DCPI 2473/ 2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2473 OF 2009

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BETWEEN

RAI PABITDARA Plaintiff

and

VEGETABLE MARKETING ORGANIZATION Defendant

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Coram : Deputy District Judge A. Kot in Court

Date of Hearing : 27 April 2011

Date of Handing Down Decision : 6th May 2011

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D E C I S I O N

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*BACKGROUND*

1. On 23 December 2010, this Court handed down judgment dismissing the Plaintiff’s claim against the Defendant (“the Judgment”) and made a costs order nisi against the Plaintiff (“the Costs Order Nisi”).
2. By a summons dated 6 January 2011, the Defendant applies for a variation of the Costs Order Nisi so that the Plaintiff is to pay the Defendant costs of this action on an indemnity basis from 7 November 2009 and with enhanced interest on costs at 10% above the judgment rate.
3. By a summons dated 14 January 2011, the Plaintiff seeks leave to appeal against the Judgment, as well as the findings on quantum.

*VARIATION OF COSTS ORDER NISI*

1. The Defendant’s application has 2 limbs : (1) the Court’s general discretion to order costs against the Plaintiff on an indemnity basis under Order 62 rule 28(3) of the Rules of District Court; and (2) the Court’s specific discretion to order indemnity costs and enhanced interest under Order 22 rule 23 of the Rules of District Court.
2. The Defendant submitted that there were 3 calderbank offers by letter to the Plaintiff before the Plaintiff started this proceedings on 22 September 2009. The Plaintiff made no response to the above calderbank orders. The Defendant should have asked for costs on indemnity basis after the 1st calderbank offer. Furthermore, on 9 October 2009, the Defendant made a sanctioned payment of HK$180,000 (“1st Sanctioned Payment”) in settlement of the Plaintiff’s claim. The 28 day limit for the Plaintiff to accept such payment without leave expired on 6 November 2009. A further sanctioned payment in the sum of HK$50,000 was paid on 17 June 2010 making the total sanctioned payment at HK$230,000 (“the 2nd Sanctioned Payment”). The latest date for the Plaintiff to accept such payment expired on 15 July 2010. Since the action was being dismissed, the Defendant should be entitled to costs on party and party basis up to 7 November 2009, being the date after the latest date on which the Plaintiff could have accepted the 1st Sanctioned Payment with certificate for counsel and thereafter on an indemnity basis with certificate for counsel, together with enhanced interest on costs at 10% above the judgment rate.
3. The Plaintiff opposed to this application on the ground that the Plaintiff has reasonable belief of a strong case. And it is submitted that even if the court found in favour of the Defendant, the appropriate date for the costs on indemnity basis to run should be 16 July 2010, i.e. the date after the latest date on which the Plaintiff could have accepted the 2nd Sanctioned Payment. As for enhanced interests, 9% is found to be appropriate in the case of *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273. And since there is no evidence of actual payment of costs by the Defendant, the rate for pre-judgment period should be half of 9% only.

*General Discretion*

1. Order 62 r. 28(3) provides that :

“The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so order or direct that the costs shall be taxed on the common fund basis or on the indemnity basis.”

1. A taxation of the successful party’s costs on an indemnity basis could properly be ordered where the proceedings were scandalous or vexatious, or had been initiated or prosecuted maliciously or for an ulterior motive or in an oppressive manner (*Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Ltd* [1997] HKLRD 1327. I found nothing in the Plaintiff’s conduct of this case satisfied this test and I do not think an indemnity costs order is warranted on this basis.

*Order 22 Rule 23*

1. Since the Plaintiff’s claim was dismissed, she failed to do better than the sanctioned payments. Hence Order 22 rule 23 is applicable. Order 22 rule 23(5) provides that the Court shall make the orders sought by the Defendant unless it considers it unjust to do so. In considering whether it would be unjust to make the orders, the Court shall take into account all the circumstances of the case including those specified under rule 23(6).
2. I found the argument raised on behalf of the Plaintiff in relation to the Plaintiff’s belief in the strength of her case do not justify the Court’s refusal to make the order for enhanced interest and indemnity costs. The strength of the Plaintiff’s case had already been considered at trial and it was found that the Plaintiff failed to prove its case. The Plaintiff elected to rely on her own subjective belief and took the risk of litigation instead of accepting the sanctioned payments, she should also take the risk of losing her case with the consequent risk of having to pay the costs of this action pursuant to Order 22.
3. After considering all the circumstances of the case including those matters set out in Order 22 rule 23(5), I do not consider it unjust to grant the orders for enhanced interest and indemnity costs.
4. As for the date for the indemnity costs to run, I agree with the reasoning of Leung DJ in the case of *Cheng Kai Kit v Kwong Kam Tim* (DCPI 2627/2008) that time should run from the expiry of the acceptance of the last sanctioned payment. The 2nd Sanctioned Payment superseded the 1st Sanctioned Payment and had the Plaintiff accepted the 2nd Sanctioned Payment, she could have been entitled to ask for her costs up to then. By the same token, the Defendant should only be entitled to costs on indemnity basis after the Plaintiff failed to accept the 2nd Sanctioned Payment.
5. As for the rate for the enhanced interest, I agree with the reasoning by Lam J in the case of *Golden Eagle International (Group) Limited v GR Investment Holdings Ltd* [2010] 3 HKLRD 273 that 9% is the appropriate rate in the circumstances of the Hong Kong economic condition to reflect the costs of money to the Defendant. I’ll also adopt the simplified approach of Lam J in the said case by ordering interest on costs before judgment at half of the rate so found since there is no evidence as to when the Defendant was out of pocket as far as its legal costs is concerned.

*Conclusion*

1. The costs order nisi made on 23 December 2010 be varied to :
   1. The Plaintiff do pay the Defendant costs of this action with certificate for counsel on party-to-party basis up to 16 July 2010;
   2. The Plaintiff do pay the Defendant costs of this action with certificate for counsel on indemnity basis from 16 July 2010 (including the present application); interest on such costs at 4.5% to date of judgment and at 9% thereafter till payment.

*LEAVE TO APPEAL*

1. The Plaintiff is seeking leave to appeal against the Judgment as well as the finding on quantum. Essentially, from the Grounds of Appeal, the Plaintiff is seeking to challenge the court’s findings of fact made as to the court’s preference of the evidence of the Defendant over the evidence of the Plaintiff.
2. Under Section 63A of the District Court Ordinance, leave to appeal shall not be granted unless the appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the appeal should be heard. This has now been clearly established by the authorities after the Civil Justice Reform to mean more than just an arguable case but an appeal that has merits, the prospects of which are more than “not fanciful”, without having to be “probable” (*Ho Yuen Ki Winnie v Ho Hung Sun Stanley*  HCMP 1009/2009).
3. The principles upon which the appellate court will upset the primary findings of facts based on credibility of witnesses and assessment of damages are well settled. The principles have been helpfully summarized by Woo VP in *Tin Kwong International Enterprise Company Limited & Ors v San Tung & anor* (unreported, CACV 164/2005) at paragraph 14 as follows:
4. “if the Court of Appeal is to reverse the trial judge’s decision on the facts, it must not merely entertain doubt whether the decision below is right but be convinced it is wrong;
5. the Court of Appeal will certainly not disturb the judge’s finding of primary fact where they are based on the credibility of witnesses or the preference of the evidence of one witness for that of another because he enjoyed the advantages of receiving the evidence in a living state of first-hand;
6. in order to disturb a finding of primary fact, the Court of Appeal has to be satisfied that the judge’s conclusion is plainly wrong in the sense that either (1) that there is no evidence to support it; or (2) that is contrary to documentary or other incontrovertible evidence that the judge overlooked. It is not enough to show there is little evidence to support the judge’s finding, or that it was contrary to the weight of the evidence. The weight of the evidence is a matter for the trial judge. It does not matter how many witnesses say one thing, and how few say the contrary. The judge is perfectly entitled to prefer the evidence of the few to that of the many.”
7. Applying the above principles, I do not consider the Plaintiff has any realistic prospect of success in her appeal nor do I see any other reason in the interests of justice why the appeal should be heard. In the premises, the Plaintiff’s application for leave to appeal is dismissed with costs, with Certificate for Counsel.

(Angela Kot)

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| Deputy District Judge |
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Mr. K. Leung instructed by Messrs M.C.A. Lai & Co. for the Plaintiff

Mr. Victor Gidwani instructed by Messrs Winnie Leung & Co for the Defendant