**DCPI331/2008**

IN THE DISTRICT COURT OF THE

HONG KONS SPECIAL ADMINSTRATIVE REGION

PERSONAL INJURIES ACTION NO. 331 OF 2008

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BETWEEN

LEE YIU PUI Plaintiff

and

WONG TAT MAN SIMON Defendant

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Coram: Deputy District Judge Frederick HF Chan in Chambers (open to public)

Date of hearing: 25th September 2008

Date of handing down the ruling: 29th September 2008

**RULING**

***Payment into Court?***

1. It is trite procedural law that when a defendant makes a payment into the District Court with a view to settling a set of legal proceedings with a plaintiff, the plaintiff (with the assistance of his legal advisers) will have 14 days to consider accepting the payment-in. Time is very much of the essence.
2. In *Hong Kong Personal Injury Service* (LexisNexis), Volume 1, paragraph 1252, p. 306, the learned editors concisely commented that:

“Payment into court is a very potent tool in the hands of the defendant. Where negotiations for a settlement have been unsuccessful, the defendant can effect a payment into court. Such a payment represents the defendant’s quantification of the value of the plaintiff’s claims plus interest up to the date of payment in. There will be real pressure on the plaintiff to settle the action upon a payment in, because of the cost implications”.

1. If the 14-day period for the acceptance of the payment-in expires, the plaintiff would invariably require the Court’s leave for a payment-out of the payment into court. The present case raised a novel procedural point:

“Whether the District Court has the discretion to extend the 14-day period to a plaintiff to accept the payment-in and if so, how should the Court exercise the discretion?”

***The Plaintiff’s case?***

1. On 9th November 2005, the Plaintiff (aged 67) was cycling along Kwong Wah Road and met a traffic accident when his bicycle collided with a private vehicle (registration no. FJ2693) which was driven by the Defendant (“*the Accident*”). He was injured and taken to hospital. His injuries included fracture of right tibia and fibula, abrasions in the right elbow and lacerations in his right leg. At the time of the Accident, he was earning HK$3,500 per month as a part-time chef.
2. Subsequently, the Plaintiff obtained legal aid and on 14th February 2008, issued a writ of summons (endorsed with a statement of claim) in the District Court against the Defendant to claim for damages in respect of his personal injuries suffered in the Accident. The Statement of Claim contained detailed allegations of the Defendant’s negligence which spanned 21 sub-paragraphs. By virtue of the Revised Statement of Damages[[1]](#footnote-1) the 21st August 2008, the Plaintiff is seeking damages in the region of *HK$995,992*.

***The Defendant’s defence?***

1. The Defendant retorted by filing a defence dated 3rd April 2008 which (a) denies that the Accident was caused by the Defendant’s negligence and (b) avers that the Accident was solely or partially caused by the Plaintiff.
2. By the Revised Answer to the Revised Statement of Damages, the Defendant takes great issue with the Plaintiff’s case on quantum of damages and argues that, if the Defendant were to be held liable to the Plaintiff for negligence, the Plaintiff could only recover damages in the spectrum of *HK$206,080* to *HK$224,080*.
3. It is plain that should there be a trial in the present case, the issues of liability and quantum of damages will be hotly contested.
4. On 26th June 2008, District Court Master K. Lo made detailed directions on the case management of the present case and granted leave to the parties to deposit the case for trial in the Running List of the District Court on any date after 21st October 2008. The trial would be conducted before a bilingual District Judge with 2 days reserved.

***The payment-in?***

1. On 9th September 2008, the Defendant (through his solicitors) made a payment into court (“*the Payment-in*”) and duly notified the Plaintiff’s solicitors of the Payment-in on the same day. The Plaintiff had the right to accept the Payment-in without leave of the Court until 23rd September 2008.

***The Application?***

1. According to the Plaintiff, what followed the notification of the Payment-in was the following happenings:

* On 16th September 2008, the Plaintiff’s solicitors sought the approval from the Director of Legal Aid to engage a counsel to advise on the Payment-in;
* On 17th September 2008, the Director of Legal Aid granted the approval and assigned Ms. Monica Chow (“*Ms. Chow*”) of counsel to prepare the advice on the Payment-in;
* On 19th September 2008, Ms. Chow received written instructions from the Plaintiff’s solicitors to render her legal opinion on the Payment-in but Ms. Chow did not indicate on when she would be able to finish the written opinion on the Payment-in;
* Ms. Chih for the Plaintiff accepted that once she receives the opinion on the Payment-in from Ms. Chow, she would be duty bound to explain the contents and implications of the same to her lay client, the Plaintiff;
* As the clock was clicking and the 14-day period prescribed by the **Rules of the District Court** (Cap. 336, Sub. Leg.) (“*RDC*”) for the Plaintiff to accept the Payment-in would soon expire, the Plaintiff issued an *inter parte* summons dated 23rd September 2008 (“*the Summons*”) pursuant to O. 3 r. 5 RDC for:

“… an extension of time for accepting the money paid into court made by the Defendant on 9th September 2008 … the costs of this application be in the cause”.

***The legal principles?***

1. Before going into the merits of the Summons, it may be helpful to refer to the provisions of O. 22 RDC which read:

Rule 1:

“(1) In any action for … damages any defendant may at any time pay into court a sum of money … in satisfaction of the cause of action in respect of which the plaintiff claims …”;

Rule 3:

“(1) Where money is paid into court under rule 1, then … within 14 days after receipt of the notice of payment … in any case, before the trial … of the action begins, the plaintiff may … accept the money …

by giving notice in Form 24 in Appendix A to … defendant to the action”;

Rule 5:

“If any money paid into court in an action is not accepted in accordance with rule 3, the money remaining in court shall not be paid out except in pursuance of an order of the Court which may be made at any time before, at or during the trial … of the action …”.

1. O. 62 r. 10 RDC is also relevant and stipulates that:

“(2) Where a plaintiff by notice in writing in accordance with Order 22, rule 3(1), accepts money paid into court in satisfaction of the cause of action … in respect of which he claims … he shall be entitled to his costs of the action incurred up to the time of giving notice of acceptance”.

1. The terms of O.3 r. 5 RDC were as follows:

“(1) The Court may, on such terms as it thinks just, by order extend … the period within which a person is required or authorized by these Rules … to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period”.

1. In the English Court of Appeal decision of **Garner v. Cleggs** [1983] 1 WLR 862, Lord Justice Robert Goff (as he then was) observed generally at p. 871F-H that:

“The position is this. A payment into court has some of the characteristics of an offer, but it is not identical with an offer because, once the payment is made into court, it is subject to all the relevant provisions of the Rules of the Supreme Court, and in particular, for present purposes, the provisions of Ord. 22, rr. 1, 3 and 5 to which Lawton L.J. has already referred. The effect of the relevant parts of these provisions is, in summary, as follows: first, once money has been paid in, the plaintiff has the right to take the money out of court in satisfaction of his claim, without leave, at any time within 21 days after receipt of the notice of the payment in and before the trial or hearing of the action begins: see r. 3. Second, after the expiry of the 21-day period the money in court may only be paid out to the plaintiff in pursuance of an order of the court: see r. 5. Third, notice of payment in (and by implication, a payment in itself) may only be withdrawn by the defendant by leave of the court: r. 1(3). In practice such leave will only be given where the defendant has shown good reason, and that ordinarily means a material change of circumstances”.

1. It is also pertinent to note that the learned editors of *Hong Kong Civil Procedure 2008*, Volume 1, commented that:

“**Time for acceptance**

The plaintiff should be prompt to accept the money paid into court in order to avoid further loss (paragraph 22/3/3, p. 417) …

**Effect of rule**

The broad effect of the rule [*O. 22 r. 5 RHC*] is that unless money paid into court under r. 1 is accepted in satisfaction of the whole cause or causes of action within the time and in the manner prescribed by r. 3, it must remain in court pending an order for its payment out (paragraph 22/5/1, p. 420) …

**Application for payment out**

The application for payment out of money remaining in court is made by summons to the master or to the judge at the trial. Such an application may be made before, at or after the trial … of the action … On such application the court shall deal with the issue of costs (paragraph 22/5/2, p. 421) …

**Defendant’s costs**

Costs incurred between the payment in and payment out are, like other costs, in the discretion of costs …

Where payment into court was not accepted within 21 days (O. 22 r. 3), four days later the plaintiff the plaintiff decided to accept the amount paid in and the defendant agreed to let them take the money out of court, the defendant’s claim for costs from payment in was allowed by Brown J. and was upheld by the Court of Appeal (*Associated Recordings (Sales) Ltd. v. Thompson Newspapers* (1967) 111 S.J. 376, CA) (paragraph 62/10/15, p. 979)”.

1. Equally, in the authoritative treatise titled “*The Law & Practice of Compromise*” (1st Edition, 1991), David Foskett QC[[2]](#footnote-2) commented at pp. 147-148, paragraph 10-10 that:

“**Timely acceptance before trial**

To permit advantage to be taken of the automatic right to costs, the plaintiff must give notice of acceptance to the other parties …within the time prescribed by the rules …

**Late acceptance before trial**

What are the consequences of a late acceptance of a pre-trial payment into court? Whether the matter be in the High Court or county court there is no automatic right to costs, nor to payment out of the money.

In the High Court an application to take the money out of court must be made. Unless the plaintiff’s prospects of success have materially worsened since the date of the payment in, an order for the payment out will be made on terms that the plaintiff pays the costs after the date of the payment in”.

1. In relation to an application under O. 22 r. 5 RHC for an order of payment-out, Lord Denning MR had these to say in **Gaskins v. British Aluminum Co. Ltd.** [1976] 1 QB 525, 530-531:

“… If the payment is made less than 21 days before the trial, the plaintiff has a *right* to accept it so long as he does it *before* the trial starts: see R.S.C., Ord. 22, r. 3. ***If the plaintiff let those time pass, he no longer has the right to accept it, but has to obtain an order of the court***. R.S.C., Ord. 22, r. 5 says:

“the money remaining in court shall not be paid out except in pursuance of an order of the Court which may be made at any time before, at or during the trial, before, at or after the trial or hearing of the action”.

If the parties agree on a settlement, the court will, of course, make an order for payment out in order to effect the settlement. But what if they do not agree? Can the plaintiff be allowed to take the money out in the face of the defendant’s opposition?

I think a distinction must be drawn between an application made before the trial, and one made at or after it. ***When the application is made before the trial, it will usually be made to a master. He can make an order allowing it. If the chances of success or failure – or of greater or lesser damages – are substantially the same as they were at the time of the payment into court, the master may allow the payment out to the plaintiff, but he will usually allow it only on the terms that the plaintiff pays all the costs from the date of the payment into court***. If the chances have substantially altered, then the master should not allow the plaintiff to take the payment out: for the simple reason that it would be unfair to hold the defendant to a sum which he offered in different circumstances …” (emphasis added).

***The issues?***

1. Neither Ms. Chih nor Ms. Wong had any qualms about the above general principles of the law relating to the procedural regime of payment into court and they have agreed that in the instant case, the key issues for me to determine are:
2. Does the Court have the discretion to extend the time to accept the Payment-in?
3. If the answer is yes, whether the Court should exercise the discretion in the Plaintiff’s favor by giving a further 14-day period to accept the Payment-in as per the Summons?
4. At the hearing before me and in the course of submissions, Ms. Chih (solicitor for the Plaintiff) confessed that she has been unable to locate *any* case law which might throw light on the above issues. Ms. Wong for the Defendant also confirmed that she was *not* aware of any direct authorities on the above 2 issues.
5. Ms. Chih, in her gallant efforts of advocacy, relied on her anecdotal and somewhat piecemeal recollections about a case numbered HCA10082/2006 where Mr. Justice Peter Nguyen granted a similar order in a Chambers hearing in the Court of First Instance. She candidly admitted that she had no clue as to whether any argument on (a) the existence and (b) the exercise of the discretion of the Court under O. 3 r. 5 **Rules of the High Court** (Cap. 4, Sub. Leg.) (“*RHC*”) to extend the 14-day period of O. 22 r. 3 RHC was ventilated before Mr. Justice Nguyen. She was unable to produce a copy of the case for me to consider. My own research on the comprehensive database of the Hong Kong Judiciary’s Legal Reference System also failed to locate the case of HCA10082/2006.
6. Ms. Chih went on to pray in aid the wide terms of O. 3 r. 5 RDC to support her contention that the District Court does have the discretion to make an order to extend the time for the Plaintiff to consider accepting and if so advised, to accept the Payment-in.

***Existence of the discretion?***

1. On the issue of whether the Court has the discretion to extend the time to accept the Payment-in, I am of the view that the answer is undoubtedly *yes*. My view is (I believe) fortified by the Court of Final Appeal’s decision in the **Re Resource 1** [2000] 3 HKCFAR 187 where, in the context of an application by a party to extend time to mount a challenge of the jurisdiction of the Court of First Instance in an admiralty case, Mr. Justice Bokhary PJ commented on O. 3 r. 5 RHC and said at pp. 202F-203D:

“Clearly enough, in the ordinary course an extension can be granted after the expiration of the period initially fixed for the doing of an act. But where a rule fixes a time-limit and treats non-compliance therewith as a submission to the jurisdiction, can an extension be granted and operate to undo that legal consequence after it has ensued?

***The answer is that the power to extend time is conferred in very wide terms. Its purpose is to ensure that the legal consequences which ordinarily flow from non-compliance with time limits fixed by the rules do not apply in cases where an extension is appropriate.*** And in the context of an extension of time, there is no reason to different between a deemed submission to the jurisdiction and other legal consequences” (my emphasis).

1. I, therefore, hold that under O. 3 r. 5 RDC, the District Court does have the discretion to extend the time for the Plaintiff to accept the Payment-in. In exercising that unfettered discretion, the Court should consider all the circumstances of the case and in particular the reasons for the Plaintiff’s delay in accepting the Payment-in and whether the extension of time will cause any prejudice to the Defendant. Clearly, before making a decision, the Court should consider all the attendant circumstances of the present case by way of a weighing and balancing exercise.

***Exercising the discretion?***

1. On the exercise of the discretion, the Defendant vehemently objected to the Summons and asks the Court to dismiss the Summons with costs to be paid in any event, to be taxed if not agreed. Broadly speaking, the Defendant’s argument was in the following vein:
2. It is far too premature for the Court to consider the Summons as certain factual matters are still unknown and uncertain e.g. whether Ms. Chow would advise the Plaintiff to accept the Payment-in? Whether the Plaintiff will accept the Payment-in?
3. Ms. Wong for the Defendant emphasized the fact that the Summons merely asked for an extension of time for the Plaintiff to accept the Payment-in, it was not couched as an application for leave of the Court to order the payment out of the Payment-in under O. 22 r. 5 RDC; as matters presently constituted, no one knows whether the Payment-in is or will be acceptable to the Plaintiff;
4. She relied on the machinery prescribed by O. 22 r. 5 RDC and argued that, normally speaking, if the 14-day statutory period expired and the Plaintiff has *not* accepted the Payment-in, the proper avenue (if the Plaintiff is minded to accept the Payment-in and compromise the legal proceedings) would be to take out an *inter parte* summons to ask the Court to make a payment-out order;
5. Under O. 62 r. 10(2) RDC, if the Plaintiff has exercised his *right* and accepted the Payment-in before the 14-day period expired, say on the very last day i.e. 23rd September 2008, the Plaintiff would be entitled to his costs of the action up to that date and this is because the Court has no discretion on costs when the Plaintiff invokes his automatic right to accept the payment-in within time;
6. This should be sharply contrasted with the situation where the Plaintiff did *not* accept the Payment-in within the permitted 14-day period and subsequently applied for a payment-out order under O. 22 r. 5 RDC;
7. When that happens, *prima facie*,the Defendant would be entitled to the costs incurred after the date of the Payment-in;
8. If the Court were to grant the extension of time to accept the Payment-in under the Summons, it would be tantamount to a sweeping extension of the operation of O. 22 r. 3 and O. 62 r. 10(2) RDC respectively;
9. worse still, if the Summons were to be allowed, that would be allowing, so to speak, the Plaintiff to steal a march on the Defendant, by effectively awarding the costs after the date of the Payment-in to the Plaintiff;
10. in that sense, Ms. Wong argued, the Defendant will definitely be prejudiced on costs.
11. I find the Defendant’s arguments on the exercise of the discretion under O. 3 r. 5 RDC both sound and compelling. I agree with them. I have carefully considered the entire circumstances of the present case and am of the view that as a matter of discretion, the Court should not exercise the discretion in the Plaintiff’s favor.
12. My additional reasons for so deciding are:
13. Generally speaking, vis-à-vis a plaintiff who fails to issue the notice of acceptance in respect of a defendant’s payment into court within the 14-day period, the first port of call for the plaintiff to embark upon should be an application for payment-out under O. 22 r. 5 RDC;
14. If the plaintiff applies instead for an extension of time to accept the payment-in belatedly under O. 3 r. 5 RDC, it immediately behoves him or her to justify to the Court that in the circumstances of the particular case, such an order to extend the time to accept the payment-in out of time is both fair and just;
15. By way of the Summons, the Plaintiff is effectively asking the Court for another 14 days to consider and reflect upon the advisability of accepting the Payment-in;
16. He can do so even without the extension of time; I am of the firm view that the Plaintiff should wait and see the written advice of Ms. Chow on the Payment-in and then decide whether he will accept the Payment-in;
17. Depending on Ms. Chow’s advice and the decision of the Plaintiff, it is not clear whether or not the Plaintiff will or will not accept the Payment-in;
18. It cannot be gainsaid that the Plaintiff’s costs will continue to escalate when his legal team goes about the task of determining whether the Payment-in is or is not acceptable;
19. In the course of her valiant submissions, Ms. Chih (on behalf of the Plaintiff) explicitly advanced the following undertaking to the Court and the Defendant, namely, that:

“from 23rd September 2008 onwards until the time when the decision will be made on whether to accept the Payment-in and the service of the notice of accepting the Payment-in, the Plaintiff will devote all future legal costs solely on the issues of the advisability and acceptability of the Payment-in and will not incur any other legal costs in respect of the preparation of the case for trial on liability and quantum of damages” (“*the Costs Undertaking*”);

1. In the next breath, however, Ms. Chih insisted that if the Court grants the 14 days’ extension of the time to accept the Payment-in and subsequently the Plaintiff accepts the Payment-in within the newly allocated 14 days, then under O. 62 r. 10(2) RDC, the Plaintiff would and could still automatically be entitled to the costs incurred up to the date when the Plaintiff accepts the Payment-in and the Court would have no discretion in relation to the costs incurred after the date of the Payment-in;
2. I find this submission startling and do not consider it just and fair for the Court, at this moment of time, to allow the Plaintiff to gain such a windfall on costs; at the very least, in respect of the costs incurred after the Payment-in, the Defendant should be given the right to be heard before the Court makes a decision, one way or the other;
3. In the circumstances of the present case, I am of the view that if, at the end of the day, the Plaintiff decides to accept the Payment-in, absent an extension of time from this Court under the Summons, the Plaintiff should proceed to take out an application under O. 22 r. 5 RDC for a payment-out order;
4. Upon the hearing of the Plaintiff’s application for a payment-out order under O. 22 r. 5 RDC, the Court will then determine the issues of costs incurred after the date of the Payment-in;
5. In the context of an application under O. 22 r. 5 RDC, *prima facie*, it should be the Defendant who should be given the costs incurred after the date of the Payment-in (i.e. 9th September 2008);
6. Put it bluntly, the Plaintiff should not be allowed to jump the queue but should follow the proper avenue under O. 22 r. 5 RDC and apply for a payment-out order from the Court;
7. The circumstances of the present case do not have any unusual or special features to warrant the Court to exercise the discretion under O. 3 r. 5 RDC.

***Orders?***

1. In all, I would reject the arguments of the Plaintiff on the discretion issue and hold without any hesitation that the Plaintiff has failed to persuade me that an extension of time should be granted to him to accept the Payment-in. Regarding the Summons. I would make the following order:
2. The Summons be dismissed;
3. The costs of the Summons and the costs of the hearing on 25th September 2008 be to the Defendant in any event, to be taxed if not agreed;
4. The own costs of the Plaintiff in respect of the Summons and the costs of the hearing on 25th September 2008 shall be taxed in accordance with the **Legal Aid Regulations** (Cap. 91, Sub. Leg.).

29. Last but not the least, I would like to express my thanks to both Ms. Chih and Ms. Wong for their respective cogent submissions.

Frederick HF Chan

Deputy District Judge

Representations:

Ms. Chih Wan Si, Vanessa of Messrs. Li, Chow & Co. for the Plaintiff;

Ms. Wong Lok Yan of Messrs. Philip K. H. Wong, Kennedy Y. H. Wong for the Defendant.

1. The Statement of Damages dated 11th June 2008 stated that the Plaintiff’s damages should be HK$585,200. [↑](#footnote-ref-1)
2. The current edition is the 6th Edition which was published in 2005. David Foskett QC is now Mr. Justice Foskett of the Queen’s Bench Division, the English High Court. [↑](#footnote-ref-2)