Introduction

Previously in our newsletter entitled “Who Pays? – A Costs Tug-of-War for Common Law Proceedings under the Employees Compensation Assistance Ordinance” (March 2014 issue) we briefly discussed the uncertainties and contradicting decisions on whether the Employees Compensation Assistance Fund Board (“the Board”) should be liable to pay costs when it actively participates in defences against claimants who have little choice but to bring claims against the Board.

In the recent High Court case of Kwan Kam Pui v Fung Man and others (HCPI 18/2012, decision dated 30 May 2014) (“the Case”), helpful break-through is seen.

Recapitulation of the Dilemma

The Employees Compensation Assistance Fund (“the Fund”) was established under the Employees Compensation Assistance Ordinance, Cap. 365 (“the Ordinance”), and is managed by the Board. The Fund provides relief payment (not damages) to injured workers in employment-related injuries, when for example, employers in question could not be identified, could not be found, or are insolvent, struck off the register, cannot be served, or fail to attend court hearings; or where no insurance policy are in force or insurers are insolvent (s.25A of the Ordinance). Injured workers must make a claim and would not be assisted by the Board unless there is a judgment or order of court (Section 20A(2) of the Ordinance) (Paragraph 21 of the Case).

The Board is under responsibility to safeguard the resources of the Fund. Sections 25A of the Ordinance empowers the Board to “join as a party” and “take over the defence as if it were the employer” in common law proceedings so that it can monitor against unworthy cases (the Court of Appeal case of Lai Chi Pon v Toto Steel & Iron Works Ltd & Oths [1997] 2 HKC 195 refers) (paragraph 29 of the Case).

A claimant is often caught in the “catch 22” dilemma of having to prove its case to the full and in doing so, loses money as the Board is known to have relied on s.20B(3) of the Ordinance in not paying costs (paragraph 1 of the Case). Claimants have often to “finance” the litigation with their own awards which are diminished by the second as they litigate (with costs). Furthermore, if sanction offers are not applicable to the Board (discussed in paragraph 39) then claimants stand on very difficult grounds indeed if the Board participates actively in
defence, enjoys freedom from cost pressure (if sanctioned offers are not applicable), while causing claimants to incur hefty costs which eat into their final relief payments.

As discussed in our previous newsletter, there have been divergent rulings on whether the Board would be liable to pay claimants’ legal fees incurred after its intervention. The Honourable Mr. Justice Bharwaney has clarified the position in the Case.

**Kwan Kam Pui v Fung Man and others**

**Background**

The Case concerns an employee claiming both employees’ compensation in the District Court and common law damages in the High Court against his employer, who could not be located. The Board joined as a Respondent in the employees’ compensation claim and paid damages and costs. By a letter to the Plaintiff, it pronounced that it would not intervene in the common law proceedings. The common law proceedings hence proceeded accordingly and the employee obtained interlocutory judgment against the employer. The Case then proceeded solely on quantum assessment.

However, about one year later, the Board changed its mind and applied to join the common law proceedings, seeking to challenge liability as well as quantum and to file a Defence making allegation of contributory negligence on the part of the employee (paragraph 6 of the Case).

The parties reached settlement shortly before trial, for a sum of $800,000 on top of the employee’s compensation already received by the employee, and an application had to be made to the Court to conclude the settlement because unrepresented parties are involved. When The Honourable Mr. Justice Bharwaney observed that the settlement is a “no order as to costs” settlement, he noted that this would mean that the claimant would be left with little moneys (after deducting his own costs). He thus directed the parties to address him on the issue of costs.

**Deletion of Entitlement to Costs**

On the history of the Ordinance, the Board represented by senior counsel submitted that at the time of enactment in 1991, it provided for full recovery of legal costs. However, due to the financial difficulties of the Fund, the provision for the entitlement to legal costs was deleted from the Ordinance in 1 July 2002 (paragraph 19 of the Case).

While accepting that such intention of Cap 365 was clear, The Honourable Mr. Justice Bharwaney held that there is nothing in the Ordinance to fetter the Court’s general discretion as to costs when the Board intervenes (paragraph 26 of the Case). All 3 sub-paragraphs of section 25A provide that when the Board chooses to intervene, it subjects itself to the
governance of the High Court Rules (viz Order 15 Rule 6). Section 25A does not curtail the wide powers of section 52A of the High Court Ordinance to make costs orders against intervening parties and even non parties. (Paragraph 36 of the Case)

The Role of the Board in intervening

The Honourable Mr. Justice Bharwaney noted that the Board is empowered to join in the proceedings as if it were the employer, and thus can advance all the defences available to the employer to contest liability and/or quantum. In assuming that role, the Board adopts an adversarial role when it intervenes, it would be “an incongruous state of affairs” if costs orders could only be in favour of but not against the Board, and that the risk of running unmeritorious points of defence is one that the Board must accept (Paragraph 45 of the Case).

Conclusion

After going through the cases, including several Court of Appeal Cases, in particular the Court of Appeal case of *Chan Cheuk Ting v Analogue Engineering Co Ltd and Anor* [1986] HKLR 935; The Honourable Mr. Justice Bharwaney concluded that the Court could order entire costs against the Board when it joins as an active intervener disputing liability and quantum (paragraph 66 of the Case); not just costs counting from the date when it intervenes. If it joins only to dispute quantum, then costs from the date of joinder is the usual order (paragraph 67 of the Case).

This is certainly a much awaited clarification for future claimants.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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