## DCPI 1622/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1622 OF 2015

-------------------------------------

##### BETWEEN

WONG YAU SUI Plaintiff

and

MORAL ACCORD LIMITED 1st Defendant

LUNG TANG TAK FAT LOGISTICS LIMITED 2nd Defendant

-------------------------------------

Before: Deputy District Judge Gary C C Lam in Chambers

Date of Hearing: 1 June 2017

Date of Decision: 1 June 2017

---------------------

DECISION

----------------------

*Introduction*

1. This is a hearing on costs and other consequences (if any) pursuant to my order made in my judgment handed down on 17 February 2017 (now reported in [2017] 2 HKLRD 322; [2017] 2 HKC 303). In that judgment, I awarded HK$164,031.25 to the Plaintiff for the personal injury he suffered in the course of employment with the Defendant. I also found that the Defendants succeeded in establishing the defence of tender before action, for which HK$242,139 had been paid in accordance with Order 22 as required by Order 18 rule 16. In that judgment, as the sanctioned payment was made known to me by the very nature of the defence of tender before action, I left the issue of costs and other sanctioned consequences to be argued separately, and granted leave to the parties to file relevant evidence.
2. For the present purpose, I only need to set out the following events:-
3. On 2 April 2015, the Defendants made a sanctioned payment of HK$92,139 in the related employee compensation case DCEC No 577 of 2015.
4. Further, by 15 April 2015, the Plaintiff had received HK$57,861 from the Defendants as periodical payments.
5. By a letter dated 15 April 2015, the Defendants’ insurer made an offer to pay HK$300,000 (including the aforesaid HK$92,139 and HK$57,861) plus costs at District Court scale to be taxed if not agreed in full and final settlement of the Plaintiff’s claim. The offer was open for 14 days.
6. On 23 July 2015, the Plaintiff commenced the present action.
7. On 23 September 2015, the Defendants paid HK$150,000 on top of the periodical payment and the sanctioned payment of HK$92,139 in DECE No 577 of 2015.
8. On 24 September 2015, the Defendants filed their defence pleading, among others, the defence of tender.
9. 21 October 2015 (that is, 28 days from the date of the sanctioned payment being 23 September 2015) was the last date when the sanctioned payment could be accepted without the leave of the Court

*Issues*

1. It is common ground that because the defence of tender before action was established, the Plaintiff is liable to pay the Defendants costs. The issues before me are, for two phases:-
2. What basis of taxation should be adopted; and
3. Whether sanctioned consequences under Order 22 should apply.
4. The two phases are:-
5. Phase 1: costs incurred from 15 April 2015 (inclusive), when the Defendants offered to settle by paying HK$242,139 more (without any actual payments in), up to 21 October 2015 (inclusive) (being the latest date on which the sanctioned payment could have been accepted without leave); and
6. Phase 2: costs incurred and other consequences after 21 October 2015.
7. Pausing here, I have been using the expression “sanctioned payment” to refer to the Defendants’ payments into Court up to 23 September 2015. I note the argument by Mr Fong, counsel for the Plaintiff, that the payment made on 23 September 2015 was not a valid sanctioned payment because the payment included additional costs consequences outside the sanctioned consequences stated in Order 22 rule 23. For the reasons set out in paragraphs 8 – 11 below, I shall dismiss such an argument, and rule that the payment was indeed a valid sanctioned payment.
8. I shall now analyse the two phases separately.

*Phase 1: Costs incurred from15 April 2015 to 21 October 2015 (inclusive)*

1. For Phase 1, it is common ground, and I accept, that the basis for taxation of the costs incurred up to 15 April 2015 should be on party and party basis. I only need to add that while at the beginning of the trial in February 2017, Mr Ho, counsel for the Defendants, was seeking indemnity costs in general, he confirmed to me today that he no longer sought the same.

*Phase 2: Costs incurred and other consequences after 21 October 2015*

1. For Phase 2, Mr Fong contended that the payment made on 23 September 2015 was not a valid sanctioned payment because (he argued) in the notice of sanctioned payment, the Defendants would require the Plaintiff to pay costs upon acceptance of the payment, contrary to the costs consequence stated in Order 22 rule 20 that the Plaintiff would be entitled to costs. He relied on *Wong Yim Man Anthea v Wong Ho Ming Felix* [2016] 3 HKLRD 249 for the proposition that an offer containing a term as to costs was not a valid sanctioned offer.
2. If the Defendants did state that the Plaintiff would still have to pay costs to the Defendants upon acceptance of the sanctioned payment, I would agree with Mr Fong that the payment would not have been a valid sanctioned payment. However, what was stated in the notice was that:-

“The Defendants shall rely on the defence of tender in satisfaction of the cause of action in respect of which the Plaintiff claims.”

1. The Defendants simply stated their intention to rely on the payments for the defence of tender before action, without more. This in effect said that if the Plaintiff chose (as he did here) to pursue the claim all the way to trial, and the court found (as I did here) that the defence of tender succeeded, then his claim would still fail and generally, costs would follow the event. The unsaid in the notice was the default position under Order 22 rule 20, that is, if the Plaintiff had accepted the payment within 28 days, then the Plaintiff would be entitled to costs. In the premises, I conclude that the Defendants did not set out any term as to costs.
2. Thus, I find that the payment was a valid sanctioned payment.
3. Since the Plaintiff failed to do better than the sanctioned payment, by virtue of Order 22 rule 23(2) – (5), unless it would be unjust to do so, I shall (1) disallow pre-judgment interest on the awards after 21 October 2015; (2) order costs on indemnity basis for costs incurred after 21 October 2015; and (3) order interest on costs incurred after 21 October at a rate not exceeding 10% above judgment rate. In considering whether it would be unjust or not, I shall consider all the circumstances including those factors set out in Order 22 rule 23(6).
4. In his affirmation filed for the present hearing, the Plaintiff explained why he pursued the claim as he did, and he set out various sanctioned offers he made, which were all higher than my awards. However, none of this amounts to any injustice for the present purposes.
5. Mr Fong also raised an argument that whether or not the defence of tender would be applicable to unliquidated claims was not clear, and this affected the Plaintiff’s assessment of whether or not to accept the sanctioned payment. I reject this argument. The applicability of the defence of tender to unliquidated claims should not affect the Plaintiff’s assessment of the substantive merits of his claim, which should be the primary, if not only, concern to his assessment of whether or not to accept the sanctioned payment.
6. Having concluded that there would be nothing unjust, I shall (1) disallow pre-judgment interest on the awards after 21 October 2015; (2) order costs on indemnity basis for costs incurred after 21 October 2015; and (3) order interest on costs incurred after 21 October 2015 at a rate not exceeding 10% above judgment rate.
7. The outstanding questions are (1) the interest rate on indemnity costs; and (2) when the interest should stop accruing.
8. For the present hearing, the Defendants filed affirmation deposing that only the following fees have been paid that were incurred after 21 October 2015 until my judgment on 17 February 2017:-
9. Expert fee, paid on 3 March 2016; and
10. Fee for counsel’s advice, paid on 10 August 2016.
11. Mr Ho submitted that while for simplicity, the Court has in the past adopted a simplified approach by awarding half of the interest rate which would otherwise be ordered, because it would be complicated to calculate the interest for each item of costs for various dates of actual payments, in the present case, given that he only sought interest on the aforesaid two items, the calculation should be relatively simple, and thus I should not adopt the simplified approach. He further urged me to adopt 5% (5% being the rate adopted in *Union Glory Finance Inc v Merril Lynch International Bank Ltd*, HCA 2494/2013, unreported, 13 December 2016) above the judgment rate to these 2 items.
12. The simplified approach which has been adopted by the Court from time to time for awarding interest on costs, in the absence of evidence of actual payments of funds for legal costs, is to apply half of the rate to the costs. I agree with Mr Ho that given that there are only 2 items for which the Defendants are seeking interest, there is no need to simplify the matter.
13. However, I disagree that the rate should be 5% above judgment rate. The main purpose of awarding interest on costs is to compensate the receiving party for the costs of money, and is not penal in nature (*Union Glory Finance Inc v Merril Lynch International Bank Ltd*,*supra* at §34). This is different from enhanced interest on the main awards in a judgment, which was also to compensate inconvenience, anxiety and distress caused by the litigation to the receiving party (*Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273 at §§10 and 16). Bearing in mind the different purposes of ordering interest on the awards and of ordering interests on costs, while it may be necessary for the Court to assess the conduct of the parties in the litigation when determining the rate of interest on an award, it is not necessary to do so when determining the rate of interest on costs. Further, bearing in mind the different purposes, it is generally undesirable to order the same interest rate for the award and for the costs simply for the sake of consistency and convenience. That said, matters concerning costs are always within the Court’s broad discretion, to be exercised judicially: see, for example, *Lo Yuk Sui v Fubon Bank (Hong Kong) Ltd* [2017] 2 HKLRD 477 at §§63-71.
14. In *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd*, *supra*, Lam J (now Lam VP) at §19 adopted 4% above prime rate (that is, 9% in total) as a generous assessment of the costs of money. That is a decision made in 2010. However, since then, there has not been much change (if any) in terms of prime rate. In the absence of any evidence about the other factors affecting the costs of money, I shall adopt 4% above prime rate (not judgment rate), that is, 9% for the interest on costs.
15. Lastly, although, in my view, the Court has jurisdiction to award interest on costs until payment instead of until judgment (*Hong Kong Civil Procedure 2017 Vol 1* §22/24/2), Mr Ho sought only interest until my judgment handed down on 17 February 2017. For the reasons expressed by Peter Ng J in §§48 – 60 of *Lo Yuk Sui v Fubon Bank (Hong Kong) Ltd*, *supra*, with which I agree, Mr Ho’s position is laudably fair. There is nothing unfair in this approach; it must be remembered that an order for payment of costs is a judgment debt, on which interest at judgment rate shall accrue. The judgment rate is 8%, which is already above the usual commercial rate of 1% plus prime rate (that is, 6%).

*Order*

1. In the circumstances, and having heard counsel’s submissions on costs of today’s hearing, I make the following order:-
2. Pre-judgment interest on the award made on 17 February 2017 shall be disallowed after 21 October 2015.
3. The Plaintiff shall pay the Defendants costs of the action:-
4. incurred from 15 April 2015 – 21 October 2015 (inclusive) on party and party basis; and
5. incurred on and after 22 October 2015 (including costs of and incidental to the present hearing) on an indemnity basis;

with certificate for one counsel, to be taxed if not agreed.

1. Interest shall accrue at 9% pa on (a) expert fee, paid on 3 March 2016; and (b) fee for counsel’s advice, paid on 10 August 2016; until 17 February 2017.
2. For the avoidance of doubt, interest at judgment rate shall accrue on all the costs (including the aforesaid interest on the two items) since 17 February 2017 until payment.

( Gary C C Lam )

Deputy District Judge

Mr Forest Fong, instructed by Kenneth W Leung & Co, for the Plaintiff

Mr Leon Ho, instructed by Au & Associates, for the 1st and 2nd Defendants