

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
PERSONAL INJURIES ACTION NO 995 OF 2018**

BETWEEN

BOKHIM DIL KUMAR

Plaintiff

and

DRAGAGES HONG KONG LIMITED

1st Defendant

DRAGAGES – BOUYGUES JOINT VENTURE

2nd Defendant

Before: Deputy High Court Judge Paul Lam SC in Chambers

Dates of Written Submissions: 12 and 25 January 2021

Date of Decision on Costs: 22 February 2021

DECISION ON COSTS

A. INTRODUCTION

1. The Defendants apply to vary the costs order nisi I made in §50 of my judgment dated 29 December 2020 whereby I ordered that the Defendants shall pay to the Plaintiff the costs of this action (including all costs reserved) to be taxed on the High Court scale if not agreed, and that the Plaintiff's own costs be taxed in accordance with the Legal Aid Regulations.

2. On 7 August 2020, the Defendants paid \$1,200,000 by way of sanctioned payment (on top of the employees' compensation of \$799,275.13 already received by the Plaintiff) into court and filed a Notice of Sanctioned Payment to pursuant to O.22, r.8(2) of the Rules of the High Court ("RHC"). In a letter issued on the same day, the Defendants' solicitors informed the Plaintiff's solicitors that, if the Plaintiff accepted the sanctioned payment, the Defendants would invoke the "otherwise proviso" and apply for an order that the Plaintiff's costs be taxed on the District Court scale (as the civil jurisdiction of the District Court was increased to \$3,000,000 from 3 December 2018). The Plaintiff did not accept the sanctioned payment by the deadline on 4 September 2020. On 8 September 2020, the Defendants' solicitors informed the Plaintiff's solicitors that, if the Plaintiff failed to beat the sanctioned payment at trial, the Defendants would seek an order that any award to the Plaintiff should not be paid out from the Court until the Defendants' costs have been agreed and paid; and the Plaintiff and the Director of Legal Aid shall pay costs on the High Court scale on an indemnity basis.

3. In the judgment, I awarded a net sum of \$913,321.30 to the Plaintiff. There is no dispute that, even if one adds interests accrued up to the date of the sanctioned payment, the Plaintiff has failed to beat the sanctioned payment by \$102,860.53. Hence, the Defendants contend that:

- (a) The Defendants should only pay costs on the High Court scale to the Plaintiff up to 2 December 2018 on party and party basis, and on the District Scale from 3 December 2018 to 4 September 2020;
- (b) The Plaintiff should pay costs on the High Court scale on indemnity basis from 5 September 2020 to the Defendants with interest on such costs at 5% per annum from 5 September 2020.

B. HIGH COURT SCALE OR DISTRICT COURT SCALE

4. The Plaintiff issued the writ herein on 20 September 2018, which was before the increase of the civil jurisdiction of the District Court on 3 December 2018. The net amount that I awarded to the Plaintiff was not substantially less than the jurisdictional limit of the District Court ie \$1,000,000 at the time when the writ was issued. The Plaintiff's quantification when he commenced this action was supported by his medical experts' evidence. I am unaware of any discussions between the parties on whether the case should be transferred to the District Court after 3 December 2018. In the circumstances, I would not say it was unreasonable for the Plaintiff to choose to commence, and continue, this action in the High Court. Hence, I take the view that the Defendants should pay costs on the High Court scale up to 4 September 2020.

C. INDEMNITY COSTS & ENHANCED INTEREST ON COSTS

5. O.22, r.23(4) provides that, in these circumstances, the Court may 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 sanctioned payment without requiring the leave of the Court; and
- (b) interest on such costs at a rate not exceeding 10% above judgment rate.

O.22, r.23(5) provides further that, where this rule applies, the Court shall make the orders referred to in sub-rule (4) unless it considers it unjust to do so.

6. There does not appear to be any serious dispute that the Plaintiff should pay costs on an indemnity basis on the High Court scale to the

Defendants from 5 September 2020. What is in issue is whether enhanced interest on costs should be awarded.

7. In general, the power to order indemnity costs or higher rate interest is a matter of achieving a fair result for the defendant, but not penalizing the plaintiff. In *Wong Tang Keung v Lee Wai Engineering Co Ltd* [2014] 1 HKLRD 404, the Court of Appeal applied the principles laid down in *Golden Eagle International (Group) Limited v G R Investment Holdings Limited* [2010] 3 HKLRD 273, and awarded interest on costs at the rate of 4.5% per annum (being half the full enhanced commercial rate of 9% per annum). The rationale behind such an approach is to do away with the need to ascertain the actual dates when the defendant had put up funds on account of costs and from which interest would run at the full enhanced rate of 9%. It should be noted that the Court also has a discretion to include a non-compensatory element (*Angbuhhang Netra Jang v Laing O'Rourke Construction Hong Kong Kong Ltd and another* [2021] HKCFI 232 at § § 7-10 where Lisa Wong J awarded enhanced interest at 10% above judgment rate).

8. The Plaintiff refers me to *Shih Pik Nog v G2000 (Apparel) Ltd* [2011] 4 HKLRD 121 where Bharwaney J concluded at §21 of his judgment that, if the receiving party has not made any payment of costs and disbursements incurred and has not made an advance on account of fees, the rationale for awarding interest on costs would not apply and that, in such a case, an order for interest or enhanced interest on costs and disbursements incurred after the last date of acceptance would produce an unjust windfall for the receiving party; and therefore, save for legally-aided parties, it is incumbent on the party seeking interest on costs to state in a supporting affirmation the amount of disbursements, costs and costs on account paid to its solicitors commencing from the last date of

A acceptance up to the date of the affirmation, and the date(s) of payment (§18 of
B his judgment). In similar circumstances, evidence was adduced by the defendant
C on payments made by its insurers on costs (eg *Rai Gehendra Raj v Yick Hing*
D *Construction Co Ltd*, HCPI48/2012 (20 November 2017, unreported), §13;
E *Angbuhhang Netra Jang v Laing O'Rourke Construction Hong Kong Kong Ltd*
F *and another* [2021] HKCFI 232, §4).

G 9. In this case, the Defendants have not adduced any evidence to
H support their application for the award of enhanced interest on costs. I agree
I with the Plaintiff that, in the absence of any such evidence, it would not be
J appropriate to allow the Defendants' application in this respect.

K *D. CONCLUSION*

L 10. For the above reasons, I vary the costs order nisi as follows:

- M (a) The Defendants shall pay the Plaintiff's costs on the High Court
N scale to the Plaintiff up to 4 September 2020 to be taxed on a party
O to party basis if not agreed;
P (b) The Plaintiff shall pay the Defendants' costs on the High Court
Q scale to the Defendants from 5 September 2020 to be taxed on an
R indemnity basis if not agreed;
S (c) The Plaintiff's own costs shall be taxed in accordance with the
T Legal Aid Regulations.

U 11. I also direct that the sanctioned payment of \$1,200,000 be paid out
V in accordance with the Defendants' proposal as set out in paragraph 9(i) of their
written submissions dated 12 January 2021.

12. The Defendants needed to make this application to reflect the consequence of the sanctioned payment but they are not entirely successful. In the circumstances, I make no order as to costs in respect of this application save that the Plaintiff's own costs shall be taxed in accordance with the Legal Aid Regulations.

(Paul Lam SC)
Deputy High Court Judge

Mr Neal Clough instructed by Massie & Clement Solicitors, for the Plaintiff

Mr Yuan Shan Cao, instructed by Norton Rose Fulbright Hong Kong, for the 1st and 2nd Defendant