## DCPI 1948/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1948 OF 2012

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##### BETWEEN

HUI WAI MAN (許偉民) Plaintiff

### and

CHAN MEI WAH (陳美華) Defendant

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Before: Deputy District Judge M Lam in Chambers (Open to public)

Date of Hearing: 1 June 2015

Date of Decision: 11 June 2015

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DECISION

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*Application*

1. By summons dated 5 February 2015 ("Summons"), the Defendant applied to vary the costs order nisi ("Order Nisi") made by this court on 23 January 2015.
2. By judgment dated 23 January 2015 ("Judgment"), this court dismissed the plaintiff's claim and made the Order Nisi that the plaintiff do pay the defendant costs of this action to be taxed, if not agreed, with certificate for counsel.
3. In this decision, I shall not repeat the factual background of this action, which is covered in the Judgment. In a nutshell, the plaintiff claimed against the defendant for damages for personal injury he sustained when a tree fell on him. The plaintiff claimed that the fall of the tree was caused by the negligent driving of the defendant. He failed his claim after trial.

*The issue*

1. The defendant seeks to vary the Order Nisi on the ground that the plaintiff failed to obtain a judgment that is more advantageous than the sanctioned offer ("Offer") he made pursuant to Order 22 Rules of the District Court ("RDC") on 12 May 2014. The Offer was that “*the action herein be withdrawn with no order as to costs*.” The Offer lapsed without being accepted on 9 June 2014.
2. The defendant now applies for an order for part of the costs of the action be taxed on indemnity basis and interest on costs as referred to in Order 22 rule 23 (3) (4) RDC (“Specified Consequences”). The defendant seeks support from the case of *Chan Kwing Chiu and another v 陳志球 (translitered as Chan Chi Kau) also known as Johnnie CK Chan* [2013] HKCU 2306, (CACV 209/ 2012, 3 October 2013).
3. The plaintiff does not dispute that the Offer constituted a valid sanctioned offer under Order 22 nor that the plaintiff failed to obtain a judgment more advantageous than the Offer. Mr Lau, counsel for the plaintiff in the present application (who did not take part at the trial), confirms that the only issue this court is invited to determine is whether it is unjust for the court to impose the Specified Consequences.

*Order 22 rule 23*

1. Order 22 rule 23 RDC states that the court *shall* make an order with the Specified Consequences unless it considers it unjust to do so. In considering whether it would be unjust to make such an order, the court is required to take into account all relevant circumstances of the case, including the matters set out in Order 22 rule 23(6)(a) to (d).
2. In the present application, the plaintiff has not filed any affirmation in reply to the defendant's affirmation. He rests heavily on an argument that it was not unreasonable for him not to accept the Offer.
3. The plaintiff admits that there was no direct evidence on the cause of the fall of the tree or the negligence of the defendant. Neither the parties nor the plaintiff’s witness was able to tell the cause of the fall. He however seeks to argue that the ambiguous statements of the defendant given to the police caused suspicion to fall upon the defendant. It was therefore reasonable for the plaintiff to have rejected the Offer and insisted on bringing the case to trial to have the issue of causation resolved by the court. Even though the claim was dismissed, the plaintiff should not be blamed as he and his witness were found to be credible witnesses.
4. In my view, the key test is not whether it is reasonable for the

plaintiff not to accept the Offer, but whether it is unjust to make an order with the Specified Consequences. A plaintiff's subjective belief that he has a good claim does not constitute a relevant consideration to override the mandatory direction in Order 22 rule 23, See the case of *Shih Pik Nog v G2000 (Apparel) Limited* [2011] 4 HKLRD 121, still less, Mr Lau's argument is far from suggesting that the plaintiff believed that he had a good claim. His argument is premised on the plaintiff's entitlement to have a chance to test the defendant's evidence at trial.

1. In any event, I am not convinced that the plaintiff was reasonable for not accepting the Offer. I agree with the defendant's submission that the plaintiff indeed had no solid basis to believe that he had a good claim. The Offer was made after the close of pleadings on liability, the completion of discovery of documents (save that the plaintiff disclosed a few documents relating to financial means subsequently), the exchange of witness statements. It is clear from the evidence by then that there was no direct evidence on the cause of the fall of the tree let alone clear evidence on the negligence of the defendant. The circumstantial evidence giving rise to the liability of the defendant was flimsy if not none.
2. In the end, the plaintiff failed to show how he would be able to discharge his burden of proof even taking into account of the defendant’s statement given to the police, not to mention the clarification and explanation on such police statements given by the defendant in his witness statement in the present action.
3. For reasons stated above, I do not find the plaintiff's argument convincing.
4. I turn to consider the factors set out in Order 22 rule 23(6). The Offer did not just ask the plaintiff to dispose of his claim, it offered to immune the plaintiff from cost liability to the defendant. The defendant abandoned his claim for costs which he had a realistic good chance to succeed. I find the Offer demonstrated a genuine and realistic attempt to resolve the dispute.
5. I am not saying that an offer on a “drop hand” basis, as asking the other side to withdraw his claim with no order as to costs, must be regarded as a genuine offer and a valid sanctioned offer for the purpose of Order 22. Each case turns on its own facts. In this case, given the peculiar circumstances as elaborated above, it is plainly obvious that the Offer is a genuine offer but not a tactical move.
6. The Offer was made when the plaintiff had most of the documentary evidence and witness statements before him. There is no suggestion that the defendant has refused to give information for the purpose of enabling the Offer to be evaluated.
7. In my judgment, the plaintiff fails to persuade me that it will be unjust to make an order with the Specific Consequences. While the plaintiff had the right to bring the case to trial, it is just for the plaintiff to bear the Specified Consequences imposed by Order 22 rule 23 RDC. His desire to test the defendant's evidence and to resolve the dispute at trial does not render it unjust for him to bear the costs of the defendant that should not have been incurred.
8. The plaintiff does not challenge the terms of the order sought by the defendant. The defendant has put in an affirmation to prove the out of pocket payment made to the mediator and the counsel which were incurred and settled between the lapse of the Offer and the trial. The former was for the purpose of disposal of this action without trial and the latter was for the further conduct of this case. I am satisfied that such payments were made. The defendant should be compensated interests on these two items. These two disbursements are subject to taxation.

*Conclusion*

1. Having considered all the documents and submissions of both parties, I allow the application and the Order Nisi be varied to:-
2. the plaintiff do pay the defendant’s costs of this action including all costs reserved, from the date of the service of the writ up to 9 June 2014, on party and party basis, to be taxed if not agreed;
3. the plaintiff do pay the defendant’s costs of this action including all costs reserved, from 10 June 2014 up to the date of the Judgment (both dates inclusive), on an indemnity basis, with certificate for counsel, to be taxed if not agreed;

(3) the plaintiff do pay the defendant enhanced interest on the following disbursements (such disbursements are subject to be taxed, if not agreed) at the rate of 9% per annum from the respective dates of payment of the said disbursements up to the date of the Judgment : -

Particulars Date of payment

(i) Half share of mediator's fee 14 October 2014

(ii) Counsel's fee 15 January 2015

(4) the plaintiff's own costs be taxed in accordance with the Legal Aid Regulations.

1. The Order Nisi as varied above is made absolute.
2. I make an order nisi for the costs of this application, including this hearing, be to the defendant on an indemnity basis, with certificate for counsel, to be taxed if not agreed. The plaintiff's own costs be taxed in accordance with the Legal Aid Regulations.

( M Lam )

Deputy District Judge

Mr Roland Lau, instructed by Tse Yuen Ting Wong, assigned by the Director of Legal Aid, for the plaintiff

Mr C K Wong, instructed by John Lam, Law & Co, for the defendant