

How to shorten legal proceedings by way of making sanctioned offer and sanctioned payment

Since April 2009, either party to an action, whether it relates to money claim, non-money claim or both, may make a sanctioned offer (有附帶條款和解提議) to settle the whole claim, a part of it or any issue arising from that dispute. The new regime of sanctioned payment (附帶條款付款) has replaced the former procedure of payment into court.

This new development is in line with the Civil Justice Reforms and the court is taking an active role to facilitate the settlement of disputes.

For example, if a party declines to accept the sanctioned offer or payment and at trial, he recovers less than the sum offered, he will suffer serious costs consequences. Not only the court may order him to pay the other side's costs on an indemnity basis but also enhanced interest that is at a rate not exceeding 10% above the judgment rate. This allows the offeror of the sanctioned offer or payment to exert considerable costs pressure on the offeree to accept a reasonable offer to settle the action. The sanctioned offer and payment are available in both High Court and District Court cases (*Order 22 of the Rules of High Court and Order 22 of the Rules of the District Court*). However, the costs consequences will only follow if the sanctioned offer or payment is made in compliance to the relevant rules. We will look at each and every of these scenarios briefly below.

Sanctioned offers made by the Plaintiffs

The sanctioned offer may be used to settle the whole claim, part of it or any issue arising from it. The offer will not have the specified costs consequences unless it is made by way of a sanction offer in the prescribed form. The offer may be made at any time after the commencement of the proceedings but not before.

A defendant may accept a sanctioned offer (made not less than 28 days before the commencement of the trial) without leave of the court, if the defendant files and serves a written notice of acceptance not later than 28 days after the making of the offer.

In the event that :-

(a) the plaintiff's sanctioned offer is made less than 28 days before the commencement of the trial; or

(b) the defendant does not accept it within 28 days;

then the defendant can only accept the sanctioned offer, if

(i) the parties agree on the liability on costs; or

(ii) with leave of the court.

However, the court in *Tsoi Hak Kong Herbert v Sun Chiu Kee (2009) HKCU844* held that if the plaintiff's sanctioned offer was made less than 28 days before trial, the offer could still be accepted before judgment was granted without leave of the court, if the parties could agree on the liability for costs.

Consequences of the defendants' acceptance of the plaintiff's sanctioned offer

(a) Where the defendant accepts the sanctioned offer without leave of the court *on the whole claim*, the plaintiff is entitled to his costs of the action up to the date when the defendant serves his notice of acceptance. The action will then be stayed except for the purpose of enforcing the terms of the sanctioned offer.

(b) If the sanctioned offer relates to *only part of the claim or an issue arising from the claim*, is accepted by the defendant,

(i) the claim is stayed as to that part of the claim or issue and pursuant to the terms of the sanctioned offer;

(ii) either party may apply to enforce those terms without instigating a new action; and

- (iii) unless the parties have agreed on the legal costs, the liability for costs shall be decided by the court.

Costs consequences of the defendant's non-acceptance of the plaintiff's sanctioned offer

- (a) Where the court has awarded judgment against the defendant which is more advantageous than the plaintiff's sanctioned offer. The defendant will be penalised in costs for refusing to accept the offer which has shown to be reasonable.
- (b) Where the plaintiff fails to obtain a judgment, as far as the defendant is concerned this is more advantageous than the plaintiff's offer. So the defendant suffers no adverse consequences as the offer has been reasonably rejected.

The court may order enhanced interest to be paid by the defendant on the whole or part of the sum awarded, if :-

- (a) the defendant is held liable to pay more than the proposals contained in the plaintiff's offer; or
- (b) the judgment against the defendant is more advantages than the plaintiff's offer.

Where appropriate the court may order the defendant to pay costs on an indemnity basis. The court must make these orders for costs and enhanced interest unless it is unjust to do so. When making these orders, the court must take into account of all the circumstances of the case.

Sanctioned offers made by the defendant to the plaintiff

As far as the scope, form and contents of the sanctioned offer made by the defendant, they are the same as the offer made by the plaintiff.

Acceptance by plaintiff of defendant's sanctioned offer

The timing for making and accepting the sanctioned offer made by the defendant to the plaintiff is also similar to that made by the plaintiff. Arguably that the decision in *Tsoi Hak Kong Herbert v Sun Chiu Kee* (2009) is also applicable to the acceptance of the sanctioned offer made by the defendant.

Consequences of plaintiff's acceptance of defendant's sanctioned offer

Where the defendant's sanctioned offer relates to the *whole claim* is accepted, the plaintiff is entitled to his costs of the proceedings up to the date of service of the notice of acceptance. The case will be stayed. The stay is pursuant to the terms of the offer and either party can apply to the court to enforce these terms without instigating a new proceedings.

The plaintiff is also entitled to his costs of the action up to the date of serve of the notice of acceptance, where :-

- (a) a sanctioned offer relates to a *part of the claim or an issue arising from the claim* is accepted; and
- (b) at the time of service of the notice of acceptance, the plaintiff abandons the other parts of the claim or other issues.

If the plaintiff accepts the sanctioned offer or payment relates only to *a part of the claim or an issue arising from the claim* :-

- (a) the claim is stayed as to that part or issue and in the case of the sanctioned offer, the stay is upon the terms of the offer;
- (b) either party may enforce the terms without the need to commence a new action; and
- (c) unless the parties have agreed on costs, the liability for costs shall be decided by the court.

Costs consequences of the plaintiff's non-acceptance of the defendant's sanctioned offer

Where a plaintiff obtains a judgment that is more advantageous than the defendant's sanctioned offer, no adverse consequences will be suffered by the plaintiff.

Even if the plaintiff has beaten the defendant's sanctioned offer, the court may still order the plaintiff to pay the defendant's costs and enhanced interest on the costs, after taking into consideration of all the facts and circumstances of the case.

Where the plaintiff fails to obtain a judgment that is more advantageous than the sanctioned offer, the court may disallow all or part of any interest otherwise payable on the whole or part of the sum awarded to the plaintiff for such period as it thinks just.

Sanctioned payments made by the defendants

A defendant can make a payment in respect of the plaintiff claim(s) and it may relate to the whole claim, a part of it or any issue arising from it.

The sanctioned payment can be made in foreign currency in satisfaction of a claim made in Hong Kong dollars.

Acceptance of the defendant's sanctioned payment by the plaintiff

The plaintiff can accept the payment by serving a notice of acceptance and the payment is accepted when the notice is served on the defendant. The plaintiff may accept a sanctioned payment made not less than 28 days before the commencement of the trial without requiring the leave of the court, if he files and serves a notice of acceptance not later than 28 days after the offer was made. If the defendant's sanctioned payment is made less than 28 days before the trial; or the plaintiff does not accept the payment within the 28 day period, then the plaintiff may :-

- (a) accept the payment without leave of the court, if the parties agree on the liability for costs,; and
- (b) only accept the offer with the leave of the court, if the parties do not agree on the liability for costs,.

Consequences of acceptance by the plaintiff of defendant's sanctioned payment

- (a) Plaintiff may obtain the payment out.
- (b) Plaintiff is entitled to his costs up to the date of service of the notice of acceptance.
- (c) The action is stayed.

These consequences may be slightly different, if the payment is made by some and not all of the defendants, or the payment relates to only part of the claim or an issue arising from the claim.

Costs consequences of the plaintiff's non-acceptance of defendant's sanctioned payment

The consequences of the plaintiff refusing to accept the defendant's payment depend upon whether the plaintiff obtains or fails to obtain a judgment which is better than the defendant's sanctioned payment.

When the plaintiff obtains a judgment which is better than the defendant's sanctioned payment, no adverse consequences will follow, as the plaintiff has acted reasonably in rejecting the payment. However, the court may take into consideration of all the facts and circumstances of the cases in deciding what costs order will be made, even if the plaintiff has beaten the sanctioned payment.

Where the plaintiff fails to obtain a judgment that is better than a defendant's payment, serious consequences will follow, namely :-

- (a) The court may disallow all or part of the interest payable to the plaintiff in respect of the sum awarded.
- (b) The plaintiff may be ordered to pay the defendant's costs after the date of the payment could have been accepted.

- (c) The court may order that the defendant is entitled to his costs on indemnity basis and enhanced interest (up to 10% above the judgment rate).

The court must take into account of all the circumstances of the case in making these orders. The court must make these orders unless it is unjust to do so.

Secrecy rule

To avoid any prejudice, both sanctioned offer and payment are not to be communicated to the trial judge or the master hearing the matter until all questions on liability and the award has been decided.

Albert Lam
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