# DCPI 4215/2019

[2021] HKDC 1310

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 4215 OF 2019

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BETWEEN

KHAN MURAD Plaintiff

and

CHAN YUK MING Defendant

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##### Before: Deputy District Judge Zabrina Lau in Chambers

Date of Defendant’s Submission: 19 August 2021

Date of Plaintiff’s Submission: 15 September 2021

Date of Defendant’s Submission in reply: 23 September 2021

##### Date of Decision: 22 October 2021

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DECISION

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1. On 15 June 2021, this court handed down my judgment in the present action (the “**Judgment**”) wherein the plaintiff was awarded damages in the sum of $217,335 (“**Judgment Sum**”) with interest. An order *nisi* was made that the defendant do pay the plaintiff the costs of the entire action, to be taxed if not agreed, with certificate for counsel.
2. By Summons dated 28 June 2021, the defendant applied to vary the costs order *nisi* to the effect that there be no order as to costs from 7 December 2020 onwards or such other date as the court deems fit, or alternatively, the defendant do pay the portion of the plaintiff’s costs as the court deems fit from 7 December 2020 onwards or such other date as the court deems fit.

*Background*

1. On 19 June 2019, the plaintiff instructed his solicitors to issue a letter before action to the defendant and the defendant’s insurance company without specifying any claim amount. On 19 December 2019, the plaintiff issued a Writ of Summons and a Statement of Damages for a claim in the sum of $2,742,746.90 plus interest. On 17 September 2020, the plaintiff filed a Revised Statement of Damages and increased his claim to $2,966,953.43.
2. On 10 March 2020, the plaintiff put forward a sanctioned offer in the sum of $1,500,000, to which the defendant did not agree.
3. On 9 November 2020, the defendant paid a sum of $210,000 into court as sanctioned payment (“**Sanctioned Payment**”).
4. The plaintiff did not respond until after the expiry of the 28-day prescribed period for accepting the Sanctioned Payment and put forward another sanctioned offer in the sum of $1,200,000 on 8 December 2020, to which the defendant did not agree.
5. At the trial, the plaintiff did not make any concession on the quantum but instead further increased it to $2,986,754.
6. The defendant argues that although the Judgment Sum awarded to the plaintiff exceeds the Sanctioned Payment, the difference (of about seven thousand dollars) was insignificant compared to the plaintiff’s claim. It is further argued that the plaintiff’s grossly exaggerated claim and his oppressive conduct in the proceedings justifies a departure from the normal rule that costs should follow the event.
7. The plaintiff, on the other hand, argues that the costs order *nisi* should be made absolute, as the Judgment Sum clearly exceeds the Sanctioned Payment. He further relies on *Mega Yield International Holdings Limited v Fonfair Company Limited*, unreported, HCA 948 of 2009, 14 May 2013 at §28 for the proposition that the defendant could have protected himself from any excessive claim as well as from the costs of pursuing such excessive claim by making an adequate sanctioned payment; yet the defendant did not do so despite it was financially capable of making a better sanctioned payment.

*Discussion*

1. There is no dispute that, under the Judgment, the plaintiff is awarded a sum that exceeds the Sanctioned Payment, albeit by a narrow margin. Therefore, the costs consequences as stipulated under O 22 r 23 are not applicable.
2. Nonetheless, there remains the question of whether there are special matters to be taken into account in the court’s exercise of discretion in considering whether to depart from the usual position of “costs should follow the event”. After all, the “following the event principle” is no longer regarded as a general rule but “only operates to shift to the unsuccessful party the burden of showing why some different approach should be adopted on the facts of a particular case, since a mechanistic adoption of the principle may result in parties incurring unnecessary costs in civil litigation: *Wong Kam Tong v Tin Shing Court, Yuen Long (IO) (No 2)* [2012] 2 HKLRD 125 at 1133-1135, §§10-13; *Hung Fung Enterprises Holding Ltd v Agricultural Bank of China* [2012] 3 HKLRD 679 at 701, §100; *Mega Yield* (supra) at §8.
3. Pursuant to RDC O 62 r 5, the court in exercising its discretion as to costs shall, to such extent as may be appropriate, take into account a number of factors such as any payment of money into court and the amount of such payment, and the conduct of all the parties. The conduct of the parties includes whether it was reasonable for a party to raise or pursue a particular issue, the manner in which the party has pursued a particular issue and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim, and conduct before, as well as during, the proceedings.
4. Having considered all the relevant factors in this case, I came to the view that it is just and appropriate to vary the costs order *nisi* to the effect that the defendant shall pay the costs of the plaintiff in this action save and except that there be no order as to costs from 7 December 2020 onwards, ie the expiry of the 28-day period for the plaintiff to accept the Sanctioned Payment. My reasons are as follows.
5. First, the defendant did make a payment into court well before the trial for the purpose of an early settlement of the matter. Although the Sanctioned Payment fell short of the Judgment Sum, the difference is on any view insignificant (being less than 4%). The plaintiff is not considerably better off by insisting on taking his case to trial.
6. Secondly, the total damages that the plaintiff claimed at trial amounted to $2,986,754, which was over 13 times of the Judgment Sum. These figures speak clearly that the plaintiff’s claim was grossly exaggerated.
7. Thirdly, the plaintiff’s manner in pursuing his claims under various heads of damages is also relevant. As I have observed in the Judgment, the plaintiff has grossly exaggerated his pain and his alleged inability to work. Yet his witness statement was silent on most of the overseas trips he had taken after the accident, and he did not provide any detailed or satisfactory explanation for a number of deposits into his bank account. Further, despite he was ordered by the court to disclose his bank statements during the relevant period, for no satisfactory reason he failed to do so for the period from February to June 2019, which was relevant for the purpose of assessing his income at the time of the accident. The way the plaintiff pursued his claim (which was excessive under each head) necessitated the defendant’s counsel to go through the plaintiff’s medical records, travel records and bank statements and cross-examine the plaintiff one by one, which no doubt increased the costs of the trial. The plaintiff also belatedly attempted to rely on a recent medical consultation and an MRI report obtained after the case was put under the Warned List, and as a result considerable time was incurred during the trial to deal with such new evidence.
8. Fourthly, the plaintiff continued to act unreasonably after the trial such that unnecessary costs were incurred in respect of the hearing of the defendant’s summons to vary the costs order *nisi*, which was only vacated at the very last minute and despite repeated enquiries from the defendant’s solicitors.
9. In view of all of the above, there are indeed special circumstances in this case justifying a departure from the usual position of costs following the event, and the plaintiff is not entitled to recover his costs incurred in this action after 7 December 2020.
10. As I have acceded to the defendant’s application to vary the costs order *nisi*, the plaintiff shall pay the defendant’s costs of and incidental to this application, including the costs incurred for the scheduled hearing on 23 August 2021, with certificate for counsel, to be taxed if not agreed.

*Disposition*

1. The order *nisi* at paragraph 111 of the Judgment be varied to the effect that the defendant shall pay the costs of the plaintiff in this action, to be taxed if not agreed, with certificate for counsel, save and except that there be no order as to costs from 7 December 2020 onwards until judgment.
2. Costs of and incidental to this application, including the costs incurred for the scheduled hearing on 23 August 2021, be paid by the plaintiff to the defendant, with certificate for counsel, to be taxed if not agreed.

( Zabrina Lau )

Deputy District Judge

Mr Wright John, instructed by C M Chow & Company, for the plaintiff

Miss Margaret K M Chan, instructed by Tsang Chan & Woo Solicitors & Notaries, for the defendant