## DCPI 1568/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1568 OF 2011

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| BETWEEN | LIMBU DHARAMARAJ | Plaintiff |
|  | and |  |
|  | ISS ADAMS SECUFORCE LIMITED | 1st Defendant |
|  | VIVA OPTICAL DISC MANUFACTURING LIMITED | 2nd Defendant  (Discontinued) |

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Coram : Deputy District Judge Tracy Chan in Chambers

Dates of hearing : 19 March 2013

Date of handing down Decision : 12 April 2013

**DECISION ON APPLICATIONS MADE PURSUANT TO ORDER 22 RULES OF THE DISTRICT COURT**

1. The Plaintiff in these proceedings claimed against the 1st Defendant, his former employer, for damages he had suffered from an accident which occurred in the course of his employment. Both liability and damages were argued and the matter was listed before this court for decision.
2. After hearing evidence and submissions, it was decided on 19 December 2012 that the 1st Defendant was liable to pay damages for a sum of $87,368.21; and that by an order nisi the Defendant was to pay the Plaintiff’s costs.
3. By way of a summons dated 28 December 2012, the Plaintiff applied to vary the above costs order nisi, the terms asked for are as follows:
4. Costs of the Proceedings from 1 December 2010 on indemnity basis to be taxed if not agreed; and
5. Enhanced interest on the 1st Defendant’s costs at a rate not exceeding 10% above judgment rate.
6. The reason in support of the application is mainly that the Plaintiff had done better in trial than his sanctioned offer made on 3 November 2010 (“the Offer”). The Offer was to expire in 28 days on 1st December 2010. It was said that the 1st Defendant having failed to accept the Offer would now have to bear the consequences on costs and interest prescribed under rule 24, Order 22 of the Rules of the District Court, Cap. 336 H.

1. Knowing that the ground taken by the 1st Defendant in opposition is that the Offer was not a sanctioned offer under Order 22 (“Sanctioned Offer”) as Order 22 r. 5 (7)[[1]](#footnote-1) was not complied with, Mr Leung sought assistance from two authorities: *Mitchell and others v James and others* [2004] 1 WLR 158; and *Sunbeam Investments Limited v The Incorporated Owners of Villa Veneto* LDBM 370/2007. In *Mitchell v James* non-compliance of CPR rule 36.14, the English counterpart of Order 22, was considered to be technical and would not cause unfairness “***with the defendants having legal advisers and there being no evidence that the defendants were misled***”; and that the failure does not nullify the effect of the offer. This approach was adopted by HHJ Wong in *Sunbeam Investments Limited.* Mr Leung submits that this line of holdings should be followed in the present case.
2. The 1st Defendant opposes to this argument. Mr Gidwani representing the 1st Defendant relied on comments of Poon J in *Montio Ltd v Tse Ping Shun Ltd* (unrep., HCA 757 of 2009 [2012] HKEC 232) and those of Saunders J in *Kwok Chun Wing v 21 Holdings Ltd* [2011] 3 HKC 542. Like what had happened in the present case, in those two cases, the “sanctioned offer” made had failed to set out the necessary provision as prescribed under r.5 (7).
3. In paragraph 9 of his judgment, Poon J said this:

“ Sanctioned offers are part of the new regime introduced by CJR to encourage litigants to take positive settlement seriously and avoid unproductive and expensive prolongation of the proceedings. Such offers enable a plaintiff to make an offer for settlement of his claims, wholly or partially. Serious consequences may follow from the sanctioned offer. If the defendant rejects it and the plaintiff does better at trial, he may have to pay indemnity costs and enhanced interest of the sum awarded. Since it is the plaintiff who seeks to invoke the new rules to protect his position, he must strictly comply with all the mandatory requirements when he purports to make a sanctioned offer. It does not lie in his mouth to say that his failure to do so is only a technical slip or the defendant is legally represented and hence must know what the requirements are. The plaintiff has a positive duty to fully comply with the rules in the first place in order to make his offer a valid sanctioned offer. I therefore rule that the Offer is not a sanctioned offer within the meaning of Order 22.”

1. Mr Leung further contends that pursuant to Order 22 r.2 (4) a party can make an offer to settle in whatever way he chooses, so even if it is found that the Offer was not a Sanctioned Offer this court can still make orders giving effect to those consequences specified under Order 22. Order 22 r.2 (4) provides that :

“Nothing in this Order prevents a party from making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Order, it does not have the consequences specified in this Order, unless the Court so orders.”

1. Mr Gidwani submits that if this court finds that the Offer was not a Sanctioned Offer, there is no other settlement offer which this court may consider under Order 22.r.2(4). Mr Gidwani argues that since the Offer was said to be “without prejudice” and without any express reservation of the right to refer to the letter on the issue of costs should the claim subsequently proceed to judgment[[2]](#footnote-2), it was neither a Calderbank nor an open offer. He draws my attention to the authorities showing that Saunders J has found in *Kwok Chun Wing* a Calderbank offer while Poon J finds an open offer in *Montrio*. In the circumstances, Mr Gidwany submits that, Order 62 (5) is the only relevant provision the Plaintiff could resort to in asking this court to exercise discretion on costs. However this application was not made on basis of those factors listed out under Order 62.
2. Having heard submissions and read those relevant authorities referred to me by the parties, I do not agree that the omission could be ignored when the requirement has been so clearly set out in Order 22 r 5. I do not agree with Mr Leung that the omissions were worse in *Montrio* and *Kwok Chun Wing.*  I am of the view that the omission of r 5(7) is serious. I follow the decision of Saunders J and Poon J and I am of the view that there should be strict compliance of the rules on the part of the Plaintiff if they meant to make a Sanctioned Offer. Without setting out the provision under Order 22 r 5 (7), the Offer did not provide a mechanism for the 1st Defendant to accept after expiry of prescribed period. The Plaintiff said that since the Defendant was legally represented they should know their right under the rule. I do not see the force behind this argument because when the Plaintiff was legally represented, they should know compliance with the rule is important. For these reasons, I find that the Offer was not a Sanctioned Offer and I do not think the Plaintiff could rely on the Offer to ask for entitlements pursuant to Order 22 r 24. The provision under Order 22 r.24 (4) has not been effectively triggered.
3. As to whether the Plaintiff could rely on Order 22 rule 2(4) to ask this court to exercise discretion in the Plaintiff’s favour, Mr Leung agrees that the letter was not a Calderbank. He has tried to persuade me that it was an open offer but I could not agree with him on this as the letter was clearly marked as “without prejudice” but with no express reservation of right to disclose the same when issue on costs is to argue. In the circumstances, I find no basis to exercise my discretion as Saunder J and Poon J had done in *Kwok Chun Wing* and *Montrio* respectively.
4. Although there has been argument on whether the court should consider enhanced interest rate on costs where the Plaintiff had produced no evidence showing that there was out-of-pocket money paid to the solicitors by him or whether the modified approach suggested by Lam J, as he then was, in *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273 should apply in the present case, the argument should now become academic as I have found that the Plaintiff had failed to bring the Offer within Order 22.
5. For completeness however, I would say that if I were to make a ruling I would not find in favour of the Plaintiff in the circumstance of the present case. In *Shih Pik Nog v G2000* (Apparel) Ltd [2011]4 HKLRD 121 in para 17 Bharwaney J says this:

“In my judgment, save for legally aided parties, it is incumbent on the party seeking interest on costs, be that party a plaintiff or a defendant, to state, in his supporting affidavit, the amount of disbursements, costs, and costs on account paid to his solicitors during the period commencing from the lst date of acceptance up to the date of the supporting affidavit, and the date(s) of payment. Upon sight of this information, the court can either refuse to or make an order for enhanced interest on the actual amounts of disbursements, costs, and costs on account paid during the relevant period, and the court can award interest either at the full rate from the actual dates of payment or adopt the modified approach of Lam. The former approach would be suitable for cases where there have only been a few payments and the latter approach for cases where there have been multiple payments spanning a long period of time.”

1. Bharwaney J has further stated in para 18 that

“The matter was not argued before me and may have to be decided in an appropriate case. However, I would indicate my agreement with Waller LJ who stated in § 23 of his judgment in *KR v. Bryn Alyn Community (Holdings) Ltd* that the court has power to award enhanced interest on costs to parties who are publicly funded and who may obtain an award of enhanced interest costs and disbursements which have been incurred but not yet paid or fully paid. ……….. However, the fact that publicly funded plaintiffs may be able to obtain an award for enhanced interest on costs incurred but not yet paid or not yet fully paid by the Director of Legal Aid does not, in my judgment, justify an order for enhanced interest on costs incurred but not yet paid by privately funded parties.”

1. The Plaintiff is not asking for enhanced interest on costs for the period when the Plaintiff was legally aided. I am of the view that it is important for the Plaintiff to prove out-of-pocket expenses already paid to his solicitors.

1. As to enhanced interest on the judgment sum, Mr Leung after some brief attempts concedes that the Plaintiff has no right to argue as it was not set out in the Summons. I would not make any ruling on this.

**Conclusion**

1. Mr Leung argues for and on behalf of the Plaintiff that the Offer was a Sanctioned Offer despite of its technical departure from the prescribed form, and that if I do not find in favour of the Plaintiff on this, I can still exercise my discretion under Order 22 r 2(4). Having considered the circumstances of the present case and the holdings in the authorities referred to me, I find that the Offer was not a Sanctioned Offer and I see no basis for me to exercise my discretion under Order 22 r 2(4) in the Plaintiff’s favour. The Plaintiff’s Summons is dismissed.

**Costs**

1. I do not see any reason to depart from the usual order that costs should follow the event. There will be an order nisi that the Plaintiff do pay the 1st Defendant’s costs of this application and such costs are to be taxed if not agreed. This order nisi shall become absolute if no application is made to vary the same within 14 days from date of this order.

Tracy Chan

Deputy District Judge

Mr Colin Leung instructed by Messrs. M.C.A. Lai & Co.for the Plaintiff

Mr Victor Gidwani leading Mr Bosco Cheng instructed by Messrs. Leung & Lau for the 1st Defendant

1. “after the expiry of 28 days from the date the sanctioned offer is made the offeree may only accept it if (a) the parties agree on the liability for costs; or (b)the court grant leave to accept it”. [↑](#footnote-ref-1)
2. See *Hong Kong Civil Procedure 2013*, Vol 1, para 22/2/A at p 490 [↑](#footnote-ref-2)