# DCPI 2725/2015

[2018] HKDC 694

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2725 OF 2015

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BETWEEN

MAN HIN FUNG（文顯峰） Plaintiff

and

SKH CHAN YOUNG SECONDARY SCHOOL

（聖公會陳融中學） Defendant

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

Date of Hearing: 14 May 2018

Date of Decision: 15 June 2018

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DECISION

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1. There are two summonses before the court following the judgment I handed down on 23 March 2018 in the above case (“the Judgment”). They are:-
2. a summons issued by the defendant dated 27 March 2018 seeking to vary the costs order made in the Judgment (“the Variation of Costs Summons”);
3. a summons issued by the plaintiff dated 19 April 2018 seeking leave to appeal against the Judgment (“the Leave to Appeal Summons”).
4. I shall deal with the summonses according to the date of their issue.

*(A) Variation of Costs Summons*

1. In the Judgment, I ordered the plaintiff’s claim be dismissed with costs to the defendant with certificate for counsel. I also ordered the plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations (“the Costs Order”).
2. In the Variation of Costs Summons, the defendant is seeking that the Costs Order be varied to the extent that:-
3. the costs of this action will be paid by the plaintiff to the defendant on an indemnity basis to be taxed if not agreed;
4. the plaintiff shall pay the defendant enhanced interest on the costs at the rate of 10% per annum above judgment rate;
5. the sanctioned payment in the sum of HK$50,000 previously paid into court by the defendant together with interest accrued thereon be paid to the defendant through his solicitors;
6. costs of and occasioned by the application be paid by the plaintiff to the defendant on an indemnity basis to be taxed if not agreed; and

(v) the plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

1. At the hearing, Mr Kumar Ramanathan SC, counsel for the defendant, has narrowed down what the defendant is seeking for under the Variation of Costs Summons as follows:-
2. that the plaintiff pay the defendant costs on a party and party basis from the date of issue of the writ on 15 December 2015 until 15 September 2016, ie the last date on which the plaintiff could have accepted the sanctioned payment made by the defendant on 18 August 2016;
3. that the plaintiff pay the defendant costs on an indemnity basis from 16 September 2016 until judgment or payment, as the court deems proper;
4. enhanced interest on the costs under (ii) above at a rate not exceeding 10% of the judgment rate from 16 September 2016 until judgment or payment as the court deems proper.

*The plaintiff’s contentions*

1. In the plaintiff’s written submissions for the Variation of Costs Summons, it has been accepted that the sanctioned payment of $50,000 was made on 18 August 2016 pursuant to Order 22 of the Rules of the District Court (“RDC”) and the plaintiff could have accepted the sanctioned payment without leave on or before 15 September 2016. It has been further accepted that, since the plaintiff’s claim is dismissed, the sanction under Order 22, rule 23(4) is engaged when the defendant would be entitled to have indemnity costs and enhanced interest thereof from 16 September 2016, unless it is shown to be unjust to do so, having regard to all circumstances of the case, including the matters set out in rule 23(5).
2. In the light of the plaintiff’s above concessions, there seems to be little doubt that the defendant is entitled to indemnity costs in the case. Nevertheless, the plaintiff seeks to argue that it is “unjust” to do so, having regard to all the circumstances of the present case. In particular, the plaintiff relies on the following grounds:-
3. The sanctioned payment is of a relatively small sum of $50,000 when compared with the agreed damages at $800,000. While it is not the plaintiff’s contention that the small amount of sanctioned payment *per se* would make it unjust to award indemnity costs or enhanced interest, it is submitted that this is one of the factors the court should take into account;
4. Having refused to accept the sanctioned payment made by the defendant, the plaintiff continued to make reasonable efforts to negotiate with the defendant to settle the matter, whether it was in whole or in part. Knowing that the offers were not going to be accepted by the defendant, it is claimed that the plaintiff had sensibly accepted the defendant’s offer to agree the quantum at $800,000, subject to establishing of liability.

*Costs on indemnity basis*

1. It is a well-established rule that just because a sanctioned payment made is nominal, it does not fall out of the purview of the rule: See *CEP Ltd v Wuxi Jiacheng Solar Energy Technology Co Ltd* [2014] 4 HKLRD 44, §§9-14; and *HK Civil Procedure 2018* §22/24/1 at §5 on p  568-9. Therefore, I see no merit in the suggestion that just because the sanctioned payment was small in relation to the subsequent agreed amount of quantum, that the usual rule should not apply. Further, I do not see why the continuous efforts to negotiate for an agreement on the issue of quantum, subject to establishing of liability, should justify a departure from the rule.
2. The plaintiff also suggests that since the witness statement were exchanged shortly after the sanctioned payment and one of the witness statements made by Coash Yuen suggested that he had difficulty to looking after the students after Mr Liu had left with another group of students earlier, therefore Coach Yuen’s witness statement reinforced the plaintiff’s view that the claim was meritorious. It follows therefore that it was not unreasonable for the plaintiff to refuse to accept the sanctioned payment of such a small amount.
3. With respect, I find no merit in such argument. The mechanism of sanctioned payment is to encourage parties to resolve their disputes without going to trial. If a defendant considers that the claim brought by a plaintiff consists of no merit but nevertheless is willing to dispose of the matter by paying a small amount of damages (plus costs) through the mechanism of sanctioned payment, it is then up to the plaintiff to make a judgement call of whether to accept or decline such an offer. If he chooses to decline such an offer, albeit at a small amount compared with what he might able to achieve should he be able to succeed at the end of the day, he runs a risk that he may have to pay the costs on an indemnity basis in the event that he is not able to beat the offer at the end of the trial.
4. In determining whether it is “unjust” to do so, the court will take into account all the circumstances of the case, including the matters contained in Order 22, rule 24(5) of the RDC. This will, as the court has stated in *Ford v GKR Construction Limited (Practice Note)* [2000] 1 WLR 1397; [2000] 1 All ER 802, include whether the parties had all the information to make an informed decision as to whether to accept an offer or payment.
5. In my judgment, there is nothing in this case which suggests that the plaintiff was deprived of any materials, whether legal or factual, to make an informed decision. The relevant legal principles and the primary facts of this case are largely not in dispute. It is really a matter of how the court will apply those principles to the evidence transpired during the trial that matters. Therefore, in my view, the plaintiff was fully aware of the risks involved when decided to reject the defendant’s sanctioned payment. In my view, just because another trial judge may come to a different finding based on the same set of facts is not a good reason to depart from the rule. Hence, the plaintiff’s contention that it would “not unfair to suggest that a different trial judge might have reached a different conclusion” in my view is not sustainable.
6. In my opinion, the plaintiff has failed to show there was anything “unjust” about not ordering indemnity costs of the circumstances in this case. The defendant’s initial invitation to ask the plaintiff to accept the Calderbank Offer in December 2015 and inviting him to accept the sanctioned payment in August 2016 can be seen as no more than genuine attempts to try to resolve the matter without going to trial. To my mind, it should not be interpreted as a concession or show of weakness on the part of the defendant. The plaintiff had a choice but on both occasions he decided to proceed to trial instead of settling the matter. Now that the outcome of trial did not go his way, he must in my view also bear the consequences of failing to accept the sanctioned payment.
7. In the aforesaid circumstances, I come to the conclusion that the defendant is entitled to costs on a party and party basis from the date of issue of writ to the date when it was still opened for the plaintiff to accept the sanctioned payment made by the defendant. ie from 15 December 2015 to 15 September 2016. Thereafter, the defendant is entitled to costs on an indemnity basis from 16 September 2016 until the date of judgment.

*Enhanced interest*

1. The plaintiff is not disputing that the defendant is entitled to enhanced interest under the rule. It is the percentage of such interest which the plaintiff is taking issue with. In the Variation of Costs Summons, the defendant asks for enhanced interest at a rate of 10% per annum above the judgment rate. However, at the hearing, the defendant’s counsel was prepared to accept a lower sum of 5% above the judgment rate by following the ruling of Recorder Jat Sew Tong SC in the *CEP* case, *supra*.
2. In *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273, Johnson Lam J (as the V-P then was) adopted the following passage of Chadwick J in *McPhilemy v Times Newspapers (No 2)* [2002] 1 WLR 934 to explain the rationale of awarding interest on costs under Order 22:-

… It is to redress, in a case to which r.36.21 applies, the element of perceived unfairness which arises from the general rule that interest is not allowed on costs paid before judgment …… So, in the ordinary case, the successful claimant who has made payments to his own solicitor on account of costs in advance of the trial will be out of pocket even if he obtains, at the trial, an order for costs in an indemnity basis ……. he will get nothing to compensate him for the costs of money (or the loss of the use of money) which he has had to bear before trial in relation to payments which he has made on account of costs. An order under para.3(b) of r.36.21 enables the court to achieve a fairer result in that respect.” (§ 16)

1. In choosing the interest rate, Lam J adopted the approach as follows:-

“18. I propose to adopt a similar but modified approach here. There is no evidence of actual payment of costs by the plaintiff. In principle the defendant should pay the plaintiff interest on the costs incurred after 1 February 2010 running from the date when the works were done respectively. However, it would be a complicated process if each item of work were to carry interest from a different date. To simplify the process, I shall borrow a well-established approach in working out interest for special damages in personal injuries litigation. I will order interest at half of the rate I would otherwise order on all the costs incurred after 1 February 2010 with interest starting to run from 1 February 2010 for all the items. I consider this approach to be appropriate bearing in mind that we are not talking about a substantial period. The relevant period is between 1 February 2010 and the date of this judgment on costs and interest when the judgment is finalised.

19. As regards the interest rate, the English authorities adopted 4% above the base rate as a generous assessment of the costs of money. Mr Ng argued that since our O.22 r.24(3)(b) referred to the judgment rate, the proper award should be 4% above judgment rate. I cannot accept that submission. The rule only sets the maxima. Given the rationale for the exercise of the power and that it is not penal, I should ask what should be the appropriate rate in Hong Kong which can generously reflect the costs of money to the plaintiff. Based on the information from Mr Chan, 4% above prime in Hong Kong is 1% above judgment rate. I shall adopt this (9%) as our generous assessment of costs of money. Applying that to my simplified approach, I will order interest on costs incurred after 1 February to the date of this judgment be paid by the defendant to the plaintiff at 4.5% and such interest shall run from 1 February 2010.”

1. I noted that the same approach has been adopted by Deputy Judge Simon Ho in *Fan Kai Ming* *v Lam Susan Shui Hing* [2017] 5 HKC 230.
2. I would respectfully agree and adopt the approach of Lam J (as the V-P then was) in *Golden Eagle, supra.* As there is no evidence on any actual payment of costs, the defendant being represented by the insurance company, I should follow the approach in the above two cases and apply a 4.5% on costs above the judgment rate as enhanced interest in this case.

*Conclusion on Variation of Costs Summons*

1. In conclusion, I shall make the following order on the defendant’s Variation of Costs Summons:-
2. The costs order made by me on 23 March 2018 in the judgment be varied to the extent that:-
3. the plaintiff pay the defendant costs on a party and party basis from date of issue of writ, ie 15 December 2015 to the last day on which he could have accepted the sanctioned payment, ie on 15 September 2016;
4. the plaintiff pay the defendant costs on an indemnity basis from 16 September 2016 until date of judgment; and
5. enhanced interest on the costs under (b) above at a rate of 4.5% above the judgment rate from 16 September 2016 until payment of the same.
6. Sanctioned payment in the sum of $50,000 previously paid in the court by the defendant together with interest accrued thereon be paid out to the defendant, through his solicitors Messrs Leung and Lau;
7. The costs of and occasioned by the application to be paid by the plaintiff to the defendant on a party and party basis, such costs to be taxed if not agreed with certificate for counsel; and
8. The plaintiff own costs to be taxed in accordance with the Legal Aid Regulations.

*(B) Leave to Appeal Summons*

1. The plaintiff is seeking leave to appeal against my Judgment. In doing so, he has listed out 6 grounds of appeal, the first 4 grounds concerned my findings on negligence and the last 2 grounds concerned my findings on causation.
2. With greatest respect to Mr Wong who represented the plaintiff, all the proposed grounds of appeal seek to attack my findings of fact in this case. Insofar as I could make out from the submissions, he is not saying that I had relied on the wrong principles of law or that I had applied the principles wrongly to the facts. It is conclusion in my findings of fact that he is not happy with.
3. The applicable principles for granting leave to appeal are clear and well established. Pursuant to the section 63A(2) of the District Court Ordinance, Cap 336 (“DCO”), leave to appeal shall not be granted unless the court is satisfied that: (a) the appeal has a reasonable prospect of success; or (b) there is some other reason in the interests of justice why the appeal should be heard.
4. The relevant test of whether an appeal has a reasonable prospect of success under section 63A(2) of the DCO is whether the applicant can show that he has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success therefore means an appeal with prospects that are “more than “fanciful” but which do not need to be shown to be “probable”. (See *KNM v HTF* (2011), unrep., HCMP 288/2011 (Hartmann & Fok JJA; 7 September 2011) at §§8-9.
5. It has been said that a case which is “*reasonably arguable*” clearly is not sufficient. “To meet the reasonable prospect of success test, an applicant is required to show more than just an arguable case, but an appeal that has merits and ought to be heard, although he does not have to demonstrate that the appeal will probably succeed”: See *Wynn Resorts (Macau) SA v Mong Henry* [2009] 5 HKC 515 at 519 §19; per Chu J (as she then was).
6. With respect to the plaintiff’s counsel, the 6 proposed grounds of appeal relied on by the plaintiff are purely attack on the findings of fact made by me in the Judgment. The plaintiff repeatedly stated in his skeleton submissions that I had “erred in making the conclusion” (See for example §§8, 12 and 21 of the plaintiff’s skeleton submissions). However, save from quoting the cases like *Hadba* and *Palmer v Cornwall County Council* [2009] EWCA Civ 456, there is no elaboration as to why and in what ways that I had erred. In *KNM*, Fok JA (as he then was) has made it clear that “unless the applicant can show that the Judge misunderstood the evidence, or failed to appreciate its effect, or overlooked some documentary evidence, or other indisputable evidence, which should have compelled him to a different conclusion, this court will not interfere with those findings of fact.” see §23 of *KNM, supra*.
7. I shall deal with the plaintiff’s proposed grounds of appeal briefly below in the light of the above principles.
8. Ground 1 alleges that I had erred in finding the supervision provided by the defendant at the time of accident was adequate in the circumstances of the present case. No particulars were provided to show why I was wrong in making such findings. With respect, this is essentially a finding of fact which has been identified in §§37 to 45 of the Judgment. I do not see why I was not entitled to make those factual findings based on the evidence.
9. As to Grounds 2 to 4 which relate to the particular of findings on negligence, some of the facts from the evidence has been identified and the plaintiff suggested that I ought to have made a finding that the established system of supervision was inadequate and therefore the defendant was negligent. This includes the staff to student ratio and the fact that Coach Yuen was left to supervise the students in the school premises by himself. The plaintiff says that the evidence shows that no one had ever ascertained from Coach Yuen as to whether he was able to supervise the remaining students in the school premises. With respect, there is no elaboration as to why this court was not entitled to arrive at the findings as I did. I do not think the plaintiff has demonstrated that he has a real prospect of success based on these grounds.
10. As to Grounds 5 and 6 which relate to the issue of causation, again, I fail to see how I might have misunderstood the evidence, or failed to appreciate its effects or overlooking some documentary evidence or other indisputable evidence which should have compelled me to make a different conclusion as I did in the Judgment. Ground 5 says that I erred in finding that, had Mr Liu been present at the school at the time of accident, he could not have prevented the accident. Ground 6 is an elaboration of the plaintiff’s contention that Mr Liu would have been able to stop the horseplay when he saw Cheng throwing the tennis ball to Lee and therefore Lee would not have thrown the Mat back to Cheng which in turn hit the plaintiff face. With greatest respect, as I had repeatedly said to the plaintiff’s counsel in his closing submissions, this would be a “total speculation”. Nobody would know what would have happened had Mr Liu been present at the time. But what we know is that the Accident happened in split seconds and it was my view that any amount of reasonable supervision would not have prevented this unfortunate freak accident.
11. In the circumstances, I regret to find that the plaintiff has failed to demonstrate that he has reasonable prospect of success in the proposed grounds of appeal or there is any other reason in the interests of justice why this appeal should be heard. Thus, the plaintiff’s summons for leave to appeal is hereby dismissed with costs in favour of the defendant with certificate for counsel.

( Andrew SY Li )

District Judge

Mr Damian Wong, instructed by Yip, Tse & Tang, assigned by the Director of Legal Aid, for the plaintiff

Mr Kumar Ramanathan SC, instructed by Leung & Lau, for the defendant