# DCPI 1985/2013

[2019] HKDC 1205

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1985 OF 2013

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BETWEEN

CHAN KWOK KUEN Plaintiff

and

ACTIONSPORTS INTERNATIONAL LIMITED Defendant

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Before: Deputy District Judge K. C. Chan in Chambers

Dates of Written Submissions: 31 May, 5 July and 15 July 2019

Dates of Further Written Submissions: 24 and 30 August 2019

Date of Decision (Paper Disposal): 16 September 2019

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DECISION ON INTEREST AND COSTS

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1. After a 7-day trial and on 30 April 2019, this court handed down its judgment in which the defendant was held fully liable for the injuries sustained by the plaintiff at work on 26 March 2012 and the plaintiff was awarded damages in the total sum of HK$462,200.30 (after netting HK$24,455.70 of salary and expenses received) (“the Judgment”). The question of interest and costs was in the circumstances left to be decided by paper disposal.
2. Certain matters and various correspondences were referred to in counsel’s written submissions but the correspondences and the documents pertaining to those matters were not placed before the court. I directed a proper bundle to be lodged; but over the contents of which parties disputed. The disputed documents were then directed to be lodged *de bene esse* together with another round of short written submissions addressing the dispute.

*Costs of the action be taxed on indemnity basis*

1. The plaintiff asks the costs of the action be taxed on indemnity basis because of the defendant’s conducts and on the basis of the settlement offers made. It is convenient for me to deal with the first limp here and the settlement offers later.
2. The principles governing the award of costs on indemnity basis are trite (see §62/App/12 *Hong Kong Civil Procedure 2019*). The discretion to so order is not to be fettered or circumscribed beyond the requirement that it must be appropriate. Instances when indemnity costs would be properly ordered include where the proceedings were scandalous or vexatious or when they were instituted or prosecuted maliciously, oppressively, or for an ulterior motive, or in such circumstances as to constitute an affront to the court. Same considerations apply when proceedings were prosecuted as well as defended.
3. One such instance when the court would express its disapproval by ordering costs to be taxed on indemnity basis is when accusations of fraud or dishonesty were levied when they were unsupported by evidence or ought never to have been made in the first place (for example: in *Tam Chi Kok Gabriel v Fok Eugina* HCA 1859/1992, unrep, 12 June 2003, DHCJ  A  Cheung (as he then was), *Hobbins v Royal Skandia Life Assurance Ltd* [2012] 1 HKLRD 977 @1002 and *Ricoh Hong Kong Limited v Wallbanck Brothers Securities (Hong Kong) Limited* DCCJ  2454/2013, unrep, 25 June 2015, HHJ Andrew Li).
4. As I introduced in paragraph 2 of the Judgment, the defendant’s main defence against liability was that all the plaintiff’s allegations, in its own words, “are and form part of pre-meditated, deceptive and fraudulent allegations and claims”[[1]](#footnote-1).
5. The defendant’s detailed allegations of fraud were summarized in paragraphs 14 and 15 of the Judgment. Succinctly, the defendant’s case was that it was never part of the plaintiff’s job description to perform manual labour, he in fact had been expressly told by the defendant not to participate in manual labour, the installation works at the Site were performed by a sub-contractor, workers employed by the sub-contractor expressly and strongly admonished the plaintiff not to be involved in moving the barrel in question, but the plaintiff either had not touched the barrel at all or had approached the barrel and pretended to be involved by barely touching it, he then feigned injury and colluded with Dr Lai (whom the defendant also accused of fraud) to obtain fake sick leave certificates and then fraudulently made this claim; and that this deception was pre-meditated in that the plaintiff had more than once enquired with the defendant about his medical insurance coverage, that his knee was in fact injured in a football game some time ago, and in a separate occasion in relation to the defendant’s business the plaintiff had attempted to solicit bribe and obtain advantage.
6. As set out in the Judgment, I found against the defence case in its entirety. Notably, in relation to the following matters purportedly in support of the allegation of fraud:-
7. The sub-contractor point was totally bogus as every defence witness readily accepted that there was no sub-contractor and every worker involved was the defendant’s employee. This bogus allegation necessitated the calling of Lee which otherwise would be totally unnecessary. It wasted preparation and trial time.
8. The allegation that the plaintiff had asked more than once about the medical insurance coverage was another completely bogus accusation unsupported by any evidence.
9. Benny Choi, the defendant’s employee holding the position of Project Manager, had in fact carried out an investigation the next day after the accident and, according to Amo, made written records of what the workers said. Benny concluded by declaring for the defendant in Form 2 that the plaintiff had suffered an accident while transporting material. The defendant itself also produced to the Labour Department 2 Chinese statements respectively signed by坤爺and Chen Kong which described certain details as to how the accident happened which essentially matched the plaintiff’s account[[2]](#footnote-2). These 2 Chinese statements are clearly contemporaneous statements. Yet, the defendant completely ignored these pieces of documentary evidence and levied and vehemently maintained these accusations of fraud against the plaintiff.
10. Instead, the defendant proffered the witness statement of Amo containing mainly hearsay of allegedly what other workers said which Amo had not made any record of but was asked to recall for the first time 3 years later when he made the witness statement.
11. Ng and Chan, the two defence witnesses who were workers present at the time of the accident essentially changed their stance about the allegation that the plaintiff was not involved in moving the barrel when they were confronted with the said 2 Chinese statements. It seems to me therefore that they had not been shown the 2 Chinese statements by the defendant when they prepared and signed their witness statements.
12. The allegation that the plaintiff in fact sustained his present knee injuries in a football game prior to the accident was totally improbable and unsupported by any objective or expert evidence. This must have been obvious to the defendant very early in these proceedings.
13. The very serious accusation that the plaintiff had on a separate occasion attempted to solicit bribe and obtain advantage had been reported by the defendant to the ICAC but no action whatsoever was taken by ICAC. Yet, the same allegation was levied and repeated in this action, and it was only reluctantly dropped when the court pressed counsel for the defendant for the evidentiary basis and relevance thereof.
14. The accusation of fraud against Dr Lai was totally unfounded and scandalous. Quite the contrary, the orthopedic experts confirmed the plaintiff’s injuries as those diagnosed by Dr Lai and his treatment and surgery proper and successful. In the same vein, the accusation that the plaintiff obtained fake sick leave certificates from Dr Lai was totally unfounded and scandalous.
15. Therefore, I have no hesitation to find that the defendant’s allegations of fraud against the plaintiff were not only unsupported by evidence, but indeed were contradicted by its own documentary evidence and that these allegations of fraud ought never to have been made.
16. Mr Clough further refers me to:-
17. Various emails written by Mr Bach to the plaintiff from early April 2012 to February 2013[[3]](#footnote-3) in which were contained contents Mr Clough describes, which I agree, as “excessive rudeness and verbal abuse” and “not only insulting but threatening in nature”;
18. Correspondence by the defendant to the Labour Department essentially accusing the plaintiff of staging a false claim and asking the Labour Department to investigate against the plaintiff; and
19. Correspondence by the defendant to the Legal Aid Department essentially accusing the plaintiff of the same thing and asking the Legal Aid Department to discharge the aid granted to the plaintiff.
20. Regarding those emails, in evidence Mr Bach has tendered an apology for the language though he maintained the allegations of fraud. In relation to the other correspondences, the defendant’s such aggressive moves by so writing to various government departments might be understood if it really had a **genuine grievance substantiated by reliable and cogent evidence**. Here, as I mentioned, the defendant’s own documentary evidence it already possessed at the time would dispel any suggestion of fraud, which evidence apparently it had completely ignored and chose to levy such unfounded and serious allegations against the plaintiff not only in the present action, but also to the said government departments. I have no doubt that these emails and correspondences were sent to unduly pressurize the plaintiff. I find the defendant such conduct oppressive.
21. The defendant submits that it was entitled to pursue its defence and was not unreasonable in, and should not be penalized for, pursuing albeit weak defences. It relies on  *Heung Wing Yan v Hangway Housing Management Ltd*[[4]](#footnote-4) in which Deputy High Court Judge Marlene Ng (as she then was) at §19 has this to say:-

“Although the discretion to award indemnity costs is unfettered and uncircumscribed, there must be some special or unusual feature in the case to justify an order for indemnity costs. I accept indemnity costs are no longer limited to cases where a party’s conduct lacks moral probity or deserves moral condemnation for which the court wishes to express disapproval. But such conduct must be “unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight …… It follows from all this …… it will be a rare case indeed where the refusal of a settlement offer will attract …… not merely an adverse order for costs, but an order on an indemnity rather than standard basis”. Further, whilst pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order.”

1. Without a doubt there is here no dispute with the broad principle that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs.
2. The defendant’s said submission, however and with due respect, completely missed and side-stepped the point here - that unfounded accusations of fraud that ought never to have been made and maintained as well as oppressive conducts should be met with the court’s disapproval. It is evident, and must have been so to the defendant, that what it did with these accusations of fraud were **much more than** properly defending the issues in the claim, these accusations of fraud attacked the character and integrity of the plaintiff, they alleged deceitfulness and dishonesty on his part; if established, these accusations would carry serious adverse consequences for his reputation and life. Likewise, those oppressive emails and correspondences were maneuvers not to properly defend the claim, but to, if you will, “hit below the belt”. Such conducts this court finds an affront.
3. This is a clear case to order indemnity costs to show disapproval. Though the defendant’s conduct in defending the quantum case was reasonable but it was relatively uncontested and straight forward, and much less time and costs were spent thereon. In the round, I find it appropriate to order the defendant to pay the costs of this whole action to be taxed on an indemnity basis.
4. For the sake of completeness, I should also deal this briefly. Mr Clough also refers me to certain correspondences and transcripts relating to DCEC 183/2013, the plaintiff’s application for employees’ compensation, to show the defendant’s conduct. This is objected to by the defendant. In the circumstances of this case I declined to and did not refer to them as the defendant’s conduct there would have been regulated by the court in that set of proceedings, and it would potentially be unfair to the defendant in that it might be penalized twice for the same set of conduct if I also consider it here.

*Settlement offers not sanctioned offers – no O 22 r 24 consequences*

1. The plaintiff made two purported sanctioned offers by letters to the defendant’s solicitors respectively dated 5 September 2014 (“the 1st Offer”) and 21 September 2018 (“the 2nd Offer”).
2. I set out in full the contents of these two letters:-
3. The First Offer:-

“Dear Sir, **WITHOUT PREJUDICE**

**SAVE AS TO COSTS**

**Re : DCPI No. 1985 of 2013**

**DCEC No. 183 of 2013**

**Plaintiff/Applicant : Chan Kwok Kuen**

We refer to captioned matters.

Solely for the sake of an early out of court settlement and to save further costs, we are instructed not [sic] negotiate back and forth but to put forward our client’s best offer in full and final settlement of our client’s claim herein:-

1. HK$450,000.00 (inclusive of interest but on top of periodical payments received); plus
2. costs and disbursements to of [sic] two actions totaling HK$100,000.00; plus
3. Legal Aid Taxation of Plaintiff’s own costs.

**This is a sanctioned offer made pursuant to Order 22 rule 5 of the Rules of District Court.**

Please take note that this sanctioned offer is open for acceptance within 28 days.

Thank you for your attention and we look forward to your favourable reply soon.

Yours faithfully,

**B. Mak & Co.**” (original emphases)

1. The 2nd Offer:-

“Dear Sirs, **SANCTIONED OFFER**

**WITHOUT PREJUDICE**

**SAVE AS TO COSTS**

**Re : DCPI No. 1985 of 2013**

**DCEC No. 183 of 2013**

**Plaintiff/Applicant : Chan Kwok Kuen**

We refer to captioned matter [sic].

**This is a sanctioned offer made pursuant to Order 22 rule 5 of the Rules of District Court.**

Solely for the sake of an early out of court settlement and to save further costs, we are instructed to put forward our client’s best offer of **HK$275,000.00 (Two Hundred Seventy-Five Thousand Hong Kong Dollars)** on top of any EC payment received, inclusive of interest, plus costs to be taxed if not agreed in full and final global settlement of our client’s common law damages (“PI”) and employees compensation (“EC”) proceedings.

**Please note that if your client accepts our client’s sanction offer after the expiry of 28 days from the date of this sanction offer, your client may only accept it if (a) the parties agree on the liability for costs; or (b) the Court grants leave to accept it.**

Thank you for your attention and we look forward to hearing from your soon.

Yours faithfully,

**B. Mak & Co.**” (original emphases)

1. The defendant submits that these two purported sanctioned offers have not strictly complied with O 22 r 5, and I quote the relevant part:-

“…

(7) A sanctioned offer made not less than 28 days before the commencement of the trial must provide that after the expiry of 28 days from the date the sanctioned offer is made, the offeree may only accept it if –

(a) the parties agree on the liability for costs; or

(b) the Court grants leave to accept it.

(8) A sanctioned offer made less than 28 days before the commencement of the trial must provide that the offeree may only accept it if –

1. the parties agree on the liability for costs; or
2. the Court grants leave to accept it.”
3. The 1st Offer, which was made more than 28 days before the commencement of trial, has not so complied as it has not expressly provided that after the expiry of 28 days from the date the sanctioned offer is made, the offeree may only accept it if (a) the parties agree on the liability for costs; or (b) the court grants leave to accept it – as required by O 22 r 5(7).
4. The 2nd Offer, which was made less than 28 days before the commencement of trial, has not so complied as it has not expressly provided that the offeree may only accept it if (a) the parties agree on the liability for costs; or (b) the court grants leave to accept it – as required by O 22 r 5(8).
5. Mr Clough rightly did not seriously contest this. I find the 1st Offer and the 2nd Offer have not complied with the requirements set out in O 22 r 5.
6. It is now well established that the requirements in O 22 r 5 must be strictly complied with or else the offer does not qualify as a sanctioned offer within the meaning of O 22 and the consequence is that the offeror, though having done better than his offer, cannot then rely on the provisions in O 22 r 24 as to costs and other consequences (§22/5/A Hong Kong Civil Procedure 2019, *Kwok Chun Wing v 21 Holdings Ltd* [2011] 3 HKC 542, *Montrio Ltd v Tse Ping Shun David* HCA 757 of 2009, unrep, 17 February 2012, Jeremy Poon J (as he then was)).
7. It follows that the plaintiff is not entitled to rely on O 22 r 24. I therefore have to refuse the plaintiff’s request to order interest on the plaintiff’s costs and interest at an enhanced rate on the sum awarded to the plaintiff.
8. Compelled by the circumstances of this case, Mr Clough attempts to persuade this court to visit the defendant with the same consequences provided by O 22 r 24 through the exercise of the court’s general discretion on costs and interest, even though the plaintiff cannot avail himself of that provision. There is cited no authority supporting the exercise of the discretion in such a manner. I do not think it right or the court has power so to do. I am content to follow the observation of Jeremy Poon J (as he then was) in Montrio that “Other than the specific provisions in [O 22] rule 24, the court does not have any power to award enhanced interest on either the judgment sum or costs.” (at §10 of judgment).

*Interest on damages*

1. Other than the above, the plaintiff has not advanced any other position in respect of the rate of interest or the period for which interest should be awarded, I therefore will make the usual award of interest as below.

*Disposition*

1. For the above reasons,
2. I award the plaintiff interest on general damages at 2% per annum from the date of writ to the date of judgment, on pre-trial loss of earnings and special damages at half judgment rate from the date of accident to the date of judgment, then on all sums at judgment rate from date of judgment until full payment; and
3. I order the defendant to pay the plaintiff costs of this whole action, including any costs reserved, to be taxed on an indemnity basis with certificate for counsel.
4. I regard sorting out the interest and costs as part of the trial, but this part being quite distinct and there is nothing unreasonable in the defendant’s conduct thereof, in the round I think it fair and make an order *nisi* that the costs of and incidental to the issues of interest and costs be paid by the defendant to the plaintiff on a party and party basis with certificate for counsel. This order *nisi* will become absolute unless an application to vary is made within the next 14 days.
5. The plaintiff’s own costs will be taxed according to Legal Aid Regulations.
6. I thank counsel for the plaintiff and solicitors for the defendant for their assistance.

( K. C. Chan )

Deputy District Judge

Mr Neal Clough, instructed by B. Mak & Co, assigned by the Director of Legal Aid, for the plaintiff

Tanner De Witt, for the defendant

1. §17 of the Defence [↑](#footnote-ref-1)
2. See paragraphs 33 to 39 of the Judgment [↑](#footnote-ref-2)
3. pp 251 to 282 of Trial Bundles [↑](#footnote-ref-3)
4. HCPI 347/2012, unrep, 14 February 2017 [↑](#footnote-ref-4)