DCPI 1636/2019

[2021] HKDC 485

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1636 OF 2019

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

BETWEEN

|  |  |
| --- | --- |
| CHEUNG HAU YING (張巧英) | Plaintiff |
| and |  |
| NEW PEOPLE’S PARTY (新民黨) | Defendant |

|  |  |
| --- | --- |
| Coram: | His Honour Judge Harold Leong in Chambers |
| Date of Hearing: | 26 March 2021 |
| Date of Decision: | 22 April 2021 |

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

DECISION

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

1. This is the plaintiff’s application to accept the defendant’s sanctioned payment out of time.

*Background*

1. The plaintiff and the defendant were involved in two parallel proceedings regarding the same incident, namely an employees’ compensation claim DCEC 1407/2016 (“the EC Claim”) and this, a personal injury claim (“the PI Action”).
2. The defendant made a sanctioned payment on 13 March 2020 (and served on 16 March 2020) under the PI Action (“the Sanctioned Payment”). However, it was stated on the Notice of Sanctioned Payment (page 56 of the Hearing Bundle):

*“Take notice that the defendant has paid HK$480,000 into court in settlement of…the whole of your claim herein and in the related EC action no. DCEC 1407/2016”*

1. The plaintiff did not accept within 28 days.
2. Subsequently, the EC Claim was settled for HK$246,324.24 by way of a joint written application on 18 September 2020. There was a dispute in the costs in the EC Claim. The parties referred to various without prejudice negotiations including the Notice of Sanctioned Payment in this Claim and a sanctioned offer by the plaintiff. All such negotiations are, however, conducted on a basis of a global settlement of both the EC Claim and the PI Action.
3. In the Decision dated 23 February 2021, Her Honour Judge Levy stated (page 109 of the Bundle of Correspondences / Chronology of Events) :

*“15. With respect to Mr. Tang, I believe that he has misunderstood the implications of s26, which obliges a plaintiff in a common law action to deduct from the award of damages, the amount of compensation which has been paid or is payable in the employees’ compensation proceedings. Owing to this mandatory requirement…when making a sanction payment in a parallel common law claim, is required by O 22 r8(2)(c)3 to state in a notice of sanctioned payment whether the sanctioned payment has taken into account the compensation paid in a related employees’ compensation application.*

*16. …Since the EC Claim and the PI Action, though related, are separate claims, separate sanctioned payments need to be made in each of these proceedings. There are presently no rules allowing for the payment of a sanctioned payment in one action to cover both proceedings as a “global” sanctioned payment for both the EC claim and the PI Action…*

*17. In the same vein, Cap Chan’s letter...offering a total sum…to settle both the EC Claim and the PI Action without specifying an amount for the EC Claim, cannot be regarded as a valid sanctioned offer for the EC Claim…*

*18. In the circumstances, I therefore conclude that the NP Party made no sanctioned payment in the EC Claim nor was there any sanctioned offer…”*

1. Despite the settlement of the EC Claim, the defendant failed to vary or withdraw the Sanctioned Payment.
2. The PI Action was warned for trial on the running list on 7 October 2020 and the Notice of Trial was issued on 9 October 2020 fixing the trial date on 12 October 2020.
3. The plaintiff took out the current application on 9 October 2020 so the call-over hearing for this application was heard on 12 October 2020 in place of the trial with an order that the remaining trial dates be vacated.

*Legal principles*

1. It is trite that the underlying purpose of Order 22 regime is to *“encourage settlement and to discourage unnecessary litigation”* (*Or Siu Lung and Fu Hong Home for the Elderly Co. Ltd* [2018] 1 HKLRD 872).
2. *Anthony Chan J in Polyever Holdings Ltd v Savills (Hong Kong) Limited* (HCA 1039/2020) summarised the considerations of the court in exercising its discretion in such applications, including :-

*“(i) The discretion of the court is unfettered...*

*…*

*(iii) The main criteria is whether there has been a change of circumstances as would render it unjust to allow the offeree to benefit from the sanctioned offer / payment…For instance, the discovery of further evidence, which puts a wholly different complexion on the case, or a change in the legal outlook brought about by new judicial decision…*

*(iv) Delay in making the application is a relevant consideration…*

*…*

*(viii) After taking into account all the relevant factors, the court will be guided by the overriding consideration to do justice between the parties…”*

1. Order 22 rule 8(2) provides that:

*“A defendant who makes a sanctioned payment shall file with the Court a notice in Form 23 in Appendix A, that :-*

*…*

*(c) states whether it takes into account any counterclaim or set-off…”*

*Considerations*

1. I agree with Her Honour Judge Levy who essentially ruled that a sanctioned payment made in a PI Action as a “global” settlement for both the PI Action and the related EC Claim cannot be regarded as a sanctioned payment for the EC Claim alone.
2. As stated by Her Honour Judge Levy, s 26 of the Employees’ Compensation Ordinance (Cap 282) obliges a plaintiff in common law action to deduct from the damages awarded the employees’ compensation which has been paid or is payable. Thus, under Order 22 Rule 8(2)(c), the defendant making a sanctioned payment must specify whether the sanctioned payment has taken into account the “set off” by the employees’ compensation.
3. In the current case, the defendant has clearly stated that the sanctioned payment sum of HK$480,000 has *not* taken into account any set off by the (then undetermined) employees’ compensation: it is stated that the sum is paid *“in settlement of…the whole of your claim herein and in the related EC action no. DCEC 1407/2016”*.
4. It is entirely correct, as Her Honour Judge Levy stated, that in the absence of a separate sanctioned payment in the EC claim, this cannot be taken as a valid sanctioned payment in the EC Claim.
5. One must also consider that, when there is a parallel EC and PI action, under certain circumstances, it may be a reasonable case management decision to suspend the EC action and to only proceed with the PI action in order to save cost, given that the damages under the PI action would likely be larger so would have adequately covered the compensation under the EC action.
6. This is also the reason why, in a parallel action situation, once the PI action is settled, the EC action should also be discontinued (*but not the other way round*). This might explain why the defendant made the Sanctioned Payment in the PI Action on such terms.
7. This clearly does not work the other way round: so if instead, the EC Claim has subsequently been *settled first and separately* from the PI Action, as in the case here, there is obviously a change of circumstances: the plaintiff is now required by s 26 to set off the compensation against the damages in the PI Action.
8. Given this change of circumstances, one may criticise the defendant for not immediately (or even now) applying to withdraw the Sanctioned Payment entirely, or to diminish the Sanctioned Payment to a sum amounting to the balance (and submitting a Payment Notice to make it clear that this new diminished payment has now taken into account of the *set off* against the Employees’ Compensation awarded). As the defendant has not make such an application, the court cannot deal with this here.
9. Nevertheless, even if the defendant has failed to make such application, it is clearly unjust to allow the plaintiff to benefit from this change of circumstances which would effectively allow the plaintiff to obtain a “double” compensation for his EC Claim.
10. Of course, the plaintiff’s own handling of case is not beyond criticism given that the current application was taken out very late.

*Order*

1. I would give the following order:
2. The application be dismissed;
3. The parties are to apply to court within 14 days of this order for the trial to be re-fixed before another judge;
4. Costs of and incidental to the application be to the defendant on a party and party basis with Certificate for Counsel, to be taxed if not agreed.

(Harold Leong)

District Judge

Mr E. Lun, instructed by Messrs Cap Chan & Co., for the plaintiff

Mr Felix Tang, instructed by Messrs Sun Lawyers LLP, for the defendant