DCPI 2103/10

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION DCPI 2103 of 2010

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BETWEEN

CHAN CHEUK KWAN Plaintiff

And

HO KAM WO 1st Defendant

YAN YAN MOTORS LTD. 2nd Defendant

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Coram: Before Master J Chow (Open to Public)

Date of Hearing: 18th May 2011

Date of Handing Down Decision: 20th July 2011

DECISION

Introduction

1. The dispute arose from the operation of Order 22 rule 20(1), the Rules of District Court.
2. The Plaintiff accepted sanctioned payment by 1st and 2nd Defendants where the amount was identical to a pre action offer. The 1st and 2nd Defendants deny costs subsequent to the pre action offer and further seek costs against the Plaintiff from the date of the pre action offer until the acceptance.

The Facts

1. The facts of this case are undisputable and straightforward. The Plaintiff was injured in a traffic accident in Castle Peak Road on 8th April 2009. He claimed damages against the 1st and 2nd Defendants being the driver and the employer of the 1st Defendant.
2. During pre action stage, on 13th July 2010, solicitors for the 1st and 2nd Defendants made an offer of settlement at $350,000 plus costs (“the Pre Action Offer”). The Plaintiff refused to accept and had continued to negotiate for a higher amount until December 2010. The 1st and 2nd Defendants refused.
3. On 8th Dec 2010, the Plaintiff issued the Writ of Summons.
4. The solicitors for the 1st and 2nd Defendants’ stance were firm enough that they maintained the Pre Action Offer since the 13th July 2010. On 6th January 2011, they effected sanctioned payment of $350,000 with Court. In less than 28 days, on 2nd February 2011, the Plaintiff’s solicitors accepted the sanctioned payment in settlement of the whole of Plaintiff’s claim.

The 1st and 2nd Defendants’ submission

1. Mr. Tai, solicitor for the 1st and 2nd Defendants, admitted the costs involved was not substantial, the reason of denial of the Plaintiff’s costs was stemmed from the Plaintiff’s unreasonable behavior.
2. Order 22 rule 20(1) reads,

“Where a defendant’s sanctioned offer or, sanctioned payment to settle the whole claim is accepted without requiring the leave of 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. He submitted, Order 22 rule 20(1) empowered the Court with discretion to depart from Plaintiff’s usual costs order. The Plaintiff should not be entitled to his costs because he has accepted a sum identical to the Pre Action Offer of which was first offered as early as 13th July 2010. He failed to see there was any change of circumstance between July 2010 and February 2011. Not only should the Court exercise discretion under Order 22 rule 20(1) to allow the Plaintiff’s costs up to 13th July 2011 (i.e. the date of the Pre Action Settlement Offer was first made), the Plaintiff should also be liable for costs of the 1st and 2nd Defendants until the acceptance.

The Plaintiff’s Objection

1. Ms Lai, solicitor for the Plaintiff disagreed. She submitted the Plaintiff’s acceptance of the sanctioned payment was made in the usual course of business, the Plaintiff is entitled to his costs under Order 22 rule 20(1).
2. She explained the Plaintiff has been given 7 days only from 13th July 2010 to consider the Pre Action Offer, he could not made up his decision within the limited time. Yet, Ms Lai conceded, the Pre Action Settlement Offer revived by way of the 1st & 2nd Defendants’ letter dated 21st September 2010. The offer was opened without time limitation.
3. During the time before and after issuance of the Writ, the Plaintiff was pondering for an orthopaedic expert report. In the Plaintiff’s letter dated 11th November 2010, both parties agreed the Plaintiff be jointly examined by their respective orthopaedic experts on 7th December 2010, nonetheless, the appointment was called off by the 1st and 2nd Defendants. No joint examination has ever taken place.
4. Ms Lai explained it was a commercial decision to accept the sanctioned payment when the acceptance was made in contemplation of the potential costs incurred in obtaining an orthopaedic expert report.
5. Ms Lai relied on an English case, Walker Residential Ltd. v. Davis & Anor [2005] EWHC 3483 in that, the Plaintiff turned down a pre proceedings offer and accepted a Part 36 payment[[1]](#footnote-1) in the same amount. The deputy Master ruled he did not have an inherent jurisdiction to set aside the Plaintiff’s entitlement on costs.

The 1st and 2nd Defendants’ Reply

1. Mr. Tai reiterated the Part 36 payment has been updated since Walker: under Part 36 Offers to Settle and Payment into Court of the Civil Procedure Rules 1998, Rule 36.10(1),

“Subject to paragraph (2) and paragraph 4(a)[[2]](#footnote-2), where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror.”

This rule was updated in 2011, the new Rule 36.10(1) reads,

“If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, *the court will take that offer into account when making any order as to costs*.”*[emphasis added]*

1. The court shall embark on the same test to decide on costs consequence in the present case.

Analysis

1. This application concerns the discretionary power of Order 22 Rule 20(1). If sanctioned payment to settle the whole claim is accepted without leave of the Court, a plaintiff is entitled to his costs of the proceedings up to the date of the notice of acceptance unless the Court orders otherwise. Unequivocally, a plaintiff’s entitlement to his costs is not as of right, in some situations, subject to a Court order.
2. The issue here boils down to: in what circumstance should the Court order costs otherwise?
3. The new Rule 36.10 shed light to situations where the Court should consider. In fact, Order 62, Rule 5(1A)(e) & (g) of the Rules of District Court stated

“The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account … (e) the conduct of the parties; and (g) any admissible offer to settle made by a party, which is drawn to the Court’s attention.”

1. I shall not restrict myself to consider matters only after the issuance of the Writ of Summons. Without prejudice offers in pre action stage should be taking into account in deciding the costs consequences under Order 22 Rule 20(1).
2. The Plaintiff’s acceptance of the sanctioned payment was not premised on new medical expert evidence when the parties did not proceed to obtain the joint orthopaedic expert report. I agree the costs of the expert report would be one of the Plaintiff’s considerations in accepting the sanctioned payment. I cannot categorize the Plaintiff’s acceptance has diverted from reasonable behavior.
3. At the pre action stage, the 1st and 2nd Defendants responded promptly in making the Pre Action Offer, the mode of conducting the proceedings was proper and reasonable.
4. In the premises, I cannot see there are any exceptional and compelling features reflecting misconduct or inappropriateness of either party or their legal representatives.
5. If I could find no unreasonableness on either party, I shall not exercise discretion under Order 22 rule 20(1) to order costs otherwise solely because the amount of the Pre Action Settlement Offer and the sanctioned payment appeared to be identical.
6. In Cho Ho Kuen v. Yu Kwok Wah, CACV 480 of 2000[[3]](#footnote-3), the case stemmed from an order of the old regime under Order 62 Rule 10(2), the Rules of High Court. It was not identical to Order 22 Rule 20(1) of the Rules of District Court because the Court has no discretion to make an order on costs otherwise upon acceptance of payment into court.
7. I note the following paragraph may provide a pointer to our case, as discussed in at page 5 of Cho Ho Kuen, Keith JA enunciated,

“I do not think that a plaintiff’s entitlement to taxed costs on the acceptance of a payment into court necessarily results in injustice to a defendant. I appreciate that there may be cases, of which this is one, in which the defendant may not want to make a payment into court if the acceptance of payment will automatically result in the plaintiff being entitled to his taxed costs. But the way to avoid that is by the defendant making his offer to settle the case in form of a Calderabank letter, i.e. a letter marked “without prejudice save as to costs”. I appreciate that a Calderbank letter will not usually be appropriate when the claim is simply for a sum of money: see Ord 62 r. 5(d). But I do not see how the limitation on the circumstances in which a Calderbank letter may be used can apply to a case in which the defendant wishes to dispute what would automatically follow I terms of costs from the acceptance of money paid in to court. If a defendant elects to make his offer to settle the case in the form of a payment into court, he has to accept that the plaintiff’s entitlement to costs is to taxed costs.”

1. Similarly, although the Court may exercise discretion on costs under Order 22 rule 20(1), the 1st and 2nd Defendants could have avoided the dispute if they had continued to embark on without prejudice negotiation with the Plaintiff. The costs consequences would not be crystallized as it had been under Order 22 Rule 20(1). Having said that, I am unable to criticize any fault on the part of the 1st and 2nd Defendants by effecting sanctioned payment into Court, after all, it is an option made available to them.
2. I conclude, the mere fact that the Plaintiff accepted the sanctioned payment in the same amount as the Pre Action Offer falls short of an exceptional and compelling circumstance to justify a departure on the costs consequence in Order 22 rule 20(1).

Conclusion

1. I dismiss the 1st and 2nd Defendants’ summons with an order on costs *nisi* that costs of the summons be to the Plaintiff.
2. This action has been settled, it is redundant to fix a date for further directions. The Plaintiff’s solicitors do submit a statement on costs within 7 days for summary assessment and the 1st and 2nd Defendants do file a list of objections within 7 days thereafter. The determination on costs shall be dealt with by way of paper disposal accordingly.

(J Chow)

District Court Master

Representation:

Ms. S.K. Lai of Messrs. LCP for the Plaintiff

Mr. Frederick Tai of Messrs. Munros for the Defendant

1. Order 22, Rules of High Court as the counterpart, save not entirely identical. [↑](#footnote-ref-1)
2. Para 2 of Rule 36(10) reads, “Where (a) a defendant’s Part 36 offer relates to part only of the claim; and (b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim, the claimant will be entitled to the costs of the proceedings up to the date of serving notice of the acceptance unless the court order otherwise.”

   Para 4 of Rule 36(10) reads, “Where (a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or (b) a Part 36 offer is accepted after the expiry of relevant period, if the parties do not agree the liability for costs, the court will make an order as to costs.” [↑](#footnote-ref-2)
3. The plaintiff commenced a personal injury action in the District Court. He accepted payment into court by the defendant which is below the District Court jurisdiction. The Court of Appeal decided the plaintiff was entitled to have his costs taxed on District Court scale. [↑](#footnote-ref-3)