



### Summary of Judicial Decision

**Samuel (“Plaintiff”) v Secretary for Justice sued for and on behalf of Director of Immigration (“Defendant”)**

**DCCJ 5724/2017**

**Decision** : Defendant’s variation of *nisi* costs order application allowed – indemnity costs with enhanced interest ordered

**Date of written submissions by the Defendant**

**: 2 November 2021**

**Date of Decision**

**: 21 December 2021**

### Background

1. On 21 December 2017, the Plaintiff (who was then represented by a firm of solicitors) commenced proceedings claiming against the Defendant that his detention under ss 26, 32(2A)(a), 32(2A)(b), 32(2A)(c) and 32(3A) of the Immigration Ordinance, Cap 115 were unlawful. He also claimed aggravated and/or exemplary damages for the alleged unconstitutional and/or unlawful treatment which he received at the Castle Peak Bay Immigration Centre (“CIC”).
2. The Plaintiff’s allegations were denied by the Defendant who made a Sanctioned Payment on 16 March 2020. As the Notice of the Sanctioned Payment was served on the Plaintiff on 18 March 2020, the last day on which the Plaintiff could accept the same without leave of the court was 15 April 2020. However, the Plaintiff never accepted the Sanctioned Payment.
3. Up until the pre-trial review (“PTR”), the Plaintiff was represented by the same firm of solicitors. The PTR was first scheduled on 27 November 2020. Surprisingly, on 12 November 2020 (i.e. 2 weeks before the original date fixed for the PTR), the Plaintiff filed a notice to act in person but he never gave any explanation as to why his former firm of solicitors ceased to act for him.
4. At the PTR on 15 January 2021, the Plaintiff indicated to the court that he would like to pursue the case himself even without the help of any lawyers. The PTR was further adjourned to 29 January 2021 to arrange a Punjabi interpreter for the Plaintiff.



5. At the adjourned PTR on 29 January 2021, the Plaintiff still evinced an intention to prosecute the claim at trial.
6. However, on 11 October 2021, the day before the trial began, when the court's clerk made telephone enquiries with the Plaintiff as to the whereabouts of his opening submissions, the Plaintiff informed the court's clerk for the first time that he wanted to withdraw his claim. He also indicated that he would not file his opening submissions nor any formal document to withdraw or discontinue his case. He further indicated that he was not going to attend the trial<sup>1</sup>.
7. On 12 October 2021, as the Plaintiff did not appear at the trial, the court dismissed the Plaintiff's claim. A *nisi* costs order was also awarded in favour of the Defendant on a party and party basis with certificate for 2 counsel<sup>2</sup>.
8. By the summons dated 1 November 2021, the Defendant applied to the court to vary the *nisi* costs order and sought an order that the costs payable to the Defendant be assessed on indemnity basis with enhanced interest for the period from 16 April 2020 to 12 October 2021 ("**relevant period**"), on the basis that the Plaintiff's claim was dismissed and thus failed to obtain a judgment better than the Sanctioned Payment.
9. The Court disposed on paper the said application for variation of *nisi* costs order.

### **Issues in dispute**

10. (i) whether it would be unjust to order indemnity costs and enhanced interest for the relevant period against the Plaintiff under Order 22, rule 23(4)&(5) of the Rules of the District Court, Cap. 336H ("**RDC**"); and
- (ii) If so ordered, whether the maximum level of enhanced interest rate should be ordered, it being 10% above judgment rate under Order 22, rule 23(4)(b) of the RDC.

### **Department of Justice's Summary of the Court's Rulings**

(Full text of the Decision at: [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=141117&QS=%2B&TP=JU&currpage=T](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=141117&QS=%2B&TP=JU&currpage=T))

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=141117&QS=%2B&TP=JU&currpage=T](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=141117&QS=%2B&TP=JU&currpage=T))

<sup>1</sup> The trial had been fixed for 12 October 2021 (with another 4 days in October 2021 reserved).

<sup>2</sup> The Reasons for Decision dated 22 October 2021 are uploaded to the Judiciary's website at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=139588&QS=%2B&TP=JU&currpage=T](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=139588&QS=%2B&TP=JU&currpage=T).



11. The court noted that the Sanctioned Payment had been made to the Plaintiff after the exchange of witness statements, preceded by extensive document discovery. All the relevant documents and information had been disclosed to the Plaintiff. Hence, the Plaintiff was in a position to evaluate the merits of his claim when the Sanctioned Payment was made. Thus, the Plaintiff could have chosen to accept the Sanctioned Payment within the time specified if he so wished. But he did not do so (§ 19).
12. In the circumstances, as to issue (i) above, the court accepted that it would not be unjust to order indemnity costs against the Plaintiff for the relevant period (i.e. since 16 April 2020 which was the day immediately after the last day of which the Plaintiff could accept the Sanctioned Payment without leave of the court up to 12 October 2021 which was the date the Plaintiff's claim was dismissed) with enhanced interest in this case (§ 20).
13. As to issue (ii) above, the court reiterated that it is trite that the same can be awarded at a rate which is greater than purely compensatory to mark the court's disapproval of a party's unreasonable or improper conduct (§ 21). In this case, the court found that the conduct of the Plaintiff amounted to an abuse of the court's process, and therefore ordered the maximum 10% on top of the judgment rate in order to mark the court's disapproval of such appalling conduct (§ 23). The court specifically noted the following:-
  - (i) The Plaintiff suddenly withdrew his claim on the eve of the trial (§ 23(a));
  - (ii) The Plaintiff did not accept the Sanctioned Payment by 15 April 2020, and only withdrew his claim one and a half year thereafter (§ 23(b));
  - (iii) The Plaintiff never explained why he wanted to act in person. No genuine reason has ever been given to explain why he withdrew the claim only on the eve of the trial (§ 23(c));
  - (iv) Although the Plaintiff asserted that he intended to bring the claim to conclusion, he did not prosecute his claim at trial and he did not even try to seek adjournment of the trial to engage a new team of legal representatives (§ 23(d));
  - (v) The Plaintiff ought to have known that his claim did not have merits and he could have chosen to accept the Sanctioned Payment (§ 23(e));
  - (vi) By not having chosen to accept the Sanctioned Payment but only chosen to drop the case only on the eve of the trial, the Plaintiff has unreasonably delayed the disposal of his claim for a long period of time (§ 23(f));
  - (vii) After April 2020, further costs (from the public fund) were incurred to bring this case to trial in anticipation that the case would be adjudicated at trial (§



23(g)); and

(viii) There has been a waste of time and resources of the court and the government caused solely by the Plaintiff. **A strong message should be sent to the asylum seeker community and their legal advisers to deter any such further abuse in future (§ 23(h)).**

**Civil Division**

**Department of Justice**

**6 January 2022**