## DCPI 2013/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2013 OF 2014

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##### BETWEEN

WONG KA CHI Plaintiff

### and

CHEUNG LI GLASS ENGINEERING

COMPANY LIMITED 1st Defendant

KAM KEE STEEL’S WORKS LIMITED 2nd Defendant

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Before : His Honour Judge Andrew Li in Chambers (Open to the public)

Date of Hearing : 13 March 2015

Date of Decision : 24 March 2015

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DECISION

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1. This is the defendants’ appeal against a master’s decision for an order made under Order 22, rule 20(1) of the Rules of the District Court (“RDC”).

*INTRODUCTION*

1. By a summons dated 13 November 2014, the defendants applied under the said rule seeking the plaintiff to pay the defendants costs of the proceedings and the costs of and occasioned by the application. By an Order dated 3 February 2015, Master CH Li (“the master”) dismissed the defendants’ application and ordered the defendants to pay the plaintiff’s costs of the application.
2. The defendants now appeal against the master’s decision pursuant to Order 58, rule 1 of the RDC.

*BACKGROUND*

1. This action arose out of an accident where the plaintiff was injured at work on 8 October 2012. His right ankle was cut by a piece of a broken glass during the accident. As a result, the plaintiff received treatments at various public hospitals and had taken sick leave.
2. On 20 November 2013, the plaintiff signed a Claim Discharge Form and acknowledged receipt from the insurer of the defendants, Falcon Insurance Company (Hong Kong) Limited (“the Insurer”) a sum of HK$100,000 plus costs at the District Court scale to be taxed if not agreed in full and final settlement of any employees’ compensation claim made or to be made by the plaintiff.
3. On 17 January 2014, the Insurer sent two letters to the plaintiff’s solicitors Messrs Kenneth W. Leung & Co (“the plaintiff’s solicitors”). In the first letter, the Insurer admitted liability on behalf of the defendants and agreed to appoint Dr Tio Man Kwun Peter to conduct a medical examination on the plaintiff and to prepare a single joint medical report on behalf of the parties. In the second letter, which was marked “without prejudice save as the costs”, the Insurer offered to pay HK$270,000 (inclusive of HK$100,000 already paid by way of employees’ compensation) plus costs at the District Court scale to be taxed if not agreed in full and final settlement of the plaintiff’s intended common law claim in connection with the accident (“the 1st Offer”).
4. The plaintiff’s solicitors did not respond to the 1st Offer.
5. On 17 May 2014, the plaintiff was examined by Dr Tio. On 22 June 2014, Dr Tio’s report was made available to the plaintiff.
6. On 10 July 2014, the Insurer wrote another letter to the plaintiff’s solicitors marked “without prejudice save as to costs”, again offered the same amount of HK$270,000 (inclusive of HK$100,000 employees’ compensation already paid) plus costs at the District Court scale to be taxed if not agreed in full and final settlement the plaintiff’s intended common law claim (“the 2nd Offer”).
7. On 11 September 2014, the plaintiff through his solicitors rejected the 2nd Offer.
8. On the same day, the plaintiff issued the writ of summons herein together with the statement of damages herein which was served on the defendants. A claim of HK$339,563 (net of HK$100,000 employees’ compensation already paid) was made against the defendants.
9. On 6 October 2014, the defendants’ solicitors served a notice of sanctioned payment on the plaintiff’s solicitors stating that the defendants had paid a sum of HK$170,000 (on top of the employees’ compensation received by the plaintiff in the sum of HK$100,000) in court in settlement of the whole of the plaintiff’s claim in the proceedings (“the Sanctioned Payment”). In other words, the Sanctioned Payment was in identical terms as those stated in the 1st Offer and the 2nd Offer, save on the costs aspect.
10. On the same date as the Sanctioned Payment was made, the defendants’ solicitors wrote to the plaintiff’s solicitors indicating that the defendants would apply to the court for a costs order that the plaintiff shall pay the defendants’ costs in the event that the Sanctioned Payment is accepted. The relevant part of that letter reads as follows:

“*We write to put on record that our client had made a settlement offer on 17 January 2014 that our client is prepared to pay to your client the sum of HK$170,000.00 on top of the advanced EC payment received in the sum of HK$100,000.00. The said offer had not been accepted by your client.*

*Given the aforesaid facts, we are instructed to give you formal notice that* ***if your client accepts the sanctioned payment made herein, our client would apply to the Court for a costs order that your client shall pay for the defendants’ costs of this proceeding by invoking the otherwise proviso under O 22 r 20(1) of the Rules of the District Court*** *on the ground that your client has incurred unnecessary costs.*” (Emphasis added)

1. On 31 October 2014, the plaintiff’s solicitors filed a notice of acceptance of sanctioned payment and accepted the Sanctioned Payment.
2. On 13 November 2014, the defendants took out the summons to seek costs of the proceedings and the application against the plaintiff.
3. Between 14 November 2014 and 4 December 2014, there had been some without prejudice discussions between the parties as to whether the defendants would agree to withdraw the summons to seek costs subject to certain terms and conditions. However, the parties were unable to agree to the terms of the settlement.
4. On 3 February 2015, the hearing took place before the master when the defendants’ summons was dismissed.

*DISCUSSION*

*Applicable Legal Principles*

1. Order 22, rule 20(1) of RDC states:-

“Where a defendant’s sanctioned offer or sanctioned payment to settle the whole claim is accepted without requiring the leave of the Court, the plaintiff is entitled to his costs of the proceedings up to the date of serving notice of acceptance, unless the Court otherwise orders.”

1. The law on this particular rule, namely, of how the court should exercise the discretion under the phrase “unless the Court otherwise orders” (“the Otherwise Proviso”) has recently been analyzed by Jeremy Poon J in *Etratech Asia-Pacific Ltd v Leader Printed Circuit Boards Ltd* [2013] 2 HKLRD 1184. At §§14 to 26 (pp 1189 to 1192) of the judgment, the learned judge laid down the proper approach in the operation of Order 22, rule 20(1). The following passages from the judgment are relevant to this case:-

“18. In my view, O 22 r 20(1) plainly envisages that upon acceptance of the sanctioned payment or sanctioned offer, the plaintiff is, as a prima facts rule, entitled to his costs of the proceedings up to the date of serving notice of acceptance. The *prima facie* rule may, however, be displaced when the court orders otherwise by applying the Otherwise Proviso.

………

20. By virtue of the Otherwise Proviso, the court retains the discretion to depart from the *prima facie* rule where necessary. But the discretion should only be exercised in exceptional circumstances that clearly warrant a different costs order. Otherwise, the certainty as to costs consequences created by the *prima facie* rule, one of the very important features underpinning the effectiveness of sanctioned payments and sanctioned offers, will be greatly diminished.

21. While it is impossible and indeed imprudent to exhaustively state the exceptional circumstances that justify the departure from the *prima facie* rule, which by definition must be rare, the burden rests squarely on the party seeking to invoke the Otherwise Proviso to establish such circumstances. The court will not lightly displace the *prima facie* rule until and unless the applicant has discharged the burden to its satisfaction.

……….

23. Further, when applying the Otherwise Proviso, the court is in effect depriving the plaintiff of his costs or even ordering him to pay the defendant’s costs. The plaintiff will be significantly disadvantaged. In my view, fairness dictates that the plaintiff, who is considering whether to accept the sanctioned payment or sanctioned offer, should be given a prior warning that the defendant will apply to invoke the Otherwise Proviso and how it is to be invoked. The plaintiff can then make an informed decision whether to accept the payment or offer with the full knowledge that upon acceptance, the *prima facie* rule on his entitlement as to costs may be displaced. Further, if a defendant is allowed to invoke the Otherwise Proviso without giving the prior warning, a plaintiff who has accepted the payment or offer on the faith of being entitled to recover his costs up to the date of serving notice of acceptance would never know if at the next moment the defendant would apply for a different costs order. The certainty as to costs created by the *prima facie* rule will be gone. Faced with the uncertainty as to costs, the plaintiff would be greatly handicapped in deciding if he should accept the payment or offer in the first place. It would render the operation of sanctioned payments and sanctioned offers ineffectual.

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26. In sum, the *prima facie* rule in O 22 r 20(1) should apply unless (1) the defendant discharges the burden of showing exceptional circumstances that justify a departure; and (b) he has given a prior warning to the plaintiff that he will apply to invoke the Otherwise Proviso upon acceptance of the sanctioned payment or sanctioned offer.”

1. In that case, the court held there was no exceptional circumstances which would justify a departure from the normal rule. The court held the alleged exaggerated claim of the plaintiff would not constitute to exceptional circumstances. The court further held that the defendant in that case had not discharged the burden of showing exceptional circumstances to apply the Otherwise Proviso.
2. In the unreported case of *Fung Yim Chun & Another v Fung Kui Wah*, HCA 115/2010, (Deputy High Court Judge Burrell; 3 April 2012), an application for costs was made under the same rule. The learned judge considered a number of unusual features in that case, which included, *inter alia*, the following:-
   1. that the terms of the defendants’ offer are the same terms of the ultimate settlement; and
   2. the plaintiff rejected that offer, solely on the ground of costs, and then returned precisely back to the defendants.
3. The other features were unique to the facts of that case. The learned judge, having considered the history of the entire dispute and particularly bore in mind what he called the “unusual features” in that case, held that it was a case which would fall into the category catered for by the word in Order 22, namely the Otherwise Proviso.

*Evidence filed by the parties*

1. The way in which the evidence has been filed in this case was rather unusual and warrants some brief mentioning here.
2. Instead of the defendants filing an affidavit/affirmation in support of their application at the time when they took out the summons to seek costs under O 22 r 20(1), the plaintiff’s handling solicitor Ms Leung Chick Yin Teresa first filed an affidavit on behalf of the plaintiff on 5 December 2014 (“Leung’s 1st affidavit”). Then on 9 December 2014, which was the date originally fixed for the hearing of the summons, Master J Chow by consent ordered the defendants to file an affirmation in reply within 21 days from the date of her order. The plaintiff was ordered to file and serve his affirmation/affidavit in reply, if necessary, within 21 days thereafter. It was also ordered that no further affirmation shall be filed without leave of the court.
3. Pursuant to be said order, the defendants’ solicitors filed the affirmation of Au Siu Yin on behalf of the defendants on 17 December 2014 (“Au’s affirmation”). The plaintiff’s solicitors filed the 2nd affidavit of Leung Chick Yin Teresa on behalf of the plaintiff on 7 January 2015 (“Leung’s 2nd affidavit”) in reply to matters raised in Au’s affirmation.
4. As it is the defendants who are trying to invoke the Otherwise Proviso in this case, the burden is for them to establish exceptional circumstances. Hence, it seems to me odd that it was the plaintiff who had chosen to file Leung’s 1st affidavit in this case first. The plaintiff’s solicitor explanation is that as up to a few days before the original scheduled date of hearing they had not seen any evidence filed by the defendants, therefore in opposing the summons and without knowing what grounds the defendants were going to rely on to invoke the Otherwise Proviso, the plaintiff filed Leung’s 1st affidavit. According to the plaintiff, Leung’s 1st affidavit purportedly set out the background of the case and the circumstances under which the Sanctioned Payment was accepted.
5. In my judgment, it matters very little which party will file the affirmation/affidavit in such application first. Although normally one would expect the party who takes out the summons will file the evidence in support of its application, this is not an inflexible rule. The more pertinent point being that the party who invokes the Otherwise Proviso under the rule bears the burden to establish the exceptional circumstances as required: see §21 of *Etratech, supra.* So long as the defendants consider that they will able to do so by simply referring to the pleadings alone in the case, it is up to them whether they want to file any affirmation/affidavit in support of their applications. However, I would consider that the situations are extremely rare when a party who bears the burden to establish exceptional circumstances in such a case will able to succeed without filing any evidence in support.
6. Given the circumstances, I can quite understand why the plaintiff’s solicitors chose to file Leung’s 1st affidavit in this case first. Anyway, evidence was eventually filed by the defendants pursuant to Master J Chow’s order in this case. Thus, by the time of the substantive hearing before the master, all the materials facts have been made available to the court.

*Solicitors making affidavit on behalf of their clients*

1. Another unusual feature regarding the evidence filed in this case is the fact that, instead of the plaintiff himself making an affirmation to explain the background and the “special circumstances” which led to his decision to accept the Sanctioned Payment, it was the plaintiff’s handling solicitor who had made the 2 affidavits on his behalf.
2. For many years, the courts in Hong Kong have been frowning on the practice of the solicitors in filing affidavits on behalf of their clients when the solicitors may not have personal knowledge on the matters deposed to.
3. In the Court of Appeal case of *Leung Kin Fook and others v Eastern Worldwide Co Ltd* [1991] 1 HKC 55, the defendant applied to amend its pleadings to strike out certain admissions in its defence. The solicitor for the 1st defendant made an affidavit in her own name to offer explanations for the amendments. The Court of Appeal, consisted of Power JA, Kempster JA and Nazareth J, refused to admit the affidavit. Power JA (as his Lordship then was) held at 59D-G the following:-

“The defendant was well aware that this application would be strictly contested and that the onus was on him to place before the court in accordance with the rules an explanation as to how the mistake had come to be made. There could have been no misapprehension that, as often occurs, strict compliance with the rules would be overlooked. It was incumbent upon [the defendant’s solicitor] in such circumstances to comply with O 41 r 5(2) indicating with reasonable particularity the sources of her information. In circumstances such as these, where the defendant was relying upon the making, be someone, of a mistake of some magnitude, the statement by [the defendant’s solicitor] that the information upon which reliance was being placed had been derived by her ‘in the course of my conduct of action’ fell considerably short of the particularity required. The judge was, I am satisfied, wrong to have admitted the Affidavit. *It is not necessary to determine whether the explanation was convincing and credible as, without the Affidavit, there is no explanation*. The application should, in the premises, have been dismissed.” (emphasis added)

1. The position has not changed in the post-CJR era. In *UES International (HK) Ltd v Maritima Maruba SA* HCA 632/2011, unreported (Anthony Chan J; 19 November 2013), the court heavily criticized the situation where a solicitor gave evidence on behalf of his client on contentious matters in respect of which he or she may be subject to cross-examination. At §§13-15 of the decision, the learned judge stated the following which are relevant to our present case:-

“13. I regret to say that this is not the only inappropriate action taken by the plaintiff’s solicitor. On the material before the court, the plaintiff’s solicitor has made a total of 7 affidavits on behalf of the plaintiff, including the one which grounded the Injunction (“Tsui 1st”) and those in relation to the present Summonses. Some of the contents of the affidavits are highly controversial and some of which are submissions made to advance the case of the plaintiff. It cannot be the role of a professional advisor to give evidence on contentious matters in respect of which he may be subject to cross-examination.

14. Rubric 41/5/4 of HKCP states follows:

“……An affidavit should where possible be sworn by the person with the most direct knowledge of the matters deposed to. This will usually be the party rather than his solicitors.”

15. In my view, solicitors should only give evidence on behalf of their client as a matter of exception which can be justified. As an example, where documents were served by a solicitor, it would be proper for him to make an affidavit to verify that matter. However, even where the client is abroad and his affidavit cannot be perfected in time, a draft of the same can be exhibited to that of his solicitor. As will be seen below, a failure to adhere to the proper practice and procedure can be detrimental to the administration of justice.”

1. I cannot agree more with what Anthony Chan J said in *Leung Kin Fook*. In my judgment, there is no good reason why the plaintiff in this case could not have explained the alleged “special circumstances” himself which now appear in Ms Leung’s affidavits. The matters deposed to by Ms Leung are clearly not within her personal knowledge and she could not be subject to cross-examination on those contentious issues. Although she might be authorized to make the affidavits on behalf of the plaintiff, this is not a good reason why she should have done that when the plaintiff himself was available to make the affirmation/affidavit himself. Given the fact that the plaintiff was able to sign a statement of truth to the statement of damages on the date before he rejected the 2nd Offer and instructed his solicitors to commence the present proceedings, on the same day, I do not see any good reason why the plaintiff could not have made those affidavits himself.
2. The above in my view are very different from situations where a party is applying for injunctive reliefs like a Mareva injunction when a party resides overseas and the application is urgent. In those cases, the courts will be more ready to accept evidence contained in affidavits/affirmations prepared by solicitors for obvious reasons. Thus, the case of *Felix Tschudi v Million Miles Global Limited* (2014), unreported, HCA 318 of 2013 (12 February 2014; To J) relied on by the plaintiff’s solicitor during the hearing can in my view be easily distinguished here.
3. In the circumstances, in my view, it is doubtful whether the matters stated by the plaintiff’s solicitor in her 2 affidavits are admissible. Even if they are admissible, I certainly would view the matters deposed to by her, which should have been given by the plaintiff himself, with a great deal of skepticism and circumspection.

*Whether the defendant has established “exceptional circumstances”*

1. In my judgment, first, it is for the defendants to discharge the burden of showing exceptional circumstances that would justify a departure from the primary rule under Order 22, r 20(1) and not for the plaintiff to show “special circumstances” as he has tried to do through his solicitor’s 2 affidavits in this case.
2. Second, in my view, there are clearly exceptional circumstances in this case which would justify a departure from the plaintiff’s primary entitlement on costs under the rule. The exception circumstances being that the Sanctioned Payment accepted by the plaintiff on 31 October 2014 was in identical terms as those offered to him under the 1st Offer and 2nd Offer (save on the costs aspect). Since those offers were made to the plaintiff more than 9 months and 3 months respectively before the Sanctioned Payment was accepted, had the plaintiff accepted the Insurer’s offer on those two occasions, he would have received exactly the same amount of compensation months ago. Further, had he done that, it would have saved the parties from incurring extra costs and time in dealing with the matter.
3. I accept the defendants’ counsel Mr Nip’s submission that, even if the plaintiff’s legal advisors considered that they might not had been in the position to evaluate the Insurer’s 1st Offer when it was made in January 2014, they would obviously be in the position to do so after they received Dr Tio’s report in June 2014. It is clear that Dr Tio in his report had taken into consideration of all the medical reports and evidence which the plaintiff relies on in the statement of damages. Further, the statement of damages itself refers extensively to Dr Tio’s report and relies on his opinion as foundation of this claim. This included Dr Tio’s recommendation on the length of his sick leave. In my opinion, therefore, with the benefit of Dr Tio’s report, there was no reason why the plaintiff or his legal advisors should not have accepted the 2nd Offer made by the Insurer on 10 July 2014, which was more than two weeks after Dr Tio’s report was made available to the plaintiff.
4. In my judgment, the circumstances in this case are particularly exceptional to justify the court to exercise the discretion under the Otherwise Proviso in favour of the defendants for the following reasons:-
   1. The defendants made not only one, but two pre-action offers to the plaintiff and the pre-action offers are no worse than the Sanctioned Payment subsequently accepted by the plaintiff;
   2. The plaintiff and his legal advisors were in a fully informed position to evaluate the reasonableness of the defendants’ offers in view of Dr Tio’s report. There was no change in the plaintiff’s circumstances in so far as the injuries resulting from the accident in question is concerned. There was also no change on his pain, suffering and loss of amenities, loss of income and loss of earning capacities resulting from the accident;
   3. The plaintiff had not mentioned any “special circumstances” prior to rejecting the Insurer’s 2nd Offer but instead commenced the present proceedings on 11 September 2014. Had he done so, I have no doubt the Insurer would have considered them carefully and may even extend the time for the plaintiff to accept the 2nd Offer. Instead, the plaintiff chose to commence the present proceedings and later on accepted the Sanctioned Payment in the exact amount as contained in the 1st and 2nd Offer; and
   4. The defendants and their Insurer had done all they could in order to achieve an amicable settlement with the plaintiff prior to the action was commenced by the plaintiff.
5. In my opinion, the facts of this case are even stronger than the facts found by Deputy Judge Burrell in *Fung Yim Chun*, *supra*.
6. Thus, I have no hesitation to hold that the defendants in this case have discharged the burden placed on them to show that there are exceptional circumstances for the court to displace the *prima facie* rule under Order 22 r 20(1).
7. In holding that there are exceptional circumstances which would justify the court to exercise the Otherwise Proviso in this case, I also bear in mind the underlying objectives of Order 1A, rule 1 of the RDC which provided the underlying objectives of rules under the CJR:-

“The underlying objectives of these Rules are:

1. *to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;*
2. *to ensure that a case is dealt with as expeditiously as is reasonably practicable;*
3. *to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;*
4. *to ensure fairness between the parties;*
5. *to facilitate the settlement of disputes; and*
6. *to ensure that the resources of the Court are distributed fairly”*
7. I do not see how the plaintiff by rejecting the 1st and 2nd Offer made by the Insurer and then subsequently chose to issue proceedings and then quickly accepted the Sanctioned Payment helps to achieve the underlying objectives laid down in Order 1A in this case. In fact, in my view, he was doing the exact opposite.
8. I think it is time for both the plaintiffs and their legal advisors to wake up to the fact that the court will strictly adhere to the underlying objectives of Order 1A, rule 1 of the RDC, particularly in situations where a party has unreasonably refused to accept offers made at an early or pre-action stage of the proceedings but subsequently choose to accept a sanctioned payment in the exact amount without good reasons.

*“Special circumstances” alleged by the plaintiff’s solicitor*

1. In Leung’s 1st affidavit, she alleged the following “special circumstances” on behalf of the plaintiff:-

“14. Unfortunately, the plaintiff had met with another accident on 15 July 2014 in the course of his employment in which he was rammed into by a reversing lorry driven by his employer when he was doing unloading work. The plaintiff was hospitalized in Tuen Mun Hospital (“TMH”) for approximately 2 months. During his hospitalization, he was unable to be engaged in any gainful employment and has no income since then. Due to his grave financial condition, he has borrowed money from his friend for an approximate sum of HK$100,000.00. There are now produced and shown to me marked “TL-6” copies of the Discharge Slip issued by Dr Yu Pak Him Vincent of TMH, Bill dated 17 July 2014 and 2 Receipts issued by TMH respectively dated 24 and 28 July 2014. It is stated in the said Discharge Slip that the plaintiff had sustained crushing injury of lower limb was admitted to the TMH on 15 July 2014.

………

16. After the plaintiff was discharged from the TMH, his friend made numerous demands for repayment of the debt. The plaintiff has sustained very serious injuries to his legs in the second accident and it is unlikely for him to take up any gainful employment for a long period of time. I confirm that the plaintiff is still on sick leave and there is no way that the plaintiff can earn money to repay his debt. Under such undesirable circumstances, the plaintiff had no alternative but to accept the Sanctioned Payment and a Notice of Acceptance of the Sanctioned Payment filed on 31 October 2014 so that he can obtain the damages to repay his debt owed to his friend and relieve him from heavy financial stress for the time being.

17. Furthermore, the plaintiff intended to have a speedy conclusion of the proceedings in order that he can concentrate on the medical treatment of his injuries sustained in another accident and the potential claim arising out of the same, notwithstanding that the amount of HK$170,000.00 fell far below of the amount of damages he claimed in the Statement of Damages. But for his 2nd accident, the plaintiff could have obtained damages in excess of the amount of the Sanctioned Payment in the sum of HK$170,000.00 having regard to the available medical and other evidence.

18. In the light of the aforesaid, I see no reason why the plaintiff who had met with unfortunate events one after another, should be penalized on costs of the present proceedings.”

1. In my judgment, the alleged “special circumstances” contained in the plaintiff solicitors affidavit should not be taken into consideration in the exercise of discretion under the Otherwise Proviso for the following reasons:-
   1. As said, there was no explanation given by either the plaintiff or his solicitors why the matters deposed to in Ms Leung’s affidavits could not be stated by the plaintiff himself under his own affirmation.
   2. While Ms Leung might be authorized to make the affidavit on behalf of the plaintiff, it is clear that the plaintiff’s own personal circumstances would not be matters within Ms Leung’s personal knowledge and Ms Leung has not explained in her affidavit why she had personal knowledge on the plaintiff’s own personal circumstances.
   3. It has been accepted that information or belief of the deponent, without stating the source of information or belief, and not corroborated by anyone who had personal knowledge (which in this case is obviously the plaintiff), in worthless and cannot be received as evidence: see *Re JL Young Manufacturing Co Ltd* [1900] 2 Ch 753 per Lord Alverstone CJ at §754. When a party relies on an affirmation to offer an explanation, and if the affirmation is not admitted, the court is entitled to rule on the basis that the party has given no explanation: see *Leung Kin Fook*, *supra*.
   4. The relevant contents regarding the alleged “special circumstances” why the plaintiff did not accept the 1st and 2nd Offer are clearly not admissible. As the plaintiff was obviously well enough to sign the general endorsement and the statement of truth of the statement of damages when the present proceedings was issued on 10 September 2014, there was no reason why the plaintiff was not able to make an affirmation by himself around that time.
   5. The plaintiff’s solicitor has failed to exhibit any documentary evidence to support the plaintiff’s allegation that he has borrowed HK$100,000 from his friend after the 2nd alleged accident.
   6. I also note that the 2nd accident alleged by the plaintiff’s solicitor happened on 15 July 2014 while the 2nd Offer was made on 10 July 2014. It was opened for him to accept within 10 days from the date of the offer. According to the medical receipt exhibited to Leung’s 1st affidavit, the plaintiff was only hospitalized up to 27 July 2014 only. There is therefore no reason why the plaintiff or his solicitor could not have accepted the 2nd Offer during the 10 day period. Should the plaintiff or his solicitors considered that he might need further time to consider the matter due to the change in his personal circumstances, there is in my view no reason why they could not have written to the Insurer to ask for an extension of time to accept such offer. The fact that the plaintiff and his solicitor had done nothing to alert the Insurer and the defendants’ solicitors prior to the acceptance of the Sanctioned Payment on 31 October 2014 would not in my view justify the court in exercising the discretion in his favour.
2. Even assuming what the plaintiff’s solicitor has stated in her affidavit is true and those matters are admissible as a matter of evidence, in my judgment, the plaintiff’s explanations still fall far short of the threshold the court would exercise its discretion in his favour.
3. First, the plaintiff’s solicitor alleged the plaintiff met with another accident on 15 July 2014 in the course of his employment with another new employer. Even if that is true, this is a completely new accident which has nothing to do with present accident caused by the defendants in this case. There is no reason why the plaintiff could not have asked his new employer to make periodical payments to him and for him to issue separate proceedings against his new employer.
4. Second, the plaintiff’s injuries sustained in the second accident have nothing to do with the injuries sustained by him in the accident in the present case. Therefore, it has no bearing on the offers made by the defendants or their insurer in this case.
5. Third, whether he has actually borrowed money from another person or was in need of repaying the loan is irrelevant in the consideration of whether the offers made by the Insurer or the defendants should be accepted or not.
6. Last but not least, as nothing in the medical evidence exhibited by the plaintiff’s solicitor indicates that the plaintiff had lost his consciousness or his mental capacity being affected during the second accident, there is no reason why the plaintiff could not have given instructions to his solicitors to accept the 2nd Offer within time.

*CONCLUSION*

1. In conclusion, based on the above, I am of the opinion that the defendants in this case have successfully discharged the burden of showing exceptional circumstances that would justify a departure from the *prima facie* rule under Order 22, rule 20(1) of RDC.
2. Since the defendants had given prior written warning to the plaintiff that they would apply to invoke the Otherwise Proviso before issuing the application to seek costs, there is in my view no reason why the Otherwise Proviso should not apply in this case.
3. In the circumstances, I would allow the appeal of the defendants and set aside the order made by the master on 3 February 2015, including the costs order made on that occasion.
4. Further, I would make an order that the plaintiff should pay the 1st and 2nd defendants’ costs of the proceedings, including the costs of the application before the master below and the costs of the present appeal, such costs to be taxed if not agreed with certificate for counsel. For the avoidance of doubt, due to the relatively straightforward nature of the appeal, I would only allow certificate for one counsel only.

( Andrew SY Li )

District Judge

Ms Teresa Leung Chick Yin, of Kenneth W Leung & Co, for the plaintiff

Mr Norman Nip and Mr Leon Ho, instructed by Au & Associates, for the 1st and 2nd defendants