

HONG KONG / JUDGMENT

WONG CHING WAN v. A S WATSON & CO LTD

COURT

District Court

DECIDED

25 June 2007

CASE / FILE NUMBER

DCEC770/2005

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bjbj DCEC770/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EMPLOYEES COMPENSATION CASE NO. 770 OF 2005

BETWEEN WONG CHING WAN Applicant and A S WATSON & CO LTD Respondent

Coram: H H Judge Marlene Ng in Chambers (open to the public) Date of Hearing: 30th May, 2007
Date of Further Written submissions by the Applicant : 22nd June, 2007 Date of Further Written
submissions by the Respondent : 20th June, 2007 Date of Handing Down Decision: 25th June, 2007

DECISION

I. Introduction The present proceedings are for employees compensation arising from injury on duty. According to the Applicant, at about 2:00pm on 17th July 2003, whilst working in the course of her employment with the Respondent at a Park N Shop supermarket, she was instructed to chop up some chops with a chopper. In the course of carrying out such duty, the Applicant was injured by the chopper and sustained injuries to her right forearm and tendons. The Applicant issued the Application on 16th June 2005. The Respondent filed its Answer (disputing the claim) and List of Earnings on 1st September 2005. On 21st September 2005, the Respondent lodged an appeal against the assessments in the Certificate of Assessment dated 6th July 2005 (Form 7). The parties filed their respective List of Documents on 21st and 22nd September 2005. According to the initial written submissions of the Respondent s solicitors, the Respondent extended a without prejudice offer to the Applicant on 13th December 2005. On 2nd March 2006, the Respondent lodged an appeal against the assessments in the Certificate of Review of Assessment dated 21st September 2005 (Form 9). On 7th March 2006, I granted leave to the Applicant to

amend the Application to include an appeal against the assessments in the Form 9. The Amended Application was filed on 9th March 2006. On 16th March 2006, the Respondent's solicitors wrote to the Applicant's solicitors to invite the Applicant to attend a medical examination by the Respondent's orthopaedic expert, Dr Chun Siu Yeung (Dr Chun), on 6th July 2006. On 10th April 2006, the Applicant's solicitors suggested it would be cost-effective to have the parties' respective medical experts carry out the medical examination jointly. On 12th April 2006, the Defendant's solicitors indicated they had no objection and queried whether the preliminary appointment on 6th July 2006 was convenient for the Respondent's expert. On 22nd April 2006, the Respondent filed Notice of Payment into Court giving notice that the Respondent had paid the sum of HK\$61,000.00 into court in satisfaction of all causes of action in respect of which the Applicant claimed against the Respondent in these proceedings after taking into account the sum of HK\$223,373.80 being advance payments already received by the Applicant from the Respondent. On 24th April 2006, the parties arranged for joint medical examination by their respective orthopaedic experts, namely Dr Chun for the Applicant and Dr Danny Tsoi for the Respondent (Dr Tsoi), to be held on 14th September 2006. On 27th April 2006, the Applicant acknowledged receipt of the Notice of Payment into Court. Dr Chun and Dr Tsoi jointly examined the Applicant on 14th September 2006 and issued their joint expert report on 23rd September 2006 (Report). The Report stated the Applicant suffered a 5cm laceration cut over her right forearm and there was evidence of tendon cut. They noted that the Applicant received the following treatment : emergency repair of cut tendon and cut muscle on 17th July 2003; occupational therapy from 9th August and from 19th September 2003 to 21st July 2004; physiotherapy from 11th August to 18th November 2003; surgery of tenolysis of right forearm on 14th September 2004; second course of physiotherapy from 20th September 2004 to 6th January 2005; second course of occupational therapy from 11th October 2004 to 18th March 2005. The orthopaedic experts agreed that the Applicant sustained cut flexor carpi radialis tendon and flexor digitorum superficialis and probably cut cutaneous nerve of the forearm. They were of the view that her clinical course was probably complicated by Complex Regional Pain Syndrome II related to the cut cutaneous nerve to the forearm. At the joint medical examination by Dr Chun and Dr Tsoi, the Applicant complained of right hand weakness, pain on radial side of forearm, numbing ache and parathesia of distal forearm, and pain on right hand when lifting object. The orthopaedic experts agreed that the above symptoms and signs were compatible with Complex Regional Pain Syndrome II and that the Applicant's condition had reached maximum medical improvement with no further treatment required except analgesics on a need basis. The orthopaedic experts noted that sick leave was granted from 18th July 2003 to 28th February 2007. But Dr Chun opined that sick leave given to the end of the rehabilitation programme (ie 21st March 2005) was appropriate and further sick leave would not have helped to improve the Applicant's condition. Dr Tsoi said that sick leave given up to 7th September 2005 was acceptable. Dr Chun said the Applicant might have difficulty carrying/ lifting heavy object with right hand, but considering that she was left handed (ie using the left hand to hold the chopper and steadying the meat with her right hand), she would be able to return to work as butcher with reduced efficiency. Dr Tsoi believed the Applicant's weakened right hand was genuine, which could be explained by the effect of Complex Regional Pain Syndrome II. He expected that the Applicant would have

difficulty and inconvenience in returning to her pre-injury job as butcher since she would have difficulty in steadying the meat with her right hand during chopping. Jobs with less right hand activities, such as messenger, watchwoman and store assistant, etc, were more suitable for her. The Applicant's solicitors in their initial written submissions stated that they advised the Applicant of the Report and of the costs implications in respect of the payment into court by the Respondent. On 10th November 2006, I gave directions for the filing and exchange of witness statements and expert medical evidence. The Applicant filed the Report on 21st November 2006. On 14th December 2006, the Respondent filed Notice of Admission of Liability. The Applicant's solicitors in their initial written submissions stated they received instructions from the Applicant to accept the payment into court by the Respondent in January 2007. Between January and March 2007 the parties carried out negotiations on their entitlement to costs on the basis that the payment into court would be accepted. On 2nd April 2007, pursuant to a Consent Summons filed by the parties H H Judge M Yuen granted leave inter alia for (a) the Applicant to accept sum of HK\$61,000.00 paid into court by the Respondent in full and final satisfaction of the cause of action in respect of which the Applicant claimed against the Respondent, and (b) such sum of HK\$61,000.00 be paid out of court to the Applicant through the Director of Legal Aid. The parties agreed to adjourn the question of costs of the action for argument, which was subsequently heard before me on 30th May 2007.

II. Parties respective stance on costs

There is no dispute that the Respondent should pay the Applicant's costs of these proceedings up to 22nd April 2006 (ie the date of payment into court by the Respondent). The Applicant's position in relation to subsequent costs of the present proceedings was as follows : the Respondent do pay the Applicant's costs of these proceedings from 23rd April to 23rd September 2006 (ie the date of the Report), including the costs of obtaining the Report, to be taxed if not agreed; the Applicant do pay the Respondent's costs of the Application subsequent to 23rd September 2006 to be taxed if not agreed. The Respondent's position was that the Applicant should pay the Respondent costs of these proceedings after 22nd April 2006 to be taxed if not agreed. Mr Tun, solicitor for the Applicant, helpfully prepared a schedule (reproduced at the end of this Decision, Schedule) that set out the quantification of the Applicant's claim under sections 9, 10 and 10A of the Employees Compensation Ordinance Cap.282 (Ordinance) based on (a) the assessments in the Form 9, (b) the assessments at the time of payment into court by the Respondent on 22nd April 2006, (c) Dr Chun's assessments, (d) Dr Tsoi's assessments, and (e) the Applicant's best case. Several matters arising from the above background and the Schedule are of note : On the basis of the assessments in the Form 9, the Applicant would not have been able to recover any further compensation sum from the Respondent at all after taking into account the advance payments. By the time the Applicant appealed against the assessments in the Form 9, she must have been aware that the Respondent had already lodged a similar appeal, no doubt with a view to persuading the court to reduce the assessments therein. By the time the Respondent made payment into court on 22nd April 2006, the Applicant was granted sick leave up to 23rd June 2006 (ie about 35 months from the date of the accident). Mr Tun submitted that pursuant to section 10(2) of the Ordinance and *Choy Wai Chung v Chun Wo Construction and Engineering Co Ltd* [2006] 2 HKLRD 803 the Applicant was prima facie entitled to compensation for temporary incapacity for the period certified in her medical certificates, so the net amount of compensation calculated on such basis

would exceed the payment into court by the Respondent after taking into account the advance payments. But even on such basis, the net amount recoverable by the Applicant in the sum of HK\$66,663.64 was only HK\$5,553.64 more than the amount paid into court by the Respondent. Despite Mr Tun's reliance on section 10(2) of the Ordinance and Choy Wai Chung (supra), the burden rests on the Applicant to persuade the court to exercise its discretion under section 10(5) of the Ordinance to allow periodical payments for a further period being not more than 12 months. The Respondent by its Answer had indicated it would oppose the same. Since this involves an exercise of judicial discretion, the Applicant's prima facie entitlement to periodical payments for the full 35 months is no means absolute. But even on the basis of the Applicant's prima facie entitlement to compensation for temporary incapacity based on the sick leave period of 35 months, it is merely 1 month short of the maximum period allowable under section 10(5) of the Ordinance. Thus the net amount recoverable by the Applicant on such basis would not substantially exceed the sum paid into court by the Respondent. According to Dr Chun's assessment, there would not have been any net amount recoverable by the Applicant after taking into account the advance payments by the Respondent. According to Dr Tsoi's assessment, the net amount recoverable by the Applicant after taking into account the advance payments by the Respondent was only HK\$2,588.50. Even on the Applicant's best case, she could not hope to achieve a net recovery of more than HK\$86,486.67 (ie HK\$25,486.67 more than the amount paid into court by the Respondent) after taking into account the advance payments made by the Respondent. The aforesaid analysis of the quantification of the Applicant's claim shows that the likely overall expenditure of litigation costs would be out of proportion to the maximum potential value of her claim. In my view, a realistic settlement at an early stage which would obviate the need to incur further costly expenditure is clearly in the interests of the parties as well as in the interests of justice. III. Order 22 and employees compensation cases Rule 20 of the Employees' Compensation (Rules of Court) Rules () provides inter alia that :

- (1) A respondent from whom compensation is claimed may pay into court a sum which is considered by him to be sufficient to cover his liability.
- (2) If no greater compensation be awarded than the sum of money which the respondent has paid into court, the court may order that any costs incurred by such respondent, after payment by him into court of the said sum of money, shall be paid by the applicant. The Court of Appeal in *Li Kwok Shing v Law Ka Fu trading as Wing Fai Electrical Engineering & anor* CACV212/2002 (unreported, 21st June 2003) held that section 21 of the Ordinance applied the provisions of Order 22 of the Rules of the District Court () to employees' compensation proceedings in the District Court and it was unnecessary to bring the ECR in line with Order 22 so as to confer the benefits obtainable under Order 22 to applicants in employees' compensation claims before the District Court. Ma JA (as he then was) held that the scheme for payments into court in employees' compensation proceedings required the application of both rule 20 of the ECR and Order 22 of the RDC. This decision was cited with approval by the Court of Appeal a few months later in *Sun Jianqiang v Trans-Island Limousine Service Limited* CACV20/2003 (unreported, 17th November 2003). Order 22 rule 2(1)(a) of the RDC provides inter alia that : [where] money is paid into court under rule 1,

then within 14 days after receipt of the notice of payment before the trial or hearing of the action begins, the plaintiff may

- (a) where the money was paid in respect of the cause of action or all the causes of action in respect of which he claims, accept the money in satisfaction of that cause of action or those causes of action, as the case may be, by giving notice in Form No. 24 in Appendix A to every defendant to the action. Order 62 rule 10(2) of the RDC provides inter alia that : [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 or of all the causes 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. IV. Usual order for costs and its rationale There is no dispute that (a) the Respondent paid the sum of HK\$61,000.00 into court pursuant to Order 22 rule 1(1) of the RDC, (b) the Applicant was aware of such payment into court, and (c) the Applicant did not accept such payment into court within 14 days of receipt of the Notice of Payment into Court. Neither Mr Tun nor Ms Sy, solicitor for the Respondent, cited authorities that canvassed in detail the rationale for the usual costs order where the payment-in was not accepted within the prescribed period. However, an understanding of such rationale is imperative to the resolution to the present dispute on costs, particularly since no criticism was made in respect of their respective conduct of the litigation. The starting point is that subject to section 53 of the District Court Ordinance Cap.336 and Order 62 rule 2(4) of the RDC, the court has a complete discretion on costs. The cardinal rule is that costs should follow event except when it appears to the court that in the circumstances of the case some other order should be made (see Order 63 rule 3(2) of the RDC). Where there has been payment-in, Order 62 rule 5(b) of the RDC provides that in exercising its discretion as to costs the court shall, to such extent, if any, as may be appropriate in the circumstances, take into account any payment of money into court and the amount of such payment. Hong Kong Civil Procedure 2007 Vol.1 para.22/5/5 at p.406 states inter alia that : This discretion, however, must be exercised judicially In considering the principle of costs follow event , where there has been payment-in, the relevant event is the recovery of more than the payment into court or the failure to do so (see Charm Marine Incorporated v Elborne Mitchell CA (Civ Div) 22nd July 1997, Lexis-Nexis electronic transcript, per Swinton Thomas LJ). So where a defendant pays money into court which beats the settlement sum or the sum awarded to the plaintiff, he is usually regarded as the successful party who is entitled to costs as from the date of payment-in and [he] can only be deprived of such costs by the proper exercise of judicial discretion upon proper materials arising out of the instant litigation or the conduct of it; he cannot be deprived of his costs for no reason or upon no or no sufficient materials (see Findlay v Railway Executive [1950] 2 All ER 969, 970-971, per Somervell LJ quoting Lord Sterndale MR in Ritter v Godfrey [1920] 2 KB 47, 52 and Viscount Cave LC in Campbell (Donald) & Co v Pollack [1927] AC 732, 811, and see also Hong Kong Civil Procedure 2007 (supra at para.22/5/5 at p.406)). The rationale was explained by Somervell LJ in Findlay (supra at p.971) where the plaintiff recovered at trial damages for personal injuries in a sum less than the sum paid into court after admission of liability : The

main purpose of the rules for payment into court is the hope that further litigation will be avoided, the plaintiff being encouraged to take out the sum paid in, if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs. Once, therefore, the money has been paid in, the lis between the parties is simply this: is that sum sufficient to cover the damage which has been suffered. Prima facie, therefore, the defendants in the present case are entitled to be paid their costs as from the date of payment in, but, of course, as in other cases, there may be circumstances connected with the case which entitled the judge to make some order other than that of giving the successful litigant his costs Denning LJ put the rationale in more colourful terms at p.972 : A judge nowadays does not know what amount has been paid into court, and it is particularly galling for a judge, whose mind may have been fluctuating between 750 and 1,000, to find that because he chose the lower figure, the plaintiff not only gets merely that lower figure, but also has to pay much of it away in costs to the defendant. Knowing how close a thing it was in his own mind, he does not want a plaintiff to suffer because the payment into court happens to exceed the amount he awards. He would prefer not to take the payment into account, but the rules require him to do it. The hardship on the plaintiff in the instant case has to be weighed against the disadvantages that would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs. That is the basis of the rules as to payment into court, and I think we should implement them here, even though it means that the plaintiff has to pay out much of her damages in costs to the defendants. The only issue in the case was the amount of damages. The defendants paid a reasonable sum into court. The plaintiff took her chance of getting more, and, having failed, she must pay the costs. It must not be assumed, however, that, in allowing the appeal, this court is laying down a rule of law as to how a judge should exercise his discretion. We have no right to do that (my emphasis) Jones v Jones CA (Civ Div), 13th October 1999, Lexis-Nexis electronic transcript, was a personal injury case. An order was made by consent for exchange of expert medical evidence by 3 medical experts on each side. The plaintiff identified 3 medical experts (including a consultant orthopaedic surgeon) whose reports she intended to rely but did not include a consultant orthopaedic surgeon who had previously treated her and whose report had already been served with the statement of claim. The defendant served 2 reports by his consultant orthopaedic surgeon and later made further payment into court. The payment-in was not accepted and trial dates were fixed. Shortly before the trial the plaintiff gave notice that she did after all intend to rely on the evidence of the consultant orthopaedic surgeon who had treated her and whose report had been disclosed at a much earlier stage. The defendant took the opinion of a further orthopaedic surgeon and disclosed his report to the plaintiff. Chadwick LJ with whom Thorpe and Morritt LLJ concurred explained the scheme for payment into court as follows : The scheme of those provisions is clear. Money may be paid in at any time. In particular it may be paid in before the disclosure of witness statements and expert reports on which the defendant will rely; and so, before the plaintiff knows the full extent of the defendant's case. The plaintiff has 21 days in which to decide

whether to take the payment out of Court. If the plaintiff decides to do that, it can be done without leave. The plaintiff makes that decision on the basis of his assessment, under advice and on the materials then available of the risk of failing to obtain an award of damages greater than the amount of the payment in court. If the plaintiff decides not to accept the payment in within the 21 day period, then he cannot accept it without leave. But it is always open to him to reassess the risk in the light of anything which subsequently emerges in the course of the proceedings, including anything which emerges in the course of the trial. In particular, the plaintiff can reassess the risk in the light of witness statements and experts reports which are disclosed by the defendant after the date of the payment in. If, on a reassessment of the risk, the plaintiff decides that it would be in his interest to accept the payment in, then, he or she can apply to the court for an order that it be paid out. In deciding what order to make on such an application, the Court can take into account what costs the defendant has occurred since the date of the payment in: costs which, if the plaintiff had accepted the payment in within the period limited by the rules, would not have been incurred. The Court may also take into account the circumstances which have given rise to the plaintiff's change of mind. In particular, if the court were satisfied that that change of mind arising from a reassessment of the risk in the light of new material was attributable to the defendant's failure to produce that material at an earlier date in contravention of some rule or some previous order of the Court, or now, in contravention of some protocol, it might take the view that the plaintiff should not be required to bear all or some part of any intervening costs. If the defendant has failed to do what the rules or an order of the court require within the time prescribed, then the price of obtaining permission from the court to do so later what he should have done earlier may be that the plaintiff should have the chance to take out the money in court, without penalty. The reason is that the costs which have been thrown away were not incurred by reason of a misreading of the position by the plaintiff, on the basis of material which was or should have been available; but the reason of the absence of available material which he should have had if the defendant had complied with his obligations. (my emphasis) So the Court of Appeal in Jones (supra) held that the plaintiff in pursuing her claim in light of the known payment-in accepted the risk that if she did not beat the same, she might find herself liable for costs incurred thereafter. On the introduction of the defendant's latest orthopaedic expert evidence, she had the opportunity to reassess that risk. The fact that the trial continued indicated that either she chose not to reassess that risk or having done so decided to continue with her claim. She therefore affirmed her decision to accept the risk that if she failed to beat the payment-in she might find herself with a liability for costs. In the circumstances, she was required to abide that decision and to suffer the ordinary cost consequence. In *Factortame Ltd & anor v Secretary of State for the Environment, Transport and the Regions* [2002] 2 All ER 838, payments-in were made under CPR Pt 36 which were substantially less than the sums claimed. Some of the claimants failed to accept the offer within the 21-day time limit, but the defendant subsequently permitted them to accept the same subject to the court's ruling on costs. The Court of Appeal upheld directions on the law by the first instance judge who adopted inter alia the principles in Findlay (supra) and Jones

(supra) set out above. Waller LJ summarised the same at p.847 : The first relevant and important principle is that the unsuccessful party should pay the costs of the successful party. If there has been a payment into court it will follow that the offer contains a further offer that the payer in will meet the costs up to the date when the payment in should have been accepted. If the payment in has not been accepted there is a further starting point accepted by the judge and by both parties in this case, that if the claimant fails to beat the payment in, prima facie the claimant will be considered the unsuccessful party as from the date when the payment in should have been accepted. He must pay the costs from that date as a normal rule (see *Findlay v Railway Executive* [1950] 2 All ER 969). But that presumption may be dislodged in special circumstances, e g where the judge takes the view that a defendant has withheld material and not allowed a claimant to make a proper appraisal of the defendant's case (see Chadwick LJ in the passage quoted by the judge from *Jones v Jones* [1999] CA Transcript 1701 and Lord Woolf MR in the passage quoted by the judge from *Ford v GKR Construction Ltd* [2000] 1 All ER 802, [2000] 1 WLR 1397). With these principles in mind, I now turn to the circumstances of the present case. V. Discussion

- (a) Applicant's arguments Mr Tun argued that in light of the continuing sick leave and pending appeal by the Applicant against the assessments in the Form 9 at the time when the Respondent made the payment into court, it was not unreasonable for the Applicant not to accept the offer within the prescribed period of 14 days. Mr Tun argued that it was not until the Report was available that there was evidence to rebut the presumption of temporary incapacity for compensation under section 10(5) of the Ordinance. There were therefore special circumstances that would justify an exercise of discretion in favour of the Applicant in respect of costs of the action between 23rd April and 23rd September 2006.
- (b) Respondent's arguments Ms Sy denied there were any special features in the present case that would justify departure from the usual order as to costs. She submitted that the issue of the Form 7 in July 2005 suggested the Applicant's medical condition had stabilised and she was fit for medical assessment. At the latest, by the time of the issue of the Form 9 in September 2005, the Applicant's medical condition must have become static. In fact, both orthopaedic experts subsequently concurred with such view. From the assessments in the Form 9 and from the Respondent's appeal against the same, the Applicant must have known prior to or at the time of the payment into court by the Respondent there was a risk that if the assessments in the Form 9 were upheld or reduced by the court, she would recover less than the sum paid into court by the Respondent. In not accepting the payment-in within the prescribed period, the Applicant plainly hoped to recover more compensation and as she was legally represented she must have been advised on the costs implications. In the circumstances, although the Respondent would not criticise the Applicant for adopting a wait and see approach, the reality was that the Applicant took her chance and had to bear the costs consequences of her decision. Mr Sy submitted that when the Respondent made the payment into court, the Respondent (like the Applicant) did not have the benefit of expert medical opinion and had to bear the risk of overpayment. It turned out that the payment into court was in fact over-generous, but the Respondent did not resile from the

same by seeking leave to reduce the payment-in. Mr Sy argued there was no justification for requiring the Respondent to run the risk of overpayment when making the payment into court and subsequently also to bear costs even though the Applicant failed to beat the payment-in.

- (c) Decision There is no dispute that (a) upon the Applicant's eventual acceptance of the payment-in the Respondent was in fact the successful party in respect of the event (ie recovery of more than the payment into court or failure to do so) and the Applicant the losing party, and (b) the normal costs consequence is that the Applicant would have to pay the Respondent's post payment-in costs of the action. However, the Applicant sought a reversal of the ordinary cost consequence in relation to the costs of the action between 23rd April 2006 (ie the date after the payment into court by the Respondent) and 23rd September 2006 (ie the date of the Report). It is necessary to distinguish 2 different parts to such costs, ie (a) the taxed or agreed costs which a losing party should normally pay to the successful party and (b) the losing party's own costs which he has to bear. If both parts are reversed so that the successful party not only fails to recover his own costs and in addition has to pay the costs of the losing party, the successful party suffers a double jeopardy as a result of a departure from the usual costs order, which is normally considered unjust but for special circumstances. Nourse LJ set out the relevant principles for depriving a successful party of his own costs and ordering him to pay the costs of the losing party in *Re Elgindata Ltd* (No.2) [1992] 1 WLR 1207, 1214 :
- (i) Costs are in the discretion of the court [Order 62 rule 2(4) of the RDC]. (ii) They should follow the event, except where it appears to the court that in the circumstances of the case some other order should be made [Order 62 rule 3(2) of the RDC]. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably [in Hong Kong, improperly or unnecessarily], the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs [Order 62 rule 7(1) of the RDC]." Here, the Respondent is undoubtedly the successful party in respect of the event . To ask the Respondent to pay any part of the Applicant's post payment-in costs would be contrary to the legal principles and the rationale on the effect of payment-in referred to above. This is especially so in light of the matters discussed in paragraphs 54-73 below. In my view, the question is whether the court should exercise its discretion to order the Respondent to recover its own costs for the relevant period between 23rd April and 23rd September 2006. The relevant principle is incorporated in (ii) of the *Elgindata* principles, ie whether there are special circumstances in this case that justify departure from the normal cost consequences. Cohen LJ in *Findlay* (supra at pp.971-972) said as follows : I do not find it necessary to decide whether it can ever be right to make the defendants pay the costs after the date of payment in, but I think it could only be where there was something in the conduct of the defendants which justified the plaintiff in proceeding to trial. No such

conduct is suggested here indeed, as counsel for the defendants pointed out, the defendants appear to have behaved with complete propriety throughout. (my emphasis) Here, both Mr Tun and Ms Sy agreed that insofar as the present litigation was concerned, neither party's conduct could be criticised. The appeals against the assessments in the Forms 7 and 9 were made within time. The parties came to sensible consensus on obtaining expert medical evidence. In the words of Cohen LJ, the Respondent appeared to have behaved with complete propriety throughout. On such common premise, the question boils down to whether the Applicant's decision to await sight of the Report before giving favourable consideration to the payment into court by the Respondent amounts to a special circumstance that justifies departure from the ordinary costs consequences. In my view, this does not amount to any special circumstance for disturbing the usual rule as to costs. Payment into court by a defendant is not necessarily tied to the merits of the claim/defence or to the value/worth of the claim. It has been said to be the price for peace to prevent further litigation. As explained by Chadwick LJ in *Jones (supra)*, a payment into court is an offer to dispose of the legal proceedings and if accepted prevents all further costs. Somervell LJ pointed out in *Findlay (supra)* that the main purpose of the provision for payment into court was the hope that further litigation would be avoided. In the circumstances, there is no embarrassment where it is not clear how the sum paid into court has been calculated (see *Hong Kong Civil Procedure 2007 Vol.1 para.22/1/22 at p.399*). As explained in para.67 of my judgment in *Miah, Mohammed Tara v Hyundai-CCECC Joint Venture DCEC1068/2005* (unreported, 22nd May 2006), where the parties are *sui juris* and not under a disability, there is no necessary correlation between (a) the sum which the plaintiff chooses to pay into court or which the defendant chooses to accept and (b) the worth or value of the claim. Sometimes a small sum is paid in or accepted for a significant claim and sometimes a large sum is paid in or accepted for a trivial claim. It depends on the judgment of the party who makes or accepts the payment into court, which judgment may be influenced by commercial, personal or other factors that are beyond an assessment of the worth or value of the claim. In considering the issue of costs, it is unnecessary for the court or the party who has made the payment into court to speculate on the reasons why the other party decides to accept the payment in. In the context of the present case, I should add that it is unnecessary for the Respondent to speculate on the reasons why the Applicant decides not to accept the payment-in within the prescribed time. Consequently, Order 22 of the RDC does not restrict (a) a defendant from making payment into court or (b) the usual rule as to costs from becoming applicable until the plaintiff knows the full extent of his own or the defendant's case (see *Jones (supra)* in paragraph 40 above). In short, the defendant can make payment into court any time after the legal proceedings have been commenced. A plaintiff who continues an action after a payment-in takes a risk and cannot normally complain if he has to pay the costs incurred thereafter which his acceptance of the payment-in would have avoided. In my view, there is no scope for reading into the provisions of Order 22 of the RDC reasonable time for acceptance of the payment-in or for implying a right for the plaintiff to investigate the merits of his own case (see *Wong Mei Na v Genryoku Sushi Company Limited CACV82/2003* (unreported, 16th July 2003) per Le Pichon JA at para.19). Here, whilst it may

be understandable that the Applicant might have wished to review the Report to appreciate clearly the full strengths and weaknesses of her case before deciding whether to accept the payment into court by the Respondent, it is not conduct on the part of the Respondent that the Applicant could complain about and it does not amount to any sufficient reason for visiting the Respondent with the double penalty of having to pay the Applicant's costs in addition to having to bear its own costs for the relevant period. To suggest otherwise would defeat the rationale and purpose of the payment-in scheme, the effect of which is blunted until the plaintiff has reasonable knowledge of the merits of his own case (in contradistinction to the defendant's case). At the time of the payment into court by the Respondent, the Applicant knew the Respondent had lodged an appeal against the assessments in the Form 9. Consequently, there is a known risk that the court may uphold or even reduce such assessments at trial. Although the Applicant was granted sick leave up to June 2005, she must also have been aware that extending the period of temporary incapacity for part of or a full third year required an exercise of discretion by the court which might not necessarily be in her favour. It was therefore incumbent upon the Applicant to make a decision whether to accept the payment into court by the Respondent based on his assessment under legal advice of the available materials and of the risk of failing to beat the payment-in. I agree with Ms Sy that it was open to the Applicant to adopt a wait and see approach and to take her chance of getting more compensation, but in choosing to do so she would have to bear the costs consequences of such decision. The injustice of the Applicant's stance on costs becomes immediately apparent from a quick consideration of the Respondent's position. Grave hardship would ensue and the laudable purpose of the payment-in scheme under Order 22 of the RDC to prevent further costs and to dispose of legal proceedings would be blunted, if I find in favour of the Applicant. Here, the Respondent made payment into court at an early stage of the litigation to avoid incurring or to seek protection over substantial subsequent legal costs (eg costly medical expert fees). If the court finds in favour of the Applicant, the Respondent, whose conduct in connection with the litigation was above reproach and who was in the same position as the Applicant in not having access to expert medical opinion, would suffer through no fault of its own the risk of overpayment of the payment-in as well as the hardship of the double penalty referred to above. This cannot be just and the public good is not served by such result. I have referred the parties to the case of *Plymouth and Torbay Health Authority v Glanfield* [2002] EWHC 827 (Qb). Although each case turns on its own facts, it is useful to see how the court in that case exercised its discretion in a similar situation. In that case, the deceased was admitted to hospital for investigation of polyarthritis. She gave a history of postmenopausal vaginal bleeding, a sign of cervical cancer. Her rheumatologist wrote a letter to a gynaecologist referring her to examination and diagnosis. Her referral letter was not acted upon by the defendants. Subsequently a diagnosis of advanced inoperable cervical carcinoma was made. The deceased died despite treatment. Legal proceedings were commenced. The defendants admitted breach of duty but denied causation on the basis that the deceased would have died even if she had been treated with reasonable promptness. After a Pt 36 payment into court was made, the defendants served an amended defence alleging for the first time that

the perforated bowel and faecal peritonitis (which was the cause of death) was not caused by the cancer or the treatment, but was an independent and coincidental occurrence. Neither of the expert gastroenterologists adequately addressed the question whether the deceased would have survived a perforated colon if she had been successfully treated with radiotherapy and had not gone to develop metastatic disease. The learned recorder gave leave to the claimant to take out the payment-in and to have his costs until mid-January 2000 but thereafter the claimant should pay the defendants costs. He held that the earliest the claimant could have known of the full extent of the dispute between the parties medical experts was when the exchange of reports was completed, but by that time the court had ordered there be a meeting of experts. Confusion arose after the joint meeting of the experts and the position did not become clear until December 1999. Taking into account the festive season at the millennium, the learned recorder opined that the claimant should have accepted the payment-in by mid-January 2000. The complex and confusing dispute as to the cause of death and the extent to which the late treatment of cancer contributed to the death justified the Claimants delaying acceptance of the payment-in until the matter had been clarified (para.33). In my view, although the facts in Plymouth and Torbay Health Authority (supra) are a far cry from the factual matrix of the present case, the special circumstance relied by the claimant in both cases is similar, ie the need to wait for expert medical evidence to clarify not the issues but the strength and weakness of his/her own case in order to assess the payment-in by the defendant. Moreland J allowed the appeal by the defendants in Plymouth and Torbay Health Authority (supra). Although that case involved a payment-in under Part 36 of the CPR, Factortame Ltd (supra) made clear that the applicable principles are similar to those in respect of a payment-in under the pre-CPR rules. In my view, Moreland J's reasoning below can be applied mutatis mutandis to the circumstances of the present case :

22. Although, waiting until the expert evidence has been exchanged or until the experts have met and discussed upon which they are agreed or remain in disagreement may be understandable, from a Claimant's point of view because the strengths and weaknesses of the respective cases of the parties may be much clearer than when a Pt 36 payment into court is made, in my judgment it would be a very exceptional case indeed when it would be justifiable within a judge's permissible margin of discretion for the judge not to make the usual order on an application by a Claimant for permission to take out money paid into court after the 21 day period allowed. After the 21-day period for acceptance the Claimant is the losing party and only exceptionally would it be a permissible exercise of discretion to refuse a Defendant an order that the Claimant should pay the defendant's costs thereafter. Otherwise the whole purpose of a Pt 36 payment into court, the CPR and its overriding objective would be blunted.
23. It is in the public interest, in the interest of justice and in the interests of the parties to litigation that cases are settled early and the expenditure of costs is kept to a reasonable minimum.

24. In this case in my judgment no criticism can fairly be made of the Health Authority in the conduct of the litigation. There is nothing to suggest that full disclosure was not made by the Health Authority with regard to clinical, surgical and nursing notes etc long before the payment into court. The issues were clear although not refined by the experts.
25. Primary negligence had been admitted. This was a failure in delaying examination and diagnosis of [the deceased s] cervical condition.
26. Outstanding were issues of causation. The burden of proving causation rested on the Claimant.
31. All these issues [on causation] were or should have been obvious to those advising the Claimant when faced with the payment into court. In the context of the case the payment into court of 15,000 was substantial, at that time perhaps 50% of its full value.
32. The Claimant, his counsel and solicitors had to consider the chances of a higher payment-in or offer or of a higher award at trial. On the other hand they had to consider that no increased offer or award might occur and that the Claimant would be on risk for an adverse order for costs which would substantially cancel out the sum of 15,000. They had to consider that after the date of payment-in costs would truly escalate, with instruction to specialists with various expertise, their reports and meetings and that having regard to the potential maximum value of the claim future costs would be disproportionate. I accept that the Recorder s approach to the exercise of his discretion was fundamentally flawed.
35. In my judgment the question that the Recorder should have asked himself when exercising his discretion was whether there were exceptional grounds on which it would be fair and reasonable to deprive the Health Authority, the successful party after the payment-in, of its costs?
36. In my judgment there were no such grounds. (my emphasis) The Applicant s solicitors tried to distinguish this case by saying that this was medical negligence claim which had fundamentally different procedures. For example, Practice Direction 18.1 requires the claimant in a medical negligence claim to serve an expert medical report on liability and causation with the Writ of Summons, but there is no such corresponding requirement for employees compensation claims, where the issue of expert medical evidence does not usually arise until there is an appeal pursuant to section 18 of the Ordinance. In my view, although Plymouth and Torbay Health Authority (supra) is plainly a medical negligence claim and the present case is not, the issue before Moreland J and this court does not turn on the nature of the claim. It turned on the fact, as highlighted by the Applicant s solicitors, that at the time of the payment-in [the issues] were clear although not refined the experts and that all the issues on causation (not evidence as refined the experts) were or should have been obvious to the claimant when faced with the payment-in. It was in those circumstances that Moreland J considered it was fundamentally wrong in principle to disturb the usual order as to costs. Indeed, the circumstances of present case are even stronger for maintaining the usual order as to costs. Normally, in a medical negligence case, it is the

defendant health authority or medical institution that has the relevant medical records pertaining to the victim's medical condition in relation to the medical incident, so the lay claimant is often not as advantaged as the defendant in identifying the medical issues on liability and causation. On the particular facts of Plymouth and Torbay Health Authority (supra), the defendants made full disclosure of the medical records and information. Here, the medical information in relation to the Applicant was entirely in her possession, custody and power and the Respondent had no access to such information other than through discovery or voluntary disclosure by the Applicant. Secondly, the so-called fundamental difference between employees compensation case and medical negligence claim, ie the requirement of service of an expert medical report on liability and causation by the claimant in a medical negligence claim, is irrelevant to the issue in Plymouth and Torbay Health Authority (supra). In that case, the problem did not arise not from the initial expert medical report that supported the claimant's medical negligence claim. As evident from the judgment, there were already expert gastroenterologist reports from both parties. It was the new causation issue raised by the defendants in the amended pleadings that rendered the expert medical evidence incomplete. But Moreland J held that once the issues were clear, the primary medical information were properly disclosed and the defendants had acted with propriety by the time of the payment-in, there was no reason to disturb the usual costs order. Here, the Respondent did not raise any new issue that might arguably have taken the Applicant by surprise. When the payment into court was made by the Respondent, both parties have lodged appeals against the assessments in the Form 9. The issues were or should have been obvious to the Applicant and those advising her. But the Applicant decided to go on with the litigation despite the payment into court by the Respondent in the hope of getting more. She failed in her endeavour, but at all times after 22nd April 2006 she could have had the amount paid into court by the Respondent (where applicable with leave of the court). The Respondent's conduct was above criticism and it was the successful party in respect of the event before the court. There is no reason why the usual cost consequences should not apply with full force. Having carefully considered the legal principles and the authorities and trying to achieve broad justice between the parties, I am satisfied that the circumstances of the present proceedings do not give rise to any special circumstances justifying departure from the usual rule as to costs. V. Conclusion I therefore make the following orders : the Respondent do pay the Applicant's costs in these proceedings (including all costs reserved if any) up to and including 22nd April 2006, such costs to be taxed if not agreed; the Applicant do pay the Respondent's costs of these proceedings (including all costs reserved if any) after 22nd April 2006, such costs to be taxed if not agreed; the Applicant's own costs be taxed in accordance with Legal Aid Regulations. There is no reason why costs should not follow event in respect of the issue argued before me. I further grant a costs order nisi that the Applicant do pay the Respondent costs of the issue reserved under paragraph 4 of the Order of H H Judge M Yuen dated 2nd April 2007 including costs of the hearing on 30th May 2007 and of the further written submissions to be taxed if not agreed. (Marlene Ng) District Court Judge Representation: Mr Billy Tun of Messrs Robin Bridge & John Liu for the Applicant. Ms Hana Connie Sy of Messrs Deacons for

the Respondent. Schedule of Quantifications Section 9 (HK\$) Section 10 (HK\$) Section 10A (HK\$) (Less advance payments) (HK\$) Interest (on the basis of 5% pa) (HK\$) Net amount recoverable) (HK\$) Form 9 4.5% x 8,830 x 72 = 28,609.20 25.67 months x 8,830 x 4/5 = 181,332.88 6,130 (223,373.80) At the time of payment-in 4.5% x 8,830 x 72 = 28,609.20 35 months x 8,830 x 4/5 = 247,240 (sick leave still continuing) 6,130 (223,373.80) 8,058.24 66,663.64 Dr Chun s assessment 5% x 8,830 x 72 = 31,788 22 months x 8,830 x 4/5 = 155,408 6,130 (223,373.80) Dr Tsoi s assessment 6% x 8,830 x 72 = 38,145.60 25.67 months x 8,830 x 4/5 = 181,332.88 6,130 (223,373.80) 353.82 2,588.50 Applicant s best case 6% x 8,830 x 72 = 38,145.60 36 months x 8,830 x 4/5 = 254,304 6,130 (223,373.80) 11,280.87 86,486.67 PAGE - PAGE DCEC770/2005/Decision DCEC770/2005/Decision A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V yocoQ xhWhWhxhxhx sk`ks tcScSct &`#\$ <FQ! _ E0 <FQ! _ E0 @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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