# DCPI 220/2020

[2022] HKDC 433

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 220 OF 2020

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BETWEEN

TSOI YIN WAN Plaintiff

and

LHG CATERING LIMITED Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 6 May 2022

Date of Decision: 6 May 2022

Date of handing down Reasons for Decision: 12 May 2022

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REASONS FOR DECISION

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1. The plaintiff has made a sanctioned offer on 21 January 2022 in this case where he is willing to accept a sum of HK$80,000 from the defendant, which is inclusive of interest but on top of the EC payment plus the costs of this action, to be taxed if not agreed, in full and final settlement of the whole of the plaintiff’s claim in this action.
2. In the letter, it has been specifically mentioned that the defendant can only accept the sanctioned offer if (i) the parties agree on the liability for costs; or (ii) the Court grants leave to accept it, after the expiry date.
3. The defendant did not accept the sanctioned offer by letter until 11 April 2022, which was almost 2 months after the deadline of the sanctioned offer.
4. They therefore issued a summons dated 26 April 2022 under Order 22 rule 16 of the Rules of the District Court, Cap 336H to ask for acceptance of the sanctioned offer out of time with an order of costs that they would pay the costs of the proceedings up to date but on a party and party basis only.
5. The plaintiff who is represented by Ms Lee of the legal aid assigned solicitors has in her submission consented to the defendant’s application saves that she says the costs should be paid on an indemnity basis from the expiry date of the sanctioned offer, ie from 19 February 2022 until today.
6. In the ordinary course of event, I would have no problem in granting costs on a party and party basis to the defendant if there was a mere delay in the acceptance of the sanctioned payment with an innocent or good explanation for the delay, like for example, due to the pandemic or difficulties in taking instructions from their clients.
7. However, as revealed during the hearing, this was not the case at all here.
8. The defendant had waited till the very last day before the expiry of the sanctioned offer, ie on 18 February 2022, to write a letter to the plaintiff in refusing to accept the sanctioned offer but instead made a counter-offer to the plaintiff in paying a sum of HK$80,000 (inclusive of interest but on top of the EC settlement sum) which is inclusive of costs of the claim. Thus, in effect, by this letter, they had rejected the sanctioned offer made by the plaintiff.
9. The plaintiff’s solicitors promptly replied 4 days later on 22 February 2022 and rejected the defendant’s counter-offer.
10. In the meantime, the plaintiff’s solicitors wrote to the Registry on 25 February 2022 asking the Court to take the case out of the running list which was originally set down to be warned for trial not before 14 March 2022. They asked it to be fixed to a date not before 23 March 2022 due to the fact that the plaintiff had been tested positive for Covid on 23 February 2022 and needed to undergo compulsory quarantine for at least 14 days.
11. Master Louise Chan, one of the PI Masters, re-fixed the case to the running list to be warned for trial not before 19 April 2022.
12. It was only on 11 April 2022, about a week before the case was placed on the running list for trial, that the defendant wrote a further letter to accept the sanctioned offer out of time.
13. While the plaintiff is certainly entitled to costs if a defendant chooses to accept a sanctioned offer out of time, the costs is at the discretion of the court. There is no hard and fast rule to say what basis a court should award to the plaintiff of his costs when the parties cannot agree on the basis of the costs itself. Each case must be judged according to its unique facts and circumstances.
14. However, while the court has an unfettered discretion in relation to award of costs, such discretion has to be exercised judiciously. In the absence of compelling reasons, it would not be a judicious exercise of discretion to award costs against a defendant who has not been adjudged liable and against whom proceedings have been discontinued: See *Li Kai Yin v Atta-Trans Limited & Anor,* HCPI 196/2009, unreported, 18 July 2011.
15. In this case, it is clear that the defendant had waited until the very last moment possible to reject the sanctioned offer and made a counter-offer which would have completely “wiped out” the damages to be obtained by the plaintiff if he has to bear his own costs. This was promptly rejected by the plaintiff. Hence, strictly speaking, the sanctioned offer was no longer on the table. However, almost 2 months later and just a few days before the case was put back to the running list to be warned for trial, the defendant quite out of the blue and without any good reasons, decided to accept the sanctioned offer on 11 April 2022.
16. I expect that much costs would have been incurred by the plaintiff in preparing for the trial in between the time when their sanctioned offer was originally rejected, ie on 18 February 2022 to the defendant’s subsequent change of position to accept the sanctioned offer on 11 April 2022.
17. In my judgment, had the defendant accepted the sanctioned offer within the 28 days specified period, the plaintiff (and the legal aid fund) would not have to incur those unnecessary costs after that day.
18. It has been said that the modern position under the Civil Justice Reform as discussed *in Petrotrade Inc v Texaco Ltd* [2002] 1 WLR 947: (see para 5 at §*22/20/A of the Hong Kong Civil Procedure 2022* at p 634), an order for indemnity costs under the equivalent provisions of the CPR is not penal and carries no stigma or implied disapproval of the defendant’s conduct. The orders are aimed to provide a means of achieving a fairer result for a plaintiff, to compensate the plaintiff for matters which are not compensated by orders for costs in the proceedings, even when such orders are made on an indemnity basis: See *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273.
19. I consider that in the particular circumstances of this case, given the fact that the defendant could have accepted the sanctioned offer within 28 days but they had chosen not to do so but making a counter-offer instead. And when that counter-offer was rejected within 4 days, they chose not to do anything until about a week before the case was placed back on the running list to be warned for trial. Under such circumstances, I consider that the plaintiff should be entitled to any costs incurred due to the defendant’s unjustified, unreasonable and unexplained delay in accepting the sanctioned offer and such costs should be paid on an indemnity basis.
20. Hence, I would make an order in terms of the defendant’s summons save as to the changes to §3 of the summons to below:

“The costs of these proceedings, including the defendant’s summons dated 26 April 2022 and the hearing today, to be paid by the Defendant to the Plaintiff, such costs to be taxed if not agreed. The costs up to 18 February 2022 to be taxed on a party and party basis and the costs after 18 February 2022 to be taxed on an indemnity basis.”

( Andrew SY Li )

District Judge

Miss Kylie Lee, of Messrs Kwong & Lee, for the plaintiff, assigned by the Director of Legal Aid

Miss Terri Ha, instructed by Messrs Au & Associates, for the defendant