# DCPI 421/2018

[2023] HKDC 617

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 421 OF 2018

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BETWEEN

ALAM ZAFAR Plaintiff

and

CHEUK FUNG ENGINEERING

COMPANY LIMITED Defendant

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Before: His Honour Judge Andrew Li in Chambers (paper disposal)

Date of lodging of the defendant’s submissions: 3 & 20 January 2023

Date of lodging of the plaintiff’s submissions: 17 January 2023

Date of Decision: 12 May 2023

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DECISION

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*INTRODUCTION*

1. This is an application by way of summons taken out by the defendant on 30 November 2022 (“the Summons”) to vary the costs order *nisi* made by me under §104 of the judgment handed down on 17 November 2022 in this case (“the Judgment”).
2. The defendant, who is the losing party in this case, applies for the costs order *nisi* to be varied to the effect that:-
3. costs of this action be in favour of the plaintiff, such costs to be taxed if not agreed on the Small Claims Tribunal scale; or
4. alternatively, costs of this action be in favour of the plaintiff, such costs to be taxed if not agreed on the District Court scale, with certificate for counsel, save and except the costs occasioned by the plaintiff after the filing of the joint expert report on 28 December 2018 to be taxed if not agreed on the Small Claims Tribunal scale.
5. The plaintiff opposes to the defendant’s application.
6. By an order dated 21 December 2022, I directed the Summons to be dealt with by way of paper disposal. I gave directions to the parties to lodge their written submissions under the said order.
7. The defendant’s skeleton submissions prepared by Mr Lawrence Cheung (together with Mr Henry Chung) of counsel[[1]](#footnote-1), was lodged on 3 January 2023 (“D’s Submissions”) while the plaintiff’s skeleton submissions prepared by the plaintiff’s assigned legal aid solicitors was lodged on 17 January 2023 (“P’s Submissions”). The defendant lodged their reply submissions on 20 January 2023 (“D’s Reply Submissions”).

*Relevant Factual Background*

1. In the present personal injuries claim, the plaintiff claimed damages against the defendant for injuries sustained by him in the course of his employment with the defendant. The defendant disputed both the issues of liability and quantum at the trial.
2. The plaintiff did not lodge any employees’ compensation claim arising out of the accident. The writ of summons of these proceedings was first issued on 23 February 2018 in the District Court.
3. After trial, I found the defendant 100% liable for the accident and awarded a sum of HK$63,340 plus interest and costs on the District Court Scale with certificate for counsel, in favour of the plaintiff.

*DISCUSSION*

*Issues before the court*

1. The following are the issues which need to be resolved by the court under the Summons:-

(a) whether it was reasonable for the plaintiff to commence his claim in the District Court at the time of issuing the proceedings;

(b) if yes, whether there was any reasonable prospect(s) of recovering more than the jurisdictional limit of the District Court after the Joint Medical Report (“JMR”) was obtained from the expert; and

(c) if, at the end of trial, the awarded sum is less than the jurisdictional limit of the District Court, what scale of costs the plaintiff is entitled to.

*Relevant legal principles*

1. Mr Cheung for the defendant cited the following principles and authorities in support of the defendant’s application.
2. The current jurisdiction of the Small Claims Tribunal includes “*any monetary claim founded in contract, quasi-contract or tort where the amount claimed is not more than $75,000*”: see §1 of the Schedule to the Small Claims Tribunal Ordinance (Cap. 338). It is also known that the Small Claims Tribunal has the jurisdiction to and does adjudicate personal injury claims: see *Cheung Yu Tin Alvin v Ho Hon Ka* [2006] 2 HKLRD 674 at §47 and *Ho Wai Leung v Wan Chi Kuen* [2001] 2 HKLRD 284 at 287E-G.
3. Moreover, §§50 and 97 of Practice Direction 18.1provides that litigants and their legal advisers should give due consideration as to where the proper venue for their action should lie and in doing so undergo a “*realistic assessment of the quantum of damages*” and *“*[t]*he costs implication should be explained to the Plaintiff”*. Once that exercise has been done and “*it becomes clear that a case is within the jurisdiction of a Court other than the Court where the action has been commenced, an application for transfer should be made as soon as possible*”.
4. It is trite that it is within the jurisdiction of the District Court to order costs on the basis of or similar to the scale as applied in the Small Claims Tribunal: see the Court of Appeal’s comments in *M Beraha & Co Ltd v Ng Wai Lun* [2004] 3 HKC 535 at §§32-33.
5. In determining the scale on which the costs order shall be taxed, the applicable test is “*whether at the time of the commencement of action, it is reasonable for the plaintiffs to have commenced the claims in this court instead of in the Small Claims Tribunal*”. In doing so, the court will look at whether the plaintiffs have reasonable prospects of success in bringing the claims before this court when the plaintiffs commenced the action, relying on the evidence available to them at that time: see *Wai Chun Incorporation Ltd & Anor v 羅民基*, unreported, DCCJ 1980/2012, (Deputy District Judge Elaine Liu (as she then was); 26 November 2015) at §35.
6. Furthermore, Suffiad J explicated the exercise courts should undergo when applying the abovementioned test in *Lam Wong Sum Monica v Tam Ka Kit Joe*, unreported, HCPI 933/2005, (Suffiad J; 26 June 2006) at §§13 to 15:-

“13.When a solicitor is presented with a prospective claim by a client as a plaintiff in a personal injuries case, if that prospective claim works out to be a border line one, that is one which may on one view exceeds, even though marginally, the District Court jurisdiction but on another view may be assessed at just below the $1 million mark, that solicitor would normally be put in a dilemma as to where to start the claim if at the end of the day, *it is the exact amount which is either assessed or settled that matters.*

14. It is for this very reason that the court has seen fit to allow for High Court’s scale of costs if such a claim is brought in the High Court, but as it turned out, settled for an amount below the $1 million mark. This is reflected in the very words used being the criteria for the determination of the scale of costs to apply, namely, that the plaintiff had a reasonable prospect of recovering an amount over the District Court jurisdictional limit.

15. *It is only where the court having viewed the overall circumstances of the case and obviously the facts of that case and can then say, given all the facts of the plaintiff’s case when pitched at its highest, the plaintiff could not have had any reasonable prospect of claiming beyond $1 million through liability, then in those circumstances would the court order District Court’s scale to apply.*” [emphasis added]

1. Mr Cheung relies on the following cases which indicate how the courts have applied the abovementioned test:-
2. In *Cheung Yu Tin Alvin v Ho Hon Ka* [2006] 2 HKLRD 674 (Woo VP, Cheung JA and Suffiad J: 17 March 2006), the plaintiff obtained judgment for HK$27,260 (at the time the monetary limit of the Small Claims Tribunal was HK$50,000), the Court of Appeal allowed the defendant’s appeal and ordered the plaintiff’s costs to be taxed on a scale similar to that of the Small Claims Tribunal and reasoned at §§30-33 and 48-49 that:-

“30. …*the plaintiff did not act reasonably to commence this action in the District Court. The medical reports, including that by Dr Lee, indicated that the injuries suffered by the plaintiff were minor*. The plaintiff did not attend hospital straightaway after the accident; he returned to his office to work. He suffered no loss of earnings and there was no prospect of any loss of future earnings. He did not require any further treatment and was advised to do exercise to help recover from his residual back pain, but he had not acted on the advice even at the time of the trial on 6 June 2005. The recovery time was described by Dr Lee as between 2 weeks and 2 months. *A reasonable assessment of the pain and suffering and loss of amenities would not be anything near the ceiling of the monetary jurisdiction of the Small Claims Tribunal. All these were accepted by the judge and evidenced by his award of $27,260 in favour of the plaintiff.*

*…*

33. In my judgment, the proper scale of costs of the action including the hearing for assessing the quantum of damages should be that similar to that of the Tribunal, which will *fairly reflect the amount of damages awarded and have the desirable effect of discouraging litigants from unreasonably selecting the District Court as the forum for a claim of damages that are well under the Tribunal’s jurisdictional limit.*

*…*

*48.* The only relevant consideration is whether at the commencement of the action, in view of the nature of the injury of the plaintiff, it was reasonable to say that he would recover more than $50,000*. I recognize fully that assessment of damages is not an easy task but at the same time any lawyer who practises in this area must be able to tell whether the plaintiff has a serious injury or not and whether his injury has any impact on his earning. In this case from the available evidence one can see that the plaintiff’s injury was extremely minor in nature and could not possibly have affected his earning. He could not possibly have recovered more than $50,000. The sum of $27,260 assessed by the judge was the best indication of the value of the claim. The lawyer was duty bound to advise the plaintiff of the costs implications of suing in the District Court.*

*49.* In the circumstances, it was unreasonable for the plaintiff to persist in pursuing the matter in the District Court*, particularly, when the defendant had drawn his attention to the fact that the matter should be dealt with in the Small Claims Tribunal.* The only proper way of exercising the discretion was to award costs to be assessed in a manner similar to the costs allowed in the Small Claims Tribunal.” [emphasis added]

1. In *Lee Tsz Kin Ken v Climax Paper Converters Limited*, unreported,HCPI 504/2003, (Tang J (as then he was); 23 July 2004), the court ordered the plaintiff’s costs on the District Court’s scale and reasoned at §4 as follows:-

“In this case, *I have found that the plaintiff has exaggerated his disabilities. This is not a case where I simply preferred the evidence of one medical expert to another. A reasonable person in the position of the plaintiff would probably not have exaggerated his disabilities and, on the basis of his actual disabilities, he would probably think that the prospect of recovering more than $600,000 quite poor*. However, I am prepared to accept that such a person might think that he has a reasonable prospect of recovering more than $50,000 (the jurisdiction of the Small Claims Tribunal).” [emphasis added]

1. In *Yim Wai Ling & Anor v Yuen Chik Wah & Anor*, unreported, DCCJ 663/2013, (HHJ A Kot; 14 February 2017), after awarding a sum of HK$32,500 in damages to the plaintiff for nuisance, the court granted costs to the plaintiff to be assessed on the Small Claims Tribunal’s scale and reasoned at §§36-37:-

“36. Having said so, this court cannot ignore the fact that the damages awarded fall within the jurisdiction of the SCT. As can be seen from the heads of claim and damages awarded at §1 above, the damages awarded is below $50,000 which is within the jurisdiction of the SCT. It is also not in dispute that the claim for damages in water leakage case is well within the jurisdiction of the SCT. The claim for interest is neither here nor there since the SCT also have the jurisdiction to award interest on an award even if with the interest added, the total award is beyond its jurisdiction limit.

37. Under such circumstances, I failed to see why the plaintiffs should not have commenced these proceedings in the SCT. Hence, the plaintiffs should only be entitled to have its costs of these proceedings to be assessed at a scale as if the claim was being brought in the SCT.”

1. The plaintiff’s solicitors do not dispute the above general principles cited by Mr Cheung.
2. However, on top of the cases relied on by the defendant, the plaintiff referred the court to *Lee Yau Wai v Yeung Kam Wing*, unreported, HCPI 281/2009, (Master Marlene Ng (as she then was); 29 March 2011)where the learned judge summarized the legal principles by referring to *Lai Ki v B+B* *Construction Company Limited & others*[2003] 3 HKLRD 192 as follows:-

“9. In *Lai Ki v B+B* *Construction Company Limited & others* [2003] 3 HKLRD 192, 200, Seagroatt J confirmed and adopted the test as stated by Glyn-Jones J in *Hopkins v Rees & Kirby Ltd* [1959] 1 WLR 740, 742 as follows:

‘Putting myself as far as I can, in the position of the plaintiff at the time when he issued that writ, am I satisfied that it was then obvious that this was a county court action, or was it an action which, when tried by one judge rather than another, might have resulted in an award exceeding [the jurisdiction limit] excluding any reduction for contributory negligence?’

Seagroatt J further observed at p.197 that “[the] acid test therefore has been, ignoring all questions of contributory negligence, has the plaintiff a reasonable prospect of recovering a sum of money in excess of the [District] Court jurisdiction?” (see also *Wong Wai Man v Yi Wo Yuen Aged Sanatorium Centre Limited* HCPI 77/2007, Suffiad J (unreported, 9 September 2008) at para.14).”

1. Further, Master Marlene Ng reiterated the above principles in *Gurung Dhar Bahadur v Po On Construction Engineering Limited & Anors*, unreported, HCPI 303/2010, (Master Marlene Ng (as she then was); 4 January 2012).
2. *Whether it was reasonable for the plaintiff to commence the action in the District Court*
3. The plaintiff invites the court to take into account of the following in this case:-

(a) The writ of summons was issued on 23 February 2018. At that time, the lower jurisdictional limit at the District Court was at HK$50,001; and

(b) The lower jurisdictional limit of the District Court was adjusted upward from HK$50,001 to HK$75,001 on 3 December 2018. Such jurisdictional adjustment was launched after the plaintiff had instituted his proceedings in the District Court; and after the joint medical examination was conducted on 11 October 2018: (See *Commencement Notices for Jurisdictional Rise of District Court and Small Claims Tribunal and Small Claims Tribunal (Fees) (Amendment) Rules 2018*dated 6 July 2018).

1. Thus, the plaintiff’s solicitors submit that it is not unreasonable for the plaintiff to commence his claim in the District Court at the time of the commencement of action.
2. I agree with the plaintiff that given the lower jurisdictional limit has not been adjusted upward on the date of issuing the writ, it was not unreasonable for them to issue the proceedings in the District Court. I am further of the view that given the injuries sustained by the plaintiff in the alleged accident and his alleged loss of income, it was perfectly reasonable for the plaintiff’s assigned solicitors to issue the proceedings in the District Court.
3. *Was there any reasonable prospect of recovering more than the jurisdictional limit in this case after the JMR was obtained?*

1. The next question is whether there is/are reasonable prospect(s) of recovering more than the jurisdictional limit of the District Court after the JMR was obtained.
2. It is trite that the Court has a wide discretion in awarding costs, under *section 53(1) of the District Court Ordinance, Cap 336*:-

“The costs of and incidental to all proceedings in the Court… are in the discretion of the Court, and the Court has full power to determine by whom and to what extent the costs are to be paid.”

1. The usual starting point is costs to follow the event, meaning that the losing party pays the costs of the winning party (SeeO 62 r 3(2) of the Rules of District Court (“the RDC”), Cap 336H).
2. O 62 r 5(1)(e) of the RDC provides that the conduct of the parties should be taken into account by the court in exercising this discretion. They include:

“(a) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(b) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(c) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and

(d) conduct before, as well as during, the proceedings.”

(see O 62 r 5(2))

1. In *Wai Chun Incorporation Limited & Anor v 羅民基, supra*, Deputy District Judge Elaine Liu (as she then was) set out the approach the court usually adopts, when determining the scale on which the costs order shall be taxed:-

“8. For the purpose of assessing whether a party is reasonable to raise issues which were unsuccessful, the court would allow for a fairly generous margin of error.  It is not a policy to discourage a party from placing before the court perfectly reasonable and properly founded submissions, which eventually may not find favour with the court.  (*Moulin Global Eyecare Holdings Limited (in Liquidation) v Olivia Lee Sin Mei*, *supra*).”

1. At §§33 – 36, the learned judge further stated as follows:-

“33. This court has a wide discretion in making a costs order, and has the power to award costs on a basis different from that for taxed costs on the District Court scale.  (*M Beraha & Co Ltd v Ng Wai Lun* [2004] 3 HKC 535; *Fong Po Shan, supra*)

34. It is the defendant’s case that since the amount awarded is within the jurisdiction of the Small Claims Tribunal (that is less than $50,000), the costs awarded shall be taxed on the scale for the Small Claims Tribunal.

35. In determining the scale on which the costs order shall be taxed, the court *shall not only look at the outcome of the trial. The proper approach is to consider whether at the time of the commencement of action, it is reasonable for the plaintiffs to have commenced the claims in this court (i.e. District Court) instead of in the Small Claims Tribunal.* The court will look at *whether the plaintiffs have reasonable prospects of success* in bringing the claims before this court when the plaintiffs commenced the action, relying on the evidence available to them at that time. (*Lee Tsz Kin Ken v Climax Paper Converters Limited,* unreported, HCPI 504 of 2003, 23 July 2004; *Wong Wai Tak Belinda v Smart Team International Investment Limited,* unreported, DCCJ 1023 of 2009, 19 July 2011).

36. *Issuance of a claim will not be taken as unreasonable simply because it turned out to be unsuccessful or simply because it is ambitious.* (*Ho Wai Leung v Wan Chi Kuen* [2001] 2 HKLRD 284) The factors that the court will consider include *whether the claim is entirely devoid of merit to have brought before this court, and whether the nature of the action is one that is more appropriately brought before a tribunal which allows legal representation*. (*Ho Wai Leung, supra; Wong Wai Tak Belinda, supra)*” [emphasis added]

1. In *Lui King Tong v Hospital Authority*[2019] HKDC 376 at §§11-12, Deputy District Judge Elaine Liu (as she then was) further summarized the considerations the court may take into account when assessing the scale of costs in personal injuries cases which was recited by this court in *Siu Lai Yee v Wong King Hay* [2021] HKDC 1304:-

“11. There is no dispute that the court has a wide discretion in the award of costs.  The discretion shall be exercised judicially.  The court has the power to award costs on a basis different from the basis for the taxed costs on the District Court scale.  If a reasonable assessment shows that the recoverable damages would not be in a figure near the ceiling of the monetary jurisdiction of the Small Claims Tribunal, it would be unreasonable for the plaintiff to commence the action in the District Court and unjustifiably put the burden of footing the legal costs bill on to the defendant.  In such case, the court could order that the plaintiff’s costs be assessed on a scale similar to that for the Small Claims Tribunal cases.  (*Cheung Yu Tin v Ho Hon Ka* [2006] 2 HKLRD 674)

12. When determining the reasonableness of commencing a claim in this court, the court should consider the evidence available to the plaintiff at the commencement of the action.  *A claim will not be taken as unreasonable simply because it turned out to be unsuccessful or because it is ambitious*.  (*Lee Tsz Kin Ken v Climax Paper Converters Limited,* unreported, HCPI 504/2003, 23 July 2004; *Ho Wai Leung v Wan Chi Kuen* [2001] 2 HKLRD 284; *Wai Chun Incorporation Limited v Profit Choice (HK) Limited and other*, unreported, DCCJ 1980/2012, 26 November 2015).”

1. I agree with the plaintiff’s submission that the court must not just look at the ultimate awarded sum to determine the scale of costs.
2. Unfortunately, the amount of damages awarded is slightly less than the lower jurisdictional limit of the District Court in this case. However, it does not mean that it was unreasonable for the plaintiff to continue with the action in the District Court after obtaining the JMR. While the final award of damages falls within the jurisdiction of the Small Claims Tribunal, with interest added, up to date of the Judgment, the awarded claim would be at a sum of around HK$74,240.61, which only slightly falls short of the jurisdictional limit of the District Court.
3. By referring to the above principles, I agree that the plaintiff should not be deprived of his costs to be taxed on the District Court Scale just because his pleaded case on quantum (in particular, the heads of PSLA and loss of earning capacity) has failed. I agree that the court shall and will allow a “fairly generous margin of error and not just look at the outcome of the figure of the awarded damages”: (See *Wai Chun Incorporation Limited & Anor v 羅民基, supra*, §8).
4. In this regard, I echo with what Mr McWalters J (as then he was) said in *Ho Ka Yin v Express Security Ltd*, unreported, HCPI 344/2008, (McWalters J (as he then was); 20 September 2011) at §9:-

“…With the benefit of hindsight a different assessment might have been made.  But issue-based costs orders and taxation at a lower scale are not to be used to discourage litigants from pursuing claims that have a reasonable prospect of success.  *That the claims did not succeed does not mean that they never had such prospects or were without merit.*” [emphasis added]

1. Furthermore, it has been shown that the plaintiff had made reasonable efforts and diligence in negotiating settlement with the defendant. In the present case, the plaintiff had made various Calderbank offers/sanctioned offers since December 2019. However, there was no response from the defendant until 8 working days before the actual trial itself. Even then, the offer was merely an offer to dispose of the whole claim of the plaintiff but not an offer to settle the claim of the plaintiff. It created no real opportunity for settlement. In my view, the defendant could have made steps to protect itself on costs by making appropriate sanctioned payment in this case if it wished to. Yet it had chosen to do nothing, including not responding to any of the plaintiff’s above offers to settle the matter. They cannot now try to take advantage of a marginally lower than the jurisdictional limit award after trial.
2. *What is the scale of costs which the plaintiff shall be entitled to?*
3. The final question is what is the proper scale of costs to be awarded in the present case.
4. On this issue, I agree with the following submissions made by the plaintiff’s solicitors:-

(a) All along the issue of liability in the present claim was in dispute. Notwithstanding the Small Claims Tribunal enjoys the jurisdiction to adjudicate claim founded in tort (see §1 of the Schedule to the Small Claims Tribunal Ordinance(Cap 338)), I agree that the present case is more appropriate to be tried before a tribunal which allows legal representatives: (*Wai Chun Incorporation Limited & Anor v 羅民基, supra*).

(b) The defendant took issues with almost everything raised by the plaintiff regarding the circumstances of the accident and the safety measures taken by the defendant at the time of or before the accident. It also raised the issue of contributory negligence. Hence, the main crux of the issue of liability goes to the credibility of each of the parties’ witnesses. Thus, it would be more appropriate for the case to be tried in the District Court for the parties to fully argue those matters at the trial by lawyers.

(c) During the trial, both parties’ witnesses, especially the plaintiff and Mr Tam Man Lung (the foreman of the defendant), were extensively cross-examined. Their evidence lasted for almost 2 full days. Significant evidence concerning credibility of the witnesses was elicited through the cross-examination by the parties’ legal representatives.

1. In light of the above, I agree that the nature of the plaintiff’s claim is more appropriate to be tried in the District Court and the scale of costs of the District Court should therefore be allowed.

*CONCLUSION*

1. For the above reasons, I find the plaintiff did not act unreasonably to institute action in the District Court. Having commenced the action in the District Court, it was not unreasonable for him to continue with the action in the District Court even after obtaining the JMR. Hence, I will reject the defendant’s application to vary the costs order *nisi* stated in the Judgment. I will order the costs order *nisi* to become absolute.
2. Costs should follow the event. The defendant who has lost the present application shall pay the costs of the Summons to the plaintiff, such costs to be taxed if not agreed. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

( Andrew SY Li )

District Judge

Messrs LWC & Co, Solicitors, for the plaintiff, assigned by the Director of the Legal Aid

Mr Lawrence Cheung & Mr Henry Chung, instructed by Messrs Francis Kong & Co, for the defendant

1. They did not appear on behalf of the defendant at the trial. [↑](#footnote-ref-1)