#### DCPI 1971/2013

[2018] HKDC 688

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1971 OF 2013

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##### BETWEEN

KONG KAM YUEN Plaintiff

### and

YIM TO KEUNG 1st Defendant

GUANGZHOU COURIER SERVICE

(H.K.) COMPANY LIMITED 2nd Defendant

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Before: Deputy District Judge Jonathan Chang in Chambers (Open to Public)

Date of Hearing: 11 June 2018

Date of Decision: 11 June 2018

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DECISION

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1. I have before me a summons taken out on 30 April 2018 by the defendants to vary the costs order *nisi* made in my judgment dated 16 April 2018 on the basis that the plaintiff has failed to achieve a higher award after trial than the sanctioned payments made by the defendants on 2 March 2015, 13 January 2016 and 3 March 2016 whereby a total sum of $357,000 had been paid into court.
2. The total award made in my judgment in favour of the plaintiff was $159,025. The plaintiff failed to beat the defendants’ first sanctioned payment which was in the sum of $200,000. The last day for the plaintiff to accept the first sanctioned payment without leave of the court fell on 30 March 2015. The defendants therefore ask for an order that the defendants pay the plaintiff’s costs of the action only up to 30 March 2015, and thereafter the plaintiff do pay the defendants’ costs of the action on an indemnity basis, to be taxed if not agreed, with certificate for counsel.
3. The defendants also ask for interest on disbursements at 9% per annum from the respective dates of payment of the disbursements up to the date of judgment.
4. I have no difficulty in awarding costs of the action to the defendants from 31 March 2015 onwards on an indemnity basis to be taxed if not agreed with certificate for counsel. The only ground advanced by Mr Yuen for the plaintiff to resist such an order is that the plaintiff is applying for leave to appeal against my judgment such that any variation of the costs order *nisi* would be pre-mature. I do not agree. The fact that my judgment may be subject to an appeal is no basis not to vary the costs order *nisi* in accordance with Order 22 of the Rules of the District Court so as to finally dispose of the action.
5. It follows that interest on the judgment sum should only be accrued up to and including 30 March 2015, and thereafter no interest be allowed. I so order. In this regard, at the hearing I pointed out to the parties that I made an error in [39] and [40] of my judgment where I awarded interest for general and special damages only up to the date of trial. Both parties agreed that interest should be awarded up to the date of judgment. Given there is no dispute on this between the parties, I hereby amend my judgment under the slip rule to such effect. The order I made today disallowing interest from 31 March 2015 onwards will be covered in a separate order.
6. I have trouble with the defendants’ claim for interest on disbursements. In my judgment in *Cheung Shuk Han v Chik Wai Yin* [2013] 4 HKC 311 at [34], I pointed out that where a party seeks an order for interest on costs, there must be evidence before the court to show that the party was actually out of pocket by payment of costs to his solicitors on account ahead of trial. At today’s hearing, the defendants produced a draft affirmation of Fong Yuk Lin who is the handling solicitor for the defendants to exhibit two receipts of disbursements, from Dr Peter Ko for rendering his orthopedic expert report, and from Ms Lui for her counsel’s fee at trial. There is however no evidence that the defendants have paid either sum upfront to their solicitors such that they could be regarded as being out of pocket to justify any interest on these two sums. I therefore decline to make such an order.
7. Finally, the defendants seek an order that the total sanctioned payments do remain in court until further order as security for the plaintiff’s as well as the defendants’ costs in this action pending taxation. In effect, this amounts to ordering the plaintiff to provide security for the defendants’ costs pending taxation. No basis for such an order was put forward by the plaintiff or could be made out in counsel’s argument. I decline to make such an order.
8. Costs of the defendants’ summons shall be to the defendants, to be taxed if not agreed on a party and party basis, with certificate for counsel. The plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations.

( Jonathan Chang )

Deputy District Judge

Mr Carl Yuen, instructed by Alan Wong & Co, assigned by the Director of Legal Aid, for the plaintiff

Ms Ann Lui, instructed by Munros, for the 1st and 2nd defendants