## DCPI 1622/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1622 OF 2015

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##### BETWEEN

WONG YAU SUI Plaintiff

and

MORAL ACCORD LIMITED 1st Defendant

LUNG TANG TAK FAT LOGISTICS LIMITED 2nd Defendant

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Before: Deputy District Judge Gary C C Lam in Court

Date of Hearing: 8 and 9 February 2017

Date of Judgment: 17 February 2017

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JUDGMENT

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*Introduction*

1. This was a trial for assessment of damages. Besides the usual disputes over the quanta of the various heads of damages, a point of law was raised with regard to the applicability and application of the defence of tender before action in unliquidated claims. Arising for the first time in Hong Kong after the Civil Justice Reform (at least as can be ascertained from published judgments and decisions), this point merits some detailed consideration in this judgment.
2. By a Consent Order dated 8 February 2016, interlocutory judgment on liability was entered in favour of the plaintiff against the defendant, leaving damages to be assessed. By his Revised Statement of Damages, the plaintiff claimed HK$845,015, on top of the advance payment already made to the plaintiff of HK$57,861. At the closing submissions, the plaintiff revised the figure down to HK$706,015.
3. The point concerning the defence of tender before action (usually, simply referred to as “defence of tender”) is twofold:-
4. the applicability of the defence of tender before action to a claim for unliquidated damages; and
5. whether the defence would apply in the present circumstances.

By the very nature of the defence of tender, I was made aware of the sanctioned payments made by the defendant into Court. In the event that I would rule that the defence of tender was unavailable in the present case, there might be issue over whether I should conduct the trial. Fortunately, given the confirmation of Mr Fong for the plaintiff and Mr Ho for the defendant to me that they would not take issue on me trying the case in any event irrespective of my ruling on the applicability of the defence, the position was analogous to a situation where a defendant made an open offer and the plaintiff rejected, I proceeded with the trial. At the risk of stating the obvious, I have not been influenced in any part of my ruling and judgment here by the sanctioned payments. I ruled and judged on the legal principles and the evidence, without taking the sanctioned payments and the rejection thereof into account.

1. Before I proceed to consider this defence of tender, I shall briefly set out the factual background of the case first.

*Background*

1. The 1st defendant carried on business of container logistics and freight handling in Kowloon. The 2nd defendant, specialised in the sea freight, import and export, was the principal contractor of the 1st defendant. The plaintiff, born on 12 June 1954, was employed by the 1st defendant as a container slinger. On 13 May 2014 at about 3am, in the course of employment with the 1st defendant, the plaintiff was doing the rigging work at a vessel known as “VLADIVOSTOK” (the “Vessel”). At the time, it was raining. The plaintiff was standing on the top of a container on the Vessel and attaching a hook of a gantry crane to a corner of the container. Unfortunately, he slipped, lost his balance and his left leg fell into the gap between two containers. He managed to pull his leg out from the gap after 2 to 3 minutes, and climbed down from the container by himself. There was no bleeding, but he required assistance to walk and could not continue to work thereafter. However, he did not go to hospital immediately. He waited until off duty.
2. According to the medical notes, at around 8:50 am (about 5 hours later) on 13 May 2014, he went to A&E of Queen Elizabeth Hospital. No fracture was detected, and he was discharged on the very same day. He attended various General Outpatient Clinic sessions due to persistent left leg pain since 20 May 2014. On 28 June 2014, he was referred to physiotherapy treatment. He was granted sick leave for the period between 13 May 2014 to 27 September 2014, in a total of 135 days. On 28 January 2015, he was assessed by the Employees’ Compensation (Ordinary Assessment) Board to have suffered a loss of earning capacity permanently caused by the injury of 0.25%.
3. After the expiry of the sick leave, in October 2014, he found a job as an electrician. However, he only worked for a week, allegedly due to pain in the left knee pain. In November 2014, he found another job. He became a container slinger again, but this time, was tasked with simpler work, which did not require him to climb up and down containers to attach and detach hooks to the container. The new employer, Fook Hing Company (my transliteration), provided a platform for him of the same height as the container, so that for incoming containers, he could just walk to the top of the containers to detach the hooks, and for the outgoing containers, he would just walk to the top of the containers to attach the hooks. He alleged that in June 2016, he suffered injury in the course of employment, and since then, he had not worked.
4. The plaintiff commenced the present action on 23 July 2015 against the defendants for unliquidated damages, claiming, *inter alia*, that the defendants were negligent. He had also commenced employees’ compensation application in DCEC No 577 of 2015.

*Defence of tender before action*

1. Before the present action was commenced, the defendants tendered to the plaintiff an offer together with actual payments in the total sum of HK$300,000. The plaintiff did not accept the offer. The details were pleaded in paragraph 3 of the Defence filed on 24 September 2015 as follows, the factual matters of which are not in dispute:-

“3… The Defendants further averred that:

(1) Prior to 15 April 2015, the Plaintiff has received periodical payments of HK$57,861.00 under the Employees’ Compensation Ordinance (Cap. 282) (“the Periodical Payments”) for the Plaintiff’s alleged injuries.

(2) On 2 April 2015, the Defendants made a payment of HK$92,139.00 into the Court under the related employee compensation proceedings of DCEC 577/2015 (“the EC Payment into Court”).

(3) By a letter dated 15 April 2015 from Falcon Insurance Company (Hong Kong) Limited, the insurer of the Defendants, to Messrs. Kenneth W. Leung & Co., the Defendants offered to pay a sum of HK$300,000.00, inclusive of the Periodical Payment and the EC Payment into Court, in settlement of the Plaintiff’s intended claim. The Plaintiff did not accept the offer.

(4) On 23 September 2015, the Defendants made a payment of HK$150,000 to the Court (“the PI Payment into Court”).

(5) The Periodical Payment, the EC Payment into Court, and the PI Payment into Court, which add up to HK$300,000, are sufficient to satisfy the Plaintiff’s claim.

(6) By a letter dated 23 September 2015, the Defendants have notified the Plaintiff of all the payments previously made to the Plaintiff and into the Court.

(7) In the circumstances, the Defendants are entitled to rely on the defence of tender.”

*Review of the law and development of defence of tender*

1. A defence of tender is a defence that before the action is commenced, the defendant has already made an unconditional offer to satisfy the plaintiff’s claim. Procedurally, Order 18 rule 16 requires that before the service of his defence, he should have already made the corresponding payments into Court in accordance with Order 22. It is a defence in effect saying that the commencement of the action is unnecessary, and the plaintiff will have to bear the costs consequence if somehow the plaintiff still chooses to commence the action. This defence is another means to encourage settlement between the parties.
2. This defence is not often invoked nowadays apparently because of the elaborate regimes now available (for example, sanctioned offers and payments) to encourage settlements. Be that as it may, if the defence is established, even though the plaintiff is entitled to the claim, the plaintiff’s action shall be dismissed with costs to the defendant. The main difference lies in this costs consequence: because the action shall be dismissed, this means that all the costs incurred from the beginning should be paid to the defendant, whereas for example, a sanctioned offer or payment can only be made after an action is commenced, and the costs consequence is therefore attached only to costs incurred after the action is commenced. In any event, there bound to be overlaps among various settlement regimes, and the parties are at liberty to choose whichever one(s) they think can facilitate reasonable settlements in the particular circumstances of the case.
3. At common law, a defence of tender is applicable only to a claim for liquidated damages: see *Davys v Richardson* (1888) 21 QBD 202 at 205. The rationale of this limitation goes like this. As mentioned above, the defence is in effect saying that the commencement of the action is unnecessary. In order to have that effect, the plaintiff’s claim and demand have to be seen to correspond to the defendant’s offer tendered, and for that purpose, the claim has to be a claim for liquidated damages. If the claim is for an unspecified amount (in cases of unliquidated damages), it cannot be seen to correspond to any defendant’s offer at all, and the Court would still have to go through the usual process to assess the damages, meaning that the commencement of the action would not be unnecessary, but would still be necessary.
4. This rationale, however, is not free of conceptual difficulties. First, even in a claim for unliquidated damages, the plaintiff may still specify an amount for his claim. For such a claim, it can still be seen to correspond to the defendant’s offer tendered. At least in such circumstances where the plaintiff specifies the amount, there is no reason why the defence of tender cannot apply. That said, there would be practical difficulty if the defence of tender would only apply in unspecified unliquidated claims. I shall return to this point in paragraph 25 below.
5. Second, this rationale is conceptually incoherent with the other settlement regimes in practice, notably, the sanctioned regime under Order 22 and the without prejudice save as to costs offers, which apply to both liquidated claims and unliquidated claims. For instance, at the end of the trial, if the plaintiff cannot bid the offer, he will have to bear the costs consequence, generally, on the basis that the litigation has actually become unnecessary upon the defendant’s offer, and thus he has to bear the costs incurred thereafter. The plaintiff cannot be heard to say that because the defendant’s offer cannot be seen to correspond to the plaintiff’s claim, he should not be met with such costs consequence. On the contrary, such costs consequence is premised on a notion that the plaintiff knew or should reasonably have known that his claim cannot bid the offer. By such settlement regimes, the parties are encouraged properly to assess the merits and demerits of their cases as early as possible and thus sensibly to tender and accept reasonable offers. Inevitably, such assessments cannot be exact, and in determining whether to tender or accept an offer, the parties have to consider litigation risks as well. Despite all these uncertainties, the parties are still taken to have reasonably known the outcome.
6. Thus, the necessity for the defendant to know the exact amount claimed by the plaintiff before it can tender an offer and invoke the defence of tender is conceptually incoherent with the other settlement regimes. However, there is no reason to justify this conceptual incoherence.
7. In England, the *Civil Procedure Rules* (“*CPR*”) attempted to expand the applicability of the defence to unliquidated claims. Part 37.2 of the *CPR* provides that:-

“(1) Where a defendant wishes to rely on a defence of tender before claim he must make a payment into court of the amount he says was tendered.”

1. In the Glossary of the *CPR*, “defence of tender before claim” is defined to mean:-

“A defence that, before the claimant started proceedings, the defendant unconditionally offered to the claimant the amount due or, if no specified amount is claimed, an amount sufficient to satisfy the claim.” (emphasis added)

1. By this definition, it was thought that a defence of tender would also be available to unliquidated claims, that is, where “no specified amount is claimed”. This attempt to expand, however, has recently been ruled to have failed, unanimously by the English Court of Appeal in *Ayton v RSM Bentley Jennison and others* [2016] 1 WLR 1281. The reason for that ruling was that because the defence of tender is a substantive defence but not a procedural defence, the scope of this substantive defence could not be varied by the *CPR* only, which are to regulate the courts’ practice and procedures only.
2. In Hong Kong, during the Civil Justice Reform, in March 2004, well before the *Ayton*’s case, at the time when it was still thought that the *CPR* had expanded the scope of a defence of tender to cover unliquidated claims, the Chief Justice’s Working Party on Civil Justice Reform published the Final Report on Civil Justice Reform (the “CJR Final Report”). In paragraphs 215 and 216 of Section 9 concerning pleadings, it was stated that:-

“215. A minor point arises on a different plane in relation to the pleading of a defence. Presently, under O 18 r 16, a defendant who wishes to plead the defence of tender before action is allowed to do so if he pays the sum tendered into court. However, the case law establishes that this common law defence only applies to liquidated claims and not to claims for unliquidated damages.

216. The CPR have extended this defence so that it is available “whether or not a specified amount is claimed.” A defendant wishing to rely on this defence must pay into court the amount which he says was tendered. As this may facilitate early settlement, the Working Party recommends that a similar rule be adopted.

Recommendation 25: The defence of tender before action should be extended to apply to claims for unliquidated damages.” (emphases added)

1. This recommendation was adopted. Different from the English approach where the attempted expansion was made by the rules, in Hong Kong this attempted expansion was implemented by passing Clauses 7 and 8 of the *Civil Justice (Miscellaneous Amendments) Bill 2007* to amend the *Law Amendment and Reform (Consolidation) Ordinance (Cap 23)* (the “*LARCO*”). The corresponding Explanatory Memorandum to the Bill read:-

“7. Clause 8 implements Recommendation 25 in section 9 of the Report. At present, the case law has established that the common law defence of tender before action only applies to a liquidated claim but not to a claim for unliquidated damages. Clause 8 adds a new section to the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) to extend the defence of tender before action to a claim for unliquidated damages.

8. Clause 7 consequentially amends the long title of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) upon the addition of the new section 30 contained in clause 8.” (emphasis added)

1. As a result of the amendments, added to the long title of the *LARCO* is the phrase “and to amend the law relating to the defence of tender before action”, and added to the *LARCO* itself is a new section 30, which provides that:-

“(1) Notwithstanding any rule of law to the contrary, in proceedings for a monetary claim, whether liquidated or unliquidated, it is a defence for the defendant to prove that before the claimant commenced the proceedings, the defendant had unconditionally offered to the claimant—

(a) the amount due where the claim is liquidated; or

(b) an amount sufficient to satisfy the claim where the claim is unliquidated.

(2) The defendant is not entitled to rely on the defence under subsection (1) unless, before serving his defence on the claimant, he has—

(a) made a payment into court of the amount offered; and

(b) notified the claimant of the payment into court.”

(emphases added)

1. I shall make two observations here. First, the wording in the CPR “no specified amount is claimed” was not borrowed; instead, section 30 directly uses the expression “unliquidated damages”. It is unclear why this is so; however, I do not see any substantive difference which the different wording makes. Second, since the attempted expansion has been implemented by way of primary legislation, the reasoning in *Ayton*’s case for holding that the CPR did not expand the defence of tender to unliquidated damages is not applicable here.

*Plaintiff’s grounds for contention that defence of tender not applicable*

1. The plaintiff, however, contended that the defence of tender did not apply to the present case. He advanced three grounds.
2. The first ground was that section 30 “does not substantively alter the common law principles, but rather procedurally protects a defendant in a situation where despite having been offered and tendered a certain amount, a plaintiff still went ahead to issue proceedings to recover an unliquidated sum where the amount pleaded was not higher than the tendered sum” (original emphases). I must confess that I do not understand what he meant by “not substantively alter the common law principles, but rather procedurally protects a defendant…”. By this very ground, the plaintiff implicitly agreed that a defence of tender would be expanded to cover unliquidated claims at least in certain situations. In my view, such expansion must be substantive but not purely procedural, because, as mentioned above, the defence is a substantive defence.
3. The true substance of the plaintiff’s first ground perhaps was that like the present case, a defence of tender would only apply if a figure had been pleaded and that figure was not higher than the tendered sum. I reject this ground for the following reasons:-
4. This ground presupposes that the plaintiff has specified a figure. However, the plain language of section 30, which the plaintiff urged me to rely on for the purpose of statutory construction, does not even indicate any differentiation between specified unliquidated claims and unspecified liquidated claims.
5. If the plaintiff is right, then the practical difficulty is that a defence of tender can very rarely apply in unliquidated claims. This is because the offer for the purpose of the defence of tender has to be made before action, and the plaintiff may readily plead a higher figure in the action commenced subsequently to defeat this defence. It is unimaginable that the legislation would envisage such readiness to frustrate the purpose of the defence to encourage settlement.
6. Further, insofar as necessary, I rely on the legislative history – to follow the English position as then thought, namely, to cover claims “whether or not a specified amount is claimed”.
7. Finally, insofar as necessary, I also rely on the conceptual coherence with the other settlement regimes within the rules, as elaborated in paragraph 14 above. In gist, there is no reason why the defence of tender, like other settlement regimes to encourage settlements, would only apply in such limited situations while other regimes do not.
8. The second ground advanced by the plaintiff is concerning the neutrality of the Court. The plaintiff contended that “[t]he Court would be forced to look at pre-action without prejudice offers by the parties before trial. The situation is different in a liquidated claim situation by the very nature of a liquidated claim.”
9. I do not think the Court’s neutrality, whether apparent or actual, would be compromised. Further, I disagree that compromise, if any, would be more significant in unliquidated claims than in liquidated claims; in both situations, the defendant discloses to the Court how much he is prepared to pay. In any event, if there would be any compromise, it would be at the expense of the defendant who chooses to plead the defence of tender.
10. Further, not only by the very nature of the defence, the Court has to look at pre-action without prejudice offers pleaded in the defence of tender; in fact, the rules themselves also envisage that the Court would look at such materials. By virtue of Order 18 rule 16, the payment for the tender must be made by way of sanctioned payment under Order 22. The general rule is that a sanctioned payment under Order 22 “must not be communicated to the trial judge…”: see Order 22 rule 25(2). However, because of the very nature of the defence of tender, Order 22 rule 25(3)(a) expressly provides an exception to the general rule, namely, “where the defence of tender before action has been raised”.
11. In the premises, I reject the plaintiff’s second ground.
12. The third ground advanced by the plaintiff was that the jurisdiction to order for provisional damages under Part II of Order 37 would become unworkable because “the Court would not be able to rule on the defence and on provisional damages at the same time”. His argument was that because there would be chances that further damages would be awarded, if a defence of tender is applicable in such cases, the parties would be put into an uncertainty as to whether or not the plaintiff bid the offer tendered, and consequentially, the costs order arising from the dismissal of the plaintiff’s action upon the establishment of the defence of tender would also be uncertain. Again, I reject this ground. First, the same reasoning, if valid at all, would be equally applicable to the sanctioned offers and payments made under Order 22. However, the rules still see fit to have this sanctioned regime. Second, perhaps seeing such uncertainties, section 72E(4)(a) of the *District Court Ordinance (Cap 336)* was enacted to provide that an order for provisional damages “does not affect the exercise of any power relating to costs”.
13. Having rejected the plaintiff’s grounds, it remains for me to deal with the coda by Underhill LJ (delivering the unanimous judgment) in *Ayton*’s case:-

“23. I would add by way of coda that even if it is desirable to expand the scope of the defence of tender to cover claims for damages, at least in some cases—which I do not regard as self-evident—I do not believe that the approach taken in the glossary to the [CPR](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I71F54A60E42311DAA7CF8F68F6EE57AB) is satisfactory. It is one thing if the claimant prior to the issue of proceedings demands damages in a quantified amount and the defendant tenders the amount so claimed. There would then be a reasonable analogy with the case of a debt, since the defendant can plead that he has tendered the very amount asked for (though there would remain a problem if the claim form does not explicitly limit the damages to the pre-claimed amount or—as in this case—positively pleads a larger amount). But the language of the glossary contemplates the defence being available also in a case where the defendant has not quantified his claim (“if no specified amount is claimed”) but where the defendant has offered “an amount sufficient to satisfy the claim”. But who is to say that the offer is sufficient? The essence of a defence of tender must be that claim and demand can be seen to correspond, so that the resort to proceedings is demonstrably unnecessary: that situation ceases to obtain if the court has to carry out an assessment of the damages in order to decide whether a sufficient tender has indeed been made.” (emphases added)

1. First, I do not see why “demonstrably” would be added to qualify “unnecessary” in respect of the resort to proceedings. By adding this qualification, his Lordship fell into the trap of confining the defence to a situation where the claim and the demand can be seen to correspond to the tendered offer, that is, where the plaintiff has quantified the claim, whether liquidated or unliquidated. However, as above, the defence of tender should not be so confined. There are still other benefits such as encouraging parties to settle to avoid paying costs incurred from the *beginning* of the action, though the court still has to carry out an assessment of damages.
2. Second, even if the original essence was concerning “demonstrably unnecessary proceedings”, by our primary legislation in Hong Kong, this essence has been modified such that the defence of tender applies to unspecified claim. Insofar as necessary, I also rely on the Explanatory Memorandum as set out above – the amendments were to implement Recommendation 25 of the CJR Final Report to extend the application of the defence of tender to any monetary claims “whether or not a specified amount is claimed”.

*Conclusion on applicability of defence of tender*

1. Having rejected the plaintiff’s grounds for his position that the defence of tender does not apply in the present case, I have no hesitation in holding that as unequivocally intended by the language in section 30 of the *LARCO*, the defence of tender now applies to unliquidated claims.
2. The language making no differentiation among various unliquidated claims or prescribing any mathematical threshold, I also hold that the defence of tender applies to all unliquidated claims, irrespective of whether or not the claims are quantified, and whether the pleaded figure is higher or lower than the tendered offer, just like that other settlement regimes still bite whether or not the claims are quantified or whether the pleaded figure is higher or lower.

*Offer tendered satisfied the requirements?*

1. In his valiant effort, Mr Fong made submissions that even if a defence of tender would be available to unliquidated claims, the defence of tender did not apply in the present circumstances. His reasons were that:-
2. the pleaded amount tendered was not all paid into Court but consisted of advance payment (that is, the Periodical Payments); and
3. the offer was in any event not unconditional.
4. To understand the submissions, it is necessary to set out in full terms the pre-action offer tendered and refer to the plea of the defence of tender already set out in paragraph 9 above. The offer was contained in the defendant’s insurance letter of 15 April 2015 in the following terms:-

“We are prepared to pay a sum of HK$300,000 (inclusive of the EC Payment that your client had already been paid in a sum of HK$57,861 as well as the sanctioned payment of HK$92,139 in DCEC No. 577 of 2015) plus costs at District Court scale to be taxed if not agreed in full and final settlement of your client’s claim in the above matter.

Please be notified that the offer is open for a period of 14 days from the receipt of this letter, failing which it will only be available upon payment of costs incurred by us after the expiration of the 14-days period.”

1. Mr Fong argued that because the offer tendered before action was HK$300,000, to establish the defence of tender, HK$300,000 should all be paid into Court as required by Order 18 rule 16, and because payments into Court only totaled HK$242,139, the requirements for the defence of tender were not satisfied. I disagree. Mr Fong looked at the offer and the defence out of context. All along, the offer was that the defendants would receive HK$300,000 in total taking into account the Periodical Payments already received by the plaintiff. It is clear that for the offer tendered, the payments which the defendants would have to make would be HK$242,139, but not HK$300,000. In terms of pleading, the plea never averred that the offer tendered was HK$300,000. The plea just referred to the Periodical Payments and the 2 payments into Court, and then averred that the defendants were entitled to rely on the defence of tender. So, looking at the plea in context, the tendered offer for the purpose of the defence of tender was HK$242,139 (already paid into Court before the service of the Defence), though this figure was not expressly pleaded.
2. It remains for me to say that the plaintiff sensibly did not contend that the EC Payment into Court should not be counted for the defence of tender in the present action. Such contention would be too technical only to ignore the nature of a personal injury case in employment context.
3. As regards his contention that the offer was not unconditional as required by section 30, he pointed out that two conditions were imposed on the offer. The first was that the offer was for “full and final settlement”. The second was that the offer was open for 14 days only.
4. In respect of the first condition, he relied on the following sentence in paragraph 21-092 of *Chitty on Contracts (31st ed) Vol 1* under the subheading “Tender must be unconditional”:-

“So tenders of money “in full of the plaintiff’s claims”, as “all that is due”, “as a settlement”… have all been held invalid.”

1. I think such reliance was misplaced. This sentence has to be understood in context. The tender discussed in *Chitty* is in the context of contracts, and is with specific correspondence to a certain obligation. In the preamble under the Section “Tender”, paragraph 21-084 stated:-

“The principle of tender**.** In many cases a party to a contract cannot complete its obligations without the concurrence of the other party, e.g. without its acceptance of goods when delivered, or its acceptance of money paid over. If the other party refuses to accept the performance in such cases, it is preventing the promisor from fulfilling its contractual obligations, and the plea of tender is available to the promisor as a defence to a subsequent action against it for failure to perform.” (emphasis added)

1. In other words, if party A sues party B for breach of contract, say, by failing to deliver goods, in defence to this claim of breach of contract, party B may raise a defence of tender to deliver. However, in the very same contract, there may well be other actual or potential disputes between party A and party B. In tendering the offer, party B cannot force party A to accept the delivery in settlement concerning such disputes, because, as put by the first sentence of paragraph 21-092 of *Chitty,*

“A tender, to be valid, must not be made upon any condition to which the creditor has a right to object”,

but certainly, party A has a right to object party B’s attempt to couple the delivery with the other or potential disputes between the parties, which have nothing to do with the delivery.

1. The context in which the defence of tender was raised in the present case is totally different. The only dispute between the plaintiff and the defendants was, at the time when the offer was tendered, the liability and quantum, and the offer tendered was to address this very dispute. Thus, it made sense to state that the offer tendered was for full and final settlement between the parties. This “full and final settlement” was not a condition at all, but simply was stating the obvious consequence of accepting the offer.
2. It must be remembered that Order 18 rule 16 requires the defendant to pay into Court in accordance with Order 22 the amount tendered. Once a payment is made into Court accordingly, a *pro forma* notice of sanctioned payment (Form No 23 of Appendix A to the *Rules of District Court*) has to be filled in and served. The notice requires the defendant to specify that the payment is “in settlement of” what claims or issues in dispute. This shows that “in settlement of” and any such similar phrases are not automatically regarded as a “condition” for the offer. Context is everything.
3. As regards the second condition, that the offer was open for 14 days, Mr Fong contended that the defence of tender could be raised only if the action was commenced at the time when the offer was still open. This contention, properly understood, was not as much a contention about condition as a contention about when the defence of tender could be raised. However, no authority was cited to me to support Mr Fong’s contention. Considering the rationale of the defence, I cannot see why the offer must still be valid when the action is commenced. The rationale is that the defendant made an offer before the action, and the plaintiff should have accepted the offer instead of commencing the action. When the plaintiff has already been afforded an adequate opportunity to accept the offer, it lies ill in his mouth to say that having waited to offer to expire, he is forced to commence an action. I qualify “opportunity to accept the offer” with “adequate”, because I can see unfairness if an offer tendered is valid for one day only, where the plaintiff even does not have sufficient time to seek legal advice. As a matter of principle, that short-lived offer should still be sufficient for a defence of tender, but at the stage of considering costs, the Court should exercise its discretion to address such unfairness. In the present case, absent any evidence to the contrary, 14 days should be sufficient.
4. In any event, in the present case, the plaintiff did not accept the sanctioned payments. I cannot see how the plaintiff could sensibly argue that it would make a difference if the offer would be valid indefinitely.
5. It follows from the above that the defendants’ defence of tender is applicable in the present case. The question is whether the amount of the tender of HK$242,139 is “an amount sufficient to satisfy” the plaintiff’s claim. To answer this question, of course, I have to assess the damages to be awarded to the plaintiff.

*Assessment of damages*

*Assessment of credibility of witnesses*

1. The plaintiff himself testified. Mr Lai Shen Fai, manager of the 1st defendant, testified for the 1st and 2nd defendants.
2. The plaintiff received education up to Primary 2. He reads simple Chinese and reads numbers. During the testimony, he appeared to have difficulty in reading documents, although the difficulty was also attributable to his failure to bring his presbyopic glasses to Court. Having sit in the witness box for about one and a half hours, he also requested for a break, saying that his left leg felt some pain after sitting for such a long time.
3. His monthly income at the time of the accident was a subject under cross-examination. In this regard, during cross-examination, he was shown a Chinese document dated 5 July 2011 titled, in my own translation, “Casual worker’s information” and documents titled, again in my own translation, “Salary receipt”, for each month of the period from June 2013 to May 2014. All these documents, as the plaintiff confirmed, were signed by him. All these documents were disclosed by the defendants under their List of Document filed one year ago on 4 February 2016. In gist, according to these documents, the plaintiff’s income from the 1st defendant was HK$500 per “work”, and for the period from June 2013 to May 2014, the monthly income varied from HK$12,000 to 15,000. When confronted with these documents, the plaintiff for the first time said that all these documents were brought to him by one “Fai Goh” (whom I understand to be Mr Lai, the witness for the defendants) for him to sign after the accident. He further alleged, for the first time, that he did not read those documents at all and did not know what those documents were about. He said that Mr Lai asked him to trust him, and to sign them for the employees’ compensation.
4. I find the plaintiff’s such allegations raised for the first time totally incredible. These documents were disclosed one year ago. When preparing his witness statement eventually dated 23 May 2016, he should have already had those documents; yet he chose not to give any explanation of those documents and he only did so at trial, essentially saying that all these documents were not authentic in that they were not created on the dates as stated thereon. One would expect that if there was any truth in such explanation, the plaintiff would have raised it at the first opportunity, and not as late as cross-examination.
5. It is indeed totally unbelievable that the plaintiff would not at least have asked for an explanation of those documents before he put his signature on them. The plaintiff had had experience of claiming employees’ compensation twice, once in June 2012 and the other in February 2013. He must have been aware of the importance of documentation relating to his income. If those documents were indeed brought to him for signing after the accident, it is unimaginable why he would not have even tried to understand what those documents were about. I do not accept his explanation that he did not raise any questions because he did not want to lose his job. His evidence was that he did not raise any question at all, but not that he tried to raise one or two questions and then was met with some unfavourable answers. I cannot see how even by raising one or two questions of what the documents he was asked to sign were about would cause him to lose his job.
6. The answer that he did not want to lose the job and thus did not raise any query with the 1st defendant had become a mantra for the plaintiff. When cross-examined on Form 5 for section 16A(2) of the *Employees Compensation Ordinance* for an explanation why he did not raise issue with the 1st defendant about the income stated there to be HK$15,000, he gave the same answer. However, this answer flied in the face of common sense. The form was issued on 4 February 2015. By that time, the plaintiff had already left the 1st defendant and worked under the employ of Fook Hing Company.
7. There are also two pieces of documentary evidence I should mention. First, Form 2 for the purpose of section 15 of the *Employees Compensation Ordinance*, and second, the plaintiff’s salary tax demand for 2013-2014 disclosed by the plaintiff himself. In the first, the monthly income in the month prior to the accident was stated to be HK$15,000, and the average monthly income for the 12 months prior to the accident was stated to be HK$14,250. In the second, his income was stated to be HK$168,000, that is, on average, HK$14,000 per month. All these are consistent with the salary receipts showing that the plaintiff’s income varied from HK$12,000 to HK$15,000.
8. In the premises, I find the plaintiff’s evidence in respect of his income at the time of the accident incredible. In coming to this conclusion, I have not overlooked the plaintiff’s submission that some of the figures of the working hours in those salary receipts did not tally with Mr Lai’s evidence that 8 hours would amount to one “work”, and an excess over the first 8 hours would amount to the second “work”, and so on. Mr Lai, however, was not asked to explain such discrepancy. It may be clerical errors, or it may be due to some other reasons. Such discrepancy, absent any opportunity for the 1st defendant to explain, in the overall evidence, cannot affect my conclusion.
9. The plaintiff’s evidence in respect of his income with the new employer Fook Hing Company is also incredible. In paragraph 14 of his witness statement prepared in May 2016, at the time when he was still working with Fook Hing Company, he alleged that “I now can only earn a monthly income of about HK$14,000” (my translation and my emphasis). However, according to the salaries record sheets prepared by Fook Hing Company and disclosed by the plaintiff himself, he received more than HK$20,000 in July, September, October 2015 and April 2016. During cross-examination, he confirmed that he received about that sum each month since July 2015 until he ceased working in June 2016. Thus, on the face of it, paragraph 14 of his witness statement was incorrect. In explanation, he said that by “now” in his witness statement, he meant “prior to July 2015”. This answer is unbelievable, contrary to the clear meaning of “now”. Further, it must be noted that the period before July 2015 was the very period for which the defendants had been complaining to the plaintiff for the latter’s failure to disclose relevant salaries sheets and tax demand issued by the Inland Revenue Department. While the plaintiff alleged that he could no longer locate the documents, they were clearly in his power, that is, he could ask Fook Hing Company or the Inland Revenue Department. However, he did not even attempt to ask. He did not give any explanation for the failure to even attempt.
10. The plaintiff’s evidence concerning his recovery was also incredible. After he suffered the injury, he attended 11 sessions of out-patient physiotherapy in the Tuen Mun Hospital from 10 July 2014 to 25 September 2014. The next session would be 9 October 2014; however, he defaulted. To put all these dates in context, it must be noted that 27 September 2014 was the last date of sick leave granted to him. Thus, the defendants contended that he should be able to resume work after 27 September 2014. The plaintiff, however, alleged that he was unable to, still feeling unwell. When asked during cross-examination why he defaulted on the 9 October 2014 session, his answer was totally unbelievable: he said that he told the physiotherapist on the 25 September 2014 session that the 1st defendant had not trusted he still suffered injury and had asked him to go back to work, and so that he could not come back for any more treatment, and in response, the physiotherapist answered that he could choose not to come for the next session. This answer was non-sensible because the plaintiff has never even attempted to return to the 1st defendant at all, and thus, whether or not the 1st defendant had asked him to go back to work would be irrelevant to his consideration whether or not to continue the treatment.
11. I also note his evidence that the General Outpatient Clinic had not asked the plaintiff to go back for examination after referring him to the physiotherapists. The plaintiff also did not see fit to see any doctor after the sick leave. These are entirely consistent with the fact that he had recovered and was able to work again.
12. Unsophisticated he may be, I do not agree that unsophistication could be a reason for him to forget to tell the important matters in the witness statement under legal advice, to ignore what he signed, to ignore what he informed the Inland Revenue Department of, and to give non-sensible answers. In general, I find the plaintiff’s evidence incredible. Where the plaintiff’s evidence is in conflict with documentary evidence or medical reports, I will reject his evidence in favour of such other evidence.
13. As regards Mr Lai, he gave evidence in relation to the plaintiff’s income and the mode of operation of the 1st defendant and the relationship between the 1st defendant and the 2nd defendant. He unshakably denied the plaintiff’s allegation that he only gave the salaries receipts for the plaintiff to sign after the accident. He also confirmed that the salaries receipts reflected the income received by the plaintiff. His evidence was corroborated by documentary evidence. As mentioned above, he was not asked about the discrepancies in the salaries receipts. Overall, I find Mr Lai a credible witness.
14. As regards his evidence in relation to the operation of the 1st defendant and the relationship between the 1st defendant and the 2nd defendant, the same was solicited during cross-examination and I did not see such evidence was seriously challenged.
15. Thus, where there is conflict between Mr Lai’s evidence and the plaintiff’s, I will reject the latter and accept the former.

*Issues*

1. The parties’ respective positions regarding the various items and heads of damages are set out below:-

|  |  |  |  |
| --- | --- | --- | --- |
|  | Head of Damages | Plaintiff | Defendants |
|  | PSLA (HK$) | 280,000 | 80,000 |
|  | Monthly income at the time of the accident (including MPF) (HK$) | 23,000 | 14,962.50 |
| * 1. (a) | Compensable absence of work from the 1st defendant | 135 days (sick leave period) + 2 months | 135 days (sick leave period) |
| (b) | Pre-trial loss of earnings and MPF (HK$) | 199,815 | 67,331.25 |
| * 1. (a) | No of months for loss of earning capacity | 12 | 0 |
| (b) | Loss of Earning Capacity (HK$) | 276,000 | 0 |
|  | Special Damages | 8,061 | 3,561 |
|  | Sub-Total: | 763,876 | 150,892.25 |
|  | Less Advance Payment | (57,861) | (57,861) |
|  | Total: | 706,015 | 93,031.25 |

1. Thus, I have to resolve the following issues:-
2. The amount of pain, suffering, and loss of amenity (“PSLA”);
3. The plaintiff’s monthly income at the time of the accident;
4. The period of compensable period of absence of work;
5. Number of months for loss of earning capacity, if any; and
6. Amount of special damages.

*PSLA*

1. What happened immediately after the accident and the treatments received by the plaintiff have already been set out in paragraphs 5 – 7 above. I highlight the fact that he did not go to hospital immediately but could wait until about 5 hours later. In this regard, in the examination-in-chief, Mr Fong attempted to solicit an answer from the plaintiff why he waited for so long. I, however, disallowed him from doing so under Order 38 rule 2A, a rule which has from time to time been conveniently ignored. The rule is there not for a technical reason, but for fairness to the parties. For example, in the present case, I understand from Mr Fong that the plaintiff would explain that he had to wait until off duty for the boat to get him onshore. This was a matter that should have been explained earlier, and had this explanation been given earlier, the defendants may carry out investigation, say, asking the other workers about that and/or checking the records of the availability of the boat.
2. According to the joint medical report, for which examination was carried out on 4 January 2016, the plaintiff managed to stand up from sitting position and walk normally. He walked normally. He had mild limping during tip-toe walking and heel walking. His left leg was unstable during the single leg standing test. He could perform full squat. He did not require any support to rise up. He suffered no abnormality in his back.
3. In respect of left leg, according to the joint medical report, he suffered no deformity, swelling, or effusion over his left knee and left ankle. The sensation to touch was normal. The ranges of movement of the knee and ankle were normal. There was tenderness over left proximal medial tibia and distal 1/3 tibia.
4. For all the special tests carried out, the results were normal. X-rays of the left knee and left leg showed no abnormality.
5. Dr Wong for the plaintiff opined, consistently with the plaintiff’s complaint to the doctors during the examination, that the plaintiff would still suffer on and off pain in his left leg particularly on exertion, while Dr Chun for the defendants opined, but not denying the existence of such on and off pain, that his residual symptom with the left leg was compatible with the residual of the injury. Both of them opined that the plaintiff was able to return to his pre-injury duty, though Dr Wong added that it would be coupled with mild decrease in capacity and efficiency.
6. I accept that the plaintiff still suffered on and off pain particular on exertion, as this was not really disputed by Dr Chun. With such intermittent pain, it must be right for Dr Wong to say that there would be mild decrease in capacity and efficiency.
7. Mr Fong cited various cases to support his contention that the PSLA should be HK$280,000. The cases were *Ng Lai Fan Fanny v The Hong Kong Golf Club*, HCPI 1511/2005, 4 April 2007, *Lung Kwong Ying v So Sai Lo*, HCPI 206/2001, 9 August 2002, *Ali Shoukat v Hang Seng Bank Ltd*, HCPI 3/2003, 23 June 2004, *Limbu Man Bahadur v Tsang Chan Fai*, HCPI 486/2003, 29 July 2004, *Chan Mei Hing v Lam Kok Heng*, HCPI 786/2004, 11 December 2006, *Li Sau Keung v Maxcredit Engineering Ltd*, HCPI 530/2001 and CACV 16/2003, 25 November 2003, *Yeung Tai Hung v Hong Kong Baptist Hospital Au Shue Hung Health Centre*, HCPI 686/2004, 20 July 2006 and *Leung On v Chan Pui Ki*, HCA 2006/1992, 30 October 1995. He said that those cases shared the common feature as in the present case that the injury was soft-tissue injury only. I have read all those cases. While the plaintiffs in most of them suffered soft-tissue injury only, the injuries were mostly concerning the back, the plaintiffs were hospitalised for significant periods, and some even suffered other injuries which were more serious, for example, anxiety and depressed mood in *Ng Lai Fan Fanny*, taking pain killers and walking with an umbrella in *Chan Mei Hing*. Mr Fong asked me to take those cases as a starting point, and to adjust down the PSLA from those cases, which on the whole awarded PSLA in the range of approximately between HK$250,000 and HK$350,000. Given the dissimilarities, I think those cases at best show that the PSLA in the present case should be considerably lower than this range.
8. Mr Ho referred me to *Ng Chi Kwan v Yeung Yiu Kwan*, HCPI 633/2011, 30 September 2014, *Chan Chun Fat v Fortress Glory Engineering*, HCPI 832/2013, 7 July 2014, *Ho Kar Chee v Tam Kwong Man*, HCPI 439/2007, *崔校光 訴 周鳳*, DCPI 1319/2008, 23 June 2009 and *Lo Yin Fong v Maxim’s Caterers Ltd*, DCPI 1424/2009. The PSLA ranged from HK$50,000 to HK$10,000. Except *Ng Chi Kwan*, all the cases involved injury to knees. Some were hospitalised; some were not. Some had longer sick leave; some shorter. The seriousness of the injury of these cases is more comparable to the present one.
9. Having considered all these cases and my findings about the plaintiff’s injury, and having taken into account inflation, I award HK$120,000 to the plaintiff under this head.

*Plaintiff’s monthly income at the time of the accident*

1. As regards the plaintiff’s income, I have found above that the salaries receipts reflected the actual situation. According to the receipts, the plaintiff earned a total of HK$171,000 from May 2013 to April 2014. Thus, the plaintiff’s monthly loss of earnings including MPF was HK$171,000 x 1.05 / 12 = HK$14,962.50.
2. The plaintiff, relying on *Shek Kam Ching v Po Kee Construction Engineering Limited* [2002] 3 HKLRD 795, asked that, on top of the 135 days’ sick leave, he should be found to have not been able to resume work for 2 months thereafter. Mr Fong stressed that the plaintiff did immediately after the sick leave took a job in October 2014 as an electrician, but one week after that, he had to quit allegedly due to persistent pain in his leg.
3. I note that despite his complaint about the persistent pain in his leg as a reason for quitting as an electrician, just one month later in November 2014, he managed to take up another job as a slinger with Fook Hing Company. More importantly, if he really did feel pain in his leg, I see no reason why he did not see a doctor again. Indeed, as mentioned above, during the evidence, he said that the 1st defendant asked him to go back to work; he did not because he was “afraid” to climb up and down again. He did not even try to see if he could.

*Pre-trial loss of earnings*

1. In the circumstances, I find that after the 135 days’ sick leave, the plaintiff was able to resume work.
2. Thus, the pre-trial loss of earnings should be HK$14,962.50 x 135 / 30 = HK$67,331.25.

*Loss of earning capacity*

1. Loss of earning capacity is to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk. The plaintiff’s age, the nature of his employment, and of course the extent of his injury are relevant. See *Yu Kok Wing v Lee Tim Loi* [2011] 2 HKLRD 306 at 311I-312G.
2. In the present case, the plaintiff earned more than HK$20,000 per month since at least July 2015 under the employ of Fook Hing Company. As regards his income from November 2014 to June 2015 with Fook Hing Company, as discussed above, he failed to disclose his records of his income for no good reason. While he alleged he earned only about HK$14,000 for that period, I draw an adverse inference that he earned more than HK$14,000 on average. It may well be that the income may start to pick up from HK$14,000 during the period to more than HK$20,000 after July 2015. What exact the figures would be, I cannot find. The point is that the plaintiff was lucky enough to encounter a sympathetic employer after the accident and earn more than prior to the accident.
3. That said, at the time of the accident, the plaintiff was almost 60 years old, and at the time of the trial, he was 61 years old. Given this age, the inconvenience caused by the injury to him, though not serious, should have a more significant impact on his competitiveness in the labour market of slingers. I award 2 months of his monthly income at the time of the accident, that is, HK$14,962.50 x 2, rounded up to HK$30,000.

*Special damages*

1. It is not disputed that the plaintiff’s medical expenses were HK$2,061. The defendants however contended that the travelling expenses and the tonic food expenses should not be as much as HK$3,000 for each.
2. The defendants pointed out that the plaintiff lived in Butterfly Estate, Tuen Mun, and he should not be taking taxi to Tuen Mun Hospital where the plaintiff mainly received the treatments. Mr Ho said that the travelling expenses should be HK$500 only.
3. The defendants also highlighted that given the mild injury, the tonic food expenses should not be as much as HK$3,000. Mr Ho said that the expenses should be HK$1,000 only.
4. Having considered the submissions from the parties, I award HK$1,000 for travelling expenses and HK$1,500 for tonic food expenses.

*Total of damages*

1. In summary, I find the damages as follows:-
2. PSLA: HK$120,000
3. Pre-trial loss of earnings (including MPF): HK$67,331.25
4. Loss of earning capacity: HK$30,000
5. Special damages: HK$4,561
6. Total: HK$221,892.25.

*Awards*

1. Less the advance payment (that is, the Periodical Payments) of HK$57,861, the defendants shall jointly and severally pay the plaintiff HK$164,031.25, and I so order. I also award interest for general damages at the rate of 2% from the date of the writ to the date of judgment; and interest for pre-trial loss of earnings and other special damages at half of the judgment rate from the date of the accident. Further, interest shall accrue on the judgment sum at judgment rate from the date of judgment.

*Costs to be further argued*

1. That leaves the issue of costs. As discussed above, the offer under the defence of tender was HK$242,139, approximately HK$78,100 above the award exclusive of interest. Clearly, even if interest is included, the defence of tender is still established. Therefore, I shall dismiss the plaintiff’s claim with costs to the defendants. The questions are
2. the basis for taxation; and
3. what sanctioned consequence should follow.
4. At the end of the closing submissions, Mr Ho indicated that he would seek sanctioned interest if the defendants’ sanctioned payments were not bid. However, perhaps because he had yet to know my judgment, he did not specify what should be the interest rate pursuant to Order 22 rule 23(4). He also did not specify whether interest on the whole or part of judgment sum should be disallowed pursuant to Order 22 rule 23(2). What was clear was that Mr Ho would seek costs on indemnity basis.
5. In all fairness, now with the above judgment, there shall be a hearing on costs. I shall give the following directions for that purpose:-
6. There shall be a hearing on costs in chambers on a date to be fixed in consultation with counsel’s diaries with 3 hours reserved.
7. There shall be leave to the parties to file and serve any relevant evidence by affidavit no later than 14 days prior to the hearing.
8. The parties shall file and exchange detailed written submissions no later than 3 working days prior to the hearing.

( Gary C C Lam )

Deputy District Judge

Mr Forest Fong, instructed by Kenneth W Leung & Co, for the plaintiff

Mr Leon Ho, instructed by Au & Associates, for the 1st and 2nd defendants