## DCPI 2179/2015

[2019] HKDC 1088

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2179 OF 2015

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BETWEEN

NG YUEK LANG SOPHIA Plaintiff

and

CHIU KING WA Defendant

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Before: His Honour Judge Edmond Lee in Chambers

Dates of Written Submissions: 14, 23 and 25 April 2019

Date of Decision: 13 August 2019

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DECISION ON COSTS

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*Introduction*

1. These are two applications by the plaintiff and the defendant respectively for variation of a costs order *nisi*.
2. This was originally a case of traffic accident. The plaintiff as a passenger in a taxi sustained personal injuries as a result of the bad driving of the defendant as the driver of a private car responsible for the accident. Judgement on liability for the plaintiff was entered by consent whereas the quantum of damages was disputed. After a two-day-hearing and by a judgment on assessment of damages handed down on 11 January 2019, I awarded damages for the plaintiff as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Plaintiff’s Claim (HK$)** | **Defendant’s Reply (HK$)** | **My Assessment**  **(HK$)** |
| PSLA | 450,000 | 80,000 - 100,000 | 250,000 |
| Loss of Earning Capacity | 150,000 | Nil | Nil |
| Special Damages  (medical, travelling, etc.) | 128,611.30 | 19,360 | 54,342 |
| Future Expenses | 57,440 | Nil | Nil |
| **Total:** | **786,051.30** | **99,360 - 119,360** | **304,342** |

1. I also made an order *nisi* that the costs be to the plaintiff, with a certificate for counsel, to be taxed if not agreed, and that the plaintiff’s costs be taxed in accordance with the Legal Aid Regulations (“costs order *nisi*”).

1. By a summons dated 24 January 2019, the plaintiff applied to vary the costs order *nisi* (“plaintiff’s application”) to the extent that:
2. the costs from the date of the writ of summons up to 28 days after the date of the sanctioned offer made on 14 June 2017 (“sanctioned offer”) be to the plaintiff, with certificate for counsel, to be taxed if not agreed;
3. the costs of these proceedings, including all costs reserved, if any, incurred by the plaintiff after 14 June 2017 be paid by the defendant to the plaintiff on an indemnity basis, to be taxed if not agreed;
4. the interest on the costs referred to in sub-paragraph (b) be paid by the defendant to the plaintiff at a rate not exceeding 10% above the judgment rate; and
5. the plaintiff’s own costs and costs of this application be taxed in accordance with the Legal Aid Regulations.
6. On the other hand, by a summons dated 25 January 2019, the defendant also applied to vary the costs order *nisi* (“defendant’s application”) to the extent that the costs of and occasioned by the plaintiff in these proceedings be partially allowed, that is the costs of and occasioned by the plaintiff in relation to the special damages and/or future expenses by wholly disallowed or partially allowed, with certificate for counsel, to be taxed if not agreed.
7. Both the plaintiff’s application and the defendant’s application are opposed. I shall deal with these two applications one after another.

*The plaintiff’s application*

1. The basis of the plaintiff’s application, in simple terms, is that the defendant should have accepted the sanctioned offer made on 14 June 2017, namely a sum of $300,000 (including interests but excluding costs), in full and final settlement of the plaintiff’s claim. Now, the fact that the plaintiff being finally awarded a total sum of $304,342 with costs, though only marginally exceeding the sum of the sanctioned offer, invoke the operation of O. 22, r. 24 of the Rules of the District Court, Cap. 336H, so that the plaintiff should be granted enhanced interest and costs on indemnity basis.
2. It is provided under O. 22, r. 24 that:

**Costs and other consequences where plaintiff does better than he proposed in his sanctioned offer (O. 22, r. 24)**

(1) This rule applies where—

1. a defendant is held liable for more than the proposals contained in a plaintiff’s sanctioned offer; or
2. the judgment against a defendant is more advantageous to the plaintiff than the proposals contained in a plaintiff’s sanctioned offer.

(2) The Court may order interest on the whole or part of any sum of money (excluding interest) awarded to the plaintiff at a rate not exceeding 10% above judgment rate for some or all of the period after the latest date on which the defendant could have accepted the offer without requiring the leave of the Court.

(3) The Court may also order that the plaintiff is entitled to—

1. his costs on the indemnity basis after the latest date on which the defendant could have accepted the offer without requiring the leave of the Court; and
2. interest on those costs at a rate not exceeding 10% above judgment rate.

(4) Where this rule applies, the Court shall make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3), the Court shall take into account all the circumstances of the case including—

* + - 1. the terms of any sanctioned offer;
      2. the stage in the proceedings at which any sanctioned offer was made;
      3. the information available to the parties at the time when the sanctioned offer was made; and
      4. the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

(6) The power of the Court under this rule is in addition to any other power it may have to award interest.

1. The plaintiff mainly relies on the authority *Wong Ka Ming v Ng Yin King and anor* HCPI 760 of 2009, judgment dated 22 July 2011 where Master Ko (as he then was) at paragraph 18 cited what was said by Evans LJ in *Charm Marine Incorporated v Elborne Mitchell* as follows:

“18. In *Charm Marine Incorporated v Elborne Mitchell*[[1]](#footnote-1), Evans LJ said:

“Should the established rule be qualified, therefore, by reserving to the court some power to order the plaintiff to pay the defendant’s costs after the date of payment in, where the payment in came close to matching the amount of the award, even though it fell short of doing so? I think not, essentially for four reasons:

1. If the plaintiff recovers more than [what] was available to him, then he has succeeded on what became the *lis* or issue at the trial, as described by Somervell L.J. However small the margin, if he does recover more he cannot be said to have failed;
2. The advantages of a clear-cut rule outweigh, in my judgment, the consequence of introducing a discretionary element which could lead to uncertainty and give scope for prolonged post-judgment debate.
3. ...

(4) A clear-cut rule means that the defendant must not underestimate the plaintiff’s chances of success, by however small an amount, just as the plaintiff must not be over-optimistic about them. This is consistent, in my view, with the policy considerations described by Denning L.J. in *Findlay v Railway Executive* [1950] 2 All E.R. 969, [1950] WN 570 at 974 of the former report.” ”

1. The plaintiff submits that the same approach, namely applying the “clear-cut rule” as aforesaid in *Charm Marine Incorporated v Elborne Mitchell*, was also adopted by Deputy High Court Judge Sakhrani (as he then was) in *Gurung Devchandra v Pacific Construction (HK) Co Limited and ors* HCPI 138 of 2011, judgment dated 15 October 2014, as per paragraphs 9 and 10.
2. The plaintiff therefore submits that, as long as the plaintiff does better than the sanctioned offer, even by a small margin, O. 22 r. 24 should still apply in this case and that the plaintiff should be granted enhanced interest (suggested to be 5% here) and costs on indemnity basis. It is also submitted that the plaintiff’s solicitors wrote to the defendant’s solicitors on 16 January 2019 seeking enhanced interest and costs but was not replied to and that the plaintiff should be granted costs on indemnity basis for this plaintiff’s application.
3. The defendant opposed to this plaintiff’s application. The only ground is that the criteria under O. 22, r. 24(5) is non-exhaustive and that the Court is entitled to take into consideration all the circumstances of the case including that the plaintiff:
4. did not succeed in every allegation and there was apparent evidence of gross exaggeration and/or unreasonable conduct; and
5. only succeeded by a very minimal amount of $4,342.
6. In my view, the ultimate question is whether it is unjust to order enhanced interest and costs on indemnity basis in all the circumstances of the case. If it is not unjust to do so, an order or orders should be made accordingly under O. 22, r. 24.
7. Having considered all the circumstances of the case and the parties’ submissions, I am not convinced that the circumstances as relied upon by the defendant amount to a valid objection to the plaintiff’s application. There is nothing unjust to make orders for enhanced interest and costs on indemnity basis in the circumstances of this case.
8. It is true that I rejected, in whole or in part, some of the plaintiff’s claims under the heads of special damages (for travelling expenses, tonic food, laundry expenses, part-time domestic helper expenses and drugs over the counter) and future expenses. Nevertheless, my rejection of the plaintiff’s claims as aforesaid had already been reflected in the final award of the damages.
9. It is noted that, the plaintiff though does not succeed in all her claims under the heads of special damages and future expenses, she succeeds in some of them. For the total amount of special damages, she is eventually awarded a sum of $54,342, which is significantly higher than the sum of $19,360 argued by the defendant, not to mention the fact that the plaintiff is awarded a sum of $250,000 for pain, suffering and loss of amenities after the hearing when the defendant sought to argue an unrealistic sum of $80,000 to $100,000. I do not lose sight of the fact that the plaintiff has failed completely in some of the claims (like those for drugs over the counter and future expenses) and in some other claims (like those for medical expenses already incurred, travelling expenses and tonic food) can only get what the defence agrees. The parties’ arguments in these areas did not take up substantial time in Court and after all, the hearing (including taking of evidence and submissions) took just a total of 2 days.
10. What is important here is that the fact remains, that the plaintiff has beaten the sanctioned offer by $4,342 and that the plaintiff has succeeded at the contested hearing.
11. It is also noted that the sanctioned offer was made by the plaintiff about three months before the first day of the hearing and by then, the defendant should have all the essential information required to consider whether or not the sanctioned offer should be accepted. In any event, the defendant did not reply to the plaintiff by seeking further information or making any counter proposal. As what was observed by Deputy High Court Judge Sakhrani (as he then was) at paragraph 11 of the judgement of *Gurung Devchandra v Pacific Construction (HK) Co Limited and ors*, (supra), which is equally valid here in this case, “*the defendants could have added a bit more to the last sanctioned payment and the result will be certain and different on the question of costs”*.
12. I am prepared to apply the “clear-cut rule” as suggested in *Charm Marine Incorporated v Elborne Mitchell*, and of the view that the small margin that the plaintiff succeeds in her final claim over the sanctioned offer should only be reflected in the percentage of the enhanced interest, which is a matter of discretion for the Court.

1. I shall grant the plaintiff’s application except that the enhanced interest should be 2% (instead of 5% as suggested by the plaintiff) above the judgment rate, in view of the small margin which the final award exceeds the sanctioned offer and all other circumstances of the case.
2. As the plaintiff succeeds in the plaintiff’s application, there is no reason why the plaintiff should not be granted costs accordingly.

*The defendant’s application*

1. The basis of the defendant’s application, in simple terms, is that the plaintiff’s costs in these proceedings should only be partially allowed as the plaintiff has only succeeded in less than one-third of her claim under the head of special damages and she failed completely in her claim under the head of future expenses.
2. The defendant relies on O. 62 rule 5(1) and (2) of the Rules of the District Court, Cap. 336H, that the Court when exercising its discretion as to costs shall take into account the conduct of the parties and whether the party has succeeded on part of his case.
3. The plaintiff opposed to the defendant’s application.
4. In fact, the parties’ arguments here are similar to those raised for arguing the plaintiff’s application as aforesaid.
5. For reasons same as those set out in paragraphs 15 to 18 above, I do not consider that the plaintiff should be deprived of any of her costs for the mere fact that she does not succeed in all of her claims under different heads. The fact remains that the plaintiff has beaten the sanctioned offer which she made to the defendant. It is also worth-noting that the final reward of $304,342 in total after the hearing is significantly higher than the argued sum of $99,360 to $119,360 by the defendant. I do not find anything in the circumstances of this case, including the parties’ conduct before and at the hearing, which should justify a departure from the general principle that costs should follow the event.
6. I shall refuse the defendant’s application. As the defendant fails in the defendant’s application, there is no reason why the plaintiff should not be granted costs accordingly.

*Disposal*

1. Now, I am prepared to amend the costs order *nisi* and make an order absolute as follows:
2. the costs from the date of the writ of summons up to 28 days after the date of the sanctioned offer made on 14 June 2017 be to the plaintiff, with certificate for counsel, to be taxed if not agreed;
3. the costs of these proceedings, including all the costs reserved, if any, incurred by the plaintiff after 28 days of the sanctioned offer made on 14 June 2017 up to the date of this decision on costs be paid by the defendant to the plaintiff on the indemnity basis, with certificate for counsel, to be taxed if not agreed;
4. the interest on the costs referred to in sub-paragraph (b) be paid by the defendant to the plaintiff at a rate of 2% above the judgment rate;
5. the costs of the plaintiff’s application under the summons dated 24 January 2019 be paid by the defendant to the plaintiff on the indemnity basis, with certificate for counsel, to be taxed if not agreed;
6. the costs of the defendant’s application under the summons dated 25 January 2019 be paid by the defendant to the plaintiff on the party and party basis, with certificate for counsel, to be taxed if not agreed; and
7. the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

( Edmond Lee )

District Judge

Ms Lorinda Lau, instructed by Hon & Co., assigned by the Director of Legal Aid, for the plaintiff

Ms Phyllis Lee, instructed by Kenneth C. C. Man & Co, for the defendant

1. Unreported, Transcript: Smith Bernal, 22 July 1997, quoted at para.25 of the judgment in *Lau Chi Keung*, op cit. [↑](#footnote-ref-1)