# DCPI 469/2019

[2023] HKDC 600

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 469 OF 2019

---------------------------

BETWEEN

TSANG MEI (曾微) Plaintiff

and

HOSPITAL AUTHORITY (醫院管理局) Defendant

---------------------------

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

Date of Hearing: 17 August 2022

Date of Decision: 11 May 2023

------------------------

DECISION

------------------------

*INTRODUCTION*

1. This is a summons taken out by the legally aided plaintiff to seek leave to accept the sanctioned payment made by the defendant out of time.
2. In the summons dated 3 August 2022, the plaintiff seeks the following order :-

(1) leave to the plaintiff to accept the sanctioned payment of HK$100,000.00 paid into court on 18 December 2019, and subject to the 1st charge of the Director of Legal Aid, be paid out to the Director of Legal Aid;

(2) the interest accrued at the court be paid out to the defendant;

(3) costs of these proceedings up to 15 January 2020 be to the plaintiff to be taxed if not agreed;

(4) costs of these proceedings thereafter be to the defendant to be taxed if not agreed;

(5) costs of this application be provided for;

(6) the trial commencing on 25 August 2022 be vacated;

1. the plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations; and

(8) there be liberty to apply.

*BACKGROUND*

1. According to §5 of the statement of claim (“SoC”), the plaintiff claims that she had injured her right knee on 25 June 2016 due to the “wet and slippery surface of floor” at the Pamela Youde Nethersole Eastern Hospital (“the Accident”). At the time, she was working as an operation assistant for the defendant. She claims the defendant, as her employer, was negligent and/or was in breach of implied terms of the employment contract and/or statutory duties.
2. On 4 February 2019, the plaintiff commenced these proceedings against the defendant.
3. On 18 December 2019, the defendant made a sanctioned payment into court of a sum of HK$100,000 in settlement of the whole of the plaintiff’s claim in the present proceedings by way of a notice of sanctioned payment of the same day (“the Sanctioned Payment”).
4. The plaintiff did not accept the Sanctioned Payment within the prescribed period as specified by the rules under the Rules of the District Court (“the RDC”).
5. Pursuant to an order made by this court dated 4 October 2021, the plaintiff set down this case for trial in the fixture list, commencing on 25 August 2022 with 4 days reserved.
6. At the Pre-Trial Review (“PTR”) hearing on 17 June 2022 before me, I expressed my preliminary views on the liability of this case.
7. According to the plaintiff, having considered the preliminary views expressed by this court, the plaintiff became fully aware of the risks of continuing with the proceedings. Since the plaintiff is legally aided, she understands that it is not justified to waste public funds in order to continue her claim. In order not to waste further time and costs, the plaintiff decided not to proceed with the claim any further.

*DISCUSSION*

*The plaintiff’s submissions*

1. At the hearing of the summons on 17 August 2022, the plaintiff’s legal aid assigned solicitor, Mr Ng Man Kin (“Mr Ng”), represented the plaintiff.
2. The core issue at the hearing was whether this court should grant leave to the plaintiff to accept the Sanctioned Payment almost 3 years out of time.
3. Mr Ng correctly submits that the court has jurisdiction to grant leave to accept the payment out of time under O 22, r 15 of the RDC. The court’s discretion to grant or to refuse leave to accept sanctioned payments after the expiry of 28 days from the date after it was made is unfettered.
4. The principles governing such applications have been discussed in *Rai v Pacific Construction (Hong Kong) Company Limited* [2011] 3 HKLRD 469 at §§31 to 38. It has been held that the main criterion for consideration is whether there has been any change of circumstances as would render it unjust to allow the offeree to benefit from the offer (§33). Delay may also make the court less inclined to grant leave if the application is made at the eve of a trial particularly when the opposing party advances a cogent reason to oppose the application (§34).
5. Under O 22, r 15(3) of the RDC, upon granting leave to accept a sanctioned payment outside the specified 28-day period (“prescribed period”), the court is empowered to make an order as to costs. Costs are in the discretion of the court pursuant to section 53 of the District Court Ordinance (“DCO”) and should normally follow the event but the court can make some other costs order where appropriate: (see O 62, r 3(2) of the RDC).
6. In exercising its discretion, the court should take into account the matters set out in O 62, r 5 including, *inter alia*, the underlying objectives set out in O 1A, r 1 of the RDC and the conduct of all the parties which in turn includes the manner in which a party has pursued or defended his case; whether a successful claimant has exaggerated his claim; and the conduct before as well as during the proceedings.
7. The costs consequences where a plaintiff fails to do better than a sanctioned payment are provided by O 22, r 23 of the RDC are as follows:-

“(1) This rule applies where a plaintiff –

1. fails to obtain a judgment better than the sanctioned payment; or
2. fails to obtain a judgment that is more advantageous than a defendant’s sanctioned offer.

(2) The Court may by order disallow all or part of any interest otherwise payable under section 49 of the Ordinance on the whole or part of any sum of money awarded to the plaintiff for some or all the period after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court.

(3) The Court may order the plaintiff to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court.

(4) The Court may also order that the defendant is entitled to –

1. his costs on the indemnity basis after the latest date on which the plaintiff could have accepted the payment or offer without requiring the leave of the Court; and
2. interest on the costs referred to in paragraph (3) or subparagraph (a) at a rate not exceeding 10% above judgment rate.

(5) Where this rule applies, the Court shall make the orders referred to in paragraphs (2), (3) and (4) unless it considers it unjust to do so.

(6) In considering whether it would be unjust to make the orders referred to in paragraphs (2), (3) and (4), the Court shall take into account all the circumstances of the case including –

1. the terms of any sanctioned payment or sanctioned offer;
2. the stage in the proceedings at which any sanctioned payment or sanctioned offer was made;
3. the information available to the parties at the time when the sanctioned payment or sanctioned offer was made; and
4. the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the payment or offer to be made or evaluated.”
5. Lam V-P (as he then was) in *Or Siu Lung v Fu Hong Home for the Elderly Co Ltd* [2018] 1 HKLRD 872 stated the following:-

“12. Though r 23 RDC provides for situations where a judgment is entered and the plaintiff failed to obtain a judgment more advantageous than a sanctioned offer by a defendant, it has been held in England under similar rules that the approach should also guide the courts in the exercise of the discretion under r 15(3) RDC when making an order for costs upon granting leave to accept a sanctioned payment of time, see *SG v Hewitt* [2013] 5 Costs LR 93 at [20] and [76].

13. We respectfully endorse such approach and we see no reason not to adopt the same in the context of our O 22 regime. At the same time, we need to highlight a difference between the situation under r 15(3) and the one under r 23. Rule 23 predicates upon a judgment being entered, hence there is a judicial determination on the merits. The comparison is to be made between the terms of the sanctioned offer and the actual outcome in that judicial determination. On the other hand, in the case of an acceptance of a sanctioned offer out of time, there would not be any judicial determination on the merits. In that respect, in the examination as to whether it would be unjust to apply the normal costs rule, in particular the consideration of the terms of the offer under r 23(6)(a), the court may need to make some broad assessment as to the reasonableness of the sanctioned offer in order to have a meaningful comparison instead of simply accepting the terms of the sanctioned offer as the benchmark for comparison.

…

17. The following propositions can be derived from the judgment of Black LJ (as she then was) in *SG v Hewitt*:

1. The approach on costs consequences under the English equivalent of our r 23 applies to an acceptance of sanctioned payment out of time with the leave of the court, see [20];
2. As the relevant rule refers to “unjust”, injustice should be the benchmark. Under such rubric, the court can assess “what the fairness of the situation demands”. It is better to avoid reference to “exceptional circumstances” as the test, as it would have a tendency to give rise to the idea that circumstances must be at the extreme end of the spectrum before they will count. See [22]-[25];
3. The court should not attempt to prescribe or restrict in the abstract the circumstances in which the court may reach the conclusion that it is unjust to make the normal order. Costs decisions are particularly sensitive to the facts of the individual case, see [29];
4. Reasonableness of a plaintiff in not accepting the sanctioned payment within time is a relevant consideration though, depending on the facts of the case, it would not necessarily be determinative. At the same time there are cases where it could form a sufficient basis for finding injustice in applying the normal costs rule. As held in *Matthews v Metal Improvements Co Inc,* the ultimate question is whether it is unjust to impose the normal costs consequences, see [43];
5. Costs decision based on the assessment under r 23(5) and (6) is highly fact-sensitive and it would not be helpful to compare one case with another. The court should guard against citation of authorities for the purpose of persuading courts to follow decisions on the facts as if they were precedents, see [47].”
6. In *Marilyn Eurony Jones v Margaret Nelly Jones,* 13 October 1999, Chadwick LJ shed some light on the process of reassessment of risk regarding a sanctioned payment (at p 11 and 12 of the judgment):-

“If the plaintiff decides not to accept the payment in within the 21-day period, then he cannot accept it without leave. But it is always open to him to reassess the risk in the light of anything which subsequently emerges in the course of the proceedings…

If, on a reassessment of the risk, the plaintiff decides that it would be in his interest to accept the payment-in, then, he or she can apply to the court for an order that it be paid out. In deciding what order to make on such an application, the Court can take into account what costs the defendant has occurred since the date of the payment in: costs which, if the plaintiff had accepted the payment in within the period limited by the rules, would not have been incurred.

The Court may also take into account the circumstances which have given rise to the plaintiff’s change of mind. In particular, if the court were satisfied that the change of mind – arising from a reassessment of the risk in the light of new material – was attributable to the defendant’s failure to produce that material at an earlier date … it might take the view that the plaintiff should not be required to bear all or some part of any intervening costs…*”*

1. Where O 22, r 23 of the RDC applies, the court “shall” make the orders “unless it considers it unjust to do so”: O 22, r 23(5) of the RDC. In considering whether it would be unjust to make the orders, the court shall take into account “all the circumstances of the case”: O 22, r 23(6) of the RDC.
2. Mr Ng submits that I should grant leave to the plaintiff to accept the Sanctioned Payment out of time in this case. He submits that it will be unjust to order indemnity costs incurred for the following reasons:-

(i) the Sanctioned Payment was made at a very early stage of the proceedings. It was made to the plaintiff after the stage of discovery of documents and before the filing of the witness statements of the defendant, preceded by extensive document discovery. Not all the relevant documents and information had been disclosed to the plaintiff. Hence, the plaintiff was not in the best position to evaluate the merits of her claim when the Sanctioned Payment was made. Thus, the plaintiff did not accept the Sanctioned Payment within the prescribed time.

(ii) It is the plaintiff’s case that the accident was caused by the slippery of the floor albeit it is not in dispute that such evidence is not supported by any contemporaneous documents.

(iii) The plaintiff decided not to proceed further of her claim upon this court’s indication of his preliminary view on the merits of the case at the PTR.

*The Defendant’s submissions*

1. Mr Leon Ho of Counsel (“Mr Ho”) who represents the defendant in this application has summarized the history of this case and has recorded all the occasions of when the plaintiff had failed to mention to the treating doctors, physiotherapists, occupational therapists and her own solicitors that she fell on the day of the Accident due to the “wet and slippery floor”. He points out the salient fact that it was only after the commencement of the present proceedings on 4 February 2019 that the allegation of “wet and slippery floor” was first mentioned by the plaintiff.
2. Contrary to the plaintiff’s submissions, I find the Sanctioned Payment made by the defendant was not made at a very early stage of the proceedings. In fact, it was made almost 3½ years after the Accident and more than 10½ months after the plaintiff had prepared her witness statement which was signed on 1 February 2019. Hence, I find the plaintiff had all the information she needed and had had more than sufficient time to decide whether the Sanctioned Payment should be accepted within 28-day time limit. In my judgment, the plaintiff who choose not to accept the Sanctioned Payment must take the consequences of her own decision.
3. As pointed out by Mr Ho in his submissions, at the PTR on 17 June 2022, this court did ask the plaintiff then assigned counsel if he had any contemporaneous evidence in support of his aided client’s allegation of “wet and slippery floor surface” (that is other than the plaintiff’s bare allegations made in her witness statement in the present proceedings), the plaintiff’s counsel fairly conceded that there was none. This court then invited the plaintiff’s assigned counsel and assigned solicitor to carefully re-consider how they are going to establish her claim at the trial given the state of the evidence.
4. Very sensibly in my view and most likely as a result of the discussions between counsel and the bench at the PTR, the plaintiff’s solicitors took out the present summons and clearly indicated to the court of his client’s intention to discontinue the present action at the hearing of the application.

*Findings of the Court*

1. As pointed out by Mr Ho for the defendant, the relevant legal principles on O 22, r 15(2)(b)(i) of RDC have been set out in §§17-20 of *Polyever Holdings Ltd v Savills (HK) Ltd* [2014] 5 HKC 588:-

“17. The principles which can be distilled from the above three authorities are as follows:

1. The discretion of the court is unfettered (*Rai,* § 31);
2. Such discretion is be exercised judicially (*Cumper*, pg 67);
3. The main criterion is whether there has been a change of circumstances as would render it unjust to allow the offeree to benefit from the sanctioned offer/payment (I see no reason to treat a sanctioned offer and a sanctioned payment differently. Indeed, they received parity of treatment under O 22.) (*Rai,* § 33). For instance, the discovery of further evidence, which puts a wholly different complexion on the case, or a change in the legal outlook brought about by new judicial decision (*Cumper*, p 70);
4. Delay in making the application is a relevant consideration (*Rai,* § 34; *Capital Bank,* § 15);
5. The substantiality of the offer to accept is a relevant consideration (In *Capital Bank,* the defendant made a late application to accept the claimant’s CPR Part 36 offer to settle for a certain sum. However, the defendant’s acceptance was not backed-up by any security for payment.) (*Capital Bank,* § 15);
6. The conduct of the applicant is a relevant consideration (*Capital Bank,* § 19);
7. The court will not, in the interlocutory application, conduct a mini-trial of the issues raised (*Rai,* § 37);
8. After taking into account all the relevant factors, the court will be guided by the overriding consideration to do justice between the parties (*Rai,* § 38);

18. In addition, I would like to add that the reason(s) for the late application to accept a sanctioned offer/payment is also a relevant consideration. *Normally, a court would not exercise its discretion without good or sufficient reason*. To begin with, it is normally necessary to explain to the court why an application has to be made to invoke its discretion. Once the explanation is before the court, it must follow that it will be scrutinized and evaluated. If the explanation is frivolous, the court cannot be expected to entertain the application. Further, generally, the court will look for more cogent reason in the case of serious delay.

19. I would also like to add a few words about change of circumstances and delay. It may be said that the former is the most important factor to be taken into account by the court (see also *Capital Bank*, §18) because once there is a settlement offer on the table, and provided that the offeree is willing to bear all the costs which have been wasted as a result of the delay in accepting the offer then barring any change of circumstances he should normally be allowed to accept the same, provided that such acceptance remains consistent with the object of O 22.

20. That brings me to the issue of delay. I believe that delay is an important factor because it can defeat the very object of O 22*. A very late application means that the court’s wishes to encourage settlement and to have its [scarce] resources fairly distributed are defeated.* As I shall explain below, a late application like the present is an unfair drain on the court’s resources.” [emphasis added]

1. I agree with Mr Ho’s submission that after the PTR, the plaintiff was fully aware that if she were to proceed to trial, her claim would most likely be dismissed with the consequence that not only she would not be able to beat the Sanctioned Payment, she would most likely be liable to the defendant’s costs on at least party to party basis up to 15 January 2022 and then on an indemnity basis thereafter.
2. With respect to Mr Ng, I do not find the events which happened at the PTR amount to any material change of circumstances.
3. Rather, I agree with Mr Ho that it would not be just nor appropriate for the court to allow the plaintiff to accept the Sanctioned Payment out of time under the circumstances of this case. The reasons being that:-

(1) In my judgment, the present proceedings should never have been commenced in the first place. There was clearly no evidence whatsoever for her to commence the case based on the allegation of a “wet and slippery floor surface”. In my view, that was clearly made up by the plaintiff for the purpose of claiming common law damages. She had already been well compensated for by way of employees’ compensation as a result of the Accident. Hence, she should or ought to know the relative strengths and weaknesses of her claim at the time when the Sanctioned Payment was made, in particular the dire lack of any evidence to establish negligence and/or breach of any duties against the defendant. Nonetheless, she decided to commence the present proceedings and pursed it all the way up to the PTR. Given her persistent stance, I am of the opinion that she should not be allowed to take advantage of the court’s indication made at the PTR and to accept the Sanctioned Payment more than 3 years out of time. I agree with Mr Ho that allowing the plaintiff to accept the Sanctioned Payment out of time under such circumstances is like letting the plaintiff to have a “second bite of the cherry” and is not fair to the defendant;

(2) As the plaintiff has through her assigned solicitor very sensibly indicated to the court at the hearing for the summons that she would not proceed with the trial, even if the court refuses to grant leave for the plaintiff to accept the Sanctioned Payment at this stage, no judicial resources will be wasted as a result; and

(3) This application was made around 3 weeks before the scheduled dates of trial. The hearing was heard 8 days before the commencement of the trial. I agree with Mr Ho that the delay is a significant factor against the exercise of discretion to allow the acceptance of the Sanctioned Payment out of time in this case.

1. In the aforesaid circumstances, I would refuse the plaintiff’s application to accept the Sanctioned Payment out of time.
2. Hence, the plaintiff’s summons is dismissed with costs in favour of the defendant, with certificate for counsel, such costs to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.
3. As for the costs of the trial itself, I gave leave to the plaintiff to discontinue the action at the end of the hearing. The costs had been reserved on that occasion. As I find the plaintiff has no evidential basis to purse a common law claim arising out of the Accident in this case, I am of the view that the case should not have been commenced in the first place. Thus, the plaintiff effectively is the losing party in this case. I therefore would order the plaintiff to pay the costs of the defendant in this action on a party and party basis, with such costs to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

*CONCLUSION*

1. In conclusion, I would dismiss the plaintiff’s summons to seek leave to accept the Sanctioned Payment out of time in this case with costs in favour of the defendant.
2. Lastly, I would like to thank both Mr Ng, the plaintiff’s assigned solicitor, and Mr Ho, the defendant’s counsel, for their helpful assistance in this matter.

( Andrew SY Li )

District Judge

Mr Ng Man Kin, of Kwok, Ng & Chan, assigned by the Director of Legal Aid, for the plaintiff

Mr Leon Ho, instructed by Deacons, for the defendant