## DCPI 801/2016

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 801 OF 2016

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BETWEEN

LAI CHU YIU Plaintiff

and

LEE MEI PING 1st Defendant

ZURICH INSURANCE COMPANY LTD 2nd Defendant

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Before: Her Honour Judge Winnie Tsui in Chambers (Open to Public)

Date of Hearing: 11 July 2017

Date of Decision: 11 July 2017

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2ND DECISION

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1. This is the second hearing in this action before me today. In this hearing, the 2nd defendant seeks to strike out the defence filed by the 1st defendant in the contribution and indemnity proceedings brought against the 1st defendant by the 2nd defendant by way of a notice dated 14 October 2016. The 1st defendant’s defence is contained in a document entitled “Defense and Counterclaims” dated 5 December 2016.
2. This morning, I heard the plaintiff’s application to strike out the counterclaim made by the 1st defendant against the plaintiff. I refer to my decision made, and the reasons given, at the end of that hearing. (I shall adopt below the background of this case as set out in that decision.) As a result of earlier court orders and my decision made this morning, the main proceedings as between the plaintiff, the 1st and 2nd defendants have now been entirely disposed of, including the issue of costs.
3. The current position of the parties in this action is therefore this:-
4. While the main proceedings have come to an end, the contribution and indemnity proceedings between the 1st and 2nd defendants are still ongoing.
5. However, if the 2nd defendant succeeds in this striking out application, that would conclude those proceedings as well and judgment would be entered for the 2nd defendant against the 1st defendant as pleaded.
6. On the other hand, if the 2nd defendant fails in this application, the contribution and indemnity proceedings will carry on.
7. In either case, though, the plaintiff will no longer have any involvement in the action.

*The 2nd defendant’s striking out application*

1. The 2nd defendant seeks to strike out the 1st defendant’s defence pursuant to O18, r19 of the Rules of the District Court and the inherent jurisdiction of the court and enter judgment against the 1st defendant.
2. The 2nd defendant’s pleaded case against the 1st defendant is as follows:-
3. The 1st defendant failed to notify the 2nd defendant of the accident in accordance with the policy terms.
4. That amounts to a breach by the 1st defendant and accordingly the 2nd defendant repudiated liability in respect of the accident.
5. It is likely that the 2nd defendant will be liable to satisfy any judgment obtained by the plaintiff against the 1st defendant, even though the 2nd defendant might be entitled to avoid or cancel the policy, pursuant to section 10 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap 272.
6. Also, by reason of the Domestic Agreement dated 1 February 1981 between the Motor Insurers’ Bureau (the “MIB”) and the motor insurers, the 2nd defendant might be called to satisfy the judgment obtained by the plaintiff.
7. For the above reasons, the 2nd defendant claims that it is entitled to be indemnified by the 1st defendant in respect of such sum payable by the 2nd defendant. In this regard, the 2nd defendant pleads as follows:-

“… the 2nd defendant is entitled to exercise the right conferred by the Domestic Agreement to seek recovery against the person on whose account such a judgment is satisfied.”

1. It further asks for judgment for any amount and costs “which the 2nd defendant may be obliged, pursuant to either a Court Order/Judgment or a bona fide settlement agreement to pay the plaintiff in this action”.
2. Given that the 2nd defendant has settled the main proceedings in the sum of $145,000 for damages and $100,000 for the plaintiff’s costs, in effect, the 2nd defendant is asking the 1st defendant to indemnity it in the sum of $245,000, together with costs of the contribution and indemnity proceedings.
3. The 2nd defendant argues that the 1st defendant’s defence discloses no reasonable defence to its contribution and indemnity claim. In the supporting affirmation filed on its behalf, it is stated:-

“18. In the 1st Defendant’s Contribution Defence, the 1st Defendant does not dispute:-

1. How the accident happened;
2. The Brief Facts of Case prepared by the Police;
3. The prosecution laid by the Police;
4. The conviction of Careless Driving;
5. Her breach of the policy condition of the Policy;
6. The repudiation of liability under the Policy by the 2nd Defendant; and
7. The 2nd Defendant’s rights conferred by the Domestic Agreement to seek recovery.

19. The 1st Defendant, only in the 1st Defendant’s Contribution Defence, raises her doubt on the causation of the Plaintiff’s injuries which is not an issue of liability in the Contribution and Indemnity Proceedings but an issue of quantum.”

1. As I understand from the 2nd defendant’s submissions, its striking out application is supported by two planks. First, in the 1st defendant’s pleading, there is no denial of and hence there is in effect admission to (a) the 2nd defendant’s right to an indemnity from the 1st defendant, and (b) the 1st defendant’s liability to the plaintiff in respect of the accident.
2. As such, the pleading contains no defence at all.
3. Second, in any event, the matters which appear in the pleading does not give rise to any defence to the 2nd defendant’s indemnity claim. Accordingly, the 2nd defendant contends that the defence ought to be struck out.

*Analysis*

1. I do not accept either plank of arguments.
2. As to issue (a), in her defence, the 1st defendant refers to the cancellation of the policy by the 2nd defendant and then states at §6:-

“… as such we assumed that contract has been cancelled and the relationship with such policyholder associated with the said vehicle policyholder and the vehicle RY 9868 under such traffic accident event was *come to an complete termination or dis-engagement*.” (emphasis added)

1. The 1st defendant is in substance alleging that by reason of the cancellation, the 2nd defendant has ceased to have anything to do with the policy or the accident and there is no further relationship between the 2nd defendant and the vehicle or the policyholder. In the circumstances, I do not consider that the 1st defendant can be taken to have admitted to the 2nd defendant’s alleged right to be indemnified.
2. As to issue (b), in her pleading, the 1st defendant is clearly disputing the existence or extent of the plaintiff’s injuries and the issue of causation.
3. For instance, see §5 in which the 1st defendant states:-

“We doubt that the various medical/clinical visit showing the plaintiff had visit to public hospital and private clinic at various dated filed in the writ of summon DCPI 801/2016 has any relations to this traffic accident event.”

And see also §7 in which the 1st defendant says:-

“I don’t quite why the plaintiff and the plaintiff’s representing lawyer and 2nd defendant … delineate a settlement proposal in writing with the Plaintiff and the Plaintiff’s representing lawyer and in court that was the proposed settlement amount *without having knowing the plaintiff injury is proven* with adequate endorsement by any witness or expert, medical report *that are proved to be in relations to this accident,* The plaintiff may be injured in other places, other events or other accident after this traffic accident event or right after the event driving back to other place or in other occasion; events or venue with no significant proof and evidence.” (emphasis added)

1. It ought to be noted that contemporaneous records (in the form of police statements and hospital notes) show that the plaintiff did not seek medical treatment on the spot but went to the Accident & Emergency Department himself about three hours after the accident. Therefore there is at least a basis in support of the 1st defendant’s pleaded challenge on the issue of causation. And that challenge is clearly something that cannot be dismissed outright at this interlocutory stage. The burden to prove causation rests with the plaintiff. If the plaintiff’s injuries are not proved at trial or if proved, it is not proved that they are caused by the accident, then the 1st defendant would not be liable.
2. Therefore, it is plain on the face of the defence that the liability issue is also seriously in dispute.
3. Given the clear denial of issues (a) and (b) as evident in the pleading, it is wrong for the 2nd defendant to now say that the 1st defendant’s defence contains no defence at all. On the contrary, it is tolerably clear from her pleading that the 1st defendant is disputing that she has an obligation to indemnify the 2nd defendant in respect of claims arising out of the accident. Both planks of argument put forward by the 2nd defendant must fail. In the circumstances, it is for the 2nd defendant to prove that it has a right to indemnity and in order for the 2nd defendant to strike out the 1st defendant’s defence, it is incumbent on the 2nd defendant to demonstrate that there is a valid legal basis on which it is entitled to be indemnified by the 1st defendant.
4. In its pleaded case, the 2nd defendant relies on the MIB Domestic Agreement. However, the 2nd defendant has not referred to any of the express clauses in that agreement which purport to give rise to the alleged indemnity. Nor is the agreement itself exhibited to its affirmation evidence filed in the present application.
5. In the absence of such evidence, I do not see how it is possible for me to come to a *conclusive* view that the 2nd defendant is entitled to an indemnity as pleaded. In fact, on the face of the pleading, the agreement is described as having been made between the MIB and all the motor insurers in Hong Kong. On that basis, how does it give rise to an obligation on the part of the 1st defendant, who is not privy to that agreement, to indemnify the 2nd defendant? Furthermore, it is common ground that the 1st defendant is not even the insured under the policy. It was her husband who was the insured. It is therefore not clear at all on what basis the 1st defendant, who apparently has had no contractual relationship with the 2nd defendant all along, is liable to indemnify the 2nd defendant.
6. At the hearing this afternoon, the 2nd defendant seems to have accepted that it is not the Domestic Agreement which gives rise to the alleged indemnity (which is of course in direct contradiction to its pleaded case). Rather, the 2nd defendant now submits that it is the terms of the policy which give rise to the 2nd defendant’s entitlement to an indemnity.
7. However, the policy is not exhibited to the 2nd defendant’s affirmation evidence. For that reason, I am unable to verify whether the 2nd defendant’s (latest) submission is correct or not.
8. Without knowing the legal basis giving rise to the alleged indemnity, it also follows that it is impossible to determine the scope of the alleged indemnity (assuming that it exists in the first place) and whether it would cover the settlement reached between the plaintiff and the 2nd defendant in the main proceedings. For instance, given the doubts raised by the 1st defendant in respect of the existence or extent of injuries and the issue of causation, the obvious questions would be – does the alleged indemnity cover the settlement sum paid by the 2nd defendant to the plaintiff and is the 1st defendant liable to reimburse the 2nd defendant for whatever amount the latter chose to pay the plaintiff?
9. To sum up, I do not accept the 2nd defendant’s submission that in her pleading, the 1st defendant has *admitted* to the alleged indemnity and her liability in respect of the accident. Given that the issue of indemnity is in dispute, and that the 2nd defendant has failed to demonstrate conclusively its entitlement to the indemnity against the 1st defendant, there is no basis to say that the 1st defendant’s defence is bound to fail.

*Order*

1. For these reasons, the 2nd defendant’s striking out application must be rejected and I dismiss the 2nd defendant’s summons.

*(Discussion re costs)*

1. I further order that:-
2. The 1st defendant do have costs of this application, summarily assessed in the sum of $800, payable by the 2nd defendant within 28 days from today.
3. The 2nd defendant do write to the PI Master within 14 days from today to fix a date for a checklist review hearing.
4. The 2nd defendant do draw up, file and serve today’s order.

( Winnie Tsui )

District Judge

The 1st defendant was not represented and was acting in person

Mr Ringo Kwong, of Cheng, Yeung & Co, for the 2nd defendant