## DCEO 12/2017

[2018] HKDC 1234

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

EQUAL OPPORTUNITIES ACTION NO 12 OF 2017

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BETWEEN

CHEUK KIT MAN (卓潔文) Claimant

and

FWD LIFE INSURANCE

COMPANY (BERMUDA) LIMITED 1st Respondent

WONG DAVID TAI WAI 2nd Respondent

CHOW KIN FAI 3rd Respondent

YVONNE POON 4th Respondent

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Before: Her Honour Judge Winnie Tsui in Chambers (open to public)

Date of Hearing: 11 June 2018

Date of Decision: 10 October 2018

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DECISION

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*INTRODUCTION*

1. This is the 1st to 4th respondents’ application to transfer the present equal opportunities claim to the Court of First Instance under section 42 of the District Court Ordinance, Cap 336. Their ground is that the EO claim should be heard together with another action commenced by the 1st respondent against the claimant in HCA 1713 of 2017 which concerns the same subject-matter.
2. The claimant opposes the application. First, she contends that the CFI has no jurisdiction to hear equal opportunities claims as the District Court’s jurisdiction over such claims are exclusive; and, secondly, even if she is wrong and the CFI does have jurisdiction, I should not exercise my discretion to order a transfer.

*FACTUAL BACKGROUND*

1. The 1st respondent is an authorised insurer in Hong Kong carrying on life insurance business, amongst its other businesses.
2. The claimant joined the 1st respondent as an insurance agent in about July 2015. Her title was Senior Agency Director. Her appointment was later terminated by the 1st respondent with effect on 17 May 2017. The termination forms the subject-matter of the present EO claim and the High Court action.
3. In 2015, the claimant and the 1st respondent entered into two agreements which made provisions for, amongst other things, remunerations payable to the claimant. The two documents are a letter dated 27 April 2015 (“the Letter”) and an Independent Agency Agreement entered into on 24 July 2015 (“the IAA”).
4. Under the Letter and the IAA, the following sums were payable to the claimant.
   1. The 1st respondent would pay a one-off signing fee in the sum of $2,174,414 to the claimant upon her registration with the Insurance Agents Registration Board and her signing of the IAA (“the signing fee”).
   2. The 1st respondent would pay a monthly special bonus of $90,601 for 24 months provided that pre-set sales targets were met by the claimant (“the special bonuses”).
   3. The claimant was entitled to receive commissions on policies issued.
5. The Letter further provided that if the IAA was terminated by either party for any reason within the first 24 contractual months from the date of the IAA, the signing fee and the special bonuses received by the claimant should be forthwith repaid in full.
6. Separately, the 1st respondent operated a scheme known as the “Give Me Five” Sales Incentive. The rules of the scheme provided that if the IAA was terminated for whatever reason on or before 30 April 2018, the claimant would repay all the sales incentive payments received by her to the 1st respondent immediately.
7. Pursuant to the above terms, the claimant received the following payments totaling $4,187,190.01 during her appointment:-
   1. The signing fee;
   2. Special bonuses for 22 months amounting to $1,993,222 in total;
   3. “Give Me Five” sales incentive in the sum of $19,554.01.
8. The claimant’s husband, Mr Ng Man Hung, was also an insurance agent of the 1st respondent. His title was Regional Director. He was more senior than the claimant by one grade.
9. On about 5 May 2017, the husband notified the 1st respondent that he would resign. Shortly afterwards, he joined AIA International Ltd, a major competitor of the 1st respondent.
10. About three days after the husband resigned, the 1st respondent notified the claimant that the IAA would be terminated with effect from 17 May 2017. The termination was in accordance with the IAA which provided that the agreement may be terminated by either party on not less than six days’ written notice.
11. Relying on the provisions in the Letter, the IAA and the “Give Me Five” sales incentive scheme rules, the 1st respondent now says that the signing fee, the special bonuses and the sales incentive should be forthwith repaid by the claimant as (a) the IAA was terminated within 24 months of its signing and (b) it was terminated before 30 April 2018.
12. As of the date of termination, the 1st respondent alleges that there was a credit balance in the sum of $116,507.71 in the claimant’s commission account and after giving credit to it, the claimant is indebted to the 1st respondent in the sum of $4,070,682.30.

*THE TWO ACTIONS*

1. Notwithstanding written demands made by the 1st respondent, the claimant has refused to pay. The 1st respondent commenced the High Court action to claim the sum in July 2017.
2. The claimant filed a defence in late October 2017. The above background facts are on the whole not disputed. She alleges that after being notified of the termination of the IAA, she has been requesting an explanation from Mr Dick Li, a Regional Director and her direct supervisor. Li told her that the IAA was terminated because of her husband’s resignation and it was in accordance with the 1st respondent’s policy.
3. The termination of the IAA, she contends, was void and ineffective. She pleads as follows:-

“5.11 in the premises, [the claimant’s] marital status and/or family status, namely her status as the Husband’s wife, was:

1. the sole reason for [the 1st respondent’s] decision to terminate the IAA; or
2. alternatively, one of the reasons for [the] decision to terminate the IAA;

5.12 for the matters pleaded above, while [the claimant] was working for [the 1st respondent] as a commission agent, [the 1strespondent] unlawfully discriminated against her by treating her less favourably than a person not of the same marital status and/or family status; and/or otherwise subjecting her to detriment, contrary to sections 4, 7, 20 and 46 of the [Sex Discrimination Ordinance] and sections 4, 5, 16 and 34 of the [Family Status Discrimination Ordinance].”

1. For that reason, the claimant denies that she is indebted to the 1st respondent at all. That is the *only* defence put forward by the claimant in the High Court action.
2. A few days after the filing of the defence, the claimant commenced the present EO claim in the District Court. In the notice of claim, she recites the same factual allegations as in her defence. More specifically, she repeats her contention that the termination of the IAA was unlawful under the Sex Discrimination Ordinance, Cap 480 (“the SDO”) and the Family Status Discrimination Ordinance, Cap 527 (“the FSDO”) by reason of her marital status and/or family status.
3. I should point out two aspects of the EO claim which do not feature in the High Court action. First, in addition to the 1st respondent, the EO claim is also made against three individuals who work for the 1st respondent. The four respondents are represented by the same legal team. Secondly, the claimant seeks a declaration that the respondents have unlawfully discriminated against her. She also seeks other remedies, including a written apology, damages for loss of income, damages for injury to feelings, punitive and/or exemplary damages. She makes no counterclaim in the High Court action at all.
4. On 1 February 2018, the 1st respondent filed a reply in the High Court action and the four respondents filed a notice of response in the EO claim. In gist, their case as regards the termination of the IAA is that in April and May 2017, the claimant and her husband invited or enticed some of the 1st respondent’s insurance agents to join AIA. One of the 1st respondent’s main concerns then was to control the damage caused by such solicitations. It was also concerned that confidential information to which the claimant had access would be disclosed to AIA via the husband. The respondents deny that the claimant’s marital status and/or family status was a concern when the decision to terminate the IAA was made.

*THE WAY FORWARD – THE PARTIES’ RIVAL POSITIONS*

1. At this juncture, it would be appropriate to make two observations.
2. First, it would be plain from the above that the High Court action and the EO claim both arise out of the same set of facts. Further, Mr Hector Pun, SC, appearing with Mr Carter Chim, for the claimant confirmed at the hearing that apart from the discrimination point, the claimant does not intend to rely on any other defence in the High Court action. The claimant’s position is therefore that the disposal of the EO claim will *automatically* dispose of the High Court action.
3. Second, on the procedural front, the two actions have been progressing in sync since late 2017 when the claimant filed the defence in the High Court action and commenced the EO claim in the District Court at around the same time.
4. In the circumstances, it is abundantly clear that the two actions ought to be dealt with or case managed together in some way, instead of each progressing further independently and without regard to the other. Once that is recognised, the key questions then become – How should they be dealt with together? And, in which forum – the District Court, the CFI or both? A decision ought to be made now on how to manage the actions together and take them forward in a speedy, cost-effective and fair manner. The parties are however unable to agree on the way forward.
5. Mr Norman Nip, counsel for the respondents, submitted that the District Court’s jurisdiction over the EO claim is not exclusive and the court should exercise its discretion to transfer the EO claim to the CFI so that the two actions can be heard and determined together there.
6. On the issue of jurisdiction, Mr Nip relied on the recent Court of Appeal decision in *Lee Kwok Tung Albert v Chiyu Banking Corporation Ltd* [2018] 2 HKLRD 273, [2018] HKCA 123. It was held that the District Court does *not* have exclusive jurisdiction to hear claims brought under the Personal Data Privacy Ordinance, Cap 486 (“the PDPO”) and that in appropriate cases, such claims may be transferred to the CFI. The respondents’ contention is that the court’s reasoning should equally apply to the discrimination legislation.
7. On the issue of discretion, it was emphasised in the respondents’ written submissions that the two actions should be tried together given the substantial overlap on the factual background, the intertwining issues in dispute and the time and costs savings that can be made by having the two actions determined together. In his oral submissions, Mr Nip highlighted that the 1st respondent commenced the contractual claim in the CFI *as of right* and that the claim is for over $4 million. The CFI, he submitted, is clearly the proper forum for the two actions.
8. On the other hand, Mr Pun disagreed on both issues. He submitted that the District Court has exclusive jurisdiction over claims brought under the SDO and the FSDO. But if he was wrong on that, he argued that the most cost-effective and fair way of resolving the disputes is for the EO claim to remain in the District Court and be tried here and the High Court action should in the meantime be adjourned *sine dine* pending the final determination of the EO claim. As noted above, the claimant’s position is that the resolution of the EO claim would be determinative of her only defence in the High Court action.

*JURISDICTION*

1. The issue of jurisdiction turns on the proper interpretation of section 76 of the SDO and section 54 of the FSDO.
2. The two sections are almost identical. For the present purpose of determining whether the District Court has exclusive jurisdiction over claims brought under the two Ordinances, there are no material differences between the wording used in the relevant statutory provisions and also the two legislations are similarly structured as a whole. I shall therefore proceed to consider the jurisdiction issue by reference to the SDO only. The conclusion reached for that Ordinance will apply equally to the FSDO.

*Section 76(3) of the SDO and other relevant statutory provisions*

1. The following subsections of section 76 of the SDO are relevant here.
2. Subsection (1) provides that a discrimination claim by a person against another person may be made the subject of civil proceedings in like manner as any other claim in tort.
3. Subsection (3), which is the key provision in this dispute, provides as follows:-

“Proceedings under subsection (1) shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and section 75(1), would be obtainable in the Court of First Instance.”

1. Subsection (3A) goes on to set out a list of remedies or reliefs which the District Court may grant in a SDO claim. They are wide-ranging, including, amongst others things, a declaration that the respondent’s act is unlawful under the SDO, an order that the respondent shall employ, re-employ or promote the claimant and damages.
2. Subsection (4) states that notwithstanding any law, the District Court shall have jurisdiction to hear and determine any proceedings under subsection (1) and shall have all such powers as are necessary or expedient for it to have in order to provide, grant or make any remedy, injunction or order mentioned in the SDO.
3. Section 75(1), which is referred to in section 76(3) and on which Mr Pun placed great emphasis, provides as follows:-

“Except as provided by this Ordinance no proceedings, whether civil or criminal, shall lie against any person in respect of any act by reason that the act is unlawful by virtue of a provision of this Ordinance.”

1. In addition to the above provisions contained in the SDO, a new section entitled “Rules in relation to jurisdiction under Sex Discrimination Ordinance” was added to the District Court Ordinance (“the DCO”) as section 73B at the same time when the SDO came into force. (See para 15 of Schedule 8 of the Ordinance No 67 of 1995.) Section 73B of the DCO also features heavily in Mr Pun’s submissions. In gist, the section empowers the District Court Rules Committee to make rules to regulate the practice of the District Court when hearing SDO claims – see subsections (1), (2), (4), (6) to (9).
2. Separately, section 73B(3) deals with costs when the District Court hears a SDO claim. It alters the general costs position in civil cases as follows:-

“Each party to any proceedings in the Court in the exercise of its jurisdiction under the Sex Discrimination Ordinance (Cap. 480) shall bear its own costs unless the Court otherwise orders on the ground that –

1. the proceedings were brought maliciously or frivolously; or
2. there are special circumstances which warrant an award of costs.”
3. Section 73B(5) relaxes the rules of evidence when the District Court hears a SDO claim as follows:-

“The Court in the exercise of its jurisdiction under the Sex Discrimination Ordinance (Cap. 480) shall not be bound by the rules of evidence and may inform itself on any matter in such manner as it sees fit, with due regard to the rights of the parties to proceedings therein to a fair hearing, the need to determine the substantial merits of the case and the need to achieve a prompt hearing of the matters at issue between the parties.”

1. It is of note that the statutory provisions make express references to “the District Court”. In particular, the costs and evidence provisions which are special to, and tailor-made for, the SDO regime are contained in the DCO but not in the SDO itself. Given such language, as a matter of statutory interpretation, does section 76(3) of the SDO confer on the District Court the *exclusive* jurisdiction to hear SDO claims? In other words, is the general jurisdiction of the CFI ousted in this area?

*The Court of Appeal decision in Lee Kwok Tung*

1. The very same issue arose for determination in respect of the PDPO regime in *Lee Kwok Tung*.
2. It is necessary to set out the jurisdiction-conferring provisions in the PDPO. Section 66(1) provides that an individual who suffers damage by reason of a contravention of a requirement under the PDPO by a data user concerning the former’s personal data shall be entitled to compensation. Section 66(5) then set outs the manner in which proceedings should be brought:-

“Proceedings brought by an individual in reliance on subsection (1) are to be brought in the District Court but all such remedies are obtainable in those proceedings as would be obtainable in the Court of First Instance.”

1. I should add here that, same as the SDO regime, a new section entitled “Rules in relation to jurisdiction under Personal Data (Privacy) Ordinance” was added to the DCO as section 73F at the same time when subsection (5) was added to section 66 of the PDPO. (See sections 38 and 43 of the Personal Data (Privacy) Amendment Ordinance 2012.) Section 73F is substantially the same as section 73B. In other words, the special costs and evidence provisions also apply to PDPO claims.
2. In *Lee Kwok Tung,* the Court of Appeal reviewed the wording used in section 66(5) of the PDPO and noted that it does not say that the District Court has exclusive jurisdiction in such an action and that words indicating exclusivity such as “only” is not used. Cheung JA commented, at para 4.3:-

“As can be seen from other legislation, where the legislature confers exclusive jurisdiction on a particular court or tribunal, this is done *in clear and express terms*.” (emphasis added)

1. As an illustration, Cheung JA referred to the explicit wording employed in section 7(2) of the Labour Tribunal Ordinance, Cap 25 and section 5(2) of the Small Claims Tribunal Ordinance, Cap 338, namely “no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong”.
2. Furthermore, the High Court which comprises the Court of Appeal and the CFI is a court of unlimited civil jurisdiction and the CFI is expressly stated to be a superior court of record: sections 3 and 12 of the High Court Ordinance, Cap 4 (“the HCO”). Hence the presumption of jurisdiction applies and *prima facie* no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so. It was held that there is nothing in the HCO to show that the unlimited jurisdiction of the CFI had been taken away by the enactment of the PDPO: paras 4.12-4.18.
3. In conclusion, the court held that nothing in either the PDPO or the HCO points to the District Court having exclusive jurisdiction of proceedings under section 66(1) of the PDPO or the lack of jurisdiction by the CFI over the same subject matter: para 4.19. The court further held that the wording of section 66(5) does point to a requirement that a PDPO claim should, in the first instance, be litigated in the District Court but in appropriate circumstances, the claim may be ordered to be transferred to the CFI: para 4.21.
4. That is the conclusion reached in respect of the proper forum for a PDPO claim. It is, in my view, plain and clear that the same conclusion should apply to the SDO regime because of the substantially similar wording employed in the jurisdiction-conferring sections in the two Ordinances and the similarity in the broad overall structure of the two statutes as far as the issue of jurisdiction is concerned. The reasoning and analysis in *Lee Kwok Tung*, namely the lack of any “exclusivity” wording and the presumption of jurisdiction in favour of the CFI, should apply with full force to the SDO. In fact, in the Court of Appeal’s analysis, the SDO provisions were referred to and it was noted that section 76(3) of the SDO is similarly worded as section 66(5) of the PDPO: para 4.9.

*The claimant’s submissions*

1. Mr Pun made a number of submissions arguing that the District Court’s jurisdiction over SDO claims is exclusive.
2. First, he submitted that *Lee Kwok Tung* should be distinguished and should not be followed. This is because, he said, that decision concerns a different statutory context, which is section 66(5) of the PDPO and not the SDO. This submission does not advance the claimant’s case at all. *Lee Kwok Tung* is of course not about the interpretation of the SDO. However, as explained above, the reasoning of, and the analysis undertaken by, the Court of Appeal should apply to the SDO context with full force.
3. Secondly, Mr Pun relied on two CFI decisions in which the master held that the District Court has exclusive jurisdiction over SDO claims: *Sunny Tadjudin v Bank of America NA* HCA 322/2008, 28 October 2008, at paras 17-19 and *Dr Alice Li Miu Ling v Dr Thomas Wong Kwok Shing* HCA 155/2006, 6 April 2009, at para 37. However, in *Lee Kwok Tung*, after referring to these two decisions and other decisions on the Disability Discrimination Ordinance, Cap 487, Cheung JA commented that “these cases are not authorities in support of the exclusive jurisdiction of the District Court” as the judges there did not have the benefit of full argument on this issue: see paras 4.8-4.11. In light of the actual decision of the Court of Appeal, the two cases relied on by the claimant cannot stand as authority in support of the exclusivity of the District Court’s jurisdiction over SDO claims.
4. Thirdly, Mr Pun urged the court to construe section 76(3) in conjunction with section 75(1). The text is reproduced in para 37 above. There is no equivalent section in the PDPO. When read together, the language of the SDO, Mr Pun submitted, is mandatory in the sense that the District Court is the only venue for the hearing of SDO claims. As I understand it, the logic underlying the submission is this. Section 75(1) says that no SDO proceedings shall lie against any person *except as provided by the Ordinance*. And that very provision is to be found in section 76(3) which says that SDO proceedings “shall be brought in the District Court”. In other words, the argument goes, SDO proceedings cannot be brought in any other court.
5. I do not think that this argument advances the claimant’s position. As is made clear in *Lee Kwok Tung*, the task here is to search for “clear and express terms” which have the effect of granting exclusivity on the District Court or ousting the presumed jurisdiction of the CFI. In my view, section 75(1) does not have that effect. For present purposes, it adds nothing to section 76(3). Granting exclusivity can be easily and readily achieved by the use of simple and straightforward wording, such as that used in the Labour Tribunal Ordinance and the Small Claims Tribunal Ordinance. Such wording or the like is simply not the present in the sections relied on by Mr Pun.
6. Accordingly, I reject Mr Pun’s submission with regard to the effect of section 75(1) of the SDO.
7. Fourthly, Mr Pun invited the court to consider the context and purpose of the SDO. He highlighted that the legislative intention was to set up a special court at the District Court level which would provide a speedy, cost-effective and accessible avenue of redress for the aggrieved. He referred to a number of legislative materials in this regard.
8. In the Legislative Council Brief on the Sex Discrimination Bill dated 14 October 1994, the “Enforcement” section read:-

“15. The Bill vests the power to hear all sex discrimination and sexual harassment cases under the Bill in the District Court. … To make litigants less worried that they might have the other side’s large bill of costs to pay if they lose, consideration could also be given to making the Court’s power to make orders for costs exercisable only in exceptional circumstances.

16. Taken together, the above measures will provide an efficient and accessible avenue of redress for the aggrieved. …”

1. In the Report to the House Committee on 16 June 1995, para 9 read:-

“The SDB proposes setting up a special court at District Court level to hear all sex discrimination and sex harassment cases under the Bill. … The EOB proposes to make discriminatory acts or practices, in general, civil wrongs, triable in District Court. The EOB proposes that the court may disregard the ordinary rules of evidence to inform itself on any matter as it sees fit. The EOB also proposes that each party to litigation will ordinarily bear that party’s own costs. The court may, however, award costs as it thinks fit in exceptional circumstances.”

1. The proposals concerning costs and the relaxation of the rules of evidence were implemented by way of section 73B(3) and (5) of the DCO. (On the other hand, while the legislative deliberations referred to “all” discrimination cases being heard in the District Court, this proposal was not carried through to, or reflected in, the actual wording in the SDO.)
2. Mr Pun therefore submitted that when the context is taken into account (as it should be), the conclusion must be that the District Court should have exclusive jurisdiction to hear SDO cases as it is equipped with the suitable statutory provisions to provide a speedy, cost-effective and accessible forum.
3. On this submission, I would make the following observations.
4. On the one hand, the express references to “the District Court” throughout the text of the SDO and the fact that SDO-related provisions were inserted into the DCO (ie section 73B) clearly and overwhelmingly suggest that the legislature had contemplated that SDO claims should be heard in the District Court. It may be said that the District Court is the natural forum for the adjudication of SDO claims. The in-built EO claims-friendly provisions are conducive to a fair, speedy and cost-effective disposal of claims. In addition, it is to be noted that, unlike other civil claims such as contract and tort, the SDO does not stipulate any upper monetary limit on the damages which the District Court may award in SDO proceedings – see the phrase “notwithstanding any law” in section 76(4); cf section 32 of the DCO.
5. On the other hand, short of clear and express statutory language, the strong preference to have the District Court hear SDO claims does not have the effect of ousting the jurisdiction of the CFI *in toto*.
6. While a litigant is required to commence his case in the District Court, in an appropriate case, the claim can be transferred to be heard by the CFI. Applying *Lee Kwok Tung*, this interpretation would best give effect to the legislative intent that while the District Court is the natural forum, the CFI is not prevented from hearing SDO claims where warranted by the circumstances of the case.

*Conclusion on jurisdiction*

1. In conclusion, the District Court’s jurisdiction over SDO claims is not exclusive. While a litigant is always required to commence a SDO claim in the District Court, the CFI has jurisdiction to hear such claim in an appropriate case.
2. The above analysis also applies to the FSDO. The equivalent provisions are sections 53(1), 54(1), (3) and (5) of the FSDO and section 73D of the DCO. The conclusion stated in the preceding paragraph applies to the FSDO.

*DISCRETION*

1. At the outset, I should highlight one prominent feature of the present case. Although the dispute between the parties has arisen out of the same set of factual allegations, the parties are pursuing two *distinct* causes of action. In the High Court action, the 1st respondent’s cause of action lies in contract. In the EO claim, the claimant is seeking relief for sexual and family status discrimination under statute law. It is therefore a “mixed claims” situation. As remarked above, as a matter of case management, the two claims ought to be dealt with together in some way. The questions are “How?” and “In which forum?”. The parties’ rival proposals are set out in paras 28 and 29 above.

*The claimant’s proposal*

1. At the hearing, the claimant’s proposal was explored and refined. The respondents were invited to consent to (a) the EO claim being carried on in the District Court, and (b) the High Court action being stayed in the meantime. And, on that basis, the claimant was prepared to undertake that after her EO claim is adjudicated upon either after trial or in a striking out application (but subject to appeal), in addition to being bound by the factual findings and legal rulings made by the District Court, she would not raise any new points of law or defence in the High Court action.
2. The rationale of the proposed undertaking was to ensure that the outcome of the EO claim would *conclusively* determine the High Court action and hence the parties would not find themselves in a situation where after going through the EO proceedings to its conclusion, they would have to starting fighting over any new issues which might arise in the contract claim in the High Court action. In other words, the overall effect of the claimant’s proposal was to convert, from a practical perspective, the mixed claims into a “pure” EO claim which could be dealt with on its own, just like other EO claims which come before the District Court from time to time. It appeared to me to be a workable solution.
3. The respondents rejected the proposal at the hearing. Their stance is simply that the 1st respondent’s contractual claim for over $4 million was brought in the CFI “as of right” and the EO claim should be transferred to be heard together with the High Court action to avoid duplication.
4. I can understand the respondents’ “as of right” point of view and am prepared to accept it as correct. However, it must be recognised at the same time that from the claimant’s perspective, she has also brought her EO claim in the District Court as of right. She is indeed required to do so under a proper interpretation of the SDO and the FSDO. That is so regardless of the amount at stake – see para 62 above. So here we have a situation where both sides are making claims in respect of the same subject-matter in two different courts *as of right*, how should the two cases be managed? And how should the conflict be resolved so as to facilitate a fair, efficient and cost-effective disposal of the claims?

*My decision*

1. I have to say that without the consent of the respondents, I find it difficult and undesirable to accede to the claimant’s proposal. And between the two rival proposals, practically speaking, the respondents’ proposal will have to be adopted for the following reasons.
2. I am only seised of the EO claim. Absent their mutual consent, I am not in a position to direct the parties what they should do with regard to the High Court action. If I refuse the respondents’ transfer application now, that would mean the EO claim will continue to be litigated in the District Court. Parties will have to deal with the High Court action separately and on its own. It may be the case that by order or by consent, it will be stayed pending the EO claim. Nevertheless, if that happens, one cannot predict with certainty how the contract claim would be proceeded with in the future.
3. It is true that the claimant has confirmed, through counsel, that the discrimination point is her only defence to the contract claim. However, strictly speaking, it does not amount to a commitment on the claimant’s part to be bound to that position in the future, particularly given that the undertaking offered by the claimant was rejected by the respondents.
4. We are still at an early stage in both actions. Discovery has not happened yet. After discovery and exchange of witness statements, it may well be the case that parties would want to revisit their positions on the contract claim or raise new points or allegations. If there is indeed going to be any change to the parties’ positions, it is possible that after the determination of the EO claim, the contract claim will have to be litigated nonetheless. It is an outcome which ought to be avoided if possible.
5. The difficulty with the claimant’s proposal lies in the timetable in which the two claims are to be dealt with in sequence. In the circumstances, it would be much more desirable for them to be handled together *by the same court* and *at the same time* from now onwards. In the absence of consent, that forum would have to be the CFI.
6. Furthermore, the CFI would be able to make appropriate costs orders covering *both* claims upon their final adjudication, having considered all matters arising from both causes of action. This is to be contrasted with the situation which may arise under the claimant’s proposal where separate costs orders may have to be made in respect of the EO claim and the contract claim, when they are disposed of sequentially.
7. For the above reasons, I conclude that the practicable and fair way of taking the two actions forward is to have them both heard at the same time in the CFI.

*Postscript*

1. In his submissions, Mr Pun put forward a number of grounds to oppose the respondents’ transfer proposal. The crux of the submissions is that it would be desirable to have the EO claim heard in the District Court, because (a) the parties can make use of and benefit from the in-built “EO claims-friendly” provisions (see, eg, section 73B(3) and (5) and section 73D(3) and (5) of the DCO) and (b) the EO procedural regime established at the District Court is a speedy, cost-effective and accessible forum for handling EO claims. These broad observations would generally apply to a “pure” EO claim. But we do not have a “pure” EO claim here. It is therefore not necessary to examine Mr Pun’s submissions in detail and making a ruling on them.
2. Lastly, Mr Pun referred me to the decision in *Re Estate of Chow Nai Chee* [2010] 5 HKLRD 640 to make the point that when choosing the forum for resolving their disputes, parties should take a proactive approach in case management and be sensitive to costs implications.
3. That case concerns an application to transfer a claim made under the Inheritance (Provision for Family and Dependents) Ordinance, Cap 481 from the CFI to the District Court. Under the statutory framework, the District Court has jurisdiction to hear claims brought pursuant to that Ordinance, without any upper monetary limit on the reliefs that it may grant: paras 20-22. The question before the court was whether the case should be carried on in the CFI or the Family Court (which is in effect part of the District Court). It appears from the judgment that the amount of the claim was in terms of millions of dollars.
4. In his oral submissions, Mr Pun highlighted the approach adopted in that case when tackling the issue of forum. Having analysed the factual issues involved, Lam J said this:-

“11. These are primarily issues of fact though the determination of the proper relief to be granted if the court were satisfied that an order should be made under ss.4 and 12 of the Ordinance involves an exercise of judicial discretion. As mentioned, judges in the Family Court are familiar with the performance of such judicial task. Judges in our Family Court often have to deal with assets of value comparable to those of the shares in dispute in the present case. *I see no reason why the case cannot be heard by the Family Court as a matter of just resolution of the dispute between the parties, proper case management and fair deployment of judicial resources. …*

12. If the matter is litigated in the Family Court, the costs will be lower than having it tried in the High Court. Having regard to the underlying objectives in O.1A r.1 of the Rules of the High Court (Cap.4A, Sub.Leg.), *if a case can properly be litigated in the District Court, it should not be transferred to the High Court*, see my observations in *May Fung Co Ltd v Wing Lung Industrial Ltd* [2009] 5 HKLRD 590.” (emphasis added)

1. The learned judge also referred to the shorter waiting time at the Family Court: para 13.
2. To complete his point, Mr Pun also drew my attention to the following passage, at para 42:-

“*After the implementation of Civil Justice Reform, the court and the parties together with their lawyers should be more proactive in case management and more sensitive to cost effectiveness. It is necessary to have regard to the underlying objectives under O.1A in choosing the forum.* In my experience, there are civil cases in the High Court that can be justly and efficiently dealt with in the District Court. *In many cases, a transfer to the District Court would bring about more expeditious and more cost-effective disposal of the case.* To invoke s.44 [of the DCO], the parties have to consent. That means a case cannot be transferred to the District Court if one or more parties object. However, a refusal to consent may be taken into account when the court considers the question of costs, particularly when the court has indicated that the case can properly be tried in the District Court and one party has agreed to such a course.” (emphasis added)

1. What Lam J said about section 44 of the DCO does not strictly speaking apply to our case, as it does not appear to have been suggested by either party that the contract claim should be transferred from the CFI to the District Court by consent, notwithstanding the size of the claim. However, the sentiment expressed by the learned judge in the passages quoted above and the judgment as a whole is unmistakable. He felt strongly that parties and their lawyers should be *proactive* and *cost-sensitive* when it comes to choosing the forum to resolve their disputes.
2. I have borne that in mind in arriving at the decision in the present case. Here, if the EO claim is considered in isolation, it is not a complicated matter. The factual disputes are not extensive and the legal issues are within narrow confines. On its own, it is a case which can suitably be dealt with in the District Court. However, the parties are not able to agree on how to deal with the parallel High Court action, notwithstanding the claimant’s proposed undertaking which effect is to practically confine the dispute to a purely EO context. As such, the case remains a “mixed claims” situation. In the circumstances, the two actions are more suitably heard at the same time in the CFI.

*CONCLUSION*

1. I order that the EO claim be transferred to the CFI.
2. I further order on a *nisi* basis that there be no order as to costs of the application and the costs of the transfer be in the cause. The former order follows the special costs position laid down in sections 73B(3) and 73D(3) of the DCO.

( Winnie Tsui )

District Judge

Mr Hectar Pun, SC and Mr Carter Chim, instructed by Tung, Ng, Tse & Heung, for the claimant

Mr Norman Nip, instructed by Cheung, Chan & Chung, for the 1st to 4th respondents