# DCPI 2469/2014

[2019] HKDC 324

**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)

Date of Hearing: 23 November 2018

Date of Decision: 8 March 2019

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## DECISION

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1. This is an application by the plaintiff to seek leave to appeal against a Decision made by me on 28 September 2018 (“the Decision”) whereby I had dismissed the plaintiff’s summons to vary the costs order nisi made in the assessment of damages dated 11 May 2018.
2. In the Decision, I held that:-
3. the plaintiff’s summons to vary with the costs order nisi be dismissed;
4. the costs order nisi to be made absolute in that the plaintiff is entitled to the costs of the assessment on a party and party basis with certificate for counsel; and
5. costs of the plaintiff’s summons to vary the costs order nisi be to the defendant on an indemnity basis with certificate for counsel.

*BACKGROUND*

1. For the background of this case and in particular in relation to the costs argument, I would refer the parties to §§18 to 29 of the Decision.

*DISCUSSION*

*Draft Notice of Appeal*

1. In the draft notice of appeal, the plaintiff claims that I had erred in law in holding that the Second Sanctioned Offer had superseded the First Sanctioned Offer which rendered the First Sanctioned Offer invalid and incapable of being accepted: (See §39 of the Decision). Further, the plaintiff alleges that even if I was right in holding that the First Sanctioned Offer was superseded by the Second Sanctioned Offer (which is denied), I had erred in law in holding the sanctioned offer containing terms as to costs was not a valid offer: (See §32 of the Decision). The plaintiff also claims that I had erred in holding the Second Sanctioned Offer did not have the consequences specified in O 22 r 24(2) & (3) of the Rules of the District Court (“RDC”): (See §40 of the Decision).
2. Instead, the plaintiff says that I should have held that:-
3. the Sanctioned Offers containing terms as to costs are not invalid sanctioned offer;
4. the fact that the Second Sanctioned Offer contains terms as to costs does not render the Second Sanctioned Offer invalid and incapable of being accepted; and
5. the Second Sanctioned Offer is a valid sanctioned offer and would have the consequences specified in O 22 r 24(2) & (3) of the RDC.
6. Further, the plaintiff claims that I had erred in law in holding that it would be unjust to award indemnity costs to the plaintiff based on O 22 r 24(2) & (3) “in the absence of any valid sanctioned offer”: (See §41 of the Decision). He claims that there was/were valid sanctioned offer(s), namely, the First Sanctioned Offer and/or the Second Sanctioned Offer.
7. Lastly, the plaintiff claims that even if I was right to hold that there was no valid sanctioned offer (which is denied), I had failed to consider whether to exercise the discretion under O 62 to award indemnity costs to the plaintiff as they consider the offer made by the plaintiff were valid *Calderbank* offers.
8. I shall deal with the plaintiff’s application under the 4 different grounds as set out in the draft notice of appeal.

*(1) Ground 1: Superseding of sanctioned offer*

1. The plaintiff submits that there was reasonable prospect of success in appealing against my finding in holding the Second Sanctioned Offer had superseded the First Sanctioned Offer which rendered the First Sanctioned Offer invalid and incapable of being accepted.
2. Mr Albert Wan, the plaintiff’s counsel, submits that O 22 is a self-contained code which provides expressly for the manner in which offers may be made, modified and withdrawn. As such, it displaces the ordinary rules of common law. Once made, a sanctioned offer under O 22 remains open for acceptance until the start of trial or his withdrawal under O 22 r 7. This is not disputed by the defendant.
3. Mr Wan relies on the case of *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081 where the English Court of Appeal found that the judge below was wrong to hold that the two earlier sanctioned offers in May and August 2007 were superseded by the subsequent offer made in February 2008. The plaintiff says that *Gibbon* has been applied in Hong Kong in *Rai v Pacific Construction (HK) Co Ltd* [2011] 3 HKLRD 469 at 485-486, §24.
4. Thus, he submits that making subsequent sanctioned offers does not constitute withdrawal or supersedence of earlier sanctioned offers. The subsisting sanctioned offer which is not beaten by the offeree after trial can be relied upon by the offeror to invoke the court’s jurisdiction to award costs on indemnity basis and interest at enhanced rates.
5. In *Rai v Pacific Construction (HK) Co Ltd,* *supra*, a decision which is binding on me, Bharwaney J held at 486, §26 that:-

“The fact that a second or third increased sanctioned offer is made in the course of the proceedings does not constitute a withdrawal of earlier unaccepted offers which remain subsisting. The subsisting sanctioned offer which is not beaten by the offeree after trial can be relied upon by the offeror to invoke the court’s jurisdiction to award costs on an indemnity basis and interest at enhanced rates.”

1. The plaintiff therefore submits that, as a matter of law, the First Sanctioned Offer was not withdrawn or had been superseded as:-
2. no leave was granted by the court to withdraw or diminish the First Sanctioned Offer under O 22 r 7 of RDC; and
3. the making of the sanctioned offers, such as the Second Sanctioned Offer, does not constitute withdrawal or supersedence of the First Sanctioned Offer.
4. Mr Wan further submits that there was nothing in the Second Sanctioned Offer to suggest that the First Sanctioned Offer should be considered as having been withdrawn or superseded. They included the fact that:-
5. the label “2nd Letter” contained in the Second Sanctioned Offer merely means it was a second letter sent to the defendant’s solicitors on 5 December 2017 and was only used to avoid any confusion with the First Sanctioned Offer dated the same day;
6. rejecting the defendant’s offer at HK$90,000 plus costs does not mean that the First Sanctioned Offer had been revoked. The plaintiff says that there was simply no causal connection between the two; and
7. purporting to put forward a new sanctioned offer does not mean it should supersede the previous sanctioned offer. They could both co-exist at the same time and acted as alternatives for the defendant to choose from.
8. The plaintiff therefore contends that the First Sanctioned Offer remains open for the acceptance for 28 days and, after 28 days, it can be accepted if the parties can agree on the costs or if the court grant leave for them to do so: See O 22 r 5(7). The plaintiff submits that, since the subsisting First Sanctioned Offer had not been beaten by the defendant after trial, it could be relied upon by him to invoke the court’s jurisdiction to award costs on an indemnity basis.
9. In my judgment, it cannot be disputed that in this particular case, the First Sanctioned Offer made by the plaintiff, when standing on its own, could constitute to a valid sanctioned offer. The only question is whether, as I had found in the Decision, the Second Sanctioned Offer had the effect of *replacing* or *superseding* the First Sanctioned Offer in the particular circumstances of this case.
10. I have no problem in accepting the principles laid down in *Gibbon* or *Ria* as cited by Mr Wan above. They must be right. However, in *Gibbon*, unlike our present case, there had been no express withdrawal of the offer made: (See §29 on p 2089). As I found in §39 of the Decision and for the reasons stated therein, on the particular circumstances of this case, the Second Sanctioned Offer was meant to replace and/or supersede the First Sanctioned Offer. Further, unlike in *Gibbon* where multiple offers were made concurrently over a span of time, the present case is one in which I found the offeror clearly had intended to have only one offer available on the table for the offeree, having presented their letter in such a format. In other words, I found on the facts of this case that, unlike in *Gibbon,* there was a clear intention on the part of the plaintiff to withdraw and supersede the First Sanctioned Offer with the Second Sanctioned Offer.
11. As I found in the Decision, the Second Sanctioned Offer contained terms as to costs which, it could not act as a valid sanctioned offer: (See §32 of the Decision). Thus, in my judgment, there was no valid sanctioned offer left on the table for the defendant to accept after the Second Sanctioned Offer was made.
12. As such, I do not consider that there will be reasonable prospect of success for the plaintiff to argue on the validity of the First Sanctioned Offer.
13. I would therefore refuse to grant leave to the plaintiff to appeal against my Decision based on Ground 1.

*(2) Ground 2: Sanctioned Offer contains terms as to costs*

1. Mr Wan in his oral submission has made it clear that their main reliance in the leave application is on Ground 1. Hence, the other grounds are “subsidiary” to Ground 1 only.
2. The plaintiff submits that I was wrong to refer the judgment of Master Marlene Ng (as she then was) in *Lin Yanjin v Smart Billion Engineering Ltd* (unreported, HCPI 739/2009, 10 August 2011) and the English Court of Appeal Decision in *Mitchell & Ors v James & Ors* [2003] 2 All ER 1064 as authorities to support my decision to find that any sanctioned offer containing terms as to costs should be held invalid. The reason being that, according to the plaintiff, there is a line of Court of Appeal authorities where offers contained terms as to costs and was held to be valid sanctioned offers and thereby attracted the usual costs consequences under O 22 r 24(4). In this regard, the plaintiff relies on *Central Management Ltd v Light Field Investment Ltd* [2011] 2 HKLRD 34, and *Chan Kwing Chiu & Another v 陳志球 (transliterated as Chan Chi Kau) also known as Johnnie C K Chan* (unreported, CACV 209/2012, 3 October 2013).
3. In my judgment, the case of *Central Management Ltd v Light Field Investment Ltd, supra* can be easily distinguished by the fact that in that case there was a valid sanctioned offer made and the defendant was penalized for costs on an indemnity basis due to the failure of the defendant to respond to the plaintiff’s sanctioned offer: (See §32 of *Central Management*). Hence, that decision was made on the basis that was a valid sanctioned offer and does not, in my view, support the plaintiff’s contention that a sanctioned offer which contains terms as to costs is still valid. What happened in *Central Management* was that the offer was made with “no order as to costs in full and final settlement of the parties’ claim and counterclaim”. This was considered as a valid offer. It was, unlike the present case, where a specific sum was specifically mentioned by the plaintiff as “terms of costs” for the purpose of O 22 r 24.
4. Similarly, in my view, the case of *Chan Kwing Chiu & Another, supra* and *Chen Tek Yee v Chan Moon Shing* [2015] 3 HKC 622 can both be distinguished on their own facts. In *Chan Kwing Chiu*,the sanctioned offer was made on a “drop hands” basis, with no order as to costs. In *Chen Tek Yee, surpa*, the costs order was made on the facts peculiar to that case and does not in my view lay down any rules that an offer containing terms of costs should still be regarded as a valid offer.
5. Therefore, I am of the view that Ground 2 of the proposed grounds of appeal does not contain any real substance and is unlikely to succeed. I would also refuse leave based on this ground.

*(3) Ground 3: whether unjust to award indemnity costs*

1. This issue is closely linked to Ground 1 above. If the plaintiff is able to succeed on Ground 1 on appeal, obviously the plaintiff will normally be entitled to indemnity costs against the defendant who did not beat the sanctioned offer. On the other hand, if the plaintiff does not succeed on Ground 1, it is unlikely that indemnity costs will follow.

1. As it would appear clear in the Decision, my reason for awarding indemnity costs in favour of the defendant on the plaintiff’s summons was made on the basis that that the plaintiff’s legal team had failed to disclose the Second Sanctioned Offer to the court when they first applied to have the costs order nisi varied. In this regard, I cannot agree with Mr Wan’s very bold submission that his legal team did not owe a general duty of full disclosure to the court in an *inter partes* application. In my judgment, his reliance on para 28/0/2 (p 723) of the White Book 2019 has clearly been misconceived and was taken out of context as O 28 deals with originating summons procedures and does not give support to such bold proposition made by Mr Wan.
2. With respect, the particular passage cited only applies to an “*inter partes* proceedings commenced by way of originating summons” and does not support a general proposition that it applies in all *inter partes* summons as Mr Wan has put forward. In my view, only in such limited circumstances, there was no duty of full and frank disclosure of all material facts. It has been stated that, subject to the duty of not to mislead the court, in an application by originating summons, a party is entitled to put before the court only such material as it thinks is necessary in the order for it to establish its own case: See *Wing Hang Bank Ltd v Kit Choy Development Ltd & Another* (unreported, HCMP 5172/2002, [2006] HKCE 1591).
3. I therefore would reject Mr Wan’s submission that there was no duty on the part of the plaintiff to disclose the Second Sanctioned Offer to the court when the plaintiff first applied for the variation of the court order.
4. Based on the above, I would also refuse leave for appeal based on this proposed ground.

*(4) Ground 4: failure to consider exercising discretion under O 62*

1. The plaintiff’s submission based on this proposed ground of appeal is that even if I was right to hold that there is no valid sanctioned offer (which is denied) in this case, I have failed to consider whether to exercise the discretion under O 62 to award indemnity costs to the plaintiff.
2. As Mr Wan has rightly pointed out, this is a general discretion under O 62 to award indemnity costs: See O 62 r 28(3) of RDC.
3. However, what I cannot agree with the plaintiff is that in a case where a sanctioned offer has been made, I would still be required to take into account any written offers “without prejudice save as to costs”, e.g. *Calderbank* offers, under O 62 r 5(1)(d). As stated in *Ria, supra*, O 22 is a self-contained code. Once it is made, it is governed by the rules under this Order and does not require the court to refer back to the general discretionary power under O 62.
4. Thus, I do not consider I should give leave to appeal based on this proposed ground also.

*CONCLUSION*

1. In conclusion, for the aforestated reasons, I would refuse to grant leave to the plaintiff based on the draft notice of appeal.
2. It follows that the costs of this application should be in favour of the defendant, such costs to be taxed if not agreed, with certificate for counsel.

( Andrew SY Li )

District Judge

Mr Albert Wan, instructed by Au Yeung, Chan & Ho, for the plaintiff

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