# DCPI 2469/2014

[2018] HKDC 1216

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2469 OF 2014

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BETWEEN

WU KIN HO（胡健豪） Plaintiff

and

WONG KONG HOP KENNETH（黃剛俠） Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Dates of Hearing: 8 June & 10 August 2018

Date of Decision: 28 September 2018

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## DECISION

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1. There are 2 summonses involved in this decision.
2. The defendant’s summons is one for leave to appeal against the assessment of damages made by me on 11 May 2018 (“the Judgment”) under O 58 r 2 of the Rules of the District Court (“RDC”) and for a stay of execution pending the determination of the defendant’s appeal under section 66 of the District Court Ordinance, Cap 336 (“DCO”) (“D’s Summons”).
3. The plaintiff’s summons is one to vary the costs order nisi contained in the Judgment under O 22 r 19 and 24 and O 62 r 3 of the RDC (“P’s Summons”).
4. I shall first deal with D’s Summons for leave to appeal and stay of execution and then to deal with P’s Summons for the variation of the costs order nisi.

*(I) D’s Summons*

1. As said, this summons taken out by the defendant is for an application to seek leave to appeal, which, if granted, to apply for a stay of execution pending the determination of the appeal.
2. The legal principles on granting leave of appeal are well settled and are not in dispute. They can be briefly summarized as follows:

(i) leave to appeal shall not be granted under section 63A of the DCO unless this court is satisfied that the appeal has a reasonable prospect of success or there is some other reasons in the interests of justice that the appeal should be heard; and

(ii) the applicant bears the burden of satisfying the court that his appeal has reasonable prospect of success which means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable. When the applicant seeks to challenge the finding of fact made by the court below, unless he can show that the trial judge misunderstood the evidence, or failed to appreciate its effects, or overlook some documentary or other indisputable evidence which should have compelled him to a different conclusion, the court of appeal will not interfere with those findings of the facts: see *Lee Chick Choi v Best Spirits Co Ltd* [2018] HKCA 449.

*The defendant’s draft grounds of appeal*

1. In the draft notice of appeal attached to D’s Summons, the defendant relies on the following grounds:

(1) HK$100,000 for pain, suffering and loss of amenities (“PSLA”) award is inconsistent with the findings of the joint medical expert report in that:

(a) there might be residual damage from the 2011 Accident;

(b) intervertebral disc at L5/S1 level was due to pre-existing degeneration of the disc.

(2) the court should not award pre-trial loss of earnings to the plaintiff in the absence of any documentary evidence; and

(3) the court has erred in attaching too much credibility and accepting what the plaintiff has stated in his oral evidence, which the defendant says was far from believable and genuine.

1. In relation to Ground 1 of the proposed grounds of appeal, I do not consider that the award of the HK$100,000 for PSLA allowed in this case was excessive; nor do I consider that taking into account of the element of inflation over the years since some of those cases referred to the court had been decided was either incorrect as a matter of principle or excessive as a matter of quantum.
2. The defendant’s proposed appeal on this ground is based on an attack on the findings of facts made by me. Since a trial judge has the advantage of assessing the credibility of the witnesses who gave evidence before him, unless the Court of Appeal is satisfied that the trial judge was plainly wrong, it usually would defer to the trial judge’s assessment even when there are some doubts on its correctness: see *Ting Kwok Keung v Tam Dick Yuen* [2002] 3 HKLRD 1 at 13E-48.
3. As all personal injury lawyers would know, there is no exact formula to arrive a precise figure for a PSLA award in any given personal injury case. In each case, the court will take into account of matters like the extent of the injuries suffered by the plaintiff, treatments received, length of hospitalization, period of recovery, the effects of the injury have on his daily life and employment, whether any loss of amenities like losing the ability to participate in a sport or hobby, etc. The court will then make comparison with victims in other decided cases who had suffered from similar injuries. It will then decide whether the injuries would fall within any of the 4 different categories as defined in landmark decisions like *Lee Ting Lam v Leung Kam-Ming* [1980] HKLR 657as updated in *Chan Pui Ki v Leung On & Another* [1996] 2 HKLR 401; *Lawati Bhawani Bikram v Ting Kau Contractors Joint Venture* (unrep, CACV 3002/2012, [2002] HKEC 1211; *Lam Chan Hung v Hang Yue Engineering Ltd* [2013] 3 HKLRD 420; and *Wong Man Kin v Golden Wheel (C & HK) Transportation Co Ltd* [2015] 5 HKC 570 at 586B. After that, it will make adjustments for any inflationary increase. At the end of the day, the court will arrive a figure which would fall within what I would describe as the “reasonable range” of PSLA award which is permissible in that particular case. Sometimes, the court may be criticized as being too generous and sometimes being too mean with the assessment on this figure, depending on which side of the case the party is on. However, in my judgment, one could not say the figure is plainly wrong or manifestly excessive, so long as it falls within that “reasonable range” which the court is entitled to award.
4. In the circumstances this case, I do not consider the HK$100,000 PSLA award could be regarded as falling outside of that “reasonable range”, which a court, having carefully considered the above matters, could arrive at: §§32-34 of the Judgment.
5. In respect of Ground 2, the defendant says that the court should have rejected the plaintiff’s claim for pre-trial loss of earnings as there was no documentary evidence to support his income.
6. In this regard, the defendant’s counsel Mr Kevin Lee relies on the decision of Master K Lo of the High Court in *Chan Lung Hing v Ng Kam Man* [2014] HKCFI 1121. With respect, that case was decided on its own facts. Like the present case, it was a pure finding of facts made by the learned master. The decision is not binding on me nor do I consider it has laid down any important principles of law which I should follow.
7. In our present case, I was acutely aware that there was not a single document to support the plaintiff’s pre-accident income. However, the plaintiff had given cogent oral evidence on this matter in the witness box and his evidence in this aspect was not shaken during cross-examination. I have also given the reasons as to why I accepted his evidence in the absence of any documentary evidence: see §36 of the Judgment.
8. Thus, I simply cannot see the defendant will have any reasonable prospect of success on appeal based on this ground also.
9. In relation to Ground 3 of the proposal grounds of appeal, with respect to the defendant’s counsel, I simply cannot see how I could be said to be plainly wrong in accepting the plaintiff’s evidence or had attached too much weight to his evidence when not a single ounce of evidence was produced by the defendant to rebuke the plaintiff’s case. In a trial, it is always open to a trial judge to accept part of the evidence of a witness and reject other parts of it. Just because I did not believe the plaintiff’s evidence in certain parts of his case does not mean that I should reject his evidence in other parts of his case also. As stated in the Judgment, I found the modest income he was claiming during the pre-trial period was extremely reasonable, even in the absence of any documentary evidence. Thus, I cannot see any reasonable prospect of success for an appeal based on this ground also.
10. In the aforestated premises, I see no reason why leave should be granted based on the 3 grounds relied on by the defendant. Further, in my view, there are also no reasons in the interests of justice why the appeal should be heard. Thus, I would dismiss D’s Summons seeking leave to appeal. It follows that the defendant’s application for stay of execution will be dismissed also. I would also award costs of the summons in favour of the plaintiff, such costs to be taxed if not agreed, with certificate for counsel.

*II. P’s Summons*

1. P’s Summons is to vary the costs order nisi contained in §55 of the Judgment where I ordered that “the defendant do pay the costs of this assessment with certificate for counsel, such costs to be taxed if not agreed”.
2. In P’s Summons, the plaintiff asked the costs nisi to be varied to the following:

“The defendant do pay the plaintiff’s costs of this action on party and party basis up to 2 January 2018, and thereafter on indemnity basis to be taxed if not agree, with certificate for counsel, with enhanced interest on the indemnity costs at the rate of 4% above judgment rate until actual payment”.

1. The plaintiff also asked the sanctioned payment of HK$68,000 paid by the defendant on 27 January 2015 and HK$24,000 on 16 March 2015, together with any accrued interest thereon, be paid out to the plaintiff via his solicitors forthwith in partial satisfaction of the awarded damages and interest.
2. Further, the plaintiff asked that the defendant to pay the plaintiff’s costs of the application on an indemnity basis, such costs to be taxed if not agreed, with enhanced interest at the rate of 4% above judgment rate until actual payment. In his amended summons dated 13 June 2018, the plaintiff added “or any other terms as the court deems fit” at the end of the paragraph which seeks enhanced interest.

*Relevant events*

1. At the hearing original fixed before me on 8 June 2018 (which was adjourned due to the late filing of hearing bundles and submissions on the part of the defendant), the plaintiff’s counsel Mr Jacky Jim had only mentioned the following what he would describe as “important events” in his skeleton submissions:

“i Interlocutory judgment on liability has been entered on 29 December 2014.

ii The Defendant made two sanctioned payments of HK$68,000.00 and HK$24,000.00 (totaling HK$92,000.00) on 27th January 2015 and 16th March 2015 respectively.

iii On 5th December 2017, the Plaintiff made a sanctioned offer (AYCS-1) to the Defendant that he agreed to accept HK$120,000.00 (inclusive of interest) plus costs to be taxed if not agreed for a full and final settlement of the claim herein (“the Sanctioned Offer”). The latest day for accepting the same without leave was due on 2nd January, 2018.

iv Assessment on damages was held on 5th January, 2018.

v By the Judgment of His Honour Judge Andrew Li dated 11th May 2018, the Plaintiff has been awarded damages of HK$135,167.00 together with interest i.e. HK$155,438.37 as seen in the letter (AYCS-2).

vi On 15th May 2018, the Plaintiff’s solicitors wrote to the Defendant’s solicitors asking for their consent to vary the costs order and to seek leave for the payment out of HK$92,000.00 as partial payment of the awarded damages. But no reply is heard from the Defendant.”

1. As Mr Kevin Lee, counsel for the defendant, has rightly pointed out in his skeleton argument for the hearing on 8 June 2018, the plaintiff had failed to disclose some of the material facts pertaining to this issue. In particular, the plaintiff had failed to mention the fact that he had sent out 2 letters containing sanctioned offers both dated 5 December 2017 but both coached in very different terms.
2. The first sanctioned offer was made by a letter dated 5 December 2017, which was referred to by the plaintiff’s counsel in his skeleton submissions, where the plaintiff had offered to accept a sum of *“HK$120,000 (inclusive of interest) plus costs on the District Court scale”* (“the First Sanctioned Offer”).
3. However, what the plaintiff had failed to mention in his June 2018 skeleton submissions is the important fact that the First Sanctioned Offer was superseded by a second sanctioned offer contained in a letter dated 5 December 2017 (but received by the defendant by fax on 6 December 2017 at 10:59 am only). In this letter, the plaintiff offered to accept *“HK$95,000 plus specified costs of HK$150,000”* (“the Second Sanctioned Offer”). It is to be noted also that, after receiving the First Sanctioned Offer, the defendant’s solicitors had acted in good faith and further negotiations took place between the parties. A reply letter was sent by the defendant to the plaintiff on 5 December 2017 (“the Reply Letter”). In the Reply Letter, the defendant’s solicitors have neither accepted nor rejected the plaintiff’s offer. Instead, they reiterated their sanctioned payment of HK$90,000 was sufficient to satisfy the plaintiff’s claim. They further asked the plaintiff’s solicitors what was their “agreed costs” so that they could take instructions from their client. In my view, that was clearly an attempt on the part of the defendant to try to negotiate for an early settlement.
4. On 13 December 2018, the plaintiff sent a letter to the defendant making a without prejudice offer of *“HK$92,000 (inclusive of interest) plus costs of HK$70,400”* in settlement of the whole of the plaintiff’s claim.
5. On 3 January 2018, the plaintiff produced another letter purporting to record the fact that the parties had reached a settlement (“the January Letter”). In the January Letter, the plaintiff claimed that the parties had agreed to settle the damages in the sum of HK$92,000 and costs at HK$70,400. The defendant said that no such agreement had ever been reached by the parties, something which has been belatedly conceded by the plaintiff’s solicitors in a second affirmation filed on 11 July 2018 after the June 2018 hearing.
6. What is really troubling to this court in this case is that the plaintiff had conveniently failed to mention the existence of the Second Sanctioned Offer, the Reply Letter and the January Letter in the skeleton submissions of his counsel lodged for the purpose of the original hearing fixed on 8 June 2018.
7. However, as said, the original hearing on 8 June 2018 was adjourned due to the defendant’s failure to lodge his submissions and hearing bundles in time in accordance with the practice directions. That hearing was adjourned to 10 August 2018 for substantive arguments with wasted costs to be borne by the defendant. In the interim, the plaintiff took the opportunity to amend his summons to add after the paragraphs seeking enhanced interest rate to include the sentence of “*or any other terms as the court deems fit*” and to file the 2nd affirmation of Au-Yeung Chi Sang, the plaintiff’s solicitor who handled the case. The latter clearly was filed in order to plug the holes which were created by the incomplete picture disclosed to the court under the skeleton submissions.

*Relevant legal principle*

1. Order 22 rule 24 of the RDC provides as follows:

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

(1) This rule applies where –

(a) a defendant is held liable for more than the proposals contained in a plaintiff’s sanctioned offer; or

(b) 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 –

(a) 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

(b) 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 –

(a) the terms of any sanctioned offer;

(b) the stage in the proceedings at which any sanctioned offer was made;

(c) the information available to the parties at the time when the sanctioned offer was made; and

(d) 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. Order 22 rules 24(5) contains an important provision which confers upon the court a discretion not to award indemnity interest where it would be unjust to do so. In determining what is considered to be “unjust”, the court is to take into account of all the circumstances of the case, including the matters contained in under rule 24(5).
2. In cases where the sanctioned offer contains terms as to costs, as in the present case under the Second Sanctioned Offer, it has been held that such an offer is not a valid one: see *Mitchell & Ors v James & Ors* [2003] 2 All ER 1064 at §§30-33; *Lin Yanjin v Smart Billion Engineering Limited* HCPI 739/2009, unreported, (Master Marlene Ng; 10 August 2011) at §§70-76.

*Is the plaintiff entitled to enhanced interest in this case?*

1. I agree with Mr Lee that, given the less than frank attitude and the rather shadowy conduct of the plaintiff, coupled with the invalid Second Sanctioned Offer which contained terms as to costs, the starting point in dealing with costs of the assessment is that the usual costs consequences of O 22 r 22 do *not* apply.
2. It is most unfortunate that the plaintiff’s counsel saw fit to base his application for the variation of the costs order on an incomplete history record to the court. The Second Sanctioned Offer was clearly a material fact which ought to have been disclosed for the court’s consideration at the original hearing. Yet it was not included until the hearing was adjourned due to other reasons. Had the plaintiff disclosed the full picture, it would have been clear to all parties concerned that he had no basis to ask for a costs order founded on O22 r24 (2) & (3).
3. I also note the fact that the plaintiff’s First Sanctioned Offer was almost immediately responded to by the defendant, demonstrating a genuine attempt on his part to reach an early settlement. However, due to the rather unrealistic and totally disproportionate amount of costs claimed by the plaintiff’s solicitors in the Second Sanctioned Offer, namely HK$95,000 damages (inclusive of interest) plus HK$150,000 agreed costs, such offer was incapable of being accepted.
4. In my view, even if the Second Sanctioned Offer was a valid one, the costs to be allowed according to the rules would have been costs incurred up to and including to that point only, ie well before the assessment hearing. Thus, it is clear that if all cards were placed on the table, there was simply no basis for the plaintiff to seek for a variation of the costs order as stated in the P’s Summons.
5. I also agree with Mr Lee’s submission that the plaintiff’s conduct had all the hallmarks of showing that he was being less than honest and sincere in settling the case. With respect, it seems to me that the plaintiff’s solicitors were more keen to secure their agreed costs rather than the amount of damages the plaintiff would able to obtain at the end of the day. This has been amply demonstrated by the disingenuous way of them first asking for an agreed costs at HK$150,000 under the Second Sanctioned Offer, only to reduce it by more than half to HK$74,000 within a week later (as contained in their letter dated 13 December 2017).
6. I have no hesitation to reject the rather disconcerting oral submission made by the plaintiff’s counsel at the hearing that the Frist Sanctioned Offer was valid and all the other letters were merely “red herrings” and not relevant to the plaintiff’s application. As seen from my analysis above, this simply could not be the case. When further pressed by the court why they were merely red herrings, Mr Jim could only say that “there was room for improvement” in the plaintiff’s case.
7. In my judgment, it is plain and obvious that the Second Sanctioned Offer had superseded the First Sanctioned Offer. This was clearly demonstrated in the letter itself. First, it was labelled as “2nd Letter”. Second, it has unequivocally rejected the defendant’s settlement offer at HK$90,000 plus costs. Third, it purportedly “put forward” a new sanctioned offer *“under Order 22 rule 4 and 5 of the Rules of District Court (sic)”* and *“to accept a sum of HK$95,000 (inclusive of interest) plus costs of HK$150,000”*.
8. As the Second Sanctioned Offer contained terms as to costs, it was an invalid offer. It therefore means that the plaintiff had not made a valid sanctioned offer capable of accepting by the defendant. Thus, the purported Sanctioned Offer made by the plaintiff did not have the costs consequences as specified in O22 r 24 (2) & (3): see *Lin Yanjin, supra* at §72.
9. In the aforesaid circumstances, I am of the view that O22 r 24(4) applies in this case. It would, in my judgment, be unjust to award indemnity costs to the plaintiff based on O22 r 24 (2) and (3) in the absence of any valid sanctioned offer made by them in this case.
10. On the other hand, since the plaintiff has managed to beat the sanctioned payments made by the defendant in this case, he is still entitled to his costs of the assessment, albeit not on an indemnity basis with enhanced interest as specified under O22 r 24. I therefore order that the costs order nisi will be made absolute, namely, the plaintiff will be entitled to the costs of the assessment on a party and party basis, with certificate for counsel, such costs to be taxed if not agreed.
11. As to P’s Summons, I am of the view there is an element of the plaintiff being less than frank with the court regarding the Second Sanctioned Offer and the summons should not have been taken out in the first place. I therefore would dismiss P’s Summons with costs on an indemnity basis in favour of the defendant, with certificate for counsel, such costs to be taxed if not agreed.

( Andrew SY Li )

District Judge

Mr Jacky Jim, instructed by Au Yeung, Chan & Ho, for the plaintiff

Mr Kevin Lee, instructed by C W Chan & Co, for the defendant