# DCPI 1198/2020

[2023] HKDC 650

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1198 OF 2020

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BETWEEN

NG WAI TAO Plaintiff

and

SIU PATRICK CHUN WAI 1st Defendant

SIU MAN WAI PAUL 2nd Defendant

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Before: Deputy District Judge Alan Kwong (Paper Disposal)

Dates of Written Submissions: 16, 23 & 27 March 2023

Date of Decision: 24 May 2023

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DECISION

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***A. INTRODUCTION***

1. On 13 February 2023, I handed down the judgment in respect of the present proceedings (the “**Judgment**”)[[1]](#footnote-1): *see* [2023] HKDC 193.
2. Whilst I ordered the 1st defendant to pay damages of HK$166,700.26 together with interest to the plaintiff (*see* Judgment §83), I dismissed the plaintiff’s claims against the 2nd defendant (*see* Judgment §84).
3. I also made a costs order *nisi* (the “**Costs Order *Nisi***”) that the 1st defendant do pay the plaintiff’s costs in these proceedings to be taxed if not agreed (with certificate for Counsel), and that the plaintiff do pay the 2nd defendant’s costs in these proceedings to be taxed if not agreed (with certificate for counsel) (*see* Judgment §90).
4. The plaintiff has applied to vary my Costs Order *Nisi*. He seeks a costs order along the following lines:-
   1. Insofar as the position of the 1st defendant is concerned:-
      * 1. The 1st defendant do pay the plaintiff’s costs on a party-to-party basis with certificate for counsel.
        2. The plaintiff be entitled to costs on liability on an indemnity basis from 3 November 2020 onwards, and interest thereon at a rate not exceeding 10% above judgment rate.
        3. The plaintiff be entitled to costs on quantum on an indemnity basis from 12 October 2022 onwards, and interest thereon at a rate not exceeding 10% above judgment rate.
   2. Insofar as the position of the 2nd defendant is concerned:-
      * 1. There be no order as to costs between the plaintiff and the 2nd defendant.
        2. In the alternative, the 2nd defendant do pay the plaintiff’s costs up to 26 March 2021 to be taxed if not agreed, and the plaintiff do pay the 2nd defendant 1/2 or alternatively 2/3 of the costs of this action after 26 March 2021 to be taxed if not agreed.

***B. THE 1st DEFENDANT’S POSITION***

***B.1 Background***

1. On 7 October 2020, the plaintiff’s solicitors issued a letter that was marked “*Without Prejudice Save as to Costs”* and “*Sanctioned Offer”*. In this letter, it was stated that “*[a]s instructed by the Plaintiff and pursuant to Order 22 Rule 4 of the Rules of District Court, Cap. 336H (“RDC”), we hereby make a Sanctioned Offer on liability that the 1st and 2nd Defendants be wholly liable in the captioned PI action”.* (hereinafter the “**1st Sanctioned Offer**”)
2. Neither the 1st defendant nor 2nd defendant had responded to the 1st Sanctioned Offer.
3. On 14 September 2022, the plaintiff’s solicitors issued another letter that was marked “*Without Prejudice Save as to Costs”* and “*Sanctioned Offer”*. In this letter, the plaintiff put forward a further settlement offer as follows: “*the Plaintiff is prepared to accept the sum of HK$100,000 (inclusive of interest but on top of employees’ compensation HK$107,273.41) plus costs to be taxed if not agreed in full and final settlement of the captioned common law action. This offer is made pursuant to Order 22 Rule 4 of the Rules of District Court, Cap.336H (“RDC”)”.* (hereinafter the “**2nd Sanctioned Offer**”)
4. Again, neither the 1st defendant nor the 2nd defendant had responded to the 2nd Sanctioned Offer.

***B.2 The Plaintiff’s Contention***

1. Insofar as the 1st defendant is concerned, it is incontrovertible that the plaintiff has achieved an outcome that is more advantageous than the proposals under 1st and 2nd Sanctioned Offers. As such, the plaintiff contends that the costs consequences under Order 24, rule 22 are triggered. He asks the court to make a costs order absolute based on the terms set out in §4(1) above.

***B.3 The 1st Defendant’s Contention***

1. The 1st defendant opposes the plaintiff’s application. He contends that:-
   1. The 1st and 2nd Sanctioned Offers were defective, and not in compliance with the formal requirements. They were made to the defendants jointly, and as such they were incapable of being accepted or denied by the 1st defendant.
   2. The 1st Sanctioned Offer was merely a tactical one, and it would be unjust if the plaintiff can rely on it to claim indemnity costs and enhanced interests.
   3. The 2nd Sanctioned Offer was confusing, and came late. As such, the plaintiff shall not be allowed to rely on it to claim indemnity costs and enhanced interests.

***B.4 Analysis***

*Whether the 1st and 2nd Sanctioned Offers were defective?*

1. Despite the force of Mr Danny Chan’s submissions, I am not of the view that the 1st and 2nd Sanctioned Offers were defective. I am unable to accept the 1st defendant’s suggestion that the 1st and 2nd Sanctioned Offers were made to *both* defendants jointly, and hence incapable of being accepted by the 1st defendant alone.
2. It is true that under the 1st Sanctioned Offer, it was proposed that “*the 1st and 2nd Defendants be wholly liable”*. However, as pleaded in the Statement of Claim, the factual and legal bases relied on by the plaintiff in pursuing claims against the 1st and 2nd defendant are different. In my view, any reasonable bystander with some knowledge of the background of the parties’ dispute would appreciate that the settlement offer in question was made to the 1st and 2nd defendant on a “joint and several” basis. Hence, it was open to the 1st defendant to accept the 1st Sanctioned Offer, irrespective of the stance taken by the 2nd defendant.
3. There is no room for the 1st defendant to make a song and dance about the words in the solicitors’ correspondence. Litigation is not a game of words. The 1st defendant (who was legally advised all along) had never sought clarification from the plaintiff’s solicitors as to whether the settlement proposal under the 1st Sanctioned Offer was put forward to the defendants jointly. It appears to me that the confusion alleged by the 1st defendant *now* is just an afterthought, and the reality was that he chose not to accept the 1st Sanctioned Offer.
4. The analysis above applies to the 2nd Sanctioned Offer as well.
5. Indeed, the 2nd Sanctioned Offer merely stated that “*the Plaintiff is prepared to accept the sum of HK$100,000 (inclusive of interest but on top of employees’ compensation HK$107,273.41)…”*. There is no room for the 1st defendant to contend that the 2nd Sanctioned Offer was only capable of being accepted by *both* defendants jointly. Nothing in the letter suggested that this was the case.
6. In this connection, I cannot see how the 1st defendant can seek to rely on the following sentence in the letter: “*We believe that you will advise the Defendants about the consequence of failing to do better than this Sanctioned Offer”.* This sentence did not suggest that the 2nd Sanctioned Offer was made to *both* defendants *jointly*, and hence could only be accepted by both of them on a joint basis. The plaintiff’s solicitors merely stated that the defendants’ solicitors were expected to advise their clients about the proposed settlement. This sentence is neither here nor there, and does not avail the 1st defendant at all.
7. In my view, any reasonable bystander with some knowledge of the background would have understood that the settlement proposal under the 2nd Sanctioned Offer was made to the 1st defendant and 2nd defendant on a “joint and several” basis, and as such it was capable of being accepted by the 1st defendant alone, regardless of the 2nd defendant’s stance. I am also of the view that there was no confusion on the part of the 1st defendant, and he knowingly chose not to accept the 2nd Sanctioned Offer. This was why the defendants’ solicitors did not seek clarification from the plaintiffs’ solicitors.

*Whether the 1st Sanctioned Offer was Genuine?*

1. I now deal with the 1st defendant’s contention that the 1st Sanctioned Offer was merely a tactical one.
2. It has been suggested that all sanctioned payments and sanctioned offers are tactical steps in litigations: *see Tsang Chiu Yip v Ho Kwok Leung* (HCPI 305/2013, 8 August 2016), §71 (*per* DHCJ Marlene Ng, as Marlene Ng J then was); and *Wharton v Bancroft & Ors* [2012] EWHC 91 (Ch), §22 (*per* Norris J).
3. The issue is whether it can be said that the 1st Sanctioned Offer was a genuine and realistic attempt to resolve the parties’ dispute.
4. In *Huck v Robson* [2003] 1 WLR 1340, §63, Jonathan Parker LJ stated:-

“it is in my judgment implicit in r 36.21 that, consistently with the philosophy underlying Pt 36 (to which I have already referred), in order to qualify for the incentives provided by paras (2) and (3) of the rule, a claimant’s Pt 36 offer **must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives.** That is not to say that the offer must be one which it would be unreasonable for the defendant to refuse; that would be too strict a test, and would introduce considerations of punishment and moral condemnation which (on the authority of *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853, [2002] 1 WLR 947 and *McPhilemy v Times Newspapers Ltd (No 2)* [2001] 4 All ER 861, [2002] 1 WLR 934) are irrelevant in the context of para (3) of r  36.21. Indeed, the terms of the offer may reflect a degree of optimism and confidence on the part of the claimant/offeror. Provided only that the offer represents a genuine and realistic offer to resolve the dispute by agreement, it is for the claimant to decide at what level to pitch his offer. In some cases, an offer which allows only a small discount from 100% success on the claim may be a genuine and realistic offer; in other cases, it may not.” (emphasis added)

1. In *Antwerp Diamond Bank NV v Brink’s Incorporated (No 2)* [2015] 4 HKLRD 628, §§18-20, our Court of Appeal (*per* Lam VP (as Lam PJ then was), Lunn VP and Barma JA) stated:-

“18. The suggestion that in order to attract the consequences of Order 22, **a sanctioned offer (or payment) must be a “genuine” rather than a “tactical” one** was made by Tuckey LJ in *Huck v Robson* [2002] 3 All ER 263, at paragraph 71. In that case, which involved a claim for personal injuries arising out of a traffic accident, Tuckey LJ expressed the view that an offer that gave only a 0.1% discount on the amount claimed might be regarded as merely “tactical”, and thus not one that would attract the consequences of the English equivalent of Order 22. Further, **in the same case Jonathan Parker LJ at paragraph 63 contrasted between offer which represented a genuine and realistic attempt to resolve dispute by agreement and offer which created no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives**. The approach was applied by Deputy Judge Lai in *Gill Ajmer Singh v Wah Hing Scaffolding Engineering Ltd* [2014] 1 HKC 495 in an employee compensation case in which a respondent had made a sanctioned offer on the basis that the applicant shall discontinue with the claim.

19. In *Kai Min Fashion (HK) Limited v Fond Express Logistics Limited and anor* [2013] 1 HKC 563, a misdelivery case (like the present) where a discount of 2% was offered, Recorder Jat SC said (at paragraph 14 of his judgment):

“… *Huck v Robson* was a traffic accident case and in that type of cases [sic] issues of contributory negligence often arise, making it uncertain as to the extent of the parties’ respective responsibility for the accident. Thus making a sanctioned offer of the kind described by Tuckey LJ may be seen as a tactical move. This case, on the other hand, is what may be called a “mis-delivery” case and claimants in such cases are often, and justifiably, confident of success if the carrier has delivered the goods without production of the original bills of lading. I do not see why the Plaintiffs should not offer a small discount in this type of case to reflect their reasonably justified confidence in the strength of their claims.”

20. In the present case, the extent of the discount offered is even less than that in *Kai Min Fashion*. But it does not follow that it would therefore be unjust to make orders of the sort envisaged by Order 22 rules 24(2) and (3). Just as in *Kai Min Fashion*, the Plaintiff here could well have genuinely regarded its claim as an extremely strong one (and there is no reason to suppose that it did not). We therefore do not think that the smallness of the discount offered of itself renders it unjust to make the orders which the Plaintiff seeks on the basis that the offer was to be castigated as merely “tactical”. Moreover, in this regard, we would, with respect, agree with the observations of Norris J in *Wharton v Bancroft* [2012] EWHC 91 at paragraph 22 that:

“The concept is not an easy one to apply. All Part 36 offers are tactical in the sense that they are designed to take advantage of the incentives provided by Part 36. A low offer in a case in which the offeror considers that the offeree’s position has no merit cannot be written off as self evidently ‘merely a tactical step’.” (emphasis added)

1. In *Gill Ajmer Singh v Wah Hing Scaffolding Engineering Ltd* [2014] 1 HKC 495, §§35-35, Deputy District Judge R Lai (as he then was) stated:-

“35. It can be seen that our system of sanctioned offer is modelled on the Part 36 offer of the 1998 English Civil Procedure Rules. **In *East West Corp v DKBS 1912 and AKTS Svendborg (No. 2)* [2002] 2 Lloyd’s Rep 222 Thomas J considered that an offer from the plaintiff to settle for 100% of their claim was “no** **offer to settle in the ordinary sense of the word” (see para 15 of the judgment)**. His Lordship expressed in para 14 of the judgment at 225 his following observations in respect of the Part 36 offer:-

“the Part 36 offer is aimed at **an offer to settle, that is to say a genuine offer to settle and not some tactical ploy** for the purpose of advancing a claim under Part 36.21 [ie pre 6 April 2007 English Civil Procedure Rules dealing with costs and other consequences where claimant did better than he proposed in his Part 36 offer which provided for sanctions similar to Order 22, rule 23 of the Rules of the District Court in Hong Kong]. The purpose of the award of an enhanced rate of interest or indemnity costs is to encourage parties to make offers of settlement in the ordinary sense of that word.”

36. **An offer requiring the opponent to pay 100% of the claim or to wholly discontinue the claim is “no offer to settle in the ordinary sense of the word**”. (emphasis added)

1. Applying the legal principles, I am of the view that the 1st Sanctioned Offer was **not** “*a genuine and realistic attempt by the [Plaintiff] to resolve the dispute by agreement*”. The plaintiff merely proposed that the 1st and/or 2nd defendants should admit liability, and be liable for the entirety of his claim. This proposal, which was made at a very early stage of the proceedings, was completely hollow.
2. If the 1st Sanctioned Offer were a genuine and realistic settlement proposal that is capable of triggering the costs consequences under Order 24, rule 22, then, any claimant who litigate in Hong Kong may, immediately after the action is commenced, mechanically and mindlessly request the respondent to admit liabilities under a purported sanctioned offer, and if the claims succeed at the end of the day, indemnity costs and enhanced interest would invariably be ordered against the respondent. Bearing in mind that the purpose of the regime is to encourage genuine settlement negotiation (rather than exerting undue pressure on respondents), this cannot be right.
3. Unlike the scenario in *Kai Min Fashion (HK) Limited v Fond Express Logistics Limited and anor* [2013] 1 HKC 563, §14 (regarding mis-delivery), I fail see how it could be said that the plaintiff might have a “reasonably justified confidence in the strength of [his] case”. As discussed in §§41-47 of the Judgment, the plaintiff’s case against the 2nd defendant was utterly hollow, and not supported by a shred of evidence. Further, as observed by Recorder Jat SC in *Kai Min Fashion (HK) Limited*, in a traffic accident case (which is the present scenario), issues of contributory negligence often arise, and it is uncertain as to the extent of the parties’ respective responsibility.
4. Based on the materials available to me, the 1st Sanctioned Offer was nothing more than a mechanical, mindless and effortless attempt inviting the defendants to waive the white flag. How could this amount to a genuine and realistic attempt to resolve the dispute in the present proceedings? How could this constitute an “offer to settle in the ordinary sense of the word”?
5. In the premises, I am of the view that the 1st Sanctioned Offer was not a genuine and *bona fide* attempt to achieve settlement. In my view, it would be unjust to permit the plaintiff to rely on the 1st Sanctioned Offer, and I am mind to exercise my discretion against the plaintiff.

*Whether it would be unjust to allow the Plaintiff to rely on the 2nd Sanctioned Offer?*

1. In the 2nd Sanctioned Offer, it was stated the plaintiff was prepared to accept a sum of HK$100,000 in full and final settlement, and this was inclusive of interest. Unlike the 1st Sanctioned Offer, the settlement proposal under 2nd Sanctioned Offer was of substance. It was plainly a genuine, *bona fide* and realisticattempt to resolve the disputes under the present proceedings.
2. The 2nd Sanctioned Offer was made around 5 months before the trial of the present proceedings took place. The 1st defendant had ample time to consider the 2nd Sanctioned Offer. He did not even need to seek leave from the court in order to accept the same: *see* Order 22, rule 16(1). I disagree that the 2nd Sanctioned Offer came late.
3. For the reasons set out in §§14-17 above, I disagree that the 2nd Sanctioned Offer was vague or equivocal. I am of the view that the 1st defendant, who was legally represented all along and who never sought clarification from the plaintiff, had made a knowing decision not to accept the 2nd Sanctioned Offer.
4. I do not see any reason why it would be unjust to allow the plaintiff to rely on the 2nd Sanctioned Offer.

***B.5 Sum Up***

1. For the reasons set out above, I am of the view that whilst it would be unjust to allow the plaintiff to rely on the 1st Sanctioned Offer, the plaintiff is entitled to rely on the 2nd Sanctioned Offer to seek indemnity costs and enhanced interest thereon against the 1st defendant.
2. I am of the view 5% above judgment rate is proportionate in the circumstances of the present case.
3. In the premises, I am prepared to vary the Costs Order *Nisi* in respect of the 1st defendant, and I make a costs order absolute as follows:-
   1. The 1st defendant do pay the plaintiff’s costs in the present proceedings up to 12 October 2022[[2]](#footnote-2) on a party-to-party basis with certificate for counsel.
   2. The 1st defendant do pay the plaintiff’s costs in the present proceedings after 12 October 2022 on an indemnity basis and interest thereon at 5% above judgment rate.

***C. THE 2nd DEFENDANT’S POSITION***

***C.1 The Plaintiff’s Contention***

1. The plaintiff does not dispute that he is the unsuccessful party in respect of the claims against the 2nd defendant. However, he contends that (**i**) the 2nd defendant should not have ignored his pre-action letter dated 14th May 2020 and refused to provide the motor insurance policy; (**ii**) the 2nd defendants’ Defence only contained a bare denial; and (**iii**) the 2nd defendant, together with the 1st defendant, failed on the issues relating to the Traffic Incident (such as breach of duties by the 1st defendant and alleged contributorily negligence on the part of the plaintiff). Relying on these factors, the plaintiff argues that the costs awarded in favour of the 2nd defendant shall be reduced, and he seeks a costs order based on the terms set out in §4(2) above.

***C.2 Analysis***

1. As pointed out in §§41-47 of the Judgment, there was not a shred of evidence showing that the 1st defendant was the 2nd defendant’s agent and/or servant. I cannot see how the plaintiff can blame the 2nd defendant for making bare denials in his Defence when his own case was completely hollow: §§44 of the Judgment.
2. It is important to stress that the plaintiff was vested with the onus of proving that the 2nd defendant was vicariously liable for the 1st defendant’s wrongdoings. The plaintiff should not have brought a claim against the 2nd defendant, unless he was satisfied that his claim stood on a solid evidential foundation. The plaintiff could have sought pre-action discovery against the relevant parties. I cannot see how the plaintiff can blame the 2nd defendant for not assisting him by providing information and/or documents. In the absence of any order made by the court, the 2nd defendant did not have any obligation to render assistance to the plaintiff.
3. However, I do not lose sight of the fact that the 2nd defendant (who was under joint legal representation with the 1st defendant and who filed a joint Defence with the 1st defendant) did rely on the 1st defendant’s pleas, evidence and submissions regarding the Traffic Accident to contest the plaintiff’s claims. The 2nd defendant’s stance was that the 1st defendant was not negligent during the Traffic Incident at all, and that the plaintiff’s claim was concocted.
4. For the reasons set out in §§21-40 of the Judgment, I rejected the defendants’ case regarding the Traffic Incident. Hence, it can be said that the 2nd defendant failed on the issues relating to the Traffic Incident (such as negligence and alleged contributory negligence). Those issues were certainly crucial. I agree with Mr Tam that they significantly increased the length and costs of the present proceedings.
5. As pointed out G Lam J[[3]](#footnote-3) (as G Lam JA then was) in *Chow Kwan Yee v Leung Mei Yin May* [2021] HKCA 832, §6:-

“[w]here a successful party has failed on an allegation that has caused a significant increase in the length or costs of the proceedings, that may be a reason for depriving him or the whole or part of his costs*: see e.g. Zuhai International Container Terminals Ltd v Lo Tong Hoi* (CACV 181/2011, 31st July 2012)”.

1. The present scenario is similar to the scenario in the *Chow Kwan Yee* case. In that case, the 2nd defendant was successful in defending the plaintiff’s action against him. However, he, together with the 1st defendant, raised a defence of gift, which was rejected by the court. The failed defence of gift was fact-sensitive, and it took up substantial time and costs. As such, the Court of Appeal held that it would be just and fair to reduce the costs awarded in favour of the 2nd defendant.
2. I have carefully considered the circumstances relating to the present proceedings, including the complexity of the issues relating to the Traffic Accident (which the 2nd defendant failed) and the complexity of the issues in respect of vicarious liability (which the 2nd defendant succeeded).
3. I am of the view that it would be just and fair to reduce the costs awarded to the 2nd defendant by 50%.

***C.3 Sum Up***

1. In the premises, I will vary the Costs Order *Nisi* in respect of the 2nd defendant. I make a costs order absolute that the plaintiff do pay 50% of the 2nd defendant’s costs in the present proceedings on a party-to-party basis with certificate for counsel.

***D. CONCLUSION***

1. I order that the Costs Order *Nisi* be varied in terms of §§35 and 45 hereinabove.
2. As regards the costs of the present application to vary the Costs Order *Nisi*, I am inclined to the view that neither party is wholly successful. However, the plaintiff has managed to achieve a favourable outcome. In the premises, I make a costs order *nisi* that the plaintiff shall have 40% of the costs in respect of the application to vary the Costs Order *Nisi* with certificate for counsel to be taxed if not agreed. Any application to vary this costs order *nisi* shall be made within 14 days.
3. I thank Mr Tam and Mr Chan for their helpful assistance.

( Alan Kwong )

Deputy District Judge

Written Submissions by Mr Tam Nok Ting, instructed by Huen & Partners, for the plaintiff

Written Submissions by Mr Chan Kin Keung, Danny, instructed by Francis Kong & Co, for the 1st and 2nd defendants

1. In this Decision, I adopt the definitions and nomenclatures that were used in the Judgment. [↑](#footnote-ref-1)
2. This is the end of the 28-day period for accepting the 2nd Sanctioned Offer without leave. [↑](#footnote-ref-2)
3. Sitting in the Court of Appeal [↑](#footnote-ref-3)