DCPI 636/2010

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 636 OF 2010

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

AU MAN MING Plaintiff

and

GOLDWELL PROPERTY MANAGEMENT LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in chambers (open to public)

Date of hearing and decision: 28 September 2011

**D E C I S I O N**

1. The Plaintiff (“**Au**”) commenced this action against the Defendant employer at the material time (“**Goldwell**”) for damages for injury at work. After trial, I handed down my written judgment on 2 September 2011. Au failed to establish liability; and therefore I dismissed his claim.
2. For completeness, I assessed the quantum to be HK$137,788 with interest. Yet this would have had to give credit to 50% contributory negligence and employees’ compensation received in the sum of HK$70,625.40. In other words, Au could have ended up with no award of damages or an award close to nil, even assuming liability had been proved.
3. I made a nisi order that Au shall pay Goldwell’s costs of the action, including any costs reserved, to be taxed (if not agreed) with certificate for counsel. Au’s own costs shall be taxed in accordance with legal aid regulations. I gave the parties 14 days to apply to vary the nisi order. This Goldwell did by way of summons dated 12 September 2011.
4. It is now revealed that Goldwell made a sanctioned payment in the sum of HK$65,000 on 14 September 2010. The last date for acceptance without leave was 12 October 2010.
5. Goldwell asks for the sanctioned payment together with interest accrued thereon be paid out of court to it through its solicitors as soon as practicable. This part of the application is uncontested.
6. Goldwell also asks for variation of the nisi costs order. Duly clarified, what Goldwell seeks is for its costs up to 12 October 2010 to be paid on a party and party basis; and its costs thereafter (including the costs of the present application) to be paid on indemnity basis together with enhanced interest on such costs. This part of the application is contested.
7. Losing his claim completely, Au fails to do better than the sanctioned payment. Pursuant to O.22, r.23, the court shall make an order as to costs as that sought by Goldwell, unless it is unjust to do so. In considering whether it is unjust to make such a costs order, the court shall take into account all the circumstances of the case including those set out in r.23(6).
8. Goldwell is prima facie entitled to the costs order being sought. Is it unjust to order so?
9. The parties refer to the correspondence between the parties regarding the sanctioned payment. The first one came from the solicitors for Goldwell days before 12 October 2010 setting out in detail their analysis of the merits and calculation of the quantum and hence the sanctioned payment.
10. The first letter indicating Au’s intention to accept the sanctioned payment came on 21 June 2011. That was more than 8 months after 12 October 2010 when the sanctioned payment could have been accepted without leave. In the circumstances, unless the parties agreed on costs, acceptance of the sanctioned payment would require leave of the court. Goldwell’s solicitors rightly pointed that out in their reply.
11. By their reply, Goldwell’s solicitors also explained their stance that costs had been incurred since the sanctioned payment; and they were minded to seek such costs against Au. This met with the reply from Au’s solicitors suggesting that he would seek costs of the action up to date, i.e., 22 June 2011. A month later, his stance changed to that he would seek costs up to the date of the sanctioned payment plus the expert fee.
12. Au’s last offer above was eventually rejected by Goldwell. Instead, Goldwell proposed no order as to costs for the action on top of Au’s acceptance of the sanctioned payment to settle the case. That was days before the trial. No agreement was reached and the trial was not avoided.
13. In my view, Goldwell was quite entitled to take issue as to its costs that could have been avoided, had Au accepted the sanctioned payment by 12 October 2010. At the end of the without prejudice negotiation, Goldwell proposed no order as to costs of the action, which was not accepted by Au.
14. The point is that despite the disagreement on costs, Au could still have applied for leave to accept the sanctioned payment together with the issue of costs to be decided by the court. He chose not to do so; and by turning down the last offer of Goldwell, Au chose to take the risk not only of obtaining an award less than the sanctioned payment, but also of failing to prove liability at all. The risk materialised; and the result could not be worse.
15. Considering all the circumstances, I grant an order in terms as sought by Goldwell. The enhanced interest rate will be 9% p.a., that is 1% above the judgment rate, as proposed by Goldwell. What costs of Goldwell under this order shall be taxed on indemnity basis and carrying enhanced interest will be a matter for taxation, if not agreed.

Simon Leung

District Judge

Mr David VRIJMOED of Messrs Au & Vrijmoed for the Plaintiff upon the assignment by the Director of Legal Aid

Mr Jeffrey CHAN of Messrs Cheng, Yeung & Co for the Defendant