DCPI 1346/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1346 OF 2012

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BETWEEN

YUEN CHI LOK Plaintiff

and

i-CABLE TELECOM LIMITED Defendant

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

Before: Deputy District Judge D. Ho in Chambers (Open to Public)

Date of Hearing: 23 December 2013

Date of Decision: 24 December 2013

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DECISION

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1. This is the plaintiff’s application for leave to accept out of time the sanctioned payment made by the defendant on 30 August 2012 with costs of the proceedings.
2. The defendant does not object to the application but argues that the defendant should pay the plaintiff’s costs only up to 27 September 2012 and the plaintiff should pay the defendant’s costs from 28 September 2012 onward including the costs of this application, all on party and party basis.
3. The plaintiff sprained his back at work in the course of employment of the defendant on 16 December 2010 and alleged to have suffered further injury after falling from a chair at the office on 23 March 2011. The plaintiff left the defendant’s employment in March 2011. His employees’ compensation claim was settled upon acceptance of a sanctioned payment of $130,000. He then commenced this common law action against the defendant and the writ of summons and statement of claim were served on 4 July 2012, claiming over $800,000 by way of damages.
4. Well before the commencement of these proceedings, the defendant commissioned surveillance on the plaintiff and two surveillance reports respectively dated 8 August 2011 (“1st surveillance report”) and 1 December 2011 (“2nd surveillance report”) came to the defendant’s possession. Without disclosing the surveillance reports, the defendant made a sanctioned payment of $100,000 (on top of the employees’ compensation) on 30 August 2012 (“Sanctioned Payment”) before filing a defence in September 2012. The plaintiff did not accept the same and the matter proceeded to case management. In mid November, the defendant commissioned yet another surveillance exercise and a third report was prepared (“3rd surveillance report”). The defendant then filed a list of documents in November 2012, without disclosing any of the surveillance reports. Neither were the surveillance reports produced to the medical experts when they jointly examined the plaintiff in December 2012. On 30 April 2013, a fourth surveillance report was commissioned.
5. By June 2013, the parties were supposed to agree on the draft trial bundle. On 10 June 2013, the defendant disclosed for the first time the 4 surveillance reports and the related VCD recordings together with a business registration search record dated 4 June 2013 (“BR search record”) in respect of a shop by the name of 手機皇 (“Shop”) in which the plaintiff was seen in the surveillance footages to have assisted in entertaining clients on diverse dates. It appears from the BR search record that the plaintiff was once the proprietor of the business operated at the same address commencing on 18 February 2008 and ceasing on 5 June 2010.
6. The defendant contends that the surveillance footages show the plaintiff to have been working at the Shop at least since August 2011. On 13 June 2013, the plaintiff’s solicitors wrote to state that the plaintiff was neither employed nor self-employed at the Shop between 1 June 2010 and 24 May 2013 though he started to work there as a salesperson since 25 May 2013. Attached to the letter was a hand-written certification from a手機皇有限公司confirming the employment of the plaintiff (though the online company search conducted by the defendant did not return any company by this name).
7. Upon disclosure of the surveillance reports and VCDs, counsel’s advice was immediately sought and was rendered in two weeks’ time. Five days later, the plaintiff’s solicitors wrote to the defendant’s solicitors offering to accept the Sanctioned Payment with costs, which offer was declined by the latter, hence the present application.
8. Before the hearing, the defendant had indicated its intention to invite me to view the surveillance footages. Upon my indication that I did not find it necessary to do so, Mr. Victor Gidwani, Counsel for the defendant, did not insist. For one thing, the contents of the surveillance reports are not being disputed by the plaintiff for the purpose of the present application. In any event, the surveillance reports contain useful summaries of the plaintiff’s activities captured by the footages. I see no genuine need for me to view the actual footages for the purpose of ruling on the issue of costs. Indeed, there is a risk of my view on the proper costs order being coloured by what is shown in the footages in the absence of any evidence from the plaintiff himself, which may not necessarily be to either party’s advantage.
9. The plaintiff himself has not filed any affirmation but his solicitor affirmed on his behalf that had the (1st and 2nd) surveillance reports and VCDs (in particular, the 2nd surveillance report) been disclosed by the time the Sanction Payment was made, the Sanctioned Payment would have been accepted with the benefit of legal advice given to the plaintiff.
10. The defendant’s solicitor filed an affirmation in opposition. He commented in great length on the merits of the plaintiff’s claim with reference to the available medical evidence and opined that any damages payable to the plaintiff would not exceed the Sanctioned Payment when the plaintiff had not only exaggerated his claim but was not frank about his claim. It was necessary, he said, to make use of surveillance to ascertain the plaintiff’s condition and employment (if any) and that surveillance was a continuous process rather than an isolated and separate exercise in order to cover a reasonable span of time. He further argued that even without the surveillance evidence, the plaintiff should have accepted the Sanctioned Payment. Mr. Dennis Law, Counsel for the plaintiff, did not dispute the appropriateness of commissioning surveillance.

***Relevant legal principles***

1. Under O 22, r 15(3), RDC, upon granting leave to accept a sanction 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 (s.53, District Court Ordinance) and should normally follow the event but the court can make some other costs order where appropriate (O 62, r3(2), RDC). 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, 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 clamant exaggerated his claim; and conduct before as well as during the proceedings.
2. Mr. Law referred to the requirement of ***Practice Direction 18.1***, §19 for parties to communicate constructively and provide mutual disclosure of information and documents with respect to issues of liability and quantum and submitted that the defendant should have disclosed the 1st and 2nd surveillance reports in the pre-action stage. In withholding the same, he submitted, the defendant’s conduct was contrary to each of the Underlying Objectives set out in O 1A, r 1, RDC.
3. Mr. Law drew my attention to the comment of Lam J (as he then was) in ***Cheung Wei Man Vivien & Chan Kim Thiam v Centaline Property Agency Ltd & Ors*** (HCA 286/2000), unrep., 15 December 2006 at §28 on the conduct of withholding material documents and late discovery:

“ The Plaintiffs had attempted to explain the late discovery as a tactical move to expose what they perceived to be the lies of the Defendants. It was a deliberate decision and regrettably a solicitor was said to be involved. In my judgment, this is not an acceptable excuse. Concealment of documents would not assist the court in making a fair assessment of a witness. A party is entitled to conduct litigation on the basis that his opponent gives proper discovery as required by the rules. All litigants and those advising them should familiarize themselves with the duty relating to discovery. Any forensic manoeuvre that smacks of ambush has no place in modern litigation and this court will not hesitate in voicing a strong disapproval for such conduct. A witness should have the chance to consider the relevant documents before he reduces his evidence into witness statement. The duty of discovery requires full discovery being given and withholding materials with a view to gain some forensic advantage in terms of trapping the opponents is an abuse of process. This court must take a firm stance to discourage such improper conduct of litigation.”

1. In the circumstances, Mr. Law submitted that the plaintiff should have the costs of the action including the present application.
2. Mr. Gidwani had no dispute with the applicable principles mentioned above but sought to distinguish ***Cheung Wei Man Vivien*** (supra). In support of his argument, he further relied on a number of local and English authorities of which I find the following particularly pertinent.
3. In ***Factortame Ltd v Secretary of State for the Environment, Transport and the Regions*** [2002] 1 WLR 2438, the English Court of Appeal held that the starting point is that a party who fails to accept a Part 36 payment until after the expiry of time for accepting such a payment is deemed to be the unsuccessful party.
4. In ***Matthews v Metal Improvements Co Inc*** [2007] EWCA Civ 215 involving a late acceptance of sanctioned payment under the earlier CPR, the English Court of Appeal held that the usual costs order was for the claimant to pay the defendant’s costs after expiration of the prescribed period for accepting payment into court and the question was whether it was unjust to make the usual order. The court held that the court below had wrongly identified the question whether it was unjust to make the usual order with the question whether the claimant’s advisors had acted reasonably in assessing the defendant’s offer. The court further held that changes in circumstances between the date of a Part 36 payment and trial were contingencies inherent in litigation and could not of themselves normally justify depriving the defendant of the benefit of his payment into court.
5. The principle laid down in ***Factortame*** was accepted by HH Judge M Ng in***Wong Ching Wan v AS Watson & Co Ltd*** [2007] 4 HKLRD 362 at §42 where the learned judge quoted the following text from the judgment of Waller LJ:

“…… The first relevant and important principle is that the unsuccessful party should pay the costs of the successful party. If there has been a payment into court it will follow that the offer contains a further offer that the payer in will meet the costs up to the date when the payment in should have been accepted.

If the payment in has not been accepted there is a further starting point accepted by the judge and by both parties in this case, that if the claimant fails to beat the payment in, prima facie the claimant will be considered the unsuccessful party as from the date when the payment in should have been accepted. He must pay the costs from that date as a normal rule (see *Findlay v Railway Executive* [1950] 2 All ER 969). But that *presumption may be dislodged in special circumstances, e g* *where the judge takes the view that a defendant has withheld material and not allowed a claimant to make a proper appraisal of the defendant’s case* (see Chadwick LJ in the passage quoted by the judge from *Jones v Jones* [1999] CA Transcript 1701 and Lord Woolf MR in the passage quoted by the judge from *Ford v GKR Construction Ltd* [2000] 1 All ER 802, [2000] 1 WLR 1397).”

(Emphasis added)

1. I also find the following discussion of Her Honour apposite in the present context:

“50. It is necessary to distinguish 2 different parts to such costs, ie (a) the taxed or agreed costs which a losing party should normally pay to the successful party and (b) the losing party’s own costs which he has to bear. *If both parts are reversed so that the successful party not only fails to recover his own costs and in addition has to pay the costs of the losing party, the successful party suffers a double jeopardy as a result of a departure from the usual costs order, which is normally considered unjust but for special circumstances.*

51. Nourse LJ set out the relevant principles for depriving a successful party of his own costs and ordering him to pay the costs of the losing party in *Re Elgindata Ltd (No.2)* [1992] 1 WLR 1207, 1214…

“ (i) Costs are in the discretion of the court [Order 62 rule 2(4) of the RDC].

(ii) They should follow the event, except where it appears to the court that in the circumstances of the case some other order should be made [Order 62 rule 3(2) of the RDC].

(iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.

(iv) Where the successful party raises issues or makes allegations improperly or unreasonably [in Hong Kong, “improperly or  unnecessarily”], the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party’s costs [Order 62 rule 7(1) of the RDC].”

…

53. In my view, the question is whether the court should exercise its discretion to order the Respondent to recover its own costs for the relevant period between 23rd April and 23rd September 2006. The relevant principle is incorporated in (ii) of the *Elgindata* principles, ie *whether there are special circumstances in this case that justify departure from the normal cost consequences*.

54. Cohen LJ in *Findlay* (supra at pp.971-972) said as follows:

“…… I do not find it necessary to decide whether it can ever be right to make the defendants pay the costs after the date of payment in, but *I think it could only be where there was something in the conduct of the defendants which justified the plaintiff in proceeding to trial…*

55. Here, both Mr Tun and Ms Sy agreed that insofar as the present litigation was concerned, neither party’s conduct could be criticised...

56. On such common premise, the question boils down to whether the *Applicant’s decision to await* sight of the Report before giving favourable consideration to the payment into court by the Respondent amounts to a special circumstance that justifies departure from the ordinary costs consequences. In my view, this *does not amount to any special circumstance for disturbing the usual rule as to costs*.

…

62 … It was therefore incumbent upon the Applicant to make a decision whether to accept the payment into court by the Respondent *based on his assessment under legal advice of the available materials* *and of the risk of failing to beat the payment-in*…(I)t was open to the Applicant to adopt a wait and see approach and to take her chance of getting more compensation, but in choosing to do so she would have to bear the costs consequences of such decision.”

(Emphasis added)

1. The introduction of the Civil Justice Reform does not affect pre-existing law which entitles a judge to consider any relevant aspect of the conduct of the parties. See ***Hong Kong Civil Procedure 2014***, para. 62/5/6.
2. Mr. Gidwani submitted that the position for a late acceptance of a sanctioned payment is the same as the previous position for a late acceptance of a payment into court locally and a late acceptance of a Part 36 payment in England. Mr. Law did not submit otherwise.
3. In ***Uttley v Uttley*** [2002] PIQR P12, the claimant sought to accept a Part 36 payment after the expiry of the prescribed period upon disclosure of a surveillance video. The defendant requested an updated statement from the claimant and withheld the surveillance video pending such a statement which came only several months later. The English court held that it was reasonable for the defendant’s solicitors to withhold the surveillance records until their receipt of the claimant’s up-to-date statement since they wanted to use it effectively as cross-examination material. The surveillance video was disclosed 5 days after service of the claimant’s updated statement.
4. In ***Booth v Britannia Hotels Ltd*** [2003] 1 Costs LR 43, the English Court of Appeal overturned a lower court’s order for the defendant to pay 60% of the claimant’s costs of assessment of damages despite the claimant’s exaggeration of her injuries as revealed by video evidence disclosed shortly before the assessment hearing. In allowing the appeal on costs by the defendant, Kennedy LJ said at §28:

“…this case, on the face of it, concerns a clamant pursuing a claim for personal injuries which she knows or must be taken to know have not been suffered. I see no reason why, even though the video evidence was completed and disclosed relatively late, the defendants should be required to bear any part of the costs she expended in that unreasonable pursuit.”

1. To illustrate the court’s readiness to penalize a dishonest plaintiff by way of costs, Mr. Gidwani referred to (i) ***Summers v Fairclough Homes Ltd*** [2012] 1 WLR 2004 in which no Part 36 payment was made and the claim was found after trial to be substantially fraudulent as revealed by surveillance evidence. There the court remarked that “(i)t is entirely appropriate…to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover…on an indemnity basis.”; and (ii) ***Molley v Shell UK Ltd*** [2002] PIQR P7 where the claimant, having grossly and deliberately exaggerated his claim, failed to beat a Part 36 payment and the English Court of Appeal took the view that even if the Part 36 payment were beaten, the only just result would be for the defendant to be awarded all their costs after the date of the Part 36 payment.
2. In both ***Painting v University of Oxford*** [2005] 3 Costs LR 394 and ***Hullock v East Riding of Yorkshire County Council***[2009] EWCA Civ 1039 also cited by Mr. Gidwani, each involving a claimant exaggerating his claim, the court managed to find the defendant to be the true winner (on the issue of exaggeration after trial) and on such basis awarded costs against the claimant for the period after the expiry of the prescribed period in the former case (a Part 36 payment having been beaten) and after interim payment in the latter (there being no Part 36 payment).

***Discussion***

1. The normal rule is for the plaintiff to pay the defendant’s costs after the expiry of the prescribed period. What I need to consider is whether, in the circumstances of the present case, I should depart from the normal rule and (i) make the defendant pay its own costs; and (ii) in addition, order the defendant to pay the plaintiff’s costs incurred during the same period, which is the effect of the costs order the plaintiff is asking for.
2. It is of note that the 1st and 2nd surveillance reports cover a period spanning over 4 months and, in the defendant’s solicitor’s own words, show “a much healthier plaintiff” who appeared to have been employed in August 2011. The defendant’s solicitor has not explained why, given the evidence revealed by the 1st and 2nd surveillance reports which apparently contradicted the plaintiff’s pleaded case, the defendant nonetheless found it necessary to withhold the same; and why the three surveillance reports were again withheld from disclosure when the defendant filed its list of documents in November 2012 even though the contents of the 3rd surveillance report were similar to those of the first two reports.
3. Mr. Gidwani submitted that even though the evidence was available before the start of this action, the plaintiff’s condition might well have been different since the start of the action and the defendant had to make sure what was previously observed remained the same. In order for surveillance result to be of any use, the defendant had to carry out further surveillance to show a consistent trend as the plaintiff could easily explain away any single incident of him being captured to have walked fast or working in a mobile phone shop. Mr. Gidwani submitted that the present case was highly similar to ***Uttley*** (supra) and that the disclosure of the surveillance reports by the defendant as it did was timely bearing in mind the time for close of pleadings and the fact that the surveillance exercise was a continuous effort to establish a pattern of lying on the plaintiff’s part.
4. In his note of comments on the authorities cited by Mr. Gidwani, Mr. Law helpfully identified the distinction between the facts of ***Uttley*** (supra) and those of the present case, which I shall not repeat. Suffice it to say the present case is hardly comparable to that of ***Uttley*** (supra). Unlike the solicitors in ***Uttley*** (supra) whom the court found to have a good reason to await the claimant’s updated statement before disclosing the surveillance evidence, here the defendant was well aware of the contradiction between the pre-action surveillance evidence and the plaintiff’s pleaded case. The defendant’s solicitor did not say in his affirmation if he had ever taken into account any possibility of the plaintiff’s sprain injury having deteriorated between the 2nd surveillance report and the commencement of this action and gave the plaintiff the benefit of the doubt. Even if this consideration did cross his mind, it must have carried very little weight when in the defendant’s view the medical report attached to the statement of damages did not support the plaintiff’s claim. In making the Sanctioned Payment (even before filing a defence), the defendant must have simply based its assessment of the proper amount of sanctioned payment on the 1st and 2nd surveillance reports read with the plaintiff’s pleadings. Indeed, Mr. Gidwani had maintained the correctness of the amount of the Sanctioned Payment when arguing that the plaintiff should have accepted the same.
5. I also agree with Mr. Law’s observation that the contents of the 2nd surveillance report are most revealing and would have satisfied the defendant’s purpose in commissioning the surveillance, namely, to ascertain the plaintiff’s physical condition and his post-accident employment. Indeed, my attention has not been drawn to anything, whether in the plaintiff’s pleadings or otherwise, to suggest any change of circumstances since the 1st and 2nd surveillance reports which would call for a more cautious approach on the defendant’s part in seeking to rely on such evidence.
6. Similarly, the defendant’s solicitor did not say whether the previously obtained surveillance evidence was withheld because the defendant saw a genuine need to commission a third surveillance exercise to make sure the stark contrast between the plaintiff’s pleaded case and the contents of the 1st and 2nd surveillance reports still existed. If the defendant did see such a need, one wonders why it did not withhold the making of a sanctioned payment pending confirmation of the latest position by the fresh surveillance exercise. In any event, I can see no good reason for the defendant to further withhold disclosure of the first three surveillance reports at the time of filing its list of documents when the last report had at least confirmed the defendant’s belief that the plaintiff had exaggerated his claim and failed to reveal his true employment status. The fact is the defendant withheld the materials for yet another 7 months despite the various opportunities to disclose the same. The consistent failure to disclose such materials casts doubt on whether the defendant genuinely wished to settle the plaintiff’s claim by way of a sanctioned payment or whether the withholding of such materials was not meant to ambush the plaintiff at a time when the defendant’s legal costs would have gone way above what the plaintiff would obtain in the eventuality of his accepting the Sanctioned Payment.
7. Seen in that light, even if the defendant could be excused (which I doubt) for withholding the surveillance evidence during the pre-action stage notwithstanding the requirement of Practice Direction 18.1, there was simply no reason for the defendant to withhold the same at the time of making the Sanctioned Payment. This conduct is contrary to the Underlying Objectives set out in O1A, r 1, RDC and should not be endorsed. I agree with Mr. Law that the comment of Lam J in ***Cheung Wei Man Vivien*** (supra) equally applies here.
8. Both the defendant’s solicitor and Mr. Gidwani went into great length in attacking the merits of the plaintiff’s claim before concluding that it was unreasonable for the plaintiff not to accept the Sanctioned Payment when it was first made. For one thing, the surveillance footages are inconclusive as to the plaintiff’s post-accident employment while the plaintiff’s apparently agile movement might not necessarily be inconsistent with the restriction on movement alleged in pleadings. All these could only be established after trial. In any event, it is unnecessary for the defendant to speculate on the reasons why the plaintiff decided not to accept the Sanctioned Payment within the prescribed period. See ***Wong Ching Wan*** (supra) at §58.
9. Just as the lower court in ***Factortame*** erred in identifying the reasonableness of the claimant’s decision not to accept a payment in with the question whether it was unjust to make the claimant pay the defendant’s costs after the expiry of the prescribed period, the defendant’s assessment of the plaintiff’s reasonableness in not accepting the Sanctioned Payment here would have little bearing on the question whether it is unjust to order the plaintiff to pay the defendant’s costs incurred after the expiry of the prescribed period. I pause here to note that in making the Sanctioned Payment and effectively proposing to settle the action at $230,000, the defendant must have at least recognized the plaintiff’s entitlement to some damages arising from the injury at work so that the plaintiff’s claim cannot be said to be entirely groundless.
10. It is unfair for the defendant to say that the plaintiff’s legal advisor could have given a fair assessment of the plaintiff’s case at the time the Sanctioned Payment was made. It may well be that the surveillance did not disclose something the plaintiff did not know. It is not the same in the case of his legal advisor to whom the plaintiff had presumably presented an incomplete picture.
11. In ***Factortame*** (supra), Waller LJ quoted with approval at §21 the direction that the judge at first instance gave himself on the applicable principles on Part 36 payments:

" Although it was decided under the old Rules of the Supreme Court, in *Ford v GKR Construction Limited* [[2000] 1 WLR 1397](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/1999/3030.html) at 1403 810, Lord Woolf MR commented…: “If a party has not enabled another party properly to assess whether or not to make an offer or whether or not to accept an offer which is made because of nondisclosure to the other parties of material facts or if a party comes to a decision which is different from that which would have been reached if there was proper disclosure, that is a material matter for the court to take into account in considering what orders should be made.

…

In *Jones v Jones* Court of Appeal transcript 13th October 1999, at page 10 of the transcript, Lord Justice Chadwick made a similar point: ‘The court may also take into account the circumstances which have given rise to a change of mind (whether or not to accept the payment into court). In particular, if the court was 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 (or now in contravention of some protocol), it might take the view that the plaintiff should not be required to bear all or some part of the intervening costs. If the defendant has failed to do what the rules or an order of the court require within the time prescribed, then the price of obtaining the permission of the court to do later what he should have done earlier may be that the plaintiff should have the chance to take the money out of court without penalty. The reason is that the costs which have been thrown away were not incurred by reason of a misreading of the position by the plaintiff on the basis of material which was or should have been available but by reason of the absence of available material which he should have had if the defendant had complied with his obligations.’ ”

1. Without knowledge of the surveillance materials in the defendant’s possession, the plaintiff’s legal advisor was not allowed to make a proper appraisal of the defendant’s case. As it turned out, counsel advice was made available to the plaintiff just two weeks after the disclosure of the surveillance evidence and the plaintiff decided to accept the Sanctioned Payment in a matter of days. Had such evidence been disclosed at the time of the Sanctioned Payment, I am satisfied that the matter would have been settled within the prescribed period and the defendant’s costs incurred thereafter could have been saved.
2. In the circumstances, it is unjust to require the plaintiff to pay those costs which the defendant had practically inflicted upon itself by withholding the surveillance evidence.
3. The next question is whether, apart from penalizing the defendant in terms of costs as aforesaid, the court should further order the defendant to pay the plaintiff’s costs incurred after the expiry of the prescribed period. As the authorities show, there have to be special circumstances.
4. It should be noted that the plaintiff himself has not filed any affidavit evidence to address any of the defendant’s complaints. His solicitor’s affidavit can at best explain how the defendant’s conduct in concealing the surveillance evidence materially affected the legal advice rendered at the time the Sanctioned Payment was made. This court is therefore entitled to draw adverse inference against the plaintiff insofar as the surveillance evidence reveals a position contradictory to his pleadings which he verified by his statements of truth. Indeed, Mr. Law fairly accepted that it might be said the plaintiff had exaggerated his injuries and the impact on his activities of daily living.
5. The surveillance evidence not having disclosed to the plaintiff, the decision of the plaintiff himself in declining to accept the Sanctioned Payment and to proceed with his claim could only be explained by his intention to take the chance of securing more compensation than he deserved without his actual physical condition and post-accident employment coming to light. Echoing what the learned judge said in ***Wong Ching Wan*** (supra), I would say that the plaintiff’s decision to take his chance does not amount to any special circumstance for disturbing the usual rule as to costs. If not for this court’s finding against the defendant regarding its own costs after the expiry of the prescribed period, the plaintiff would have been ordered to pay such costs. There would have been no question of his being entitled to his costs incurred after the expiry of the prescribed period.
6. As per Cohen LJ in ***Findlay*** (see paragraph 19 above), there has to be something in the conduct of the defendant which justified the plaintiff in proceeding to trial. In the example cited by Waller LJ in ***Factortame*** (quoted in ***Wong Ching Wan*** (supra) above), a defendant’s conduct in withholding materials (not necessarily surveillance evidence) and not allowing a claimant to make a proper appraisal of the defendant’s case would in the learned judge’s view constitute a special circumstance dislodging the presumption that the claimant should pay the defendant’s costs after the expiry of the prescribed period under the normal rule. The court did not go on to say the same conduct would at the same time warrant an order for the defendant to pay the claimant’s costs incurred during the same period.
7. When I come to consider the plaintiff’ conduct here, I share the sentiment of the court in ***Booth*** (supra) and take a similar view that even though disclosure of the surveillance reports and VCDs came late, the defendant should not be required to bear the plaintiff’s costs in his unreasonable pursuit after the expiry of the prescribed period.
8. I am not prepared to hold that an act of withholding surveillance evidence or evidence of similar effect can never amount to an improper conduct or otherwise give rise to special circumstances so as to warrant an order for the withholding party to pay the other party’s costs instead of simply bearing his own costs. Each case turns on its own facts. On the facts of this case, I am prepared at least to say if the withholding of the surveillance evidence here justifies such a costs order, the same is set off by the equally, if not more, improper conduct of the plaintiff in pursuing his claim after the expiry of the prescribed period.
9. There is therefore no good reason for making the defendant pay the plaintiff’s costs incurred after 27 September 2012.

***Conclusion***

1. Leave is granted for the plaintiff to accept the Sanctioned Payment out of time. I further order the defendant to pay the plaintiff costs of this action up to 27 September 2012, to be taxed if not agreed with a certificate for counsel. Each party shall bear his/its own costs incurred after 27 September 2012. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
2. I have heard Counsel’s submissions on the costs of this application. The plaintiff set out to ask for all costs of the action but ends up having to bear his own costs after the expiry of the prescribed period. The defendant agreed to pay the plaintiff’s costs up to the expiry of the prescribed period but asked for its costs incurred thereafter. It similarly ends up having to bear its own costs after the expiry of the prescribed period. Since neither party has fully succeeded in securing a favourable result or otherwise opposing the other party’s costs proposal, there shall be no order as to the costs of this application.
3. Counsel’s assistance is appreciated.

(D. Ho)

Deputy District Judge

Mr. Dennis Law instructed by Andrew Chan & Co., Solicitors assigned by the Director of Legal Aid for the plaintiff

Mr. Victor Gidwani and Mr. Dixon Lo instructed by John Lam, Law & Co., Solicitors for the defendant