## DCPI 948/2019

[2021] HKDC 451

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 948 OF 2019

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BETWEEN

CHAN NGA Plaintiff

and

CATHAY PACIFIC CATERING SERVICES Defendant

(H.K.) LIMITED

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Before: His Honour Judge KC Chan in Chambers (Open to Public)

Date of Hearing: 8 March 2021

Date of the defendant’s Supplemental Written Submissions: 19 March 2021

Date of the plaintiff’s Written Submissions: 29 March 2021

Date of the Director of Legal Aid’s Written Submissions: 1 April 2021

Date of the defendant’s Written Reply: 9 April 2021

Date of Decision: 20 April 2021

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DECISION

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1. By my judgment herein handed down on 8 January 2021 (“the Judgment”), I gave judgment for the plaintiff and awarded her damages in the total sum of HK$343,402 together with interest but to be deducted therefrom the employees’ compensation in the sum of HK$280,000 previously received by her (“the EC Payment”). I awarded that sum against the amount of HK$3,251,271.04 claimed in the Revised Statement of Damages.
2. There, I made a costs order *nisi* that the defendant do pay to the plaintiff the costs of this action, including the costs of the HCPI Action before it was transferred to the District Court but such costs to be taxed on the District Court scale, to be taxed if not agreed; and the plaintiff’s own costs, incurred when she was legally aided, to be taxed according to the Legal Aid Regulations.
3. The defendant now says that the plaintiff failed to do better than the sanctioned payment in the sum of HK$100,000 made by the defendant on 15 February 2018 pursuant to O22 r8 (“the Sanctioned Payment”). In the Notice of Sanctioned Payment dated 15 February 2018, the sum of HK$100,000 was stated to be paid on top of the EC Payment already received and inclusive of interest.
4. By summons filed on 21 January 2021 (“the Summons”), the defendant now seeks to vary the costs order *nisi* and impose the consequences as provided under O22 r23 against the plaintiff.
5. To help understand the terms of the order now sought in the Summons, I would first set out the following short chronology:-

|  |  |
| --- | --- |
| Date | Event |
| 25 August 2013 | Date of the Accident |
| 7 May 2014 | The plaintiff was granted legal aid |
| 21 March 2016 | The plaintiff commenced the HCPI Action |
| 15 February 2018 | Notice of the Sanction Payment |
| 15 March 2018 | Last day for acceptance of the Sanctioned Payment under O22 r15(1) |
| 27 November 2018 | The plaintiff’s legal aid was discharged |
| 26 February 2019 | Order transferring the HCPI Action to the District Court |

1. The orders sought in the Summons are:-
2. The costs order nisi be varied to:
   * + 1. The defendant do pay the plaintiff the costs of the HCPI Action incurred up to 15 March 2018 (with all costs reserved in the period) on the District Court scale and on party and party basis, to be taxed if not agreed;
       2. The plaintiff do pay the defendant the costs of the HCPI Action incurred from 16 March 2018 up to 26 February 2019 (with all costs reserved in the period) on the High Court scale and on indemnity basis, to be taxed if not agreed;
       3. The plaintiff do pay the defendant the costs of this action incurred from 27 February 2019 onward (with all costs reserved in the period) on the District Court scale and on indemnity basis, to be taxed if not agreed;
       4. The plaintiff do pay the defendant interest on costs, namely (i) fees in the sum of HK$44,715 paid to Dr Benjamin Lai on 1 June 2018 and (ii) fees paid to Daniel K.K. Chan Barrister-at-law on 20 August 2018 in the sum of HK$120,000, at 10% over judgment rate from the dates of their payment to the date of the Judgment, and thereafter at judgment rate until full payment;
3. The interest on the award of PSLA (HK$200,000) be disallowed as from 15 March 2018;
4. The Sanctioned Payment of HK$100,000 be paid out as follows:
5. Subject to DLA’s first charge, HK$82,255.59 be paid out through the Director of Legal Aid to the plaintiff in satisfaction of the judgment sum and interest; and
6. The balance of HK$17,744.41 and all interest accrued on the Sanction Payment be paid to the defendant through its solicitors.
7. The defendant’s said costs incurred from 16 March 2018 to 27 November 2018 (including the interest on costs mentioned in paragraph (1)(d) above within this period) be paid by the Director of Legal Aid (“DLA”);
8. The defendant’s said costs incurred from 28 November 2018 (including the interest on costs mentioned in paragraph (1)(d) above within this period) be paid by the plaintiff personally;
9. The costs of this application be paid by the plaintiff on indemnity basis to be taxed if not agreed; and
10. The plaintiff’s own costs, while she was legally aided, be taxed according to the Legal Aid Regulations.
11. At the hearing on 8 March 2021, I gave directions to the parties, and to the DLA upon his request, to lodge their written submissions. I further directed that the Summons would be disposed of on papers. Since then, the parties and the DLA have lodged their submissions and I have considered them. This is my decision.

*Sanctioned Payment not disputed*

1. It is not disputed that the Sanctioned Payment was validly made pursuant to O22 r8, such that if the plaintiff failed to do better than it, it would attract the consequences pursuant to O22 r23.

*Did the plaintiff fail to obtain a judgment better than the Sanctioned Payment?*

1. Initially in its first round of submissions lodged for the hearing on 8 March 2021, the defendant contended that of the award of HK$343,402 no interest should have been awarded regarding HK$280,000 thereof as the latter sum, being the EC Payment, was accepted on 24 July 2015, which was before the commencement of the HCPI Action. According to the defendant, the total interest, without taking into account the EC Payment as principal, would only amount to HK$18,853.59; and therefore the total judgment would be HK$362,255.59 (HK$343,402 + HK$18,853.59), which would be less than the sum total of the EC Payment and the Sanctioned Payment at HK$380,000.
2. Such contention about the award of interest might have its merits if it had been made at trial. That however was not the interest I awarded in the Judgment. While it was common ground in the pleadings that the EC Payment was received (with no mention as to when it was received), in the Answer under section 12 entitled “Interest” the defendant merely pleaded a general non-admission of the rate and period on which interest would be payable with no mention that the defendant contended that interest should not be payable on the EC Payment. At trial, my attention was not drawn to the date of the receipt of the EC Payment and there was no contention made by the defendant whether in the written or orally submissions that the sum of HK$280,000 should be excluded for the purpose of the award of interest. On that footing, in paragraphs 84 to 86 of the Judgment, I awarded the said sum of HK$343,402, then interest on general damages and on pre-trial loss and special damages at their respective usual rates and over the usual periods, and adjudged that from the total award (ie the said sum and interest thereon) the EC Payment would be deducted.
3. That being the case, if the defendant wanted to take issue with my award of interest, it could and should do so before the Judgment was sealed, at which time this court was not yet *functus* and could and would hear further representations on that issue. However, the defendant has not done so and went on to seal the Judgment on 24 February 2021. In the circumstances, the defendant is not entitled now to re-open the award of interest. I therefore do not accept its said contention.
4. The defendant now further contends that to decide whether the plaintiff has obtained a better judgment than the Sanctioned Payment, the Sanctioned Payment should be compared with the awarded sum plus interest thereon calculated up to the last day for acceptance of the Sanctioned Payment under O22 r15(1), namely 15 March 2018.
5. Mr Ho, counsel for the defendant (who lodged the Supplemental and Reply written submissions for the defendant, and not the one for the hearing on 8 March 2021), referred me to the cases of *Wong Kwong San v Lee Choi Wan*[[1]](#footnote-1)*, Bokhim Dil Kumar v Dragages Hong Kong Ltd & Another*[[2]](#footnote-2) and *Tsang Chiu Yip v Ho Kwok Leung*[[3]](#footnote-3) in which either it was accepted or mentioned that interest was calculated up to the last day for acceptance of sanctioned payment when considering whether the judgment obtained was better than the sanctioned payment.
6. Mr Ho further cited the English case of *Blackham v Entrepose UK[[4]](#footnote-4)* in which the Court of Appeal allowed the appeal against the trial judge’s costs order made based on his conclusion that the payment-in made under Part 36 of CPR was bettered by the judgment. The Court of Appeal held that the trial judge had erred by comparing the amount of the Part 36 payment with his award plus interest up to the date of judgment, instead of comparing it with the award plus interest calculated only up to the last day the Part 36 payment could be accepted without permission.
7. Mr Wong, for the DLA, does not dispute the approach submitted by Mr Ho.
8. In my view, the approach submitted by Mr Ho is clearly right, and I would adopt the same to decide whether the judgment the plaintiff obtained here was better than the Sanctioned Payment. In this regard, I accept as correct the calculation of Mr Ho in the following table which shows that the award plus interest up to 15 March 2018 amounted to HK$377,299.49, which was HK$2,700.51 less than HK$380,000 (the Sanctioned Payment plus the EC Payment):-

|  |  |
| --- | --- |
| PSLA | HK$200,000 |
| Interest on PSLA from 21 March 2016 (date of Writ) to 15 March 2018 | HK$200,000 x 2% x 1 360/365  = HK$7,945.21 |
| Loss of pre-trial earnings | HK$113,442 |
| Special damages | HK$28,960 |
| Interest thereon from 25 August 2013 (date of Accident) to 15 March 2018 | (HK$113,442 + HK$28,960) x 4% x 4 203/365  = HK$25,952.28 |
| Future medical expenses | HK$1,000 |
| **Total:** | **HK$377,299.49** |

1. Therefore, I find that the plaintiff has not obtained a judgment better than the Sanctioned Offer.

*O22 r23*

1. Having so found, O22 r23 is triggered. O22 r23 provides:-

“**Costs consequences where plaintiff fails to do better than sanctioned offer or sanctioned payment** (O. 22, r. 23)

(1) This rule applies where a plaintiff—

(a) fails to obtain a judgment better than the sanctioned payment; or

(b) 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 of 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—

(a) 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

(b) 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—

(a) the terms of any sanctioned payment or sanctioned offer;

(b) the stage in the proceedings at which any sanctioned payment or sanctioned offer was made;

(c) the information available to the parties at the time when the sanctioned payment or sanctioned offer was made; and

(d) 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.

(7) The power of the Court under this rule is in addition to any other power it may have to award or disallow interest.”

1. O22 r23(5) states mandatorily that the court shall make the orders referred to in O22 r23(2), (3) and (4) unless the court considers it unjust to do so.

*Unjust to make the orders?*

1. The plaintiff in her submissions raised a number of matters and said that together they made it unjust for the court to impose the consequences. DLA in its written submissions did not make any submission to contend that it was unjust to impose the consequences.
2. First, the plaintiff said that the Sanctioned Payment was made in the middle of the proceedings. The Sanctioned Payment was made (a) about 2 weeks before the directions hearing on 2 March 2018, (b) when the action had not been set down for trial, (c) about a year and a half after the parties had received the Joint Orthopaedic Expert Report and (d) about a week before the parties received the Joint Psychiatric Expert Report dated 23 February 2018. With the chronological context of those procedural steps in view, I do not find anything at all in the timing of the making the Sanctioned Payment that would make it unjust to impose the consequences.
3. After the receipt of the Joint Psychiatric Expert Report, the plaintiff still had about 3 weeks to consider whether to accept the Sanctioned Payment before the expiry of the 28 days’ period for acceptance. At that time, the plaintiff was receiving Legal Aid and was legally represented. As I commented in the Judgment, the Joint Psychiatric Expert Report was thorough and the opinion of the two experts did not diverge much, if at all. In the circumstance, I would regard 3 weeks as sufficient time for the plaintiff and her legal team to digest the report and understand that the opinion expressed in both sets of expert reports did not support the very substantial claim she was maintaining. Then on 24 May 2018, the plaintiff filed her Revised Statement of Damages increasing her claim, before deducting the EC Payment, from the total sum of HK$2,621,847.87 to HK$3,251,271.04.
4. Second, it was complained that the Notice of Sanctioned Payment did not mention about interest, costs, how the sum of HK$100,000 was arrived at and the consequences of not accepting the Sanctioned Payment. I find no substance in the complaint. The Notice of Sanctioned Payment did state expressly that the sum was for full settlement of the whole of the plaintiff’s claim inclusive of interest. There is no obligation on the part of the litigant making a sanctioned payment to explain to the opposite party how the sum of the sanctioned payment was arrived at. The consequences of not accepting the Sanctioned Payment are provided by O22 r23. A claimed ignorance of the law is not a valid factor to be taken into account when considering whether it was unjust to impose the consequences (see *Mozard (HK) Co Ltd v Dachser Hong Kong Ltd*[[5]](#footnote-5)*).* In any case, at the time the plaintiff was represented by her former solicitors Messrs Yu & Associates, whose duty it was to explain to the plaintiff the consequences of not accepting the Sanctioned Payment. I also note that the plaintiff has had a prior experience in accepting the sanctioned payment made by the same defendant in respect of her claim for employees’ compensation in DCEC 2131/2014 on 24 July 2015, when presumably matters relating to accepting or refusing a sanctioned payment had been explained to her.
5. Third, the plaintiff cited *賴容 對 醫院管理局* [[6]](#footnote-6) and said that in that case the solicitors acting for the Hospital Authority had explained to the plaintiff how the sum of sanctioned payment was arrived at and had actively solicited for a settlement, and that therefore it is unjust here as the defendant had not done so. In that case, the plaintiff acted in person and therefore the solicitors acting for the Hospital Authority was allowed to approach the plaintiff directly. In our present case, the plaintiff was legally represented at the time of the Sanctioned Payment and it was therefore a breach of professional conduct on the part of the defendant’s solicitors to contact the plaintiff direct. In any case, it was clear from the judgment that Chu J never held that there was any obligation or duty on the part of the person making the sanctioned payment to have to explain or to actively solicit a settlement, making it unjust if such were not done.
6. Fourth and lastly, the plaintiff maintained that it was reasonable for her to refuse to accept the Sanctioned Payment because the expert reports did not correctly reflect her condition, liability against the defendant was established, and that she had been cooperative in the proceedings. I have given my reasons in the Judgment for finding against the plaintiff’s quantum case and for assessing the amount of the award. Quite clearly, the amount the plaintiff claimed was totally unrealistic, if not exorbitant. Moreover, by making the Sanctioned Payment, the defendant was accepting liability and was offering the amount paid in as the appropriate amount of damages plus interest. Therefore, I do not find the fact that the defendant was later adjudicated liable has anything to do in making the plaintiff’s refusal to accept the Sanctioned Payment reasonable.
7. In all, I find that nothing has been shown that would make the imposition of the consequences under O22 r23(2) to (4) unjust.

*Costs incurred after 15 March 2018 be paid by the plaintiff on indemnity basis*

1. In the premises and pursuant to O22 r23(4)(a), I order that the defendant’s costs of the action incurred after 15 March 2018 be paid by the plaintiff and be taxed on an indemnity basis.

*Scale of costs*

1. The defendant now asks that the costs the plaintiff would receive while this action was litigated in the High Court be taxed on the District Court scale. This is in accordance with general principle and not pursuant to O22 r23. Clearly, the amount I awarded in the Judgment was well within the jurisdiction of the District Court at the time the HCPI Action was commenced, which was HK$1,000,000. This claim should never have been commenced in the High Court. The plaintiff’s such costs must be taxed in the District Court scale.
2. The defendant asks that the costs it incurred after 15 March 2018 up to the transfer of the HCPI Action to the District Court be taxed on High Court scale. Again, this is pursuant to general principle and not O22 r23. Since the plaintiff had chosen to commence her present claim in the High Court rather than the District Court, there is no reason why the defendant should not recover its costs incurred during the said period to be taxed in the High Court scale. I would so order.

*Disallowing interest*

1. Pursuant to O22 r23(2), the defendant now asks that interest on general damages of HK$200,000 be disallowed as from 15 March 2018. It being not shown that it is unjust so to do, I would so order.

*Interest on costs*

1. In respect of the interest on costs, namely, fees in the sum of HK$44,715 paid to Dr Benjamin Lai on 1 June 2018 and fees paid to Daniel K.K. Chan Barrister-at-law on 20 August 2018 in the sum of HK$120,000, I am satisfied by the receipts produced that they were paid in those amounts and on those dates. Pursuant to O22 r23(3) and following *Shih Pik Nog v G2000 (Apparel) Ltd* [[7]](#footnote-7), as the DLA submitted, I would order the plaintiff to pay the defendant interest on those respective sums at the commercial enhanced rate of 9% per annum from the dates of their respective payment to the date of the Judgment, and thereafter at judgment rate until full payment.

*Payment of the defendant’s costs by DLA*

1. The defendant asks that the defendant’s costs incurred from 16 March 2018 to 27 November 2018, taxed on indemnity basis, be paid by the DLA. The DLA in its written submissions did not resist it. I so order.

*Directions for payment out of the Sanctioned Payment of HK$100,000*

1. The defendant sought such directions premised on the fact that the plaintiff is only entitled to the award plus interest in the total sum of HK$362,255.59, being the sum of HK$82,255.59 on top of the EC Payment – per the calculation mentioned in paragraph 9 above. As explained in paragraphs 10 and 11 above, I do not accept this calculation as the correct amount according to what I awarded in the Judgment. Whether a direction to pay out to the defendant the balance would evidently depend on whether there remains such a balance. It remains to be calculated out according to the interest I awarded in the Judgment but disallowing such interest as said in paragraph 30 above whether a balance still remains. I would therefore not make the directions of payment out now sought in the Summons, and would let the matter be dealt with in the usual way should a balance remains.

*Disposition*

1. In the premises, I will make an order in terms of paragraphs 1, 2, 4, 5 and 7 of the Summons, save that paragraph 1(d) thereof be changed to the order in the terms set out in paragraph 31 above.
2. Regarding the costs of this application, I note (a) this application was initially made entirely based on the contention set out in paragraph 9 above which I do not accept, and (b) though the DLA participated, but he only filed a short submission regarding the rate of the interest on the fees of Dr Lai and Mr Chan, which I accepted. In the circumstance, I would make a costs order *nisi* (a) that the plaintiff do pay the defendant the costs of this application, but disallowing the costs of the defendant’s written submissions dated 4 March 2021, on indemnity basis, to be taxed if not agreed, and (b) no order between DLA and the parties.
3. The plaintiff may arrange with my clerk to have this decision interpreted to her in Punti.

( KC Chan )

District Judge

The plaintiff was not represented and appeared in person

McKenzie friend of the plaintiff, Chan On Ki, appeared in person

Ms Lee Yuk Yee of Winnie Mak, Chan & Yeung and Mr Leon Ho, instructed by Winnie Mak, Chan & Yeung, for the defendant

Mr Patrick Wong of Legal Aid Department, for the Director of Legal Aid

1. HCPI 700/2010, unrep, 22 September 2017, Master J Wong [↑](#footnote-ref-1)
2. [2021] HKCFI 308, DHCJ Paul Lam SC [↑](#footnote-ref-2)
3. HCPI 305/2013, unrep, 8 August 2016, DHCJ Marlene Ng (as she then was) [↑](#footnote-ref-3)
4. [2005] 1 Costs LR 68 [↑](#footnote-ref-4)
5. DCCJ 5823/2015, unrep, 6 July 2018, Deputy District Judge W H Wong [↑](#footnote-ref-5)
6. HCPI 219/2013, unrep, 11 January 2016, B Chu J [↑](#footnote-ref-6)
7. [2011] 4 HKLRD 121 [↑](#footnote-ref-7)