## DCPI 2016/2015

[2020] HKDC 293

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2016 OF 2015

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##### BETWEEN

YEUNG KIU YING Plaintiff

and

FAIRWOOD FAST FOOD LIMITED

trading as FAIRWOOD Defendant

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Before: Her Honour Judge Phoebe Man (paper disposal)

Date of Defendant’s Submissions: 16 April 2020

Date of Plaintiff’s Submissions: 23 April 2020

Date of Defendant’s Submissions in reply: 29 April 2020

Date of Decision: 15 May 2020

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DECISION

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*Variation of Costs*

1. By a Judgment dated 23 January 2020 (the “Judgment”), I awarded damages to the Plaintiff in the sum of HK$50,826 plus interest. I made the following costs order *nisi* in the Judgment:-

“*The defendant do pay the plaintiff’s costs with certificate for counsel (including all costs reserved, if any) to be taxed if not agreed*.”

1. By a summons dated 5 February 2020, the defendant applied to vary the costs order *nisi* to:-

*“The defendant do pay the plaintiff’s costs (including all costs reserved, if any) up to 20 June 2016 on a party and party basis, to be taxed if not agreed, and the plaintiff do pay the defendant’s costs with certificate for counsel (including all costs reserved, if any) incurred thereafter on an indemnity basis with enhanced interest thereon at a rate not exceeding 10% above judgment rate should the Court deem fit.”*

1. The defendant also applied by the same summons to vary the interest awarded. In the Judgment, I awarded:-

*“… interest at 2% p.a. on the award for PSLA from the date of the service of the writ until the date of judgment and interest on pre-trial loss of earnings and other special damages at half the judgment rate from the date of the Accident to the date of judgment.*

1. The defendant applied to vary the award of interest to:-

*“… with interest at 2% p.a. on the award for PSLA from the date of the service of the writ until the latest date on which the defendant’s sanctioned payment and sanctioned offer both made on 23 May 2016 could have been accepted without leave, i.e. 20 June 2016, and interest on pre-trial loss of earnings and other special damages at half the judgment rate from the date of the Accident to 20 June 2016.”*

*Grounds for Variation*

1. The defendant primarily relies upon the settlement offers made by it to argue that the plaintiff failed to obtain a judgment better than the offer. The history of the settlement offers and payments made by the defendant and the plaintiff are as follows:-
2. On 12 February 2014, the plaintiff commenced her employees’ compensation claim under DCEC 261/2014 (the “EC Claim”).
3. The defendant made a sanctioned payment of HK$22,000 in relation to the EC Claim. Under Order 22 rule 20(1) of the Rules of the District Court, the deadline for the acceptance of the sanctioned payment in the EC Claim without leave was 18 September 2014. The plaintiff did not accept the sanctioned payment.
4. On 11 September 2015, the defendant commenced the present personal injuries claim under DCPI 2016/2015 (the “PI Claim”).
5. On 23 May 2016, the defendant’s solicitors sent a letter (the “23 May 2016 Letter”) to the plaintiff’s solicitors. The 23 May 2016 Letter was marked:

“*By Hand*

*Sanctioned Offer*

*Without Prejudice Save as to Costs*”

A notice of sanctioned payment of the same date was attached to the 23 May 2016 Letter. It is necessary to set out the content of the letter as the plaintiff disputes the validity of it as a sanctioned offer:

“*By way of service, we send you herewith a copy of Notice of Sanctioned Payment of even date. This letter should be read together with the said Notice. Pursuant to Order 22 rule 3 of the RDC, our client hereby makes a Sanctioned Offer accompanying the Notice of Sanctioned Payment. Kindly note that the Sanctioned Payment of HK$38,000 (inclusive of interest) is made* ***on top of****: -*

1. *advanced payments made in the total sum of HK$9,520; and*
2. *the Sanctioned Payment of HK$22,000 effected on 21 August 2014 under DCEC No 261 of 2014*

***plus***

1. *costs in DCEC No.261 of 2014 up to 18 September 2014, to be taxed if not agreed and there be no order as to costs thereafter; and*
2. *costs in these proceedings up to 20 June 2016, to be taxed if not agreed.*

*All our client’s rights are hereby fully reserved.*” .

By the notice of sanctioned payment of the same date attached to the 23 May 2016 Letter, the defendant indicated that it had paid a sum under the PI Claim of HK$38,000, net of HK$9,520 advanced payment and the HK$22,000 sanctioned payment made under the EC Claim. In other words, the total amount paid into court was HK$60,000 (HK$38,000 + HK$22,000) plus advanced payment made to the plaintiff in the sum of HK$9,520. This the defendant says represents damages in the total sum of HK$69,520 (The “Defendant’s Offer for Settlement”). The sanctioned payment is in settlement of the whole of the plaintiff’s claim and that “*it is part of a sanctioned offer set out in the letter from the Defendant’s Solicitors to the Plaintiff’s Solicitors dated 23 May 2016. If you give notice of acceptance of this sanctioned payment, you will be treated as also accepting the sanctioned offer.*”The deadline for accepting the sanctioned payment in the PI Claim without leave was 20 June 2016.

1. On 23 June 2016, the plaintiff rejected the Defendant’s Offer for Settlement and offered HK$80,000, inclusive of interest but net of advanced payments of HK$9,520 plus costs, as full and final settlement of the EC Claim and the PI Claim. This was not accepted by the defendant.
2. On 28 March 2017, the defendant invited the plaintiff to accept the Defendant’s Offer for Settlement out of time. This was not accepted by the plaintiff.
3. On 16 November 2017, the plaintiff offered HK$70,000 inclusive of interests but net of advanced payments of HK$9,520 plus costs, as full and final settlement of the EC Claim and the PI Claim. This was not accepted by the defendant.
4. On 16 August 2019, the plaintiff offered HK$190,000 inclusive of interest and costs in full and final settlement of the PI Claim, provided that the defendant waived all adverse costs claims against the plaintiff. This was not accepted by the defendant.
5. On 12 October 2019, the plaintiff made a sanctioned offer of HK$100,000 inclusive of interests and the sanctioned payment of HK$22,000 in the EC Claim, but net of advanced payments of HK$9,520, plus costs in full and final settlement of her claim as a result of the accident. This was not accepted by the defendant.
6. Failing settlement, the PI Claim proceeded to trial. HH Levy J. ordered on 5 March 2019 that the EC Claim be stayed pending the determination of the PI Claim, and on 26 March 2019 further ordered that parties are bound by the evidence in the findings made in the trial of the PI Claim.
7. The defendant says the plaintiff failed to obtain a judgment better than the sanctioned payment as it had offered a total of HK$69,520 and the court only awarded HK$50,826 in damages. This approach of taking into account payments made in employees compensation proceedings when exercising the court’s discretion as to costs in the common law proceedings was endorsed by Bharwaney J in the case of *Andrew William Maxwell v Keliston Marine (Far East) Limited (Now in liquidation)[[1]](#footnote-1)*:-

“*I agree with the submission that it is appropriate for the court, exercising its discretion as to costs in the common law proceedings, to have regard to the fact and amount of any payment made into court in the employees’ compensation proceedings.*”

1. The plaintiff on the other hand says the Defendant’s Offer for Settlement (be it by way of the 23 May 2016 Letter or the sanctioned payment) was invalid and does not attract the costs consequences as set out in Order 22 Rule 23. Instead, the plaintiff says Order 62 Rule 5 applies.

*Does the Defendant’s Offer for Settlement Attract Costs Consequences under Order 22 Rule 23?*

1. Mr Wong, counsel for the plaintiff says in accordance with the principles set down in *Montrio Limited v Tse Ping Shun David* [[2]](#footnote-2), for a sanctioned offer to be valid, strict compliance with the mandatory requirements under Order 22 Rule 5 is required. The plaintiff says (and it is not seriously disputed by the defendant) that the 23 May 2016 Letter is an invalid sanctioned offer because it:-
2. did not state whether it related to the whole claim or to part of it or to an issue arising from it and if so to which part or issue; and
3. did not provide that after the expiry of 28 days the plaintiff could only accept if parties agree on costs or the if the court grants leave to accept it.
4. Mr Wong further submits that as the sanctioned offer was not valid, the sanctioned payment which was part of the sanctioned offer was not valid.
5. Mr Cao, counsel for the defendant, does not seem to dispute that certain requirements for a sanctioned offer had not been complied with in the 23 May 2016 Letter. Instead, Mr Cao says the principles laid down in the case of *Montrio* does not apply to the present case, as there was no sanctioned payment accompanying the sanctioned offer in *Montrio*; whereas the defendant’s sanctioned offer in the present case was accompanied by a sanctioned payment. As the notice of sanctioned payment dated 23 May 2016 complied with the requirements under Order 22 Rule 8, it was valid and the defendant is entitled to rely on it and benefit from the costs consequences under Order 22 Rule 23.
6. I am of the view that despite the fact that the 23 May 2016 Letter did not qualify as a sanctioned offer under Order 22 Rule 5, the sanctioned payment under the PI Claim made by the defendant is valid and attracts the costs consequences under Order 22 Rule 23 for the following reasons:-
7. There is no allegation by the plaintiff that the notice of sanctioned payment dated 23 May 2016 did not comply with the requirements under Order 22 Rule 8. As such, it is a valid sanctioned payment on its own.
8. Under the Order 22 regime, there is no requirement that a sanctioned payment must be accompanied by a sanctioned offer. I draw support from the wording of Order 22 Rule 3: “*An offer by a defendant to settle the whole or part of a claim or an issue arising from the claim does not have the consequences specified in this Order unless it is made by way of a sanctioned offer* ***or*** *a sanctioned payment* **or both***.*” (emphasis added). Thus it is envisaged that under the Order 22 regime, in some circumstances a defendant can make a sanctioned payment on its own without a sanctioned offer, and it will still attract the same costs consequences.
9. Order 22 Rule 23(1) provides that costs consequences follow if the plaintiff:

*“a) fails to obtain a judgment better than the sanctioned payment* ***or***

*b) fails to obtain a judgment that is more advantageous than a defendant’s sanctioned offer*.”

(emphasis added)

This again supports the contention that either a sanctioned payment or a sanctioned offer will attract costs consequences under Order 22 if the plaintiff fails to obtain a better or more advantageous judgment.

1. This was also made clear in *Montrio* where Poon J (as he then was) said: “*A party who wishes to invoke the costs saving mechanism in Order 22 must either make a sanctioned offer* ***or sanctioned payment*** *as mandated by the relevant provisions. When a valid sanctioned offer* ***or*** *sanctioned payment has been made, the court will apply Order 22 in exercising its discretion as to costs*” (emphasis added)
2. There can be little dispute that the 23 May 2016 Letter, although not qualifying as a sanctioned offer under Order 22, is nonetheless a settlement offer made on a “without prejudice save as to costs” basis, *ie* a Calderbank offer. For the avoidance of doubt, I am conscious of the fact that a Calderbank offer should not be taken into account pursuant to Order 62 Rule 5(1)(d) if the party could have protected his position by means of a sanctioned offer or sanctioned payment under Order 22. I am not relying on the Calderbank offer when exercising my discretion. I am only pointing out that although the offer from the defendant does not qualify as a sanctioned offer, it is not something that would invalidate an otherwise valid sanctioned payment.
3. Nothing in the 23 May 2016 Letter contradicts the notice of sanctioned payment such that it becomes unclear or ambiguous, and thus, invalid.
4. I thus reject Mr Wong’s argument that once the sanctioned offer was not valid, the accompanying sanctioned payment automatically becomes invalid.

*Unjust to apply indemnity costs or enhanced interest?*

1. Given my view that the notice of sanctioned payment dated 23 May 2016 was valid, and that the court ought to apply Order 22 in exercising its discretion as to costs, the onus is on the plaintiff to show that the orders sought by the defendant are unjust under Order 22 Rule 23(5).
2. The plaintiff, in an affirmation sworn by her solicitors and Mr Wong’s written submissions put forward the following matters in support:-
3. under the Rules of the District Court, the plaintiff should be entitled to costs of both the PI Claim and the EC Claim up to the date of the plaintiff serving the notice of acceptance. The Defendant’s Offer for Settlement only offered costs in the EC Claim up to 18 September 2014, and is thus in conflict with the Rules of the District Court.
4. The plaintiff says when the defendant served the notice of sanctioned payment on 23 May 2016, she did not have the benefit of the expert opinion regarding the issue of apportionment of her injuries (to what extent the injuries were caused by her pre-existing condition or the accident). She was thus not in a position to consider if she should accept the sanctioned payment.
5. The plaintiff says she was successful on part of her case. The failure of the defendant to concede liability had led to substantial costs, time and delay in the PI Claim because:
6. Most of the plaintiff’s evidence was on liability, the entirety of the evidence of Miss Wong, the only defence witness, was on liability only. The majority of time spent at trial and cross-examination was on liability. If liability was conceded earlier, the case could have been heard by Master for assessment of damages instead of a full blown trial.
7. Miss Wong was found to be an unreliable witness. The Court found that Ms Wong should have knowledge of the accident. In those circumstances, it was unreasonable for the defendant to have denied the accident having happened at all.
8. The defendant alleged contributory negligence on the plaintiff’s part and only withdrew by way of closing submissions.
9. Before the commencement of the EC Claim and the PI claim, the defendant had submitted inaccurate information of how the accident happened and the monthly earnings of the plaintiff, thereby compromising the plaintiff’s interest.
10. It is not yet known if the sanctioned payment made in the EC Claim in the sum of HK$22,000 was reasonable. The defendant has not shown that the plaintiff will fail to obtain a better award in the EC Claim.
11. Mr Cao argued that the plaintiff has failed to show that it is unjust for the court to apply the relevant costs consequences:-
12. Although the defendant contested liability, it was justified because:
13. the plaintiff’s pleaded case was unsatisfactory as to the cause of the accident;
14. it was only at trial that the plaintiff revealed during oral evidence that it was an Indian female colleague pushing the table that caused the stack of trays to fall.
15. the medical records seemed to suggest that the plaintiff did not mention the accident during her consultation at Kwong Wah Hospital.
16. the plaintiff did not call any witness to corroborate her account of the accident.

Mr Cao says all these casted doubt on the accident having happened at all.

1. the plaintiff’s conduct throughout was to be criticised as she failed to provide certain documentation to the defendant in a timely manner.
2. The plaintiff’s claim was grossly exaggerated. She was only awarded less than 15% of the pleaded damages in the Revised Statement of Damages.
3. Having considered all the circumstances of the case, I am of the view that the plaintiff has only to a limited extent demonstrated that it is unjust for the court to make the relevant orders for the following reasons:-
4. It is misconceived to say that the sanctioned payment contradicts the Rules of the District Court. The offers and the sanctioned payments of the EC Claim and the PI Claim were made on different dates and thus would naturally have different cut-off dates in relation to costs. I do not see how they were made in conflict of the Rules of the District Court. Further, no detail was given on what costs the plaintiff would have to pay in the EC Claim between 19 September 2014 and 20 June 2016 to demonstrate any injustice suffered by the plaintiff.
5. I do not accept that the plaintiff did not have sufficient information when the sanctioned payment was made. As I found in the Judgment, the plaintiff had been suffering from right trigger thumb the latest from 2012. She did not need an expert report for her to realise she had a pre-existing condition. There was also no dispute that despite the accident, the plaintiff returned to full time work and also worked a second job with no lessening of earnings. There is thus little force in saying that without the expert evidence in apportionment she would have considered the accident to have contributed to a large extent of her condition.
6. As the defendant’s mistakes when providing information on how the accident happened and the monthly earnings of the plaintiff had been rectified before the commencement of the EC Claim and the PI Claim, I am of the view that it had little impact on how the Court should exercise its discretion on costs.
7. At the same time, the plaintiff also failed to provide certain documentation requested by the defendant in a timely manner. I do not accept that the it was reasonable for the plaintiff to behave in such a manner simply because she was 55 years old and had little education. It has to be borne in mind that the plaintiff was all along legally represented. Even though the plaintiff might not have appreciated the importance of timely submission of documents or the importance of providing accurate information, her legal representatives ought to have explained the same to her.
8. The plaintiff has grossly exaggerated her claim. She claimed around HK$350,000 in damages, when eventually she was only awarded HK$50,826. The court has time and again shown its displeasure on exaggerated claims by way of costs.
9. I consider it a red herring for the plaintiff to argue that IF the plaintiff proceeds to revive her EC Claim, she MIGHT get a better award for a multitude of reasons, and hence it was reasonable for her to reject the sanctioned payment of HK$22,000 in the EC Claim. Bharwaney J in *Andrew William Maxwelli* [[3]](#footnote-3)had given guidance on what is the proper practice when an employee’s compensation has been stayed pending the determination of the common law proceedings:

“*Very often the employees’ compensation proceedings are held in abeyance, pending the common law claim, to be revived in case the common law claim fails on the issue of liability. I would observe that the proper course to take in such cases, where the employees’ compensation proceedings are held in abeyance pending the determination of the common law claim, is to mention that fact in the Statement of Damages and to state that the employees’ compensation proceedings would be discontinued in the event that damages are awarded to the plaintiff…*

*There may be cases where the plaintiff may still wish to pursue his employees’ compensation claim after the award of common law damages, for example, in cases where there is a concern that the court may assess a high degree of contributory negligence on the part of the plaintiff. In such cases, the parties should first proceed with the employees’ compensation claim and the further prosecution of any common law claim should depend on and await the determination of the employees’ compensation proceedings. Where the court, for good reason and in the exercise of its case management powers, permits the common law claim to proceed first and the plaintiff is unwilling to state, in his Statement of Damages, that he would discontinue the employees’ compensation proceedings in the event that he succeeds in the common law claim, then he must give particulars of his employees’ compensation claim in the Statement of Damages and request the court dealing with the common law claim to assess the value of the employees’ compensation claim that has not yet been determined by an employees’ compensation court, and to deduct that value from the award of common law damages, as required by the proviso to section 26(1) of the ECO*.”

It is trite that the statutory award of employees’ compensation was not designed to be additional to common law damages. No calculations, only speculations, had been put forward by the plaintiff as to what she might obtain under the employees’ compensation regime. I am not persuaded that the plaintiff has demonstrated that given my findings, by which she is bound, she can obtain an award of employees’ compensation in excess of my award.

1. As to the defendant’s conduct in contesting liability, I agree that it should be something that the court should take into account when considering costs. This is because the sole defence witness, Miss Wong, was present on the day of the accident. I had already found that being the direct supervisor of the plaintiff, the plaintiff had to inform Miss Wong before she left work early on the day of the accident. Miss Wong thus should have been informed by the plaintiff about the accident on the day. In those circumstances, to continue contesting liability is opportunistic behaviour on the defendant’s part in hoping that the plaintiff does not come up to proof. I agree that it was unreasonable for the defendant to insist on contesting liability.
2. Having considered all the circumstances of the case and submissions from counsel, I am of the view that although the sanctioned payment was valid and attracts the costs consequences under Order 22 Rule 23; given that the defendant’s unreasonable and opportunistic behaviour in contesting liability, I will deprive the defendant of costs on the higher basis of indemnity basis, and will only award the defendant costs incurred after 20 June 2016 on a party and party basis.

*Enhanced interest*

1. The defendant asks for enhanced interest on costs, which is within the court’s power under Order 22 Rule 23 (4)(b). The plaintiff argues that interest should only be allowed for the amount of costs actually paid and should run from the time each payment was made. I agree and would adopt the traditional approach of ordering enhanced interest on each payment of costs made by the defendant from the date of payment by the defendant or its insurer up to the date of Judgment, at 1% above judgment rate, and thereafter, at judgment rate until full payment of the same.
2. There is no dispute that interest on costs should only be allowed for the amount of costs actually paid. In that regard, I will grant leave for the defendant to file an affirmation submitting evidence with documentation in support thereof. The award of enhanced interests on costs actually paid is subject to the undertaking of the defendant filing and serving an affirmation within 35 days hereof.

*Costs Order Absolute*

1. I will vary the costs order *nisi* to the following costs order absolute:-
2. *The defendant do pay the plaintiff’s costs with certificate for counsel (including all costs reserved, if any) up to 20 June 2016 on a party and party basis, to be taxed if not agreed.*
3. *The plaintiff do pay the defendant’s costs with certificate for counsel (including all costs reserved, if any) incurred after 20 June 2016 on a party and party basis, to be taxed if not agreed.*
4. *Upon the defendant undertaking to file and serve an affirmation within 35 days hereof, setting out evidence of the date and amount of costs paid by the defendant or its insurer, the plaintiff do pay the defendant enhanced interest at 1% above judgment rate on each payment of costs (incurred after 20 June 2016) from the date of payment by the defendant or its insurer up to the date of Judgment, and thereafter, at judgment rate until full payment of the same.*
5. The interest on the award will also be varied accordingly in view of my decision to take into account the sanctioned payment:-

“There will be judgment in the sum of HK$50,826 with interest at 2% p.a. on the award for PSLA from the date of the service of the writ until 20 June 2016, and interest on pre-trial loss of earnings and other special damages at half the judgment rate from the date of the accident to 20 June 2016*.*”

*The plaintiff’s costs to be set off against the defendant’s costs*

1. The defendant asks that the plaintiff’s costs be set off against the defendant’s costs to minimise administrative work. The plaintiff objects for a lack of legal and evidential basis.
2. I do not see any special circumstances why the court should make such an order.

*Withholding payment out*

1. Seeing it as almost certain that the plaintiff will need to make further payment to the defendant in costs, the defendant asks that the sum of HK$60,000 be kept in court instead of paid out to the plaintiff, as the sum would earn a more preferential rate of interest and would be beneficial to both parties.
2. The plaintiff says she is the winning party and should be entitled to the award immediately. Further, the time it will take for all costs to be finalised can be lengthy. There is also no evidence that the plaintiff will be unable to pay costs. I agree with Mr Wong’s submission and decline to make an order withholding payment out.

*Costs of the Summons*

1. In view of the result, the plaintiff and the defendant are successful on parts of the summons respectively. I make an order *nisi* that that there be no order as to costs in relation to the summons dated 5 February 2020.
2. I thank counsel for their helpful written submissions.

( Phoebe Man )

District Judge

Mr Simon Wong instructed by Kenneth W. Leung & Co., for the plaintiff

Mr Yuan Shan Cao instructed by WMC Partners, for the defendant

1. Unrep HCPI 945/2003, 11 April 2012 [↑](#footnote-ref-1)
2. Unrep HCA 757/2009, 17 February 2012 [↑](#footnote-ref-2)
3. §32, 33 [↑](#footnote-ref-3)