## DCPI 2489/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2489 OF 2013

--------------------

##### BETWEEN

KWAN WING LEUNG Plaintiff

### and

FUNG CHI LEUNG 1st Defendant

MENTEX ENGINEERING LIMITED 2nd Defendant

--------------------

Before : Deputy District Judge Anthony Chow in Chamber (Open to public)

Dates of Hearing : 14 August 2014

Date of Decision : 15 September 2014

--------------------

DECISION

--------------------

*Background*

1. This is a personal injury claim arising from a vehicular accident. The plaintiff, driver of a taxi license plate number FU9882 (the “Taxi”), claimed against the 1st defendant (the “D1”), the driver of light goods vehicle license plate number MM8793 (the “LGV”) and the 2nddefendant (the “D2”), owner of the LGV and the D1’s employer.
2. After trial, I order the defendants do pay, jointly and severally, the sum of $196,247 to the plaintiff, with interest: on $76,247 at half judgment rate from the day of the accident until the day of this judgment; on $120,000 at 2% per annum from the day of filing of this claim until the day of this judgment; and on $196,247 from the day of handing down of this judgment until full payment is received.
3. I also made an order nisi, to be made absolute in 14 days, that the defendants do pay the plaintiff, jointly and severally, costs of this action, to be taxed, if not agreed, with certificate for counsel and the plaintiff’s own costs be taxed in accordance with Legal Aid regulations.

*The defendant’s application*

1. On 28 July 2014, the defendant filed this summons to vary my costs order nisi as follows:-
2. the 1st and 2nd defendants’ do pay the plaintiff’s costs of this action up to and including 12 November 2013 at District Court scale, to be taxed on party & party basis if not agreed;
3. the plaintiff do pay the 1st and 2nd defendants’ costs of this action from 13 November 2013 to 20 November 2013 including costs reserved under the order dated 20 November 2013 at the High Court scale, to be taxed on indemnity basis if not agreed;
4. the plaintiff do pay the 1st and 2nd defendants’ costs of this action from 21 November 2013 and thereafter, including costs under the order dated 18 March 2014 at District Court scale, with certificate for counsel, to be taxed on indemnity basis if not agreed; and
5. the plaintiff do pay interest on costs to the 1st and 2nd defendants at the rate of 10% above judgment rate or such other rate as the Court thinks just.
6. The defendant also applied to vary my interest order as follows:-
7. on $76,247 at half judgment rate from the date of the accident and up to 12 November 2013;
8. on $120,000 at 2% per annum from the date of filing of the claim until 12 November 2013; and
9. there be no interest on $196,247 from 13 November 2013 and thereafter.
10. The defendant’s application is divided into two parts.
11. First, as to the costs of this action up to and including 12 November 2013 at District Court scale (referred to as the “First High Court Period” by Mr Ernest CY Ng (“Mr Ng”), counsel for the defendant), Mr Ng argued that the plaintiff should have never commenced this action in the Court of First Instance and accordingly, costs prior to the transfer to this court should be on the District Court scale.
12. Second, on 15 October 2013 the defendant made a sanctioned payment in the sum of $280,000. The last day to accept the sanctioned payment, without leave of court, was 12 November 2013. The plaintiff ignored the sanctioned payment. As the court awarded damages to the plaintiff in the sum of $196,247, the plaintiff failed to beat the sanctioned payment by close to 30%. Mr Ng argued that O 22 r 23 (5) mandates this court to: (a) disallow all or part of any interest payable; (b) order the plaintiff to pay the defendant’s costs from 13 November 2013, (c) at a rate not exceeding 10% above the judgment rate.
13. Mr Tim Tang, solicitor for the plaintiff disagrees and argued: First, in respect to the First High Court Period, the plaintiff had sufficient reason to bring this action in the Court of First Instance and in accordance to section 44A of the District Court Ordinance, this court is entitled to allow costs on the Court of First Instance scale.
14. Second, citing Practice Direction 18.1, Mr Tang argued it is unjust for this court to apply Order 22 rule 23 (5), because on 24 January 2014, the defendant had unreasonably refused the plaintiff’s mediation proposal.
15. The chronology of events relevant to the two costs issues are as follows:-

11 August 2010 Date of accident.

9 December 2010 Plaintiff declared to a government medical official that he was pain free.

24 February 2011 Plaintiff declared to a government medical officer that there was ‘no more neck pain’.

11 December 2012 Plaintiff commenced action in the Court of First Instance. The plaintiff filed mediation certificate.

25 January 2013 Defendant filed their joint mediation notice.

10 May 2013 Defendant filed joint mediation notice.

21 May 2013 Plaintiff filed mediation response.

19 June 2013 Defendant wrote to the plaintiff stating that the claim is within the District Court’s jurisdiction.

11 July 2013 Joint medical report issued by Dr Chak and Dr Lee.

18 September 2013 Plaintiff filed revised Statement of Damages.

15 October 2013 Defendant made sanctioned payment in the sum of $280,000 and reaffirmed its position that this claim is within the District Court jurisdiction.

20 November 2013 By consent, this claim was transferred to the District Court.

23 January 2014 Plaintiff proposed mediation prior to the next check list review scheduled on 25 February 2014.

24 January 2014 Defendant refused the plaintiff’s proposal to mediate and suggested further without prejudice negotiation.

1. As I see it the issues in this matter can be narrowed down to two parts: (1) In respect of the scale of costs in the First High Court Period; and (2) In respect of the costs after 12 November 2013, the last day to accept the defendant’s sanctioned payment.

*The scale of costs in the First High Court period*

1. The plaintiff’s claim for costs on Court of First Instance scale prior to the transfer is based on section 44A of the District Court Ordinance, which states:-

“(1) This section applies to an action or proceeding transferred-

…

(5) In an action founded on contract, quasi-contract or tort, for the proceedings in the Court of First Instance before the transfer, the Court may, if satisfied that there was sufficient reason for bringing the action in the Court of First Instance and subject to any order of the Court of First Instance, allow costs on the Court of First Instance scale.”

1. At the time of the transfer from the Court of First Instance to this court, Master Roy Yu also ordered: “The Costs of this action including this application be reserved to the trial judge (including scale of costs)”. Accordingly, if I am satisfied that there was sufficient reason for the plaintiff to bring this action in the Court of First Instance, I may allow the plaintiff costs prior to the transfer on the Court of First Instance scale.
2. As to the applicable legal principle, both Mr Ng and Mr Tang referred me to the English decision of *Hopkins v Rees & Kirby Ltd* [1959] 2 All ER 352 as applied by Seagroat, J in *Lai Ki v B+B Construction limited & Ano*, HCPI 63 of 2001.
3. Seagroat J expressed the applicable principle as follows:-

“The acid test therefore has been, ignoring all questions of contributory negligence, has the plaintiff a reasonable prospect of recovering a sum of money in excess of the (District) Court jurisdiction?”

1. Although *Lai Ki* was a personal injury claim that was settled for a sum within the District Court jurisdiction, not one that was transferred and damages within the District Court jurisdiction awarded, I see no reason the same legal principle should not apply.
2. As to how the reasonable prospect test should be applied, Mr Tang submitted that the plaintiff’s case on quantum ought to be viewed at its highest when determining the proper jurisdiction where the case should be brought and referred me to *Wong Miu Kwan v FPD Savills Property Management Ltd*, HCPI 1061 of 2003 as support.
3. *Wong Miu Kwan* is an appeal from Master’s decision to transfer a personal injury claim from the Court of First Instance to the District Court.
4. In overturning the Master’s order to transfer, Suffiad J held:-

“When determining the proper jurisdiction… Quit apart from such statutory provisions, as a matter of practice, the court or master should also consider the following matters:-

1. In the absence of abuse, a plaintiff should be entitled to frame his case in the manner that he wishes.
2. At an interlocutory stage, it would not be proper for the court or a master to view the plaintiff’s claim in the same way as it would be viewed at trial by weighing the different evidence or by believing or disbelieving some or all of the evidence. That exercise can only be carried out when all the evidence, cross-examination and submission has been heard, particularly where there are factual and or other disputes between the parties, as for instance disputed expert opinion.
3. Accordingly**, the plaintiff’s case on quantum as framed by him ought to be viewed at its highest when determining the proper jurisdiction where the case should be brought**.” (Emphasis added.)
4. Mr Ng, on the other hand referred me to *Lee Yau Wai v Yeung Kam Wing*, HCPI 281 of 2009 and *Yu Wai Kan v Law Cho Tai*, HCPI 62 of 2010, where personal injury claims commenced in the Court of First Instance were settled for a sum within the District Court’s jurisdiction. In both cases, Master M Ng (as she then was), applied the reasonable prospect test by a minute examination of all evidence, the parties’ argument and cases relied on in each head of damages, as if she was conducting a trial based on the evidence available on the date of writ.
5. This approach may be fine in cases where the claim was settled before trial and the Master or Judge is looking at the evidence available on the date of the writ with a pair of fresh eyes.
6. In cases similar to this action, where a trial has been completed, the trial judge has already made findings based on the overall factual matrix-including those only available after the date of writ, it is difficult, if not impossible, when re-examining the evidence available at the date of writ, not to be tainted by the evidence available only after the writ is filed. The danger of cross contamination of evidence available after the writ is real and must be carefully handled.
7. Fortunately, there is an alternative approach. In *Wong Chi Ho Jacky v Poon Yuk Shan*, HCPI 910 of 2002, Deputy High Court Judge Jat SC, adopted a more broad brush approach to the reasonable prospect test. Deputy High Court Judge Jat SC wrote:-

“I am not persuade(d) that I should take into account the lack of evidence from the plaintiff’s side. The test, as I understand it, is an objective one, ie **whether it would be obvious to a reasonable plaintiff or his adviser that the case was a District Court rather than High Court case**. The subjective intent of the plaintiff and his legal advisers would not normally be relevant.” (Emphasis added)

1. The relevant time to apply this test is of course at the time of issuance of the writ, without consideration of any settlement or awarded sums, or any evidence which may appear on a later date. In *Wong Chi Ho Jackey*, Deputy High Court Judge Jat SC also stated:-

“ …(O)ne cannot look at the eventual settlement amount. In my view that must be right since the relevant time for consideration was the time when the writ was issued.”

1. There can be no argument that reasonable prospect must be evaluated objectively, but at the same time, plaintiffs and their legal advisors must not be placed in a situation, where in cases that legitimately straddles the High Court and District Court jurisdictional limits, to lower their claims for fear of an adverse costs consequence.
2. In my view, by phasing the test as: “Whether it would be **obvious to a reasonable plaintiff** or his adviser that the case was a District Court rather than High Court case” (emphasis added), Deputy High Court Judge Jat SC achieved a balanced approach that imposes a duty on the plaintiff and his legal advisors to evaluate their choice of court reasonably and objectively. Only in obvious cases where the claim should be brought in the District Court, their decision to do otherwise would attract a costs sanction.
3. Accordingly, in this case I adopt Deputy High Court Judge Jat SC’s approach. I will now look into each head of damage and the evidence available to the plaintiff separately.

*PSLA*

1. Mr Ng submitted in view of the fact that of the four cases relied on by plaintiff’s counsel at trial, only the plaintiff in *Yu Wai Kan v Law Cho Tai*, HCPI 62/2010 recovered PSLA in a sum above $300,000. The plaintiffs in the other three cases relied on, received an award of $120,000 to $150,000 for PSLA. Since the plaintiff in *Yu Wai Kan* also suffered from psychiatric disabilities as a result of the accident and the plaintiff here did not, *Yu Wai Kan* was clearly not a comparable case. The plaintiff never had a reasonable prospect to recover an amount similar to *Yu Wai Kan*.
2. Mr Tang did not address this part of Mr Ng’s argument and I agree with Mr Ng’s argument.
3. Accordingly, viewed at its highest, a reasonable plaintiff and his legal advisor, the claim for PSLA should be no more than $150,000.

*Pre-trial loss of earnings-sick leave*

1. Mr Ng relied on: (1) both experts rejected a 23 months sick leave period; (2) on 9 December 2010, the plaintiff reported to the government medical officer he was pain free; and (3) the plaintiff’s later complaint about wrist pain was irrelevant of the accident; and argued the objective inference must be that at the time of the writ, there was no reasonable prospect for the plaintiff to claim 23 months of sick leave.
2. I am afraid I do not agree with Mr Ng’s argument.
3. First, the joint medical report was issued on 11 July 2013, after the issuance of the writ, and is therefore irrelevant to the consideration at the time of the writ. On 11 December 2012, the date of writ, the plaintiff was given 23 months of sick leave certificate by his doctors and looking at it objectively, it was entirely reasonable for the plaintiff and his legal advisors to rely on these sick leave certificates as a basis to decide which court to file the plaintiff’s claim.
4. Second, although in the consultation summaries dated 9 December 2010 and 24 February 2011, it was noted that the plaintiff was “pain free”, the plaintiff disputed the accuracy of these consultation summaries. Also, the later consultation summaries, specifically those starting from 5 July 2011, began to refer to neck pain again. Looking at the evidence available on the date of writ objectively, it was not obvious that the plaintiff’s neck pain stopped at the end of 2010. It was not until the joint medical report was available that the picture became clear.
5. Third, until the joint medical report, it was reasonable for the plaintiff to rely on all of his sick leave certificates to calculate this head of damages.

*Pre & post-trial loss of earnings-reduction of earning capacity*

1. Mr Ng submitted that on the four factors I relied on to reject this head of damage: (1) the plaintiff could arrange his own working hours; (2) he was already having three rest periods prior to the accident; (3) the plaintiff chose not to return to work and (4) experts consider the plaintiff’s reduction in efficiency would be low, only (4) was available after the date of writ. Accordingly, viewed objectively, prior to issuance of the writ, the plaintiff did not have a reasonable prospect to recover any loss based on reduction of work capacity.
2. In fact, in paragraph 100 of my judgment I wrote:-

“Either way, considering the fact that the experts agreed the plaintiff’s impairment of work efficiency is very low; the plaintiff has full control over his rest period if he decided to return to work; the plaintiff choose to stop working even though he reported on 9.12.2010 he was pain free; and both experts consider him fit to return to work, I find after 9.12.2010 the plaintiff suffered no further loss of income as a result of his injury.”

1. Of the four factors I relied on, only the plaintiff had full control over his rest period was known on the date of writ. The fact that the impairment of work was low and the plaintiff was fit to return to work were evidence derived from the joint medical report. As to whether the plaintiff reported he was pain free, again this was a disputed fact. It was reasonable for the plaintiff to rely on his version of fact to decide which court to file his claim.

*Special damages*

1. Medical expenses and travel expenses were agreed and Mr Ng is not disputing the plaintiff’s claim for $5,000 as tonic food was reasonable.

*Conclusion*

1. Having considered all of the evidence, I am not satisfied that it was obvious to a reasonable plaintiff or his legal advisor that this case should have been commenced in the District Court rather than the Court of First Instance.

*Defendant’s alternative argument*

1. As an alternative, Mr Ng submitted that the scale of costs should be District Court after 11 July 2013, the date of the joint medical report.
2. Mr Ng’s argument will require the plaintiff and his legal advisors to be able to understand the joint medical report, realize its full impact on each item of the plaintiff’s claims and be able to work out the numbers all on the date of the report.
3. In reality, the plaintiff’s legal advisor would require some time to read the joint medical report, understand its content, calculate its impact on the plaintiff’s claims, explain the same to the plaintiff and obtain his instruction to revise the statement of damages.
4. Added to all the above, this was a legally aided case and report and directions would have to be obtained from the Director of Legal Aid.
5. When all these are considered, it was not unreasonable for the plaintiff’s legal advisors to file the Revised Statement of Damages within two months of receiving the joint medical report.
6. Once the revised Statement of Damages is filed, both parties were entitled to apply to transfer this case to the District Court. Both parties are equally at fault when the transfer was not completed until another two months have gone by.
7. Accordingly, the plaintiff should have his costs prior to the transfer to be taxed on the Court of First Instance scale, if not agreed.

*The costs after 12 November 2013*

1. Order 22 rule 23 of the District Court Ordinance states:-

“(1) This rule applies where a plaintiff-

1. fails to obtain a judgment better than the sanctioned payment; or
2. fails to obtain a judgment that is more advantageous than a defendant's sanctioned offer.

(2) The Court may by order **disallow all or part of any interest** otherwise payable under section 49 of the 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**-

1. 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 Cour**t; and
2. interest on the costs referred to in paragraph (3) or subparagraph (a) at a rate not exceeding 10% above judgment rate.

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

(6) In considering whether it would be unjust to make the orders referred to in paragraphs (2), (3) and (4), the Court shall take into account all the circumstances of the case including-

1. the terms of any sanctioned payment or sanctioned offer;
2. the stage in the proceedings at which any sanctioned payment or sanctioned offer was made;
3. the information available to the parties at the time when the sanctioned payment or 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 payment or offer to be made or evaluated.

(7) The power of the Court under this rule is in addition to any other power it may have to award or disallow interest.” (Emphasis added)

1. It is not disputed that the plaintiff failed to obtain a judgment better than the defendant’s sanctioned offer and the costs sanctions in Order 22 rule 23 is triggered. The question is whether considering all of the circumstances of this case, it is unjust to apply the sanctions stated in subsection (5).
2. It is also undisputed that the defendant filed Mediation Notice on 10 May 2013 and the plaintiff filed Mediation Response on 21 May 2013.
3. By letter dated 23 January 2014, the plaintiff proposed mediation to be held before the next check list review hearing. On the following day, the defendant’s solicitor replied and refused the plaintiff’s proposal to mediate.
4. The defendant’s solicitor wrote:-

“In view of the huge difference in the amount proposed by our respective clients for settlement sum of the above action, our clients see no prospect that the action can be resolved in mediation.

In order to save costs, our client suggests that the parties to try further negotiations on the settlement sum through us with a view to achieve conclusion of the matter expeditiously. …”

1. Paragraph 29 of Practice Direction 18.1 reads as follows:-

“29. In exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include **any unreasonable failure of a party to engage in mediation** where this can be established by **admissible materials**. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation.” (Emphasis added).

1. Accordingly, when defendant refused the plaintiff’s mediation proposal, the costs sanction in paragraph 29 was also triggered.
2. Mr Tang rely solely on the fact that the defendant refused to mediate as the unjust reason not to apply the costs sanctions under Order 22 rule 33 (5).
3. Mr Chan seemed to agree with this approach and replied accordingly.
4. I, however, do not agree that is the right approach.
5. The costs sanctions stipulated under subsections (2), (3) and (4) of Order 22 rule 23 states they are applicable only to costs incurred “…after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court”.
6. The costs sanction under paragraph 29 of Practice Direction 18.1 on the other hand, has no such restriction. Paragraph 29 simply states: “In exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation…”.
7. Using failure to mediate as an unjust reason not to apply the costs sanction in Order 22 rule 23 will result in restricting the costs sanction under Practice Direction 18.1 paragraph 29 to costs “…after the latest date on which the payment or offer could have been accepted without requiring the leave of the Court”. A restriction clearly not intended by Practice Direction 18.1.
8. The proper approach is to apply the costs sanctions under Order 22 rule 23 and Practice Direction 18.1 separately and independent of each other.
9. As Mr Tang did not raise any other unjust reasons not to apply the costs sanction under Order 22 rule 23 and after considering all relevant circumstances, including but not limited to those mentioned in Order 22 rule 23 (6), I find no unjust reason not to apply the mandatory sanctions against the plaintiff.
10. The only issue left is: What costs sanctions, if any, should be applied against the defendant under Practice direction 18.1 paragraph 29?
11. On whether any costs sanction should be applied against the defendant under Practice Direction 18.1, Mr Ng raised two arguments.
12. First, Mr Ng stated the defendant did not definitely reject mediation outright, but in view of the huge difference in the proposed settlement between the parties, suggested a more costs effective way to resolve the matter by further settlement negotiations.
13. Invitation to further settlement negotiate is not a replacement of mediation. Paragraph 26 of Practice Direction 18.1 clearly states:-

“An underlying objective of the Rules of the High Court and of the District Court is to facilitate the settlement of disputes. The Court has the duty as part of active case management to further that objective by **encouraging the parties to use an ADR** if the Court considers that appropriate and facilitating its use ("the duty in question"). The Court also has the duty of helping the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question.” (Emphasis added).

1. By ADR, Practice Direction 18.1 meant mediation and not settlement negotiation between the parties. Paragraph 28 of Practice Direction 18.1 states:-

“ADR means a process whereby the parties agree to appoint a third party to assist them to settle or resolve their dispute. **Settlement negotiations between the parties do not amount to ADR**. A common mode of ADR is mediation….”. (Emphasis added).

1. Second, Mr Ng argued that because Mr Tang included the plaintiff’s letter dated 23 January 2014, proposing mediation and the defendant’s letter dated 24 January 2014, refusing to mediate, at the “eleventh hour, without an affidavit filed”, that those letters were not “admissible material” as stipulated in paragraph 29 of Practice Direction 18.1.
2. I am afraid I do not agree with Mr Ng’s argument. Paragraph 31 of Practice Direction 18.1 clearly explained the court was actually concerned with privileged material when referring to “admissible material” in paragraph 29. Paragraph 31 states:-

“In all contexts, including dealing with matters arising under the Directions in Part D hereof and in exercising its discretion on costs, **the Court cannot compel the disclosure of or admit materials so long as they are protected by privilege** in accordance with legal principles, including legal professional privilege and the privilege protecting without prejudice communications. What happens during the mediation process, being without prejudice communications, is protected by privilege. It must be emphasized that there is no question of the Court undermining the protection afforded by privilege.” (Emphasis added)

1. Neither the plaintiff’s letter dated 23 January 2014, proposing mediation nor the defendant’s letter dated 24 January 2014, refusing to mediate were privileged communications. These letters are admissible evidence in a Practice Direction 18.1 costs sanction application.
2. Although not argued by Mr Ng, paragraph 30 of Practice Direction states in some circumstances, costs sanction should not be ordered against a party that refused mediation. Paragraph 30 states:-

“The Court will not make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation where:

* 1. The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation in accordance with paragraph 41 hereof.
  2. A party has a reasonable explanation for not engaging in mediation. The fact that active without prejudice settlement negotiations between the parties are progressing is likely to provide such a reasonable explanation. However, where such negotiations have broken down, the basis for such explanation will have gone and the parties should then consider the appropriateness of mediation. The fact that the parties are actively engaged in some other form of ADR to settle the dispute may also provide a reasonable explanation for not engaging in mediation in the meantime.”

1. The defendant refused to participate in any mediation, therefore there was no minimum level of participation.
2. The parties agreed at the time of the defendant’s letter dated 24 January 2014, without prejudice negotiation has broken down. There was also no other form of actively engaged ADR. Accordingly, the paragraph 30 exceptions do not apply.
3. Now I come to what costs sanction should be applied against the defendant under Practice Direction 18.1.
4. Mr Tang referred me to Master Levy’s judgment in *Ansar Mohammad v Global Legend Transportation Limited*, HCPI 1057 of 2007, a case involving an invitation to mediation that pre-dated the full implementation of CJR.
5. After referring to *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited*, CACV 252 of 2007, *Supply Chain & Logistics Technology Limited v NEC Hong Kong Limited*, HCA 193 of 2006 and *Golden Eagle International (Group) Limited v GR Investment Holdings Limited*, HCA 2032 of 2007, Master Levy concluded:-

“Had the mediation regime been fully implemented, the defendant may likely be at risk of having its entire costs be deprived. Given the fact that the regime is relatively new, and has only recently become an obligatory part of the CJR, it would not be fair to deprive the defendant’s entire costs…”.

1. Master Levy then deducted 20% of the defendant’s costs in that case.
2. In the present case, CJR has been implemented for a number of years. The importance of mediation and the costs consequence of refusing to mediate are well known to the legal profession and they are required to explain the same to their clients. I can see no reason not to follow Master Levy’s proposed costs sanction in this case.
3. I therefore order that the defendant is deprived of the whole of its costs, including those costs sanctions against the plaintiff as stipulated under Order 22 rule 23.
4. Accordingly, my costs order is varied as follows:-
5. the 1st and 2nd defendants do pay the plaintiff’s costs of this action up to and including 12 November 2013 at Court of First Instance scale, to be taxed on party & party basis if not agreed; and
6. there be no order as to costs after 13 November 2013.
7. As to interest, in view of the sanctioned offer by the defendant, Mr Ng’s application is correct. Accordingly, my interest order is varied as follows:-
8. on $76,247 at half judgment rate from the date of the accident and up to 12 November 2013;
9. on $120,000 at 2% per annum from the date of filing of the claim until 12 November 2013; and
10. there be no interest on $196,247 from 13 November 2013 and thereafter.
11. Finally, there is the matter of costs for this summons.
12. In view of the fact that both parties were equally successful in this summons: the defendant in the Order 22 rule 23 costs sanction; and the plaintiff in the Practice Direction 18.1 paragraph 29 costs sanction; it is fair and equitable that each should bear their own costs. Accordingly, there is no order as to costs for this summons.
13. The plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations.

( Anthony Chow )

Deputy District Judge

Mr Tim Tang, of Wong, Kwan & Co, for the plaintiff

Mr Ernest CY Ng, instructed by Cheung Wong & Associates, for the defendants