## DCPI 1905/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1905 OF 2013

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##### BETWEEN

YIP MAU KEI（葉茂基） Plaintiff

### and

WONG KAM TIM（黃錦添） Defendant ----------------------

Before: HH Judge Levy in Chambers

Date of Hearing: 25 February 2015

Date of Decision: 27 February 2015

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D E C I S I O N

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*Introduction*

1. On 10 February 2015, I gave judgment in this action by awarding the plaintiff damages in the total sum of $140,405 for various heads of damage with interest, and costs on a nisi basis.
2. There are now two applications before me. One is by the defendant for payment out and for the variation of the costs order nisi.
3. The plaintiff’s application is for leave to appeal against my judgment.
4. These summonses were heard together. The plaintiff, as in the trial for assessment of damages, was still acting in person. The defendant was represented by Mr Chiu.
5. Though the plaintiff’s application was later in time, I will deal with the plaintiff’s application for leave to appeal first as it is more straightforward.

*Plaintiff’s application for leave to appeal*

1. The grounds, loosely set out, are found in the plaintiff’s supporting affirmation and were further elaborated in his oral submissions.
2. Broadly, the plaintiff submitted that the amount of damages I awarded was inadequate, and that I had been too “lenient” to the defendant. He also said that I was wrong in rejecting his evidence, and in describing the 2nd accident that I referred to in my judgment as only a domestic accident. Lastly he said that I should not have accepted the documents in the hearing bundle as they were largely inaccurate due to the mistakes his former solicitors had allegedly made.
3. Mr Chiu opposed the application and submitted that my judgment was based on the medical evidence and that the allegation against his lawyers had no bearing in this leave application.
4. In applying for leave to appeal, the plaintiff needs to satisfy me that, in accordance with s.63A (2) of the District Court Ordinance, “(a) the appeal has a reasonable prospect of success; or (b) there is some other reason in the interests of justice why the appeal should be heard.”
5. When considering the plaintiff’s home-made grounds contained in his supporting affirmation and his oral submissions, I am prepared, given that the plaintiff is a litigant in person, to examine the grounds he puts forward in the most favourable light. I am however unable to discern any merits in his leave application.
6. His main primary ground about the alleged inadequacy of the award is only a bare assertion. As discussed in my judgment, the amount of damages that I had assessed was based on the medical evidence in this action.
7. As for his other ground concerning my wrongful rejection of his evidence, I do not think that this ground has any merit. My decision to reject his evidence, as set out in the judgment, was not just based on the documents in this case alone, but also on my observation of his demeanour in court.
8. In conclusion, I am not satisfied that the plaintiff’s intended appeal has a reasonable prospect of success. Neither am I satisfied that there is other reason for allowing an appeal to be heard.
9. In the circumstances, the plaintiff’s summons for leave to appeal is dismissed.
10. As for the costs of this application, the parties agree that in the event of the court refusing to grant leave, the defendant should be allowed costs of $1,950. This is a reasonable sum, and I will order this amount to be paid by the plaintiff.

*Defendant’s summons*

1. To understand the basis of the defendant’s application, I should begin with the defendants’ sanctioned payments as the defendant’s entire application hinges upon these payments into court.
2. The defendant had altogether made three sanctioned payments in this case. Relevantly, the defendant’s second sanctioned payment made on 1 September 2014 resulted in a total payment into court of $150,000 that was available to be accepted by the plaintiff without leave on or before 29 September 2014.
3. On 5 December 2014, the defendant made one more sanctioned payment of $50,000 resulting in a total payment into court of $200,000.
4. When calculating the interest on the damages that I awarded, as shown in §1 of the summons, the defendant - on the ground that 29 September 2014 was the latest day the plaintiff could have accepted the aggregate sum of $150,000 without leave - only calculated interest up to 29 September 2014. The total amount of interest, calculated this way, amounted to the sum of $7,462.32. Thus, the gross award of damages, together with interest up to 29 September 2014 would come to a total of $147,867.32. This was less than the total amount of $150,000 available to the plaintiff to accept after the second payment.
5. Thus, according to the calculations set out in §1 of the summons, the defendant, though not having stated as such in the summons, is implicitly applying for the disallowance of the plaintiff’s interest after 29 September 2014.
6. The defendant therefore applies in §1 of the summons for the amount of $147,867.32 to be paid out from the payments into court to the plaintiff through the Director of Legal Aid (as the plaintiff was previously legally aided) with the balance of $52,132.68 to be paid to the defendant through his solicitors (§2 of the summons).
7. Since, as already discussed in §19 above, the gross sum award of $147,867.32 is less than the total amount of $150,000 available to the plaintiff to accept after the second payment on 29 September 2014, the defendant further asks the court to vary the costs order nisi by only allowing the plaintiff’s costs of this action up to and including 29 September 2014 (§3 of the summons) and further ordering the plaintiff to pay the defendant’s costs after 29 September 2014 on the indemnity basis (§4 of the summons).
8. The plaintiff did not make any submission and said that he would be content with any decision the court was to make saying that he believed the court would give a fair decision.
9. By using the date of 29 September 2014 - the latest date the plaintiff could have accepted the sanctioned payments in the total amount of $150,000 without leave- as the last date for the plaintiff’s entitlement to interests for the relevant heads of the award of damages that I made and also as the mark off date for varying the costs order in favour of the defendant, the defendant is invoking the provisions of O.22 r.23 of the Rules of the District Court, relevantly sub-rr(2), (3), (4)(a), (5) and (6).

“ r.23. Costs consequences where plaintiff fails to do better than sanctioned offer or sanctioned payment (O.22, r.23)

(2) The Court may by order disallow all or part of any interest otherwise payable under section 49 of the Ordinance on the whole or part of any sum of money awarded to the plaintiff for some or all of the period after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court.

(3) The Court may order the plaintiff to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court.

(4) The Court may also order that the defendant is entitled to-

(a) his costs on the indemnity basis after the latest date on which the plaintiff could have accepted the payment or offer without requiring the leave of the Court; and

……

(5) Where this rule applies, the Court shall make the orders referred to in paragraphs (2), (3) and (4) unless it considers it unjust to do so.

(6) In considering whether it would be unjust to make the orders referred to in paragraphs (2), (3) and (4), the Court shall take into account all the circumstances of the case including-

(a) the terms of any sanctioned payment or sanctioned offer;

(b) the stage in the proceedings at which any sanctioned payment or sanctioned offer was made;

(c) the information available to the parties at the time when the sanctioned payment or sanctioned offer was made; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the payment or offer to be made or evaluated. ”

1. The rationale of sanctioned payments under O.22 is designed to encourage parties to take positive steps seriously and to avoid unproductive and expensive prolongation of litigation. If a plaintiff rejects a sanctioned payment and subsequently fails to achieve a better result at trial, he can be ordered to pay all the defendant’s costs after the date when the plaintiff could have accepted the defendant’s sanctioned payment (see *Hong Kong Civil Procedure 2015* §22/0/2).
2. According to O.22 r.23 (5), the starting point is that the court will, unless it is unjust to do so, disallow interest and further order a claimant to pay the defendant’s costs on the indemnity basis when such a claimant fails to do better than a sanctioned payment after the latest date on which the payment could have been accepted without requiring the leave of the court.
3. According to the defendant’s calculations of interest, which I accept, by 29 September 2014, the date the plaintiff could have accepted the payment without leave, an aggregate sum of $150,000 was already available to the plaintiff to accept. The plaintiff, having failed to accept the sanctioned payments by that day, will now face the consequences as provided in O.22 r.23, which provisions are applicable to such a plaintiff who fails to do better than a sanctioned payment.
4. By 29 September 2014, all the evidence in this case, including the joint medical report, was available to the plaintiff and his legal advisers assigned to him by the Director of Legal Aid to enable them to evaluate the merits of the case for the purpose of enabling the plaintiff to accept the second sanctioned payment. This was not done and the plaintiff was unable to offer any reason for having failed to do so.
5. After having considered all the circumstances of this case, I do not consider it unjust to disallow interest after 29 September 2014 or to order him to pay costs on the indemnity basis after that day.
6. Thus, pursuant to O.22 r.23 (2), I disallow any interest that would otherwise have accrued on the relevant heads of damage after 29 September 2014. Thus, I grant orders in terms of §§1 and 2 of the defendant’s summons. The nisi costs order directing the plaintiff’s own costs to be taxed in accordance with the Legal Aid regulations will of course stand.
7. I further make, pursuant to O.22 r.23 (3) and (4), an order in terms of §§3 and 4 of the defendant’s summons.
8. As for the costs of the defendant’s application, since the defendant has succeeded in his application, I therefore also order the plaintiff to pay the defendant’s costs of the application to be taxed if not agreed. For the purpose of taxation, I will disallow the defendant’s costs in respect of the 25 minutes of the adjournment during the hearing in order to give time to Mr Chiu to obtain a copy of the relevant rules.
9. An interpreter will again be arranged to interpret this Decision to the plaintiff at the time of the handing down.

(Katina Levy)

District Judge

The plaintiff appeared in person

Mr Chiu Wai Shing of Simon C W Yung & Co, for the defendant