## DCPI 2016/2015

[2020] HKDC 715

**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 Defendant

Trading as FAIRWOOD

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Before: Her Honour Judge Phoebe Man (paper disposal)

Date of Plaintiff’s Submissions: 2 July 2020

Date of Defendant’s Submissions: 23 July 2020

Date of Plaintiff’s Reply Submissions: 27 July 2020

Date of Decision: 2 September 2020

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DECISION

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1. *BACKGROUND*
2. By a Judgment dated 23 January 2020 (the “Judgment”), I awarded damages to the plaintiff in the sum of HK$50,826 plus interest in the present personal injuries action. 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 (amongst other things) 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. By a decision dated 15 May 2020 (the “Decision”), I varied the costs order *nisi* to the following costs order absolute:-
   1. *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.*
   2. *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.*
   3. *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.*
2. *APPLICATION*
3. By summons dated 27 May 2020, the plaintiff applied for leave to appeal from the Decision.
4. *LEGAL PRINCIPLES*
5. The legal principles for leave to appeal are trite law and not disputed by the parties.
6. Under section 63A(2) of the District Court Ordinance (Cap 336):-

“*Leave to appeal shall not be granted unless the judge … is satisfied that – (a) the appeal has a reasonable prospect of success; or (b) there is some other reason in the interests of justice why the appeal should be heard.*”

1. To meet the “reasonable prospect of success” test, an applicant is required to show more than just an arguable case, being an appeal that has merits and ought to be heard, although he does not have to demonstrate that the appeal will probably succeed[[1]](#footnote-1).
2. The question of costs is in the discretion of the court and the Court of Appeal “*will not interfere with the exercise of a judge’s discretion in the award of costs unless it is shown that [the court] failed to exercise the discretion, or exercised it upon a false principle, or did not exercise it judicially*[[2]](#footnote-2).”
3. *GROUNDS OF APPEAL*
4. The plaintiff relies on the following 2 proposed grounds of appeal:-
   1. The judge erred in law in finding that the Sanctioned Payment was valid and/or would attract the costs consequences under O.22 r.23. Accordingly, the judge wrongly exercised the discretion on costs under O.22 r.23 instead of O.62 r.5 and such discretion was exercised upon a false principle.
   2. Even if the Sanctioned Payment were valid, the judge did not exercise the discretion on costs judicially because she failed to consider it unjust to make the orders that she made and failed to consider, sufficiently or at all, the circumstances that if the plaintiff accepted the Sanctioned Payment, the plaintiff would be treated as accepting the defendant’s offer as stated in the defendant’s solicitors’ letter dated 23 May 2016, which included a term that the plaintiff be deprived of her costs in the Employees Compensation action after 19 September 2014.
5. *The sanctioned offer and sanctioned payment in question*
6. For easy reference, I repeat the relevant history of the settlement offers and payments made by the defendant and the plaintiff:-
7. On 12 February 2014, the plaintiff commenced her employees’ compensation claim under DCEC 261/2014 (the “EC Action”).
8. The defendant made a sanctioned payment of HK$22,000 in relation to the EC Action. 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 Action without leave was 18 September 2014. The plaintiff did not accept the sanctioned payment.
9. On 11 September 2015, the plaintiff commenced the present personal injuries claim under DCPI 2016/2015 (the “PI Action”).
10. 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 Action of HK$38,000, net of HK$9,520 advanced payment and the HK$22,000 sanctioned payment made under the EC Action. 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 “Sanctioned Payment”). The Sanctioned Payment is in settlement of the whole of the plaintiff’s claim and “*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 Action without leave was 20 June 2016.

1. On 23 June 2016, the plaintiff rejected the Sanctioned Payment 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 Action and the PI Action. This was not accepted by the defendant.
2. On 28 March 2017, the defendant invited the plaintiff to accept the Sanctioned Payment 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 Action and the PI Action. 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 Action, 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 Action, 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. *Does the Sanctioned Payment Attract Costs Consequences under Order 22*
7. Mr Wong, Counsel for the plaintiff argued that the 23 May 2016 Letter was invalid as a sanctioned offer under Order 22 for the following reasons:-
   1. Non-compliance with the mandatory requirement under Order 22 r.5.
   2. The 23 May 2016 Letter included a term as to costs which conflicts with the costs consequence prescribed by Order 22 r.20. Mr Wong says that as the offer in the 23 May 2016 Letter contained a term that costs in the EC Action would only be paid up to 18 September 2014, it effectively meant that there would be no order as to costs between 19 September 2014 (the deadline for acceptance of the sanctioned payment in the EC Action) to 20 June 2016 (the deadline for accepting the Sanctioned Payment in the PI Action) in the EC Action. This offer, Mr Wong says, is thus made on the basis of “no order as to costs” and is in conflict with Order 22 r.20(1).
8. As noted in §9 of the Judgment, there was no dispute that the 23 May 2016 Letter did not comply with the mandatory requirements and is an invalid sanctioned offer because it:-
9. 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
10. 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.

Likewise, Ms Loh, counsel for the defendant did not dispute this in the present application.

1. Mr Wong argued that on this ground alone, the 23 May 2016 Letter was an invalid sanctioned offer. Since the Sanctioned Payment was part of the terms of the sanctioned offer in the 23 May 2016 Letter, one cannot accept one whilst declining another. Since the sanctioned offer was held to be invalid, it is irrelevant that the sanctioned payment on its own was valid. For this Mr Wong now relies on the decision of HH Judge Kot in *Yim Wai Ling & Anor v Yuen Chik Wah & Anor[[3]](#footnote-3)* (which, for reasons not explained, was not cited nor relied upon during the original application to vary costs and prior to the present application for leave to appeal).
2. In that case, there was a provision for “no order as to costs” in the sanctioned offer in question. The learned Judge held[[4]](#footnote-4) that:-

“*With the Sanctioned Offer, the plaintiffs cannot accept the Sanctioned Payment and take advantage of the costs consequences of O.22 r20(1) but instead had to accept the terms in the Sanctioned Offer as well which deprived them of the said benefit. Even though the Notice of Sanctioned Payment was made in line with O.22 r.8, this cannot be considered out of the context and ignored the terms in the Sanctioned Offer as well since the defendants had specifically mentioned that the Sanctioned Payment is part of the terms of the Sanctioned Offer….*

*The Sanctioned Payment made, being tied with the Sanctioned Offer which included a term as to costs had deprived the plaintiffs the benefit they should enjoy under O22. This is clearly against the spirit of O.22 and the defendants could not have protected their position by means of the Sanctioned Payment*.”

1. Ms Loh distinguished the *Yim Wai Ling* case as she said in that case there was a “no order as to costs term”, whereas she disputed that the 23 May 2016 Letter contained such a term. Ms Loh submitted that it was wrong to suggest that a valid sanctioned offer can never include a term as to costs as such. It is only so if the term as to costs conflicts with the costs consequences prescribed by order 22 r.20. She drew support from *The Owners and/or Demise Charterers of the Ship or Vessel “MCC Jakarta” v The Owners and/or Demise Charterers of the Ship or Vessel “Xin Nan Tai 77”* [[5]](#footnote-5), Ng J., after considering *Wong Yim Man Anthea v Wong Ho Ming Felix* observed, in §28-29:-

“*In this court’s view, Wong Yim Man Anthea v Wong Ho Ming Felix is not authority for the proposition that a valid sanctioned offer can never include a term as to costs as such. As can be seen from paragraphs 18 and 39 of DHCJ Kent Yee’s judgment quoted above, it is only if the term as to costs conflicts with the costs consequence prescribed by RHC O 22 r 20 (or some other rules in RHC O 22) that the sanctioned offer will be rendered invalid.*

*The matter can be tested in this way. Suppose a defendant’s sanctioned offer to settle the whole of a plaintiff’s claim includes a term as to costs, but that term is identical to what is stated in RHC O 22 r 20(1) ie the plaintiff is entitled to his costs of the proceedings up to the date of service of the notice of acceptance. Unless the offer falls foul of other specific rules in RHC O 22, for instance, r 5 (concerning form and content), it does come squarely within the definition of “sanctioned offer” in RHC O 22 r 1 in that it is “an offer made in accordance with this Order” even though it includes a term as to costs. In those circumstances, there is no reason or logic to regard the offer as an invalid sanctioned offer.*”

1. Ms Loh said the 23 May 2016 Letter provided for costs of the EC Action up to 18 September 2014. There was no evidence indicating what costs would the plaintiff be entitled to in the EC Action at the time when and if the plaintiff accepted the Sanctioned Payment in the PI Action. Hence, Ms Loh said that when considering the validity of the Sanctioned Payment in the PI Action, it could not be said that the provision for costs up to a certain date in the EC Action fell foul of Order 22 r.20(1).
2. Mr Wong accepted that there was no evidence on what the plaintiff would have obtained by way of costs in the EC Action post 18 September 2014. However he argued that the defendant bore the burden to show that the Sanctioned Payment was valid. As there was no evidence on the issue, the defendant had failed to show that the Sanctioned Payment complied with Order 22 r.20(1).
3. Ms Loh disagreed and said that the plaintiff bore the burden to show that the 23 May 2016 Letter was invalid by reason of the costs provision in the EC Action and as there was no evidence, the plaintiff had failed to show that the 23 May 2016 Letter was invalid on that ground.
4. For the purposes of the present application for leave to appeal, these arguments on the burden of proof may be academic in view of the fact that there was no dispute that the 23 May 2016 Letter did not fulfill all the requirements under Order 22 r.5 and was held by me to be invalid as a sanctioned offer attracting costs consequences under Order 22.
5. Whilst I would distinguish the case of *Yim Wai Ling* on the basis that unlike *Yim Wai Ling,* nothing in the 23 May 2016 Letter contradicts the notice of sanctioned payment nor is anything unclear or ambiguous; I agree, in light of the decision of HH Judge Kot in *Yim Wai Ling*, Mr Wong’s argument that so long as the sanctioned offer is invalid (for whatever reason), any accompanying sanctioned payment would be invalid, has a reasonable prospect of success.
6. I will thus grant leave on the proposed ground of appeal (1).
7. *Was it unjust to impose the costs consequences under Order 22 in light of the costs provision for the EC* Action?
8. Mr Wong submitted that as the EC Action was only stayed on 5 March 2019, the plaintiff must have incurred not insubstantial costs between 19 September 2014 (the deadline for acceptance of the sanctioned payment in the EC Action) to 20 June 2016 (the deadline for accepting the Sanctioned Payment in the PI Action) in the EC Action. He further submitted that unless the defendant demonstrates that the plaintiff would not be entitled to costs in the EC Action after 19 September 2014, the plaintiff’s refusal to accept the sanctioned payment remained reasonable.
9. This is misconceived. The plaintiff bore the burden to show that the costs provision for the EC Action was unjust. It is inappropriate and without any evidential basis for the plaintiff to suggest a hypothetical scenario on what a “reasonable” award would be under the EC Action and the likelihood of her obtaining a judgment more than the sanctioned payment of HK$22,000 under the EC Action. There is simply no evidence as the basis for such submissions. I repeat paragraph 17(6) of the Judgment.
10. I do not consider there to be any reasonable prospect of success for the proposed ground of appeal (2).
11. *The Interest of Justice*
12. Given that I have already granted leave to appeal on the proposed ground of appeal (1), it is unnecessary to consider the “in the interest of justice” argument.
13. *Order*
14. I thus grant leave for the plaintiff to appeal against the costs order based on the proposed ground of appeal (1). The application for leave to appeal on the proposed ground of appeal (2) is dismissed.
15. I make a costs order *nisi* that:
    1. costs of and occasioned by the proposed ground of appeal (1) be in the cause of the appeal, with certificate for Counsel, to be taxed if not agreed; and
    2. costs of and occasioned by the proposed ground of appeal (2) be paid by the plaintiff to the defendant, with certificate for Counsel, to be taxed if not agreed.
16. To assist taxation, I will apportion 60% of the costs for the proposed ground of appeal (1) and 40% of the costs for the proposed ground of appeal (2).

( Phoebe Man )

District Judge

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

Ms Phillis Loh, instructed by Messrs WMC Partners, for the defendant

1. *Wynn Resorts (Macau) SA v Mong Henry*, unrep. HCA 192/2009, 10 August 2009, per Chu J (as she then was) at §19 [↑](#footnote-ref-1)
2. *Choy Yee Chun v Bond Star Development Ltd* [1997] HKLRD 1327 at 1337A [↑](#footnote-ref-2)
3. *unrep.* DCCJ 663/2013, 14 February 2017 [↑](#footnote-ref-3)
4. At §25, 26, 29 [↑](#footnote-ref-4)
5. *unrep.* HCAJ 48/2011, 30 November 2017, Ng J. [↑](#footnote-ref-5)