## DCPI 1495/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1495 OF 2015

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##### BETWEEN

OR SIU LUNG,

the person appointed to represent the estate of

LAM CHOI CHING（林賽貞）, deceased Plaintiff

### and

FU HONG HOME FOR THE ELDERLY COMPANY

LIMITED trading as

FU HONG HOME FOR THE ELDERLY Defendant

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Before: Deputy District Judge Eric Tam in Chambers

Date of Hearing: 18 October 2016

Date of Decision:16 November 2016

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DECISION

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1. By a summons dated 14 July 2016 (“the present summons”), the plaintiff applied for the following orders under O 22 r 15, the Rules of the District Court (“RDC”):-
2. Leave for the plaintiff to accept the defendant’s sanctioned payment of $380,000.00 made on 17 July 2015;
3. The defendant to pay the plaintiff’s costs of this action, to be taxed if not agreed;
4. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.
5. The defendant’s position was as follows:-
6. There was no objection that leave be granted to the plaintiff to accept the defendant’s sanctioned payment;
7. The defendant agreed to pay the plaintiff’s costs of this action up to and inclusive of 14 August 2015 (ie, the latest date on which the sanctioned payment could have been accepted without leave of the court);
8. Costs of the action as from 15 August 2015, excluding the costs of this application, be paid by the plaintiff to the defendant on indemnity basis;
9. Costs of this application be paid by the plaintiff to the defendant on party-and-party basis.

*Chronology of events*

1. The following events are relevant:-

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| **Date** | **Event** |
| 9/9/2013 | Lam Choi Ching (“Lam”), the original plaintiff, met the accident at the residential care home operated by the defendant. |
| 6/7/2015 | Lam issued Writ of Summons (“the writ”) against the defendant in this action. |
| 17/7/2015 | The defendant made a sanctioned payment of $380,000.00. |
| 17/7/2015 | Lam asked for a breakdown of the sanctioned payment (as per O 22 r 14, RDC). |
| 22/7/2015 | The defendant replied by arguing that (i) the claim for Pain, Suffering and Loss of Amenities (“PSLA”) was excessive; and (ii) the multiplier for future expenses should only be one. |
| 31/7/2015 | Interlocutory judgment on liability entered against the defendant, leaving damages to be assessed. |
| 14/8/2015 | The last date on which Lam could have accepted the sanctioned payment without leave of the court. |
| 17/2/2016 | Lam passed away as a result of bronchopneumonia which was unrelated to the accident. |
| 9/5/2016 | Or Siu Lung, the plaintiff, inquired whether the defendant would agree to pay for the costs of this action if the plaintiff were to accept the sanctioned payment out of time. |
| 25/5/2016 | The plaintiff was appointed to represent the estate of Lam for the purpose of this action. |
| 14/7/2016 | The plaintiff issued the present summons. |

*Applicable principles*

1. Under O 22 r 15(3), RDC, if the court grants leave to the plaintiff to accept the defendant’s sanctioned payment, it should also make an order as to costs.
2. According to the legal principle for late acceptance of sanctioned payment as stated in *Wong Ching Wan v AS Watson & Co Ltd* [2001] HKLRD, unless there are special circumstances, the usual costs order is for the plaintiff to pay the defendant’s costs after the expiration of the prescribed period.

*The plaintiff’s submissions*

1. Mr Cheng, counsel for the plaintiff, submitted that the plaintiff’s conduct was reasonable. It was reasonable to expect damages of more than $380,000 when the defendant made the sanctioned payment in July 2015.
2. Right after to the sudden death of Lam in February 2016, it became reasonable to accept the sanctioned payment, as the claim for future expenses would probably be reduced.

*The defendant’s submissions*

1. Mr Ngai, counsel for the defendant, submitted that whether it was reasonable for Lam not to accept the sanctioned payment within the 28-day limit was not relevant. The merit of the plaintiff’s claim on quantum was also irrelevant. The death of the original plaintiff was a contingency inherent in litigation and did not justify the departure of the usual costs order.
2. If the death of a plaintiff was to be regarded as a special circumstance, it would mean that the older a plaintiff is (or the less healthy a plaintiff is), the less costs protection a defendant making a sanctioned payment could have (because the plaintiff is more likely to pass away before trial). This uncertainty in costs protection could have the consequence of discouraging a defendant from making a sanctioned payment. This is inconsistent with the underlying objectives under O 1A, r  1, RDC.

*Decision*

1. I agree with Mr Ngai’s submission that the merits of the plaintiff’s claim on quantum were irrelevant. It is impossible for the court on the costs hearing to adjudicate on the merit issues.
2. It was not submitted by either parties that the other party was acting unreasonably. I accept the reasonableness is one of the factors to be considered but it is not determinative. The plaintiff failed to convince the court the death of Lam was a special circumstance.
3. Lam was born in 1925; she was about 90 years old at the time of issuance of the writ. According to Mr Cheng, her life expectancy had been estimated to be 6.69 years. Notwithstanding that, at her age, her demise before trial could only be regarded as the vicissitudes of life, an event not unusual and should be within contemplation. It is a contingency inherent in litigation.
4. I find that it is unreasonable to deprive the defendant the protection under the sanctioned payment. Such decision will also give certainty on costs relating to sanctioned payment in respect of the death of an aged plaintiff.
5. Mr Ngai withdrew the application for indemnity costs in the hearing.

*Conclusion*

1. I grant the following orders:-
2. Leave to the plaintiff to accept the sanctioned payment made on 17 July 2015 as full and final settlement of the claim;
3. The defendant do pay the plaintiff’s costs of this action up to and inclusive of 14 August 2015;
4. The plaintiff do pay the defendant’s costs of this action as from 15 August 2015, including the costs of this application, on party-and-party basis;
5. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

# ( Eric Tam )

# Deputy District Judge

Mr Alfred CP Cheng, instructed by Cheng, Yeung & Co, for the plaintiff

Mr Lawrence LK Ngai, instructed by Wong & Associates, for the defendant