## DCPI 2272 /2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2272 OF 2008

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##### BETWEEN

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| TSANG MEI LUEN | Plaintiff |
| And |  |
| YIP WAI BIU | Defendant |

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Coram: District Judge S. T. Poon in Chambers

Date of Hearing: 28th June 2010

Date of Handing Down Decision: 12th August 2010

D E C I S I O N

1. This is an application by the Defendant to vary the costs order nisi of His Honour Judge Yung in his Judgment awarding damages to the Plaintiff after trial. In the summons, the Defendant also applies to disallow interest in respect of the damages awarded. As the learned Judge has now retired, the matter is listed before me for hearing.
2. The Plaintiff was knocked down by a vehicle driven by the Defendant while crossing a road. The trial started on 17th September 2009. In his Judgment dated 15 December 2009 with Corrigenda dated 7th January 2010, the learned Judge found that the Defendant was negligent but the Plaintiff was responsible for 2/3 of the liability. The Plaintiff was finally awarded a total sum of HK$85,067 with “usual interest” as damages.
3. The learned Judge made a costs order nisi in favour of the Plaintiff but did not specify a period within which application to vary the costs order nisi shall be made.
4. The Judgment was sealed on 21st January 2010 with the award described as “the sum of HK$85,607 with interest on the respective sums of HK$66,666.67 at the rate of 2% per annum from 24th October 2008[[1]](#footnote-1) until the date of Judgment and HK$18,400.33 at the rate of 5.5% per annum from 15th November 2006[[2]](#footnote-2) until the date of Judgment and thereafter at judgment rate until full payment.”. The amount of HK$66,666.67 represented the award under the head of Pain, Suffering and Loss of Amenities (“PSLA”) while the amount of HK$18,400.33 was awarded under the head of “Loss of Service” and special damages.
5. The Defendant had made a sanctioned offer on 9th June 2009 to admit 60% of liability and topped up the sanctioned payment to HK$90,000 on 24th August 2009. As such, the Plaintiff had failed to do better than both the Defendant’s sanctioned offer and sanctioned payment and pursuant to Order 22, rule 23 of the Rules of the District Court (“RDC”) the Court may disallow all or part of the interest otherwise payable and/or order the Plaintiff to pay costs. Sub-rules (2), (3) and (4) provide as follows:

“(2) The Court may by order disallow all or part of any interest otherwise payable under section 49 of the [District Court] Ordinance on the whole or part of any sum of money awarded to the plaintiff for some or all of the period after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court.

(3) The Court may order the plaintiff to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court.

(4) The Court may also order that the defendant is entitled to –

(a) his costs on the indemnity basis after the latest date on which the plaintiff could have accepted the payment or offer without requiring the leave of the Court; and

(b)interest on the costs referred to in paragraph(3) or subparagraph (a) at a rate not exceeding 10% above judgment rate.”

1. Although the learned Judge did not in his Judgment specify the time for application to vary his costs order nisi, Order 42, rule 5B(3) of RDC provides that such application shall be made within 14 days and therefore, contrary to the submission made by Mr. So, solicitor for the Defendant, the application was unquestionably made out of time.
2. Mr. Leung, solicitor for the Plaintiff, by adopting the written submission of his counsel (who is not appearing in this hearing), argued that this court has no jurisdiction to hear the Defendant’s summons as it was made out of time. In the said written submission, counsel relied on the comments of Chung J. in the Court of Appeal decision in *Tang Man Kit and Anor v Hip Hing Timber Company Limited[[3]](#footnote-3)* expressing his view that “once an order nisi has become an order absolute, the court cannot “unwind” the change in its nature merely by extending the prescribed time”[[4]](#footnote-4). However, neither counsel in her written submission nor Mr. Leung reminded me that the Court of Appeal have in fact ruled that the Court has jurisdiction to extend the time to apply for variation of a costs order nisi under Order 3, rule 5. In fact, in his same Judgment, Chung J. acknowledged that *Ma Wan Farming Limited v the Chief Executive in Council and another (No. 2)*[[5]](#footnote-5) was binding and the decision therein that time can be extended should be followed.
3. This court has clearly the jurisdiction to hear the Defendant’s summons and to extend time if appropriate.
4. As what the Court of Appeal have done in *Tang Man Kit*, I shall then consider whether the Defendant has justifiable reason for not making the application within time and whether the Defendant has merit in his application.
5. Mr. So gave an affirmation in support of the Defendant’s summons. He stated that a lot of time had been spent on clarifying ambiguities in the Judgment, in particular, the miscalculation of the award and the rate of interest awarded. It was mentioned that “[t]he Plaintiff at all time requested the Defendant not to issue proceedings for the purpose of an amicable settlement” and that “[o]nly after the parties could not finally come to a compromise of the costs, the Plaintiff raised the issue for the first time that the costs order nisi cannot be varied because of delay…”.
6. The correspondences between parties after judgment had not been produced for my consideration. I had only the chronology of events set out in Mr. So’s affirmation as reference. From the chronology, it can be seen that parties indeed spent a lot of time and effort to seek clarifications on the Judgment. However, it was not until 30th March 2010, 3½ months after the Judgment was handed down and all ambiguities had been clarified, that the Defendant wrote to the Plaintiff proposing a costs order in the Defendant’s favour.
7. In his affirmation, Mr. So blamed the Plaintiff for not raising earlier the issue of delay and has “induced the Defendant to enter into a prolonged settlement negotiation process or implicitly agreed that the parties should spend such time as necessary for an amicable settlement”. With respect, this cannot be right.
8. There is nowhere in the evidence suggesting that the Defendant had at any time earlier than 30th March 2010 indicated to the Plaintiff his intention to apply for variation of the costs order nisi. It is true that, given the small difference between the awarded sum and the sanctioned payment, the correct calculation of the award and interest may well affect the liability of costs in the end. However, if it was the intention of the Defendant to reserve his position to apply for variation of the costs order nisi pending clarification of the Judgment, he should have mentioned this to the Plaintiff in the clearest terms in order to safeguard his position. As the solicitor of the Defendant, it would only be prudent on the part of Mr. So to advise his client as such.
9. Quite obviously, the question of delay did not cross the mind of Mr. So until the Plaintiff raised it in reply to the Defendant’s proposed costs order. This is consistent with the Defendant’s stance taken in this application that there was no time limit specified in the order nisi and hence he could take out the application within a reasonable time.
10. In my view, the reason for the delay was either because of the erroneous belief of Mr. So that there was no deadline to meet or that he has paid too much attention on clarifying the ambiguity of the award. Both are not good reasons.
11. Regarding the merit of the Defendant’s application, Mr. Leung has fairly conceded that he can hardly resist it if leave is given to the Defendant to apply out of time. It is undisputable that the Defendant has made sanctioned offer and payment that the Plaintiff failed to beat and in accordance with the rules, the Defendant is entitled to at least the costs.
12. The explanation given by the Defendant is not satisfactory and the delay is substantial. However, but for the delay, the court will readily accede to the application and vary the costs order nisi. Besides, I can see no evidence of any prejudice suffered by the Plaintiff because of the delay which cannot be compensated by costs.
13. On balance, I would hesitantly exercise my discretion in favour of the Defendant and allow him to make the application out of time. I must stress that in similar situation the court will expect a good explanation for the delay. But in this particular case, the award given by the learned Judge, both in relation to the amount and interest, was indeed ambiguous and can in some way contribute to the delay. Leave to apply to vary the costs order nisi out of time is hereby granted.
14. The following orders were sought in the Defendant’s summons:
15. Interest on award of liability after 7th July 2009 (i.e. the latest date for the acceptance of the Defendant’s sanctioned offer on liability) be disallowed;
16. Costs of issue of liability of the action up to and inclusive of 7th July 2009 be paid by the Defendant to the Plaintiff to be taxed if not agreed; costs of issue of liability of the action from 7th July 2009 be paid by the Plaintiff to the Defendant to be taxed if not agreed with Certificate for Counsel;
17. Interest on award of damages after 16th September 2009 (i.e. one day before the hearing date on 17th September 2009 which is also the latest date for the Plaintiff to accept with[out] leave of the court the 3rd sanctioned payment dated 24th August 2009) be disallowed;
18. Costs of this action up to and inclusive of 16th September 2009 be paid by the Defendant to the Plaintiff to be taxed if not agreed; costs of this action from 17th September 2009 and thereafter be paid by the Plaintiff to the Defendant to be taxed if not agreed with Certificate for Counsel;
19. The costs payable by the Plaintiff to the Defendant be on indemnity basis.
20. Pursuant to Order 23, rule 23(5) of the RDC, the Court shall make the orders referred to in paragraphs (2), (3) and (4) of the rule, as set out under Paragraph 5 herein, unless it considers it unjust to do so. As such, I should give the orders in terms of (b), (c) and (d) above unless it is unjust to do so. For (a), as there is no such thing as “interest on award on liability” as distinct from the interest on award of damages, it can simply be dismissed.
21. I should say something about the relevant dates, i.e. the “latest dates”, provided in (b), (c) and (d) above.
22. Regarding the costs on liability, the sanctioned offer of the Defendant was served to the Plaintiff on 9th June 2009. The Defendant takes 7th July 2009 as “the latest date on which the offer could have been accepted without requiring the leave of the Court” under Order 22, rule 23(3). Obviously, the Defendant has taken into account Order 22, rule 15(1)[[6]](#footnote-6) and formed the view that “the latest date” here means the 28th day from the date of the offer, on or before which the offer can be accepted without leave.
23. On the other hand, in respect of the sanctioned payment, the first date of trial (17th September 2009) was taken as the “latest date”. The Defendant offers no explanation as to his choices of the “latest date”. I can only assume it is the Defendant’s view that in the present case, as the relevant sanctioned payment was made on 24th August 2009 which was less than 28 days before the trial date, Order 22, rule 15(1) is not applicable and therefore a different “latest date” should be adopted.
24. Different views have been taken regarding the meaning of “latest date” under Order 22, rule 23 (or rule 24) in situation where the relevant sanctioned payment or offer is made less than 28 days before the trial date.
25. In *TSOI HAK KONG HERBERT v. KOK WAI CHUN AND ANOTHER[[7]](#footnote-7)* , Chung J. considered the same issue in a different context. His Lordship was asked to impose sanction on costs and enhanced interest under Order 22, rule 24 against the defendant for failing to beat the plaintiff’s sanctioned offer made less than 28 days before trial. In determining the “latest date”, the learned Judge had this to say[[8]](#footnote-8):

“A plaintiff’s offer can be accepted without the court’s leave up to the time when the court pronounces its holding or judgment (but not beyond that time). This conclusion flows from the following:-

(a) the power conferred by Ord. 22 r. 24(4) becomes exercisable when there is a holding or judgment which falls within the terms of Ord. 22 r. 24(1)(a) and/or (b) (see para. 12 above);

(b) to prevent Ord. 22 from becoming operative, not only must a defendant accept a plaintiff’s offer (pursuant to Ord. 22 r. 16(2)(a)(i) or (ii)), he must do so before the holding or judgment is pronounced. Once that event occurs, it will be too late for him to do so;

(c) in other words, the period during which the defendant could have accepted the offer without the court’s leave cannot extend beyond the time when the holding or judgment is pronounced.”

An example was given as illustration[[9]](#footnote-9):

“A simple example will provide a clear illustration. The plaintiff makes a sanctioned offer pursuant to Ord. 22 r. 16(2)(a) on Monday. The trial commences on Tuesday and finishes on Wednesday. Judgment (which falls within the terms of, say, Ord. 22 r. 24(1)(b)) is pronounced on Thursday. In such a case, the “latest date” falls on Wednesday.”

1. In *CHENG KAI KIT v. KWONG KAM TIM MARBLE COMPANY LIMITED AND ANOTHER*[[10]](#footnote-10), a subsequent decision in the District Court, HH Judge Leung adopted a different approach to the issue. This is a case where the defendants made the relevant sanctioned payment less than 28 days before trial and the plaintiff failed to beat the same. The learned Judge viewed that the “latest date” the plaintiff could have accepted the sanctioned payment without leave was the date before commencement of trial. It seemed that the meaning of the “latest date” was not in issue and presumably *TSOI HAK KONG HERBERT* has not been referred to the learned Judge.
2. It was not without reason that the date before commencement of trial was chosen as the “latest date” by the learned Judge. After the trial commenced, the Court has thereby seized upon itself the matter. I doubt that the parties can still settle the matter in any way without asking for leave from the Court, even if they have agreed everything including the liability for costs.
3. However, there are several points worthy of note. Firstly, if the “latest date” under Order 22, rule 23 (or rule 24) means simply the date before commencement of trial or the date before pronouncement of judgment, there is no reason why the rules were not written simply and clearly in those terms. Secondly, there should be some relevance, in substance, between whether leave is required for acceptance and having the liability to pay costs or interest. Thirdly, Order 22, rule 15 must be of significance for the purpose of determining the “latest date” as this is the only where in the rules allowing acceptance of sanctioned offer or payment without leave.
4. Regarding the second point above, the obvious relevance is that if leave is not required, it would be entirely in the hands of the offeree to decide whether to accept a particular offer. For example, if the relevant sanctioned offer/payment is made more than 28 days before trial, within the immediate 28 days after the date of the relevant sanctioned offer/payment it will be entirely up to the offeree to decide whether to accept it and if he does, a settlement is reached. In this case, it is sensible to make the time when the acceptance can be made without leave as a reference point to incur liability to pay costs or other sanctions as the offeree is the only person to blame for not accepting the reasonable offer.
5. On the contrary, if the offeree himself cannot control whether the acceptance is allowable, it would be difficult to say that but for the decision of the offeree not to accept the offer, further costs could have been avoided. For example, if the relevant sanctioned offer/payment is made less than 28 days before trial and there is no agreement on liability for costs but the offeror maintains a very unreasonable stance on the issue of costs, it would be unfair to blame the offeree for not entering into an agreement on liability for costs and accept the offer without leave[[11]](#footnote-11). In that case, the date when an acceptance can be made without leave should not be relevant in considering when to incur liability to pay costs or other sanctions.
6. In my judgment, Order 22, rules 23 and 24 should be read side by side with Order 22, rule 15. Similar to rule 15, cases where the relevant sanctioned offer/payment is made less than 28 days before the commencement of trial or not should be distinguished. If not, rule 15(1) becomes relevant and the “latest date” will be the 28th day after the date of the relevant sanctioned offer/payment.
7. If the relevant sanctioned offer/payment is made less than 28 days before the commencement of trial, rule 15(2)(a)(i) becomes relevant and the Court should consider evidence as to when it was open to the offeree to enter into a reasonable agreement on the liability for costs and accept the relevant sanctioned offer/payment without leave.
8. I note that the wordings of rules 23(2) and 23(3) are different from rule 23(4)[[12]](#footnote-12). In the former provisions, the words “could have been accepted” are used whereas the words “the plaintiff[[13]](#footnote-13) could have accepted” are used in the latter one. In my view, for reasons set out above in paragraphs 28 and 30 herein, they have in fact the same meaning as “the plaintiff [[14]](#footnote-14)could have accepted”.
9. In the present case, the sanctioned offer on liability was made more than 28 days before the commencement of trial. As mentioned in paragraph 30 herein, there should be an order in terms of paragraphs 19(b) and (e) herein and I so order.
10. Regarding the sanctioned payment, it was made less than 28 days before commencement of trial. There is no evidence before me that it was open to the Plaintiff to enter into a reasonable agreement on the liability for costs and accept the sanctioned payment without leave and hence, I am not satisfied that the Plaintiff could have accepted the sanctioned payment without leave at any time. For this reason, I am not prepared to grant the order as sought under paragraph 19 (c) and (d) herein.
11. I order that the costs order nisi of HH Judge Yung be varied to the extent as set out under paragraph 34 herein.
12. As the Defendant only succeeds in part and there was a delay on their part, there should be no order as to costs for the Defendant’s summons. This is an order nisi and will become absolute upon the expiry of 14 days from the date of this Decision.
13. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(S. T. Poon)

District Judge

Mr. Eddie Leung of Messrs Cheng Yeung for the Plaintiff.

Mr. C. S. Co of Messrs Lee & So for the Defendant.

1. The date of commencement of proceedings [↑](#footnote-ref-1)
2. The date of the accident [↑](#footnote-ref-2)
3. CACV 137/2002 [↑](#footnote-ref-3)
4. At paragraph 24 [↑](#footnote-ref-4)
5. [1998] 2 HKLRD 314 [↑](#footnote-ref-5)
6. Which reads “… a plaintiff may accept a sanctioned offer or a sanctioned payment made not less than 28 days before the commencement of the trial without requiring the leave of the Court if he files with the Court and serves on the defendant a written notice of acceptance not later than 28 days after the offer or payment was made.” [↑](#footnote-ref-6)
7. [2009] 4 HKLRD 215 [↑](#footnote-ref-7)
8. At paragraph 35 [↑](#footnote-ref-8)
9. At paragraph 36 [↑](#footnote-ref-9)
10. DCPI 2627/2008 [↑](#footnote-ref-10)
11. Order 22, rule 15(2): “If – (a) a defendant’s sanctioned offer or sanctioned payment is made less than 28 days before the commencement of the trial…then the plaintiff may –(i) if the parties agree on the liability for costs, accept the offer or payment without the leave of the Court…” [↑](#footnote-ref-11)
12. Same for rule 24 [↑](#footnote-ref-12)
13. “defendant” in case of rule 24 [↑](#footnote-ref-13)
14. Ditto [↑](#footnote-ref-14)