DCPI 547/2003

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 547 OF 2003

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BETWEEN:

NGAI CHU SING Plaintiff

and

CHAN WAI HO and CHAN, ALAN

trading as DR. CHAN WAI HO and

DR. ALAN CHAN CLINIC Defendants

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Coram : HH Judge Lok in Chambers

Date of hearing : 28 August 2006

Date of handing down of Decision : 2 November 2006

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DECISION

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1. This application is about one issue: whether the District Court has a discretion to order a plaintiff’s costs be taxed on basis other than the District Court scale, in the case that the plaintiff accepted a payment into court made by a defendant the amount of which is within the jurisdiction of the Small Claims Tribunal.
2. The first-named Defendant is a registered dentist in Hong Kong, and the Plaintiff’s claim is one for medical negligence as a result of a dental treatment provided by the first-named Defendant in 1999. According to the Revised Statement of Damages dated 26 May 2005, the quantum of the Plaintiff’s claim amounts to $325,760. However, the first-named Defendant made a payment into court in the sum of $20,000 on 24 January 2006, and the same was accepted by the Plaintiff on 7 February 2006. As the amount of the payment falls within the jurisdiction of the Small Claims Tribunal, there is a dispute between the Plaintiff and the first-named Defendant as to the proper basis upon which the Plaintiff’s costs are to be taxed in the present case.

*O 62 r 10(2) and the case of Cho Ho Kuen*

1. The Plaintiff’s entitlement to costs following the acceptance of a payment into court is prescribed in O 62 r 10(2) of the Rules of the District Court, Cap. 336 (RDC), which reads:

*‘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, or accepts money paid in satisfaction of one or more specified causes of action and gives notice that he abandons the others, he shall be entitled to his costs of the action incurred up to the time of giving notice of acceptance.’*

1. It is the Plaintiff’s case that under the said provision, the court has no discretion but to award the Plaintiff’s costs on the District Court scale. In support of that proposition, Mr. Kwok, counsel for the Plaintiff, relies heavily on the case of *Cho Ho Kuen v Yu Kwok Wah and others* [2001] 3 HKC 566. In that case, the plaintiff claimed against the defendants in the District Court in respect of damage done to his car in a road traffic accident. The claim was for $52,508. The defendants paid $25,000 into court in full and final settlement of the claim, and the same was accepted by the plaintiff. By summons, the defendants sought that the plaintiff’s costs of the action be assessed as if the claim had been brought in the Small Claims Tribunal. The judge dismissed the defendants’ application and held that the plaintiff was entitled to have his costs taxed on the District Court scale. The defendants appealed to the Court of Appeal, contending that the District Court had a discretion under O 62 r 10(2) of the Rules of the High Court, Cap. 4 (the new RDC not having come into force at the material time) to direct that the plaintiff’s costs be assessed on some other basis. However, the Court of Appeal rejected the argument and dismissed the appeal.
2. As the new RDC were not in force by that time, the Court of Appeal accepted that the relevant rules in the Rules of the High Court (RHC) were applicable. According to the judgment of Keith JA, RHC O 62 r 9(1) applies to O 62 r 10(2) in construing the latter provision. O 62 r 9(1) provides:

*‘Subject to this order, where by or under these Rules or any order or direction of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.’*

It was held the words ‘[s]ubject to this order’ in O 62 r 9(1) mean that where a party is entitled to his costs, he is entitled to taxed costs unless there is anything in O 62 which provides otherwise. Accordingly, the words ‘his costs of the action’ in O 62 r 10(2), when read with O 62 r 9(1), refer to the party’s taxed costs of the action, and the court has no discretion to direct that the costs be assessed on some other basis. The plaintiff was therefore entitled to have his costs taxed on the District Court scale. Keith JA also added that if a defendant elects to make his offer to settle the case in the form of a payment into court, he has to accept that the plaintiff’s entitlement to costs is to taxed costs. The way to avoid that is by the defendant making his offer to settle the case in the form of a Calderbank letter, ie. a letter marked ‘without prejudice save as to costs’. This interpretation has the benefit of bringing certainty on the issue of costs, as Mayo VP had pointed out in the same judgment:

*“It makes good sense when litigants are considering whether or not to accept a payment which has been made into court that there should be an element of certainty on the subject of costs so that everyone knows exactly where they stand. It would have been obvious to the defendants that the plaintiff’s costs relative to the amount being claimed would be significant. Having regard to the clear wording of O 62 r 10(2) they should have realized that by accepting the $25,000 paid into court they would have to pay the plaintiff’s costs in the District Court action as taxed.”* (at p. 572C)

Further, Keith JA also disapproved the decision of the late Li DJ in *Ho Kin Chung v Tsang Hiu Sang & Anr.* [2001] 1 HKC 110, which held that the District Court has full discretion to deal with the issue of costs in circumstances similar to those of the present case.

1. As the wordings of the relevant provisions in the RHC and the RDC are the same, the Plaintiff says that, applying the case of *Cho Ho Kuen*, this court has no discretion to direct that the Plaintiff’s costs be assessed on basis other than the appropriate District Court scale.
2. It seems that the *ratio* of the case of *Cho Ho Kuen* is directly relevant to the issue of the present case, and I am bound by the Court of Appeal’s decision in this regard. However, Ms. Chan, solicitor for the first-named Defendant, relies on the following two grounds to argue that the court still retains the discretion to order the Plaintiff’s costs be assessed as if the claim had been brought in the Small Claims Tribunal. Firstly, under O 22 r 4 of the RDC, in the case that one of the defendants makes a payment into court, the plaintiff then has to ask the court to make an order for payment out, and in such circumstances, the court has the power to make any order regarding the costs of the plaintiff. Secondly, Keith JA’s construction of the relevant provisions in O 62 was based on the old s 43(2) of the District Court Ordinance, Cap 336 (DCO). As such provision was repealed and was replaced by the new s 44A(6) of the DCO, the proposition established in *Cho Ho Kuen* is no longer good law. I will deal with these arguments in turn.

*O 22 r 4 of the RDC*

1. O 22 r 4 of the RDC provides:

*‘(1) Where a plaintiff accepts any sum paid into court and that sum was paid into court -*

* 1. *by some but not all of the defendants sued jointly or in the alternative by him; or*
  2. *………*
  3. *………*

*the money in court shall not be paid out except under paragraph (2) or in pursuance of an order of the Court, and the order shall deal with the whole costs of the action or of the cause of action to which the payment relates, as the case may be.*

* + 1. *Where an order of the Court is required under paragraph (1) by reason only of paragraph 1(a) then if, either before or after accepting the money paid into court by some only of the defendants sued jointly or in the alternative by him, the plaintiff discontinues the action against all the other defendants and those defendants consent in writing to the payment out of that sum, it may be paid out without an order of the court.*
    2. *………’*

1. In the present case, we have two defendants and the payment into court was only made by one of them. In such case, Ms. Chan submits that an order for payment out is necessary, and under O 22 r 4, the court can then have jurisdiction to make any appropriate order for costs. However, prior to this hearing, the second-named Defendant had already indicated in writing that he had no objection for the payment out. Further, at the beginning of the hearing, the Plaintiff applied to me, with the consent of the second-named Defendant, to discontinue the action against the latter, and an order to that effect was made by the court. Hence, according to O 22 r 4(2), an order for payment out is no longer necessary under such circumstances, and it follows that the court has no further power to deal with the issue of costs between the Plaintiff and the first-named Defendant. Further, the rights and liabilities *vis-à-vis* the Plaintiff and the first-named Defendant should have crystallized at the time when the Plaintiff accepted the payment into court, and the power given by O 22 r 4 is, in my judgment, only for the court to deal with the issue of costs between a plaintiff and other non-paying defendants. Hence, the first argument of the first-named Defendant cannot possibly succeed.

*Whether the proposition established by the case of Cho Ho Kuen is still good law?*

1. I then turn to the second argument. In *Cho Ho Kuen*, the defendants were asking the court to assess the plaintiff’s costs as if the claim had been brought in the Small Claims Tribunal. In this regard, Keith JA made the following observation:

*‘In that connection, it is, I think, pertinent to observe that there is no provision in either the District Court Ordinance (Cap 336) or the Small Claims Tribunal Ordinance (Cap 338) restricting the entitlement to costs of a plaintiff who brings his claim in the District Court when the claim might more appropriately have been brought in the Small Claims Tribunal. That is to be contrasted with s 43(2) of the District Court Ordinance (as it then was prior to its recent replacement), which empowered the Court of the First Instance to award costs only on the District Court scales when a claim brought in the Court of First Instance might have been more appropriately brought in the District Court.’* (at p. 570H)

1. The old s 43(2) of the DCO provides that any proceedings in which the District Court has jurisdiction are brought in the Court of First Instance, then the costs shall be recoverable only on the District Court scale unless the Court of First Instance otherwise orders. This subsection was repealed in 2000 and was somewhat replaced by the new s 44A(6). However, the power under s 44A(6) is more restrictive as it only applies to proceedings transferred from the Court of First Instance to the District Court or *vice versa*, or to proceedings transferred from a tribunal to the District Court. Ms. Chan therefore submits that as Keith JA’s interpretation of O 62 rr 9(1) and 10(2) of the RHC was based on the old s 43(2), the proposition established in that case is no longer good law.
2. I do not agree. In construing the meaning of O 62 r 10(2), Keith JA was only relying on the wordings of O 62 r 9(1) and the legislative history of O 62 r 10(2) in arriving at the conclusion. The learned judge was not relying on the old s 43(2) in the interpretation exercise, although he expressed reservation as to whether the District Court, in the absence of express statutory provision, has the power to order costs be taxed as if the claim had been brought in the Small Claim Tribunal. Hence, as pointed out by Woo VP in the case of *M Beraha & Co. Ltd v Ng Wai Lun* [2004] 3 HKC 535 at p. 545B, such observation by Keith JA was entirely *obita*. Further, *Cho Ho Kuen* was decided after the repeal of the old s 43(2), and Keith JA in his judgment was aware of the fact the old s. 43(2) was repealed in 2000, yet this did not affect his construction of the relevant provisions in O. 62. Finally, the case of *Cho Ho Kuen* was cited with approval in the subsequent decisions of *Associated Engineers Ltd. v Lo Chee Pui*, unreported, CACV 398 of 2002 (decision of the Court of Appeal on 27 February 2003, at paras. 36 and 38) and *Cheung Yu Tin Alvin v Ho Hon Ka*, unreported, CACV 255 of 2005 (decision of the Court of Appeal on 17 March 2006, at para. 24), and so the proposition established in *Cho Ho Kuen* is still good law and is strictly binding on this court.
3. Since the wordings of the relevant provisions in O 62 of the RHC and the RDC are identical, it should follow that if a plaintiff in an action in the Court of First Instance accepts a payment into court the amount of which is within the jurisdiction of the District Court, the judges in the Court of First Instance likewise have no power to order the plaintiff’s costs be assessed on basis other than the High Court scale. However, the cases cited by Ms. Chan seem to suggest the contrary.
4. In *Lai Ki v B + B Comstruction Co. Ltd.* [2003] 3 HKLRD 192, Seagroatt J. was asked to determine the appropriate scale of costs to be applied after the case was settled at a sum which was within the jurisdiction of the District Court. Although this was not a case involving payment into court, Seagroatt J. expressed the view that where a sum of money which was within the District Court jurisdiction was paid into court, and accepted by the plaintiff without agreement by the parties as to the scale of costs to be taxed, the plaintiff must apply promptly by way of summons to a master for a determination as to the scale of costs. By saying so, the learned judge implicitly accepted that the Court of First Instance has the power to order a plaintiff’s costs be taxed on basis other than the High Court scale. In another case of *Chak Wing Keung & Ors. v B.S.C. Home Improvement Centres Ltd.*, unreported, HCPI No. 880 of 2002 (decision of Suffiad J on 19 October 2005), the same question arose after the plaintiff accepted a payment into court the amount of which was within the jurisdiction of the District Court. After examining the nature of the 1st plaintiff’s claim, the learned judge concluded that there was no reasonable prospect of the 1st plaintiff in obtaining an award in excess of $1 million had the matter gone to trial, and so the 1st plaintiff was only entitled to have his costs taxed on the District Court scale after the increase of jurisdiction of the District Court in 2003.
5. These two cases are not in line with the *ratio* of *Cho Ho Kuen*. Prior to the repeal of the old s. 43(2) of the DCO, one may argue that the Court of First Instance may have jurisdiction under the said old provision to award costs on the District Court scale. However, such provision was repealed in 2000 and was replaced by the much restrictive s 44(6). Hence, applying the case of *Cho Ho Kuen*, the Court of First Instance should have no power, in the case of an acceptance of payment into court, to direct the plaintiff’s costs be assessed on basis other than the High Court scale. Apparently, the case of *Cho Ho Kuen* was not referred to the presiding judges in the said first instance cases, and it remains to be tested whether the Court of First Instance will in future follow the same practice. At this stage, and in the absence of proper legal argument, I would not comment as to whether the existing practice in the Court of First Instance is correct. For our present purposes, I will only say that *Cho Ho Kuen* is still good law and is strictly binding on this court.
6. Based on the aforesaid, I accept that this court has no power to order the Plaintiff’s costs be taxed on basis other than the District Court scale, and I therefore direct that the first-named Defendant do pay the Plaintiff’s costs of this action to be taxed on the District Court scale. I also make an order *nisi* that the first-named Defendant do pay to the Plaintiff the costs of the Plaintiff’s summons dated 18 May 2006 with certificate for counsel. Such order *nisi* will be made absolute 14 days after the date of the handing down of this decision.

(David Lok)

District Judge

Mr. Tim Kwok, instructed by Messrs. Lau Chan & Ko, for the Plaintiff

Ms. Stephanie Chan of Messrs. Richards Butler for the first-named Defendant

Mr. Ho Fu Wah of Messrs. Joseph C. T. Lee & Co. for the second-named Defendant