

HCA 1209/2016 and  
HCA 1948/2016  
(Heard together)  
[2023] HKCFI 600

HCA 1209/2016

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

ACTION NO 1209 OF 2016

BETWEEN

HAPPY FISH COMPANY LIMITED

Plaintiff

and

TANG JEB MING

Defendant

AND

HCA 1948/2016

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

ACTION NO 1948 OF 2016

BETWEEN

MARK O'KANE

Plaintiff

and

TANG JEB MING

Defendant

Before: Deputy High Court Judge Jonathan Chang SC (Paper Disposal)

Dates of Written Submissions: 18 January, 8 and 21 February 2023

Date of Decision: 27 February 2023

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DECISION ON COSTS

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1. On 16 December 2022, I handed down Judgment after trial ([2022] HKCFI 3767) in favour of the plaintiffs (O’Kane and Happy Fish) and made a costs order *nisi* that the defendant (Tang) do pay the costs of O’Kane and Happy Fish (save that all the costs of preparation of the trial bundles are disallowed) to be taxed if not agreed. The abbreviations in the Judgment are adopted in this Decision.

2. Tang now applies to vary my costs order *nisi* to the effect that he should only bear half of the costs of O’Kane and Happy Fish by reason that they have failed to prove that Tang had repudiated the Agreement by delaying in the construction of the village houses. My reasons for rejecting the plaintiffs’ case are set out in [35] to [43] of the Judgment.

3. Whilst costs are in the unfettered discretion of the court, costs should normally follow the event. The general rule does not cease to apply just because the successful party raised issues on which he fails. After all, costs are not to be decided according to a score sheet on how many issues have gone one way or another. In any litigation, it is not unusual for a winning party to have raised (and failed on) one or more issues, but this by itself does not attract a costs sanction. There is no doubt a discretion in the court to deprive a successful party of the whole or part of his costs if he has caused a significant increase in the length or costs of the proceedings

A by raising issues on which he did not succeed, and this can be done even if  
B it was not unreasonable to have raised those issues. But the necessity of  
C an issue is not to be judged with the benefit of hindsight. The court should  
D give real weight to the overall success of the winning party and approach  
the question of costs from such a perspective.

E 4. The complaint of Tang's significant delay in the construction  
F of the village houses is one of the two bases of the plaintiffs' case that Tang  
G had repudiated the Agreement: Judgment at [4]. As Mr Brown for Happy  
H Fish submitted, the plaintiffs' claim against Tang is based on one single  
I cause of action, namely repudiation of the Agreement, and the "event" is  
the finding that Tang had done so by reason that he had transferred the Lots  
to Wong when the Agreement was subsisting. The complaint of delay is  
not one which is so "distinct and separate in itself" that the decision of it  
constitutes an "event", the rejection of which triggers a costs sanction:  
J *Seepersad v Persad* [2004] UKPC 19 at [24].

K 5. Whilst a substantial part of the pleadings and evidence touch  
L on the issue of delay, Mr Brown is correct in submitting that the evidence  
M on delay provided the court with the history of the matter and is necessary  
N to put the complaint against Tang in proper context, and therefore relates  
O to the plaintiffs' claim generally and not merely to the question of delay.  
P For example, as I pointed out in the Judgment at footnote 10, there is  
Q evidence that Tang had sold the Lots to Wong in order to back out from his  
bad bargains with O'Kane and Happy Fish caused by the escalation in  
construction costs due to the long time for completion and the high  
premium assessed. Even though at the end I do not find it necessary to  
come to a conclusion in this regard, this serves to illustrate that the plea  
and evidence relating to delay in the construction of the village houses  
R

could not be said to have been unreasonably or improperly raised by the plaintiffs as part of the background facts. It is unrealistic and opportunistic for Tang to argue that the court could take a blinkered view and focus only on the transfer of the Lots to Wong in isolation, now that the Judgment had found against the plaintiffs on their delay complaint.

6. I have not lost sight of the fact that Mr Yim (for O’Kane) in his trial written closing has suggested a 20% reduction of O’Kane’s costs to reflect any failed issues and lengthening of the trial process, from which Mr Yim now seeks to resile. Whether I should exercise my discretion to deprive any part of the plaintiffs’ costs is ultimately a matter for the court and is not dictated by what one party may perceive to be the position. Mr Brown certainly did not side by Mr Yim in that regard.

7. In conclusion, I am of the view that it was not unreasonable nor improper for the plaintiffs to advance their case on delay as one of the two bases in support of their claim against Tang. Even though at the end I have found against them on that issue, I decline to exercise my discretion to deprive them of part of their costs in the action.

8. Tang’s application to vary the costs order *nisi* is dismissed with costs to O’Kane and Happy Fish, to be taxed if not agreed. My costs order *nisi* in the Judgment is made absolute.

( Jonathan Chang SC )  
Deputy High Court Judge

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Mr Toby Brown, instructed by Payne Clermont Velasco, for the Plaintiff  
in HCA 1209/2016  
Mr Foster Yim and Mr Owen Kun, instructed by Payne Clermont Velasco,  
for the Plaintiff in HCA 1948/2016  
Mr Damian Wong, Mr Andrew Tse and Mr Leon Guo, instructed by  
Rowdget W. Young & Co., for the Defendant in both Actions

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