

HONG KONG / JUDGMENT

CB v. APTHORP, BRIAN DREW

[2025] HKCA 809

COURT

Court of Appeal

DECIDED

11 September 2025

CASE / FILE NUMBER

CAMP42/2025

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CAMP 42/2025, [2025] HKCA 809

On Appeal From [2024] HKDC 1160 & [2025] HKDC 208

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 42 OF 2025

(ON AN INTENDED APPEAL FROM DCPI 357/2021)

BETWEEN

CB

Plaintiff

and

APTHORP, BRIAN DREW

Defendant

Before: Hon Au JA and Anthony Chan J in Court

Date of Plaintiff's Written Submissions: 9 May 2025

Date of Defendant's Written Submissions: 23 May 2025

Date of Judgment : 11 September 2025

JUDGMENT

Hon Anthony Chan J (giving the Judgment of the Court) :

Introduction

This is the plaintiff's renewed application for leave to appeal against the judgment of Deputy District Judge David Chan in DCPI 357/2021 dated 23 July 2024 ([2024] HKDC 1160) ("Judgment").

After a 5-day trial, the judge dismissed the plaintiff's claims. On 14 February 2025, the judge dismissed the plaintiff's application for leave to appeal against the Judgment for the reasons set out in his decision ([2025] HKDC 208) ("Leave Decision"). On 28 February 2025, the plaintiff filed the present Summons under CAMP 42/2025 to seek leave to appeal from this Court. The grounds of the proposed appeal are set out in the Summons ("Proposed Grounds of Appeal").

Having considered the papers and the submissions of both sides, we exercise our power to determine the application on paper without an oral hearing pursuant to O 59, r 2A(5) of the Rules of the High Court, Cap 4A.

Background

The background and the respective case of the parties had been set out in considerable detail in the Judgment at [1] to [52].

In short, the plaintiff's claims against the defendant are for personal injuries suffered, resulting from the defendant's alleged indecent assaults during the plaintiff's employment as his domestic helper from 5 September 2018 to 6 August 2019.

In her statement of claim, the plaintiff separated the alleged indecent assaults into four categories: (1) the Body Check Assault; (2) the Sexual Massages; (3) the Whipping Incidents; and (4) the Video Watching Incident. Collectively, the judge referred to them as the "Sexual Abuses".

It is not necessary, for the present application, to set out the entirety of the background but to highlight the judge's approach and summary of his findings.

The judge set out the key issues and applicable legal principles in his Judgment at [53]–[55] :

"53. Broadly speaking, the alleged Sexual Abuses are disputed in their entirety by the defendant. As submitted by counsel, and I agree, the outcome on the issue of liability rests on the Court's finding on the factual disputes between the parties. In cases of such nature, parties' evidences, and their testimonies at trial, are factors that would tilt the balance to the favour of one side over the other. Every word they uttered would be scrutinised, and every mistake could be magnified. All of these could assist the Court in assessing the credibility and reliability of the parties' evidences, with the outcome dictated by these assessments.

54. I do not wish to set out all the relevant legal principles relating to the assessment of a witness' credibility and reliability. I have done so quite extensively in the case of *Lee Yun Shing, The Sole Executor of the Estate of Lau Shui Kwan, Deceased v Lau Yun Chiu*. Suffice it to say, I have reviewed those authorities and principles when considering the parties' evidences in our case.
55. In the present case, the plaintiff and the defendant have each filed 2 witness statements. As accepted by Mr Shum, the burden is on the plaintiff to prove on balance of probabilities that the Sexual Abuses did happen as described. I shall therefore first set out her evidence, and at the same time, highlight by italicising the salient parts of her case, and the differences between her pleaded case, her evidence as contained in the witness statements, and the testimonies she gave at trial."

The judge then conducted a very detailed analysis of the evidence of both plaintiff and the defendant in respect of liability and came to the following conclusions :

"Summary on the plaintiff's evidence

264. For the reasons above, I am not persuaded that the Sexual Abuses happened as alleged by the plaintiff, based solely on her evidences.
265. I observe from Mr Shum's closing submissions that he is relying heavily on the admissions and flaws in the defendant's case in support of the plaintiff's case. I shall therefore, in the section below, provide my observations on the defendant's evidences.

...

Summary on the liability

285. Although I am not entirely convinced with the case and evidence of the defendant, I have far greater reservation as to the plaintiff's. I do not find the problems with the defendant's case could help the plaintiff in overcoming the flaws in her case. With the burden of proof squarely on her shoulders, and on the balance of probabilities, I find against her on liability. Her claim against the defendant is dismissed."

The plaintiff now seeks leave to appeal based on the Proposed Grounds of Appeal.

Proposed Grounds of Appeal

There are three Proposed Grounds of Appeal :

Ground 1: The judge erred in failing to identify issues and apply the correct burden of proof.

Ground 2: The judge erred in failing to state the exact matters the plaintiff failed to prove.

Ground 3: The judge erred in failing to dismiss the defendant's positive defences.

Before addressing the Proposed Grounds of Appeal, we outline the applicable legal principles for this application which are well-trodden.

Legal Principles

Pursuant to s.63A(2) of the District Court Ordinance, Cap 336, leave to appeal shall not be granted by this Court unless it is satisfied that the intended appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the appeal should be heard. Reasonable prospect of success means a prospect that is more than “fanciful” but without having to be “probable”.

Given that the Judgment is based upon the judge’s findings of primary facts, there is a high threshold for the plaintiff to surmount to successfully challenge the judge’s conclusions.

The applicable principles regarding appeals against findings of fact made by a trial judge are well established. This Court will not overturn the trial judge’s findings of fact unless they are plainly wrong. Absent any palpable error, such as where the finding was one (a) which there was no evidence to support; (b) based on a misunderstanding of the evidence; or (c) which no reasonable judge could have reached, this court will not interfere with the evaluation of the evidence or the weight attached by the trial judge to any piece of evidence.

The reasons for deference to be given to a trial judge were set out in *Shine Grace Investment Ltd v Citibank NA & Anr* [2022] HKCA 1341 at [60] and *Cheung Yuk Ying Engracia v MacGregor Isabella* [2023] 3 HKLRD 164 at [28].

With these principles in mind, we turn to consider the merits of the Proposed Grounds of Appeal.

Analysis

As an overview, we note that the plaintiff has not challenged any of the judge’s findings of fact.

The thrust of this leave application is the assertion that the judge incorrectly applied the burden of proof. This criticism is premised on the allegation that the defendant had “admitted” 3 of the 4 Sexual Abuses in his Defence and Counterclaim, thereby shifting the evidential burden onto the defendant to substantiate his positive defences. The plaintiff, therefore, argues that given the judge’s observations on the defendant’s evidence, the judge should have found that the defendant had failed to discharge his burden. Consequently, he should have been held liable for the Sexual Abuses.

Ground 1

There are two parts to Ground 1, namely, (a) the judge erred in failing to identify the issues; and (b) the judge failed to apply the correct burden of proof.

In neither the Proposed Grounds of Appeal, nor the plaintiff’s written statement has the plaintiff identified any error by the judge in “failing to identify issues”.

In the Judgment, the judge set out, in detail, the plaintiff's pleaded case, the defence, the plaintiff's reply, the key issues and applicable legal principles, the plaintiff's evidence on liability, the defendant's evidence on liability and the judge's analysis on the evidence and discussions on liability.

We are unable to see how it can be said that the judge erred in failing to identify the issues of the case. The first contention under this Ground is illusory.

Turning to the plaintiff's second contention, it is striking that the plaintiff asserts that the judge erred in his application of the burden of proof when no challenge is levelled at paragraph 53 of the Judgment, where the judge stated: "[b]roadly speaking the alleged Sexual Abuses are disputed in their entirety by the defendant".

In this application, the plaintiff has not identified any error in the judge's considerations of the "admissions". This was also pointed out by the judge in the Leave Decision at [33]. To the contrary, the judge carefully outlined the extent of the defendant's admissions to the plaintiff's pleaded case.

In any event, we have reviewed the pleadings, in particular the Defence and Counterclaim, and we agree with the judge that the Sexual Abuses were broadly disputed in their entirety by the defendant :

The Body Check Assault: Save for admissions that the defendant showed a document to the plaintiff titled "Health Declaration" and asked the plaintiff questions on the Health Declaration, and that the defendant asked the plaintiff to follow him into the master bedroom where he explained to her the scope and procedures of the body check and she gave her consent, the plaintiff's allegations regarding an assault taking place were denied and/or not admitted. The plaintiff was put to strict proof. It cannot be said that there was any admission made by the defendant regarding the alleged indecent assault.

The Sexual Massages: Save that the defendant admitted that the plaintiff was required to give him a massage, the defendant denied any allegation of indecent assault. The plaintiff was put to strict proof.

The Whipping Incidents: The defendant denied the Whipping Incidents. He averred that the whipping was initiated and proposed by the plaintiff to monitor his weight such that the plaintiff would perform the whipping on his back and buttock in case he gained weight. He denied that the whipping brought him sexual pleasure, and averred that the plaintiff had not refused to perform the whipping. None of these pleas supported the plaintiff's case that she was forced to whip the defendant out of her fear of him.

The Video Watching Incident: The plaintiff agrees that this was denied by the defendant.

Whether or not there were "admissions" which shifted the burden of proof may be tested by asking if the plaintiff's case were to be determined solely on the pleadings, would it have succeeded? The answer in this case is clearly in the negative.

None of the “admissions” were sufficiently broad to relieve the plaintiff from her obligation to prove her claim that the Sexual Abuses took place as pleaded. These were matters which had to be proved at trial.

After careful consideration of the defendant’s evidence, the judge held that whilst he was not entirely convinced by the defendant’s case and evidence, he had far greater reservation over the plaintiff’s case, and the problems with the defendant’s case could not help the plaintiff in overcoming the burden of proof. Consequently, the plaintiff’s claim was dismissed.

We do not find any error in the judge’s application of the burden of proof. Ground 1 is bound to fail.

Ground 2

The plaintiff contends that the judge erred in making a general finding that the plaintiff had failed to prove her case without stating which aspects of the Sexual Abuses had not been proved. The plaintiff says this error was attributable to the “admissions”. The plaintiff was not required to prove what had been admitted, and it was for the defendant to prove his positive defences.

For the reasons set out above, there were no “admissions” which had the effect of relieving the plaintiff of the burden of proving her case.

The plaintiff’s contention that the judge failed to specify which aspects of her case were unproven is unfounded. The judge carefully assessed the plaintiff’s evidence. The Judgment contains a thorough analysis of the inconsistencies, contradictions and imperfections in the plaintiff’s pleadings, evidence in-chief and cross-examination. The judge was clear as to why he rejected the plaintiff’s case.

As the defendant points out, the fact that the plaintiff has not specifically challenged the correctness of the judge’s analysis and factual findings is telling.

We reject Ground 2 as unarguable.

Ground 3

The plaintiff submits that the judge erred in failing to reject the defendant’s positive defences.

This submission is bound to fail.

The judge did not dismiss the plaintiff’s case by accepting the defendant’s version of events, but because the plaintiff had failed to prove her case due, primarily, to the quality of her evidence. At the risk of stating the obvious, rejection of the defendant’s case and evidence does not mean that the judge should agree with the plaintiff’s case.

Ground 3 is also rejected as unarguable.

Disposition

Accordingly, the application is dismissed.

As this application is totally without merit, we make a further order under O 59, r 2A(8) that no party may, under rule 2A(7), request this determination to be reconsidered at an oral hearing.

There is no reason to depart from the general rule that costs should follow the event. We order that the plaintiff pays the defendant's costs of this application. Having considered the defendant's statement of costs lodged on 23 May 2025 for summary assessment, we assess the costs payable to the defendant at HK\$80,000. Both the costs order and the summary assessment are on nisi basis, which shall become absolute in 14 days in the absence of any variation application made within such time.

The plaintiff's own costs be taxed in accordance with Legal Aid Regulations.

(Thomas Au)

(Anthony Chan)

Justice of Appeal

Judge of the Court of First Instance

Mr Erik Shum and Ms Yvonne Leung, instructed by Patricia Ho & Associates, for the Plaintiff

Mr Jacky Ho, instructed by Haldanes, for the Defendant

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