DCPI 3307/2019

[2022] HKDC 992

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 3307 OF 2019

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

BETWEEN

CHAN CHUN LONG SUNNY Plaintiff

and

EGL TOURS COMPANY LIMITED Defendant

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

Before: Master Matthew Leung in Chambers (By Paper Disposal)

Date of Defendant’s Written Submissions: 22 July 2022

Date of Plaintiff’s Written Submissions: 4 August 2022

Date of Decision: 19 September 2022

|  |
| --- |
| DECISION ON VARIATION OF COSTS ORDER NISI |

1. By the Assessment of Damages handed down on 13 May 2022 [2022] HKDC 386 (“**the Assessment of Damages**”), I assessed that the amount of damages payable to the Plaintiff, after deduction of Employees’ Compensation, was $426,022.50.
2. I also made a costs order *nisi* in favour of the Plaintiff against the Defendant for the assessment of damages proceedings including all costs previously reserved in relation to the assessment of damages, if any.  The above order *nisi* shall become absolute after 14 days unless any party applies to vary them within the 14 days’ period.
3. By Summons dated 26 May 2022, the Defendant made an application for variation of the costs order *nisi* that:
4. The Defendant do pay the Plaintiff’s costs relating to the assessment of damages on party and party basis up to 18 November 2020 to be taxed if not agreed.
5. The Defendant shall pay interest on the judgment sum up to 18 November 2020 only.
6. The Plaintiff shall pay the Defendant’s costs relating to the assessment of damages from 19 November 2020 up to the date of the Assessment of Damages, with certificate for counsel, on an indemnity basis, to be taxed if not agreed.
7. The Plaintiff shall pay interest on the Defendant’s costs at 10% per annum above judgment rate from the date when the costs were so incurred, up to the date of the judgment.
8. The Defendant also sought directions for the amount of Sanctioned Payments payable to the Plaintiff be retained in Court pending taxation.
9. I have since given directions on the filing of affidavit evidence and submissions in support and opposition. The parties agreed that the Summons be disposed of on paper without oral hearing.
10. From the affidavit evidence filed by the Defendant in support of the application on 26 May 2022, it is contended that the Plaintiff could have done better by accepting the 3rd Sanctioned Payment made on 21 October 2020 for which the total amount of Sanctioned Payment was $500,000. In fact, the total amount paid by the Defendant at the time when the 6th Sanctioned Payment was made, i.e. on 24 September 2021, was $730,000. The Plaintiff chose to proceed with the Assessment without accepting the same. The Plaintiff’s explanation was set out in his Affirmation filed on 23 June 2022.
11. There are various issues to be dealt with: (1) whether the Plaintiff should only be entitled to costs of the Assessment and interest on the judgment sum calculated up to 18 November 2020 and whether the Plaintiff should pay costs to the Defendant of the Assessment thereafter, (2) if so, whether costs should be assessed on an indemnity basis, (3) whether enhanced interest should be made, and (4) whether the remaining amount of Sanctioned Payment should be retained in Court until the costs be agreed or taxed.
12. I will deal with the above issues in turn.

**Whether the Plaintiff should pay costs**

1. Order 22, rule 23(2) to (4) of the Rules of the District Court provides the following:

“(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—

(a) 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

(b) interest on the costs referred to in paragraph (3) or sub-paragraph (a) at a rate not exceeding 10% above judgment rate.”

1. In considering whether it would be unjust to make the orders, the Court shall take into account all the circumstances of the case including the factors listed under O. 22, r.23(6) —

“(a) the terms of any sanctioned payment or sanctioned offer;

(b) the stage in the proceedings at which any sanctioned payment or sanctioned offer was made;

(c) the information available to the parties at the time when the sanctioned payment or sanctioned offer was made; and

(d) 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.”

1. The Defendant submits that the Plaintiff should pay the costs incurred after the last day of acceptance of the 3rd Sanctioned Payment because:
2. At the time when the 3rd Sanctioned Payment was made, the Plaintiff was legally represented and he cannot argue that he was deprived of any legal or factual material to make an informed decision.
3. The 3rd Sanctioned Payment was made 10 months after the joint medical expert report was available on 24 December 2019, and 5 months after the parties exchanged their witness statements in early June 2020.
4. From the time when the 3rd Sanctioned Payment was made, up to the time when the parties were ready to set down for assessment, there was no new material surfaced which would advance or impede the Plaintiff’s case.
5. The issue in the proceedings depended very much on the Plaintiff’s credibility and by the time of the 3rd Sanctioned Payment, the Plaintiff could well make an informed analysis.
6. The Plaintiff argues that the general rule is that the Plaintiff shall have costs from the Defendant when the Plaintiff wins the case, and it is for the Defendant to prove special circumstances to depart from the general rules. In the Assessment of Damages, the Plaintiff was commented by the Court to be a reliable and honest person. The Plaintiff’s position is that he reasonably maintained his position better than all sanctioned payment even after a substantial deduction of the claim for future loss of earnings prior to the Assessment of Damages.
7. I am not with the Plaintiff on this point. First of all, as a matter of fact, what I said at §35 of the Assessment of Damages was that I was unable to say that the Plaintiff was entirely unreliable and dishonest. I considered that the Plaintiff was prone to exaggeration especially as to the extent and severity of his injuries and that is why I had to deal with his evidence with great care.
8. As mentioned in the case of ***Man Hin Fung v. SKH Chan Young Secondary School*** [2018] HKDC 694 (DCPI 2725/2015, unreported, 15 June 2018), at §10, the mechanism of sanctioned payment is to encourage parties to resolve their disputes without going to trial.  If he chooses to decline such an offer, he runs a risk that he may have to pay the costs in the event that he is not able to beat the offer at the end of the trial. In determining whether it is “unjust” to do so, the court will take into account all the circumstances of the case. 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.  In the present case, the Plaintiff maintained a claim of about $2.7 million after deduction of the employees’ compensation in the Revised Statement of Damages filed on 2 July 2020. Interlocutory Judgment was entered by consent on 25 January 2021 and leave to set down was granted on 7 May 2021. The Plaintiff has been represented by solicitors from the outset until 18 August 2021 when he filed a Notice to Act in Person. I agree that from the time when the 3rd Sanctioned Payment (i.e. 21 October 2020) was made, up to the time when the parties were ready to set down for assessment, there was no new material surfaced which would advance or impede the Plaintiff’s case. There is nothing which suggests that the Plaintiff was deprived of any materials, whether legal or factual, to make an informed decision.  The Plaintiff was fully aware of the risks involved when decided to reject the Defendant’s sanctioned payment.
9. The Plaintiff contends that he reasonably maintained his position better than all sanctioned payment even after a substantial deduction of the claim for future loss of earnings prior to the Assessment of Damages. However, it is trite that a plaintiff’s subjective belief that he or she has a good claim does not constitute a relevant consideration to override the mandatory direction in Order 22 rule 23: ***Shih Pik Nog v G-2000 (Apparel) Ltd*** [2011] 4 HKLRD 121, *per* Bharwaney J at §6.  It makes no difference that such belief was based on legal advice.
10. The Plaintiff stated in his affirmation filed on 24 June 2022 that a consent order was signed to the effect that the Defendant do pay costs of the action on liability up to 14 January 2021. He therefore believed that there shall be no possible variation of the costs order made up to 25 January 2021. The Consent Order was made by the parties on the issue of liability and the costs order was made therein concerning liability only. The present application concerns with the Defendant’s costs relating to the Assessment of Damages, not liability.
11. From 18 August 2021 to 21 February 2022, the Plaintiff was acting in person. He argued that he did not have any legal advice when he received the 6th sanctioned payment. However, he attended the Case Management Conference before me on 20 October 2021, and indicated to me that he could proceed with the hearing himself. The Assessment hearing was then fixed to be heard on 22 February 2022. The Plaintiff, still acting in person, made a last minute adjournment application on 8 February 2022 which was refused. On 21 February 2022, Messrs Tai & Co filed a Notice to Act to act for the Plaintiff. They made a similar last minute adjournment application which was refused again. Notwithstanding the Plaintiff’s concession through his counsel just 1 day before the date of the Assessment hearing that the total claim amount was reduced to $737,172 as per the Re-Revised Statement of Damages, the Plaintiff chose to proceed with the Assessment hearing. I do not accept the Plaintiff’s argument that he reasonably maintained his position better than all sanctioned payment even after a substantial deduction of the claim for future loss of earnings prior to the Assessment of Damages.
12. Having considered all the circumstances, I am satisfied that the Plaintiff should only be entitled to costs and interest on the judgment sum calculated up to the last day of acceptance of the 3rd sanctioned payment. The 3rd sanctioned payment was made on 21 October 2020 and it was open to the Plaintiff to accept on or before 18 November 2020. The Plaintiff shall pay the Defendant’s costs relating to the Assessment of Damages from 19 November 2020 up to the date of the Assessment of Damages, with certificate for counsel.

**Indemnity costs**

1. Order 62, rule 28(3) of the Rules of the District Court provides that “[the] Court in awarding costs ...... may in any case in which it thinks fit to do so order or direct that the costs shall be taxed ...... on the indemnity basis”.
2. If the mechanism of sanctioned payment is triggered off, it is up the Plaintiff to make a judgment call of whether to accept it or not. If he chooses to decline such an offer, he runs the risk that he may have to pay costs on an indemnity basis. In the case of ***Yip Mau Kei v. Wong Kam Tim*** DCPI 1905/2013 (unreported, 27 February 2015), HHJ Levy said at §26 that “according to O.22 r.23(5), the starting point is that the court will, unless it is unjust to do so, disallow interest and further order a claimant to pay the defendant’s costs on the indemnity basis when such a claimant fails to do better than a sanctioned payment after the latest date on which the payment could have been accepted without requiring the leave of the court.”
3. In the present case, having considered all the circumstances of the case, including the matters listed out in O.22, r. 23(6), I am of the view that the Plaintiff was fully aware of the risk involved when decided to reject the sanctioned payments and to proceed with Assessment of Damages. Although I was unable to say that the Plaintiff was entirely unreliable and dishonest, I considered that the Plaintiff was prone to exaggeration especially as to the extent and severity of his injuries. I fail to see if there is nothing “unjust” to order the Plaintiff to pay the Defendant’s costs after 19 November 2020 on an indemnity basis.

**Enhanced interest**

1. The purpose of awarding interest on costs at an enhanced rate is not to penalise a plaintiff for not accepting a sanctioned payment but to compensate the defendant 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.
2. In ***Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd*** [2010] 3 HKLRD 273, J. Lam J (as he 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. On enhanced interest rate, the following approach is adopted:-

“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. The Defendant argues that enhanced of 10% above the judgment rate should be adopted because:
2. The Court found that the Plaintiff was prone to exaggeration especially as to the extent and severity of his injuries.
3. The Plaintiff failed to accept the subsequent Sanctioned Payment after the 3rd Sanctioned Payment which were extremely generous offers to him.
4. Last minute applications to adjourn the Assessment were made by the Plaintiff 2 weeks before the Assessment and by his Solicitors 5 days before the Assessment respectively. The Plaintiff could have engaged lawyer earlier after his legal aid application has been declined.
5. The Plaintiff only withdrew his claim for future loss of earnings and agreed with the Defendant’s calculation of pre-trial loss of earnings in his Supplemental Opening.
6. In the case of ***Hu Wan v Sanwo International Co Ltd***, [2021] HKDC 948 (DCPI 3621/2019, unreported, 11 August 2021), HHJ Li considered that in the PI context, a 2% above judgment rate as enhanced interest on damages was reasonable. For interest on costs, the plaintiff in that case sought a rate of 2% above judgment rate which was accepted by the learned Judge. In the present case, having considered all the circumstances, including the conduct of the parties and the sanctioned payments made by the Defendant, I consider that a rate of 2% above judgment rate is suitable.

**Sanctioned payment remaining in Court**

1. After deducting the interim payment of $150,000, the amount of Sanctioned Payments remained in court is $580,000.
2. The Defendant claims that they have incurred around $550,000 as costs and disbursement after 19 November 2020 up to present. The Defendant assesses that the Plaintiff will at most be entitled to $309,646.63 as damages and interest. The Plaintiff has never received any legal aid. The Defendant submits that it will be unfair if the Plaintiff is allowed payment out of the Sanctioned Payment in satisfaction of the judgment sum without giving the opportunity to the Defendant to seek a set off with the costs recoverable from the Plaintiff.
3. A similar application was made in the case of ***Yeung Kiu Ying v Fairwood Fast Food Ltd,*** [2020] HKDC 293 (DCPI 2016/2015, unreported, 15 May 2020). HHJ Man rejected the application on the ground that there was no evidence that the Plaintiff would be unable to pay costs and the time to be taken for the costs to be finalised can be lengthy.
4. As a general rule, a winning party should be entitled to the award immediately. There is no evidence in the present case that the Plaintiff will be unable to pay costs, and in fact, he has been awarded costs prior to the 3rd Sanctioned Payment. The Defendant’s application in effect will be an order asking the Plaintiff to provide security for the Defendant’s costs pending taxation. I do not think that this is an appropriate order to be made in the circumstances.

**Conclusion**

1. Based on the foregoing, I hereby make the following order:
2. The costs order *nisi* be varied as follows:
3. The Defendant do pay the Plaintiff’s costs relating to the Assessment of Damages on party and party basis up to and including 18 November 2020 to be taxed if not agreed.
4. The Defendant shall pay interest on the judgment sum of $426,022.50 as per paragraph 70 of the Assessment of Damages up to and including 18 November 2020.
5. The Plaintiff shall pay the Defendant’s costs relating to the Assessment of Damages from 19 November 2020 up to the date of the Assessment of Damages, with certificate for counsel, on an indemnity basis, to be taxed if not agreed.
6. The Plaintiff shall pay interest on the Defendant’s costs as set out in sub-paragraph (c) above at 2% per annum above judgment rate from the date when the costs were so incurred, up to the date of the judgment.
7. No order is made in respect of paragraph 2 and 3 of the Defendant’s Summons dated 26 May 2022.
8. The parties shall agree on the calculation of interest payable to the Plaintiff and shall seek further directions for the payment out of the Sanctioned Payments within 28 days from the date hereof,
9. There be costs order *nisi* that the costs of this application be paid by the Plaintiff to the Defendant, with certificate for counsel, on an indemnity basis to be taxed if not agreed.

(Matthew Leung)

Master of the District Court

Mr Calvin Law, instructed by Messrs Tai & Co., for the Plaintiff

Mr Alfred Cheng, instructed by Messrs Mayer Brown, for the Defendant