## DCPI 2885/2014

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2885 OF 2014

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

BETWEEN

LAU WA YING (A BANKRUPT) Plaintiff

and

CARITAS – HONG KONG Defendant

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

Before: Deputy District Judge K C Chan in Chambers

Dates of Hearing: 18 April 2017

Date of Decision: 18 April 2017

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

DECISION ON COSTS

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

1. In the judgment handed down on 6 March 2017 (“the Judgment”), this court dismissed the Plaintiff’s action and made a costs order nisi that the Plaintiff do pay the Defendant costs of this action with certificate for one counsel, to be taxed if not agreed, and the Plaintiff’s own costs to be taxed according to the Legal Aid Regulations.
2. By Summons dated 20 March 2017, the Defendant seeks to vary the costs order nisi to the extent that its costs incurred after 1December 2016 be paid by the Plaintiff on an indemnity basis.
3. The date 1 December 2016 is chosen as the cut off date as by a letter marked “without prejudice save as to costs” dated 16 Nov 2016, the Defendant invited the Plaintiff to discontinue this action with no order as to costs, which offer would lapse within 14 days on 30 November 2016 (“the Offer”).
4. Mr Ho, for the Defendant, submits that such indemnity costs should be awarded because
   1. the Plaintiff knew she was the author of her own misfortune and yet made this claim based on allegations that she knew were untrue; and
   2. the Plaintiff refused to accept the Offer, which was favourable.
5. It is common ground that the Offer is not a sanctioned offer made pursuant to Order 22 of the Rules of District Court, such that applicable are the general principles governing the exercise of discretion as to whether and when to award costs on an indemnity basis.

*LEGAL PRINCIPLES : INDEMNITY BASIS*

1. Order 62 rule 5 of the Rules of District Court sets out the matters to be taken into account in the general exercise of the discretion as to costs, which I do not think I need to recite here; while Order 62 rule 28(3) provided that costs may be awarded to be taxed on an indemnity basis where the court thinks fit.
2. *Hong Kong Civil Procedure 2017* (at §62/App/12) summarizes the relevant principles thus:

“The Court of Appeal in *Choy Yee Chun (The Representative of the estate of Chan Pui Yiu) v. Bond Star Development Ltd* [1997] H.K.L.R.D. 1327, CA reviewed the cases and summarized the law as follows. 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. Any proceedings instituted or prosecuted in such circumstances as to constitute an affront to the court could properly be the subject of a direction for the taxation of the successful party’s costs on the indemnity basis. However, the circumstances in which an indemnity award might properly be made were not restricted to circumstances such as those described. The discretion was not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be ‘appropriate’……”

8. Mr Ho cites the following cases as “examples in Hong Kong and overseas that the Court penalized dishonest plaintiffs by costs on indemnity basis” :

* 1. In *Esure Services Ltd v Quarcoo[[1]](#footnote-1)*, the plaintiff claimed against his insurer for the value of his BMW which he alleged was stolen whereas the court found it was not and that the plaintiff handed to the insurer a set of 4 car keys when in fact 3 belonged to the car in question and he swapped the fourth with a key from another BMW with a view to deceive the insurer;
  2. In *Shehzad Mohammad v Tim Fung Steam Laundry (Shatin) Company Limited[[2]](#footnote-2)*, Deputy High Court Judge Kwok SC awarded indemnity costs against the malingering plaintiff who “[put] forward a claim knowing that the claim as asserted is false”. There the judge found that he, among others, made up his claim of injuries to his right arm when there was none and that he included as his claim injury he suffered from a totally unrelated incident; and
  3. In *Ivory v Telstra Corporation[[3]](#footnote-3),* the judge found the claim has always been a dishonest one and the trial has been prolonged by the plaintiff’s conduct as a witness and in cross examination of witnesses and that he persisted in engaging in fanciful conspiracy theories despite warnings by the judge.

1. These cases obviously stand on their own facts. They illustrate the application of the above principles and Mr Ho does not contend that they establish a general principle that the court will penalize “dishonest” plaintiff with indemnity costs per se and without more.
2. The Plaintiff draws my attention to a passage in *Heung Wing Yan v Hangway Housing Management Ltd[[4]](#footnote-4)* in which the learned Deputy High Court Judge Marlene Ng summarized some further principles, which are not disputed, at §19, thus :

“Although the discretion to award indemnity costs is unfettered and uncircumscribed,[[5]](#footnote-5) there must be some special or unusual feature in the case to justify an order for indemnity costs.[[6]](#footnote-6) I accept indemnity costs are no longer limited to cases where a party’s conduct lacks moral probity or deserves moral condemnation for which the court wishes to express disapproval. But such conduct must be “unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight …… It follows from all this …… it will be a rare case indeed where the refusal of a settlement offer will attract …… not merely an adverse order for costs, but an order on an indemnity rather than standard basis”.[[7]](#footnote-7) Further, whilst pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order.[[8]](#footnote-8)”

1. The Plaintiff further refers me to another observation made by Deputy High Court Judge Marlene Ng in that case at §24 that

“ … there was some basis, albeit weak, on which P’s allegations against D1 could be taken to trial. **The exposure of such weakness at trial was a different matter from saying that the pursuit of the case in reliance on it was unreasonable to such a high degree that it ought to be marked by an award of indemnity costs. As explained above, the matter should not be viewed with hindsight**.” (the Plaintiff’s emphasis)

12. I respectfully agree with this observation and find it apposite

in respect of certain aspects of the Plaintiff’s claim here.

*DISCUSSION*

1. There are indeed a number of allegations made by the Plaintiff in purported support of her claim that, as I found in the Judgment, were evidently false, without merit and/or clearly contradicted by contemporaneous documents. Some of them I found she should have known that they were not true, notably
   1. That the tiles of the Toilet were not of the non-slip type;
   2. That the Toilet would always be wet and slippery with faeces and urine after 5 pm; and
   3. That it would take her 8 to 10 minutes to fetch the towels.
2. I also found that there was a certain degree of malingering and manipulation to obtain sick leave on the part of the Plaintiff.
3. The Plaintiff’s conduct in putting forth these allegations that she well knew were false and in malingering should attract a degree of disapproval. It was, however, tempered by the fact that trial counsel for the Defendant has, in my view rightly and wisely, not taken up much time at trial to pursue these quite unsustainable allegations.
4. As I found in the Judgment, the contemporaneous records in the form of photos, floor plan, internal records of the Defendant, with some explanation, have effectively and efficiently refuted the Plaintiff’s such allegations.
5. I have no reason to believe that the costs spent in collating these documents, in taking instructions on them and presenting them for trial would not be recoverable in a taxation on a party and party basis.
6. As to the other allegations of the Plaintiff that I have found against, I take the broad view that they fall within, albeit barely, the above quoted observation of Deputy High Court Judge Marlene Ng that “the exposure of such weakness at trial was a different matter from saying that the pursuit of the case in reliance on [them] was unreasonable to such a high degree that it ought to be marked by an award of indemnity costs”.
7. On the Defendant’s submission that the Plaintiff knew that she was the author of her own misfortune and yet brought this claim. I have in fact not so found in the Judgment. The conclusion I did reach at §48 was that I did not find truthful or reliable the Plaintiff’s account as to how the accident happened; and no more.
8. I have found the Plaintiff as a witness to be prone to exaggeration, to argue and in instances to have shifted her evidence along the way. My impression was that her such behaviours were not unlike many anxious litigants in similar position. I view her such behaviours as less than reasonable, but not so unreasonable to such a high degree or as an affront to the court.
9. Regarding the Offer, I am in respectful agreement with the observation of Simon Brown LJin *Kiam v MGN Ltd (No 2)* as quoted by Deputy High Court Judge Marlene Ng and re-quoted above and do not regard the refusal of the Offer as unreasonable to such a high degree as should attract the costs consequence of a taxation on an indemnity basis.
10. In the round and by a thin margin, I am not persuaded that this is a case to award indemnity costs as sought and I dismiss the   
    Defendant’s Summons to vary the costs order nisi, which is hereby made absolute.

*COSTS OF THIS APPLICATION*

1. Though the Plaintiff successfully resists this application, as I have mentioned, there are certain conducts of the Plaintiff that warrant disapproval to a certain degree. I think the just costs order for this application in the circumstances is no order as to costs. I so order. The Plaintiff’s own costs will be taxed according to Legal Aid Regulations.

( K C Chan )

Deputy District Judge

Ms M Lee, of Rita Law & Co, for the Plaintiff

Mr Leon Ho, instructed by Au & Associates, for the Defendant

1. [2009] EWCA Civ 595 [↑](#footnote-ref-1)
2. HCPI 842/2014, unreported, Deputy High Court Judge Kwok SC, 31 August 2016 [↑](#footnote-ref-2)
3. [2001] QSC 102 [↑](#footnote-ref-3)
4. HCPI 347/2012, unreported, 14 February 2017 [↑](#footnote-ref-4)
5. see *Town Planning Board v Society for the Protection of the Harbour Limited* (2004) 7 HKCFAR 114 [↑](#footnote-ref-5)
6. see *Jackson Xu Zhao Ze & anor v Tsai Tim Yuen & anor* HCA902/2011, DHCJ Winnie Tam SC (unreported, 30 August 2013) paras 6-9 [↑](#footnote-ref-6)
7. see *Kiam v MGN Ltd (No 2)* [2002] 2 All ER 242, 246 *per* Simon Brown LJ [↑](#footnote-ref-7)
8. see *Wates Construction Limited v HGP Greentree Allchurch Evans Limited* 105 CLR 47, 55 [↑](#footnote-ref-8)