the respondents therein that, having made advance payments for $319,695, no further damages should be payable.

48. Even assuming the respondents are correct, given my inclination of awarding only $25,000 as interim payment, I am of the view that the respondents would not suffer from any hardship even if they are unable to recover this amount as overpaid amount at the end of the day.

ORDER

49. I therefore order that the respondents shall make interim payment to the applicant in the sum of $25,000.

COSTS

50. I make a cost order *nisi* that the respondents shall bear the costs of the applicant of this application, and such costs shall be assessed summarily on paper pursuant to Order 62 rule 9A(1)(a) of the RDC.

51. The above order *nisi* shall become absolute in the absence of application to vary within 14 days hereof.

52. For the purpose of summary assessment:

(i) The applicant shall lodge and serve his statement of costs (see Appendix A of PD 14.3) within 7 days after the costs order *nisi* above has been made absolute;

(ii) The respondents shall lodge and serve their statement of objection within 7 days thereafter.

(H. Au-Yeung)
District Judge

M.C.A. Lai Solicitors LLP for the Applicant

W. H. Chik & Co. for the 1st and 2nd Respondents