DCPI 2627/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2627 OF 2008

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BETWEEN

CHENG KAI KIT (鄭繼杰) Plaintiff

And

KWONG KAM TIM MARBLE

COMPANY LIMITED (鄺錦添雲石有限公司) 1st Defendant

FUNG YUEN CONSTRUCTION COMPANY

LIMITED (逢源建築有限公司) 2nd Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung (ruling on paper)

Last date of filing of written submission: 27 January 2010

Date of decision: 1 February 2010

**DECISION ON COSTS**

1. On 16 November 2009, I handed down my written judgment in the present case. I dismissed Cheng’s claim and made a nisi order that costs of the action, including any costs reserved, shall be to the Defendants, to be taxed, if not agreed, with certificate for counsel; and that Cheng’s own costs shall be taxed in accordance with legal aid regulations. I gave the parties 14 days to make application or the nisi order shall become absolute.
2. By summons dated 24 November 2009, the Defendants apply for variation of the nisi order. They ask for the costs, including those of this application, to be taxed on an indemnity basis and interest on such costs at a rate not exceeding 10% above judgment rate.
3. By consent, I gave directions for the filing of written submissions. I now make my ruling.

**The judgment**

1. This court found that Cheng failed to establish liability. Assuming that liability was established, this court also assessed the quantum of damages to be HK$239,532 plus interest but subject to credit to be given to the employees’ compensation to Cheng in the sum of HK$175,808.08.

**The application**

1. The Defendants’ present application has 2 limbs: (1) the court’s general discretion to order costs against Cheng on an indemnity basis: see O.62, r.28(3) of the Rules of the District Court; and (2) the court’s specific discretion to order indemnity costs and enhanced interest: see O.22, r.23 of the Rules.

**General discretion**

1. O.62, r.28 provides that:

“(1) This rule applies to costs which by or under these Rules or any order or direction of the Court are to be paid to a party to any proceedings either by another party to those proceedings or ……

1. Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis ……
2. 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: see *Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Ltd* [1997] HKLRD 1327; *Hong Kong Civil Procedure 2010* (Vol.1) at 62/App/12.
2. It is contended on behalf of the Defendants that on proper evaluation of the evidence on paper before the commencement of the action, it should not have been thought that Cheng had a valid claim against the Defendants. The prosecution of such claim, which had no merits at all, was oppressive and tantamount to an abuse of the legal process. Hence it is appropriate to order indemnity costs against him.
3. I do not intend to repeat the evaluation of the evidence of the parties and the discussion of liability in the judgment. Indeed Cheng failed to establish liability. This would be the case, even assuming that the accident was in fact caused by the defective condition of the ladder in question. However I will not go so far as the Defendants contend to categorise the claim and the conduct of Cheng and his witness during the trial as affront to the court or abuse of process. I do not think that an indemnity costs order is warranted on this basis.

**O.22, r.23**

1. O.22, r.23 provides that:

“**Costs consequences where plaintiff fails to do better than sanctioned offer or sanctioned payment (O.22, r.23)**

* 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. [*not applicable*]
  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 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 Court; 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 where 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.”

1. The Defendants have made sanctioned payments into court on top of the employees’ compensation. On 6 July 2009, sanctioned payment in the sum of HK$90,000 was made. The 28-day limit for Cheng to accept such payment without leave expired on 3 August 2009. On 6 August 2009, the Defendants made an additional payment of HK$50,000 into court. The case was then warned for trial. The trial commenced in less than 28 days from the second payment.
2. Even assuming that liability were established, the award net of employees’ compensation would not have exceeded the sanctioned payments, probably not even the first payment. This triggers the court’s discretion to make an order under r.23(3) or (4). R.23(5) makes clear that in that case, the court shall make such orders unless it considers it unjust to do so. To consider whether it will be unjust to make the order, I shall take into account all the circumstances of the case including those specified under r.23(6).
3. In the submission on his behalf, Cheng seeks to explain that it was not unreasonable for him to refuse to accept the sanctioned payments. But it cannot be argued that the terms of the sanctioned payments were unreasonable. In the present case where both liability and quantum were in dispute, the risk that Cheng took by not accepting the payments was also that he might fail to establish liability and therefore his entitlement to any damages at all. This was Cheng’s assessment whether to take the risk. He took it. The risk materialised.
4. It is argued on behalf of Cheng that the second sanctioned payment was made less than 28 days before the commencement of the trial. It was a few days short. It is also argued that this would likely have been the case even for the first sanctioned payment, if the parties had not postponed the original ‘warn date’ by consent.
5. Whilst it is a risk taken by a defendant to make a sanctioned payment too close to the ‘warn date’, the fact that it is less than 28 days before the trial only means that leave of the court may be necessary for its acceptance. If parties could agree on the liability for costs, the payment could still be accepted without leave: see r.15(2)(b)(i). If not, he could still accept the payment with leave of the court: see r.15(b)(ii). In that case, the court will have to resolve the dispute as to costs: see r.15(3).
6. But the point here is not that the Defendants’ sanctioned payment came too late for Cheng’s acceptance in time to avoid the trial. Cheng never intended to accept the sanctioned payments and took the ultimate risk that he might not even establish liability. Therefore I do not agree that the second sanctioned payment being a few days short of 28 days before the commencement of the trial should operate against the Defendants.
7. The parties have explored the feasibility of mediation. Cheng made the mediation proposal on 30 July 2009. The Defendants’ initial view towards mediation was not positive. Nevertheless they agreed to proceed to mediation. This led to the stay of this case by consent. The mediator was appointed and the mediation was fixed for 6 August 2009. On the day before the mediation, Cheng’s solicitors informed the Defendants’ solicitors that Cheng actually had no approval from the Director of Legal Aid to mediate and Cheng could not attend the mediation as scheduled. This case was further stayed by consent to attempt mediation, while the Defendants also made the second sanctioned payment. Eventually the mediation still had to be aborted. The sanctioned payments were not accepted.
8. On behalf of Cheng, it was said to be unfortunate but understandable that the Director of Legal Aid’s approval for mediation was not obtained in time. The failure to mediate, according to Cheng, should not a factor to be taken into account. I do not entirely agree. Whether the fact that Cheng’s proposal to mediate had to be subject to the Director’s approval is understandable or not, the fact was that the Defendants have acted reasonably in response to the proposal. R.16(6) is wide enough to include such conduct of the Defendants in attempting to settle the case by mediation as a relevant circumstance of the case to be taken into account.
9. It is argued on behalf of the Defendants that since Cheng could not have achieved a better result than the first sanctioned payment, he should pay the Defendants’ costs since 4 August 2009 on the higher basis. I do not agree. By making the second sanctioned payment, the Defendants have effectively kept both payments open to acceptance notwithstanding the lapse of time for accepting the first sanctioned payment without leave. Had Cheng accepted the payments before trial, he could have been entitled to ask for his costs up to then: see O.22, r.20(1).

**Conclusion and order**

1. Considering all the circumstances, I should make an order for indemnity costs and enhanced interest. The nisi order is varied as follows: The Defendants shall have costs of this action, of which the Defendants’ costs of and since the commencement of the trial (including those for the engagement of counsel and the present application) shall be taxed on an indemnity basis. Interest on such costs shall run at 4% above the judgment rate until payment. Cheng’s own costs (including those of the present application) shall remain subject to legal aid taxation.

Simon Leung

District Judge

Messrs Tony Au & Partners on the assignment of the Director of Legal Aid for the Plaintiff

Messrs Leung & Lau for the 1st and the 2nd Defendants