**[2018] HKDC 1611**

**DCPI 1408/2017**

**IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.1408 OF 2017

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

BETWEEN

LUI YAT LING ELAINE (雷逸寧) Plaintiff

and

TAM KWOK FAI (譚國輝) 1st Defendant

ROYMASTER LIMITED 2nd Defendant

CHINA PING AN INSURANCE 3rd Defendant

(HONG KONG) COMPANY LIMITED

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

Before : Master S.H. Lee in Chambers (open to public)

Date of Hearing : 7 Dec 2018

Further written submissions from 3rd Defendant: 20 Dec 2018

Further written submissions from Plaintiff: 20 Dec 2018

Date of Handing Down Decision : 31 Dec 2018

-------------------

DECISION

-------------------

1. Is a sanctioned payment made by a *third party* insurer joined as a party and against whom judgment has been entered in plaintiff’s favour to be paid out in satisfaction of the *whole or entirety* of plaintiff’s claim of *bodily injuries* against it or *only* in satisfaction of those for *bodily injuries*, but not that for *property damage* (**the Question**)? The Question arises on plaintiff’s summons filed on 28 Nov 2018 (**P’s Summons**) before me.
2. Mr Ho appearing for 3rd defendant insurer (**D3**) contended for the former answer to the Question and submitted that plaintiff cannot further proceed with assessment of damages (**AOD**) against D3 on plaintiff’s claim for *property damage*.
3. Mr Chan appearing for plaintiff contended for the latter answer and submitted that plaintiff can further proceed with AOD against D3 on plaintiff’s claim for *property damage*.
4. The 1st (**D1**) and 2nd Defendants (**D2**), both unrepresented, did not appear before me. Indeed, they have been absent throughout these proceedings. But I am satisfied that they have due notice of P’s Summons and I proceeded with this hearing in their absence.
5. To answer the Question, what materially has happened in chronological order can be summarized as follows.

1. The plaintiff drove a car and met a traffic accident involving another car owned by D2 and driven by D1 (**the Accident**). On the day of the Accident, D3 has issued a policy to D2 as the insured covering D2’s car for *third party risks* only (**the Policy**). Such third party risks covered by the Policy include not only third party bodily injury but also *third party property damage*.
2. Plaintiff’s solicitors later issued letters to D1 and D2 (**the Pre-Action Letters**) making claims against them for bodily injuries and property damage for the Accident, and copied them to D3.
3. D3’s solicitors in turn wrote to D1 and D2 (**the Repudiation Letters**), referring to the Pre-Action Letters, asserting breach of the Policy, repudiated liability to provide indemnity under it and reserved D3’s right to seek indemnity from them should D3 be obliged under s.10 of Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap.272 (**the Ordinance**), to satisfy any judgment entered against them.
4. Afterwards, plaintiff’s solicitors issued generally indorsed writ in these proceedings against D1 and D2, seeking damages for “personal injury, loss and damages” for the Accident. They gave notice of these proceedings at the same time to D3.

1. D1 and D2 did not file any notice of intention to defend. Interlocutory judgment was thus entered against them in plaintiff’s favour for damages to be assessed.
2. Later, D3 applied (**the Joinder Application**) and obtained an order to join as D3 to these proceedings (**the Joinder Order**). Under the Joinder Order, D3 is “entitled to exercise all the rights to defend the action” and can file and serve a Defence to plaintiff’s claim.
3. Pursuant to the Joinder Order, plaintiff’s solicitors amended the title of the writ to add D3 as an additional party and reissued an amended writ. On the same day, they filed Statement of Damages seeking damages for bodily injuries and property damage.
4. D3’s solicitors subsequently acknowledged service of the amended writ and indicated D3 intended to contest these proceedings.
5. But, on 8 May 2018 (**the 8 May Letter**), D3’s solicitors wrote to plaintiff’s solicitors to admit “liability of the case, leaving damages to be assessed”, and asked for draft consent order for their approval.
6. On 15 May 2018, D3’s solicitors wrote to plaintiff’s solicitors making a Calderbank offer of “HK$50,000 (inclusive of interest) plus costs on your client’s *personal injuries* claim, to be taxed if not agreed, in full and final settlement of your client’s *personal injuries* claims (italics supplied)”[[1]](#footnote-1) (**the Calderbank Offer**).
7. On 21 May 2018, plaintiff’s solicitors wrote to D3’s solicitors accepting the Calderbank Offer.
8. On 23 May 2018, solicitors for plaintiff and for D3 signed and filed a consent summons seeking “interlocutory judgment on liability be entered for plaintiff against D3 with damages to be assessed” and also for costs of the action on liability issue be paid by D3 to the plaintiff (**the Consent Summons**).
9. On 29 May 2018, an order was made in terms of the Consent Summons by consent (**the Consent Order**).
10. In Aug 2018, plaintiff’s solicitors filed Revised Statement of Damages (**RSOD**), maintaining claims for bodily injuries and property damage.
11. On 3rd Oct 2018, D3 filed Answer to RSOD. D3 specifically averred that it is not liable for plaintiff’s *property damage* claim by reason of s.10 of the Ordinance.
12. On the same day, D3 made the subject sanctioned payment of $50,000 into court in settlement of “*part* of plaintiff’s claim” identified as “plaintiff’s claim for *personal injuries* arising from the subject accident… (italics supplied)” (**the Payment**).
13. On 11 Oct 2018, the plaintiff filed and served her notice of acceptance, accepting the Payment “in settlement of *part* of plaintiff’s claim as set out in the notice of the [Payment]… (italics supplied)”.
14. On 28 Nov 2018, pursuant to the Consent Order, plaintiff’s solicitor filed interlocutory judgment in plaintiff’s favour against D3 for damages to be assessed (**the Judgment**) and the costs of the action on liability issue was to be paid by D3 to plaintiff.
15. On the same day, plaintiff’s solicitors took out P’s Summons under O.22 r.18, Rules of District Court.
16. Checklist review hearing is to be held in Jan 2019 for leave to set down for AOD.

*D3’s submissions*

1. Mr Ho submitted, by reference to affidavit filed on D3’s behalf in the Joinder Application, that D3 applied to join, and was allowed to be joined, as D3 was potentially liable to plaintiff under s.10(1) of the Ordinance for any judgment that plaintiff may obtain against D1 and/or D2 in these proceedings.
2. Such potential liability of D3 to plaintiff, he contended, is limited to judgment only in respect of such *third party* liability *required* to be covered by a policy under s.6(1)(b) of the Ordinance i.e. such liability incurred in respect of the death of or *bodily injury* to any person arising out of the use of a motor vehicle on a road.
3. Such compulsory third party liability required to be insured under s.6(1)(b) of the Ordinance, he emphasized, does not include third party *property damage*.
4. Hence, despite the Policy had insured D1 and/or D2 for third party *property damage* arising out of the use of D2’s car on a road, D3 cannot, he submitted, be held liable at law to plaintiff under s.10 of the Ordinance for *property damage*. The Joinder Order, the Consent Order and the Judgment cannot change, and have not changed, the said legal position.
5. Therefore, D3 had only offered to settle, and had only settled plaintiff’s claim for *bodily injuries*, which claim is the *whole or entirety* of plaintiff’s claim against D3, by way of the Payment.

*Plaintiff’s submissions*

1. It was submitted in plaintiff’s further written submissions that the Ordinance is of no assistance to D3. It merely “enlarges rather than reduces D3’s liability to plaintiff”. It “puts D3 under an *additional* statutory liability”. It “does not restrict D3’s liability to *only* claim for *personal injuries* and nothing else (italics supplied)”.
2. Mr Chan submitted that D3 had knowingly and voluntarily submitted to liability towards plaintiff for her claims of bodily injuries and property damage by the 8 May Letter, the Consent Order and the Judgment.
3. D3 was, Mr Chan contended, well aware of plaintiff’s claim for *property damage* for the Accident. The Pre-Action Letters had been exhibited to affidavit filed on D3’s behalf in the Joinder Application. He also pointed to contents of general endorsement in the amended writ served on D3. D3 could, he stressed, have defended these proceedings by filing a Defence to contest liability.
4. By electing to admit liability of the case in the 8 May Letter and agreeing to the Consent Summons, D3 had, he submitted, accepted plaintiff’s claims for bodily injuries and property damage in these proceedings by the Consent Order and the Judgment. It would now be too late and inequitable for D3 to claim that it was not liable to plaintiff for her claim of *property damage* in these proceedings.
5. By so admitting liability of the case, it was submitted in plaintiff’s further written submission that D3 had precluded itself from arguing (or put to trial) that it was entitled to repudiate the Policy for alleged breach of the Policy by D1 and/or D2.
6. Hence, D3, Mr Chan contended, had only settled that *part* of plaintiff’s claim for bodily injuries (and not that for property damage) by the Payment.

*Discussion*

1. I agree with D3’s submissions at paragraphs 26 to 30 above.
2. I reject such contrary plaintiff’s submission at paragraphs 31, 32, 34 to 36 above.
3. My reasons are as follows.
4. Firstly, the plaintiff has, I think, no direct cause of action *against D3* for loss and damage for the Accident at law *except* her statutory right under s.10 of the Ordinance.
5. If plaintiff has such *other* causes of action at all, she could have, one imagines, sued D3 as an *original* party in the writ *in the first place* on such *other* causes of action.
6. Mr Chan and the plaintiff never articulated nor explained such *other* causes of action at all.
7. Had the plaintiff had such *other* causes of action against D3, plaintiff’s solicitors could have so added to the general endorsement when they reissued the amended writ under the Joinder Order. But the *same* general endorsement mentioning *only* D1 and D2 appears in the writ and in the amended writ served on D3.
8. Secondly, as was made clear by affidavit filed on D3’s behalf in the Joinder Application, D3 was joined solely because of its potential liability to plaintiff under s.10(1) of the Ordinance.
9. Such potential liability of D3 to the plaintiff under s.10(1) of the Ordinance for such judgment entered against D1 and/or D2 (and D3’s repudiation of its liability under the Policy to indemnify D1 and D2 for alleged breach of the Policy) was made known to the plaintiff by D3’s solicitors having exhibited the Repudiation Letters in affidavit filed for the Joinder Application.
10. Plaintiff’s solicitors gave, I think, written notice to D3 of the plaintiff bringing these proceedings against D1 and D2 with a view to take the benefit of such statutory right under s.10 of the Ordinance in future. Under s.10(2)(a) of the Ordinance, such notice is a *pre-condition* for plaintiff’s cause of action under s.10(1) thereof.
11. Thirdly, the Joinder Order, I think, never gave, and could not have given, the plaintiff any cause of action against D3 which she *otherwise* does not enjoy at law *save* under s.10(1) of the Ordinance.
12. Fourthly, the Judgment could *only* have, I think, been based on such statutory cause of action the plaintiff enjoys at law against D3 under s.10(1) of the Ordinance for judgment entered against D1 and/or D2 and on no *other* causes of action.
13. I derive support for my 3rd and 4th reasons from the judgment of Bharwaney J in *Chan Ka Ki v Lau Sin Ting* [2013] 1 HKLRD 671, where Motor Insurers’ Bureau (**MIB**) applied and was joined as second defendant to an action brought against the uninsured 1st defendant driver for injuries caused to plaintiff in a traffic accident.
14. At paragraph 5 thereof, his lordship said:

“The grant of leave to amend the writ of summons in such cases is given to enable the plaintiff to add MIB as an additional defendant. It is not given to enable the plaintiff to pursue a direct cause of action against MIB. There is no such cause of action before a relevant judgment has been obtained against an uninsured driver and which is unsatisfied.”

1. MIB was allowed to be joined, when the 1st defendant driver was uninsured, his lordship explained in *Chan Ka Ki*, supra, as liability to pay plaintiff would ultimately fall on MIB. It would be unjust to let MIB to stand idly watching judgment entered against the uninsured driver without saying a word when it has to foot the plaintiff’s bill.
2. In his oral submissions, Mr Chan sought to distinguish *Chan Ka Ki*, supra, in 3 ways:

(1) That case involved MIB when these proceedings did not;

(2) No property damage, or no such issue, was involved in that case; and

(3) Default judgment was entered against 1st defendant uninsured driver in that case after MIB was joined. In our case, it was entered against D1 and D2 before the Joinder Order was made.

1. I am, however, not persuaded by Mr Chan.
2. Mr Chan’s first and third points are not, I think, material distinction for our purpose.
3. In situation similar to MIB, D3 is an “insurer concerned” potentially liable to pay the plaintiff for any judgment she may obtain against D1 and/or D2 in these proceedings. It was equally allowed to be joined in our case for the same reasons given for joinder of MIB in *Chan Ka Ki*, supra.
4. The order in time of the joinder as compared to the default judgment against the uninsured driver in *Chan Ka Ki*, supra, and that against D1 and D2 in our case does not affect, I think, the reasoning of *Chan Ka Ki*, supra, at paragraphs 50 & 51 above.
5. Similarly, D3 and MIB could only be liable to an injured in traffic accident after a relevant judgment is obtained by such plaintiff against the insured driver and the uninsured driver respectively and such relevant judgment is not satisfied by such drivers.
6. Such order in time of the joinder as compared to the default judgment could, one thinks, have been arrived at *randomly*. Indeed, it could be “reversed”. D3 could have applied to set aside default judgment entered against D1 and D2 in our case if it contests liability and/or asserts contributory negligence (**CN**). For MIB having filed a defence asserting CN against plaintiff for not wearing seatbelt in *Chan Ka Ki*, supra, his lordship set aside the default judgment entered against the 1st defendant uninsured driver in that case.
7. Regarding Mr Chan’s second point, what is common and material for our purpose is that the two plaintiffs in *Chan Ka Ki*, supra, and in our case could respectively go after MIB and D3 for judgment entered against the uninsured driver and the insured driver.
8. Significantly, I agree with Mr Ho on my reading and construction of ss.6(1)(b) and 10(1) of the Ordinance that such potential statutory liability of D3 to pay the plaintiff under s.10(1) of the Ordinance is limited to judgment entered against D1 and/or D2 for bodily injuries and not for *property damage*.
9. The Consent Order and the Judgment could not have and have not, I think, “improved” plaintiff’s *original* position at law vis-à-vis D3. Before their making, the plaintiff could not have directly sued D3 for any judgment obtained against D1 and D2 for *property damage* under s.10(1) of the Ordinance.
10. Considering the reasons for allowing D3 to be joined to these proceedings as explained in *Chan Ka Ki*, supra, one fails to see any grounds for such improvement either.
11. The fact that D3, as was fairly accepted in D3’s further written submissions, would have taken over the defence of D1 and D2 and paid up on plaintiff’s judgment against them for bodily injuries and property damage had D3 not repudiated on the Policy is, I think, neither here nor there.
12. D3 would have so done to honour its *contractual* obligations with D2 under the Policy to provide indemnity to D1 and D2 for third party risks of bodily injuries and property damage covered under the Policy.
13. But, in our case, D3 had already repudiated such *contractual* liability under the Policy by the Repudiation Letters addressed to D1 and D2 for their alleged breach of the Policy and decided not to take over their defence in these proceedings. As such, the plaintiff has to fall back on its only *statutory* cause of action against D3 under s.10(1) of the Ordinance limited to *bodily injuries*.
14. Had D3 knowingly and voluntarily submitted otherwise?
15. Objectively speaking, I do not so find.
16. It is true that D3 elected not to file a Defence to contest liability, let default judgment against D1 and D2 to stand and signed the Consent Summons.
17. But D3’s solicitors had already made it clear to plaintiff in affidavit filed in Joinder Application that D3 had applied to participate in these proceedings for fear of potential liability to plaintiff under s.10(1) of the Ordinance, and that D3 had by then repudiated liability to provide indemnity to D1 and D2 under the Policy.
18. Two days before the filing of the Consent Summons, the Calderbank Offer made by D3 limited to plaintiff’s claim for *personal injuries* was accepted by the plaintiff.
19. Plaintiff’s claim for property damage, *if any*, caused by the Accident *remains* to be *proved* and *quantified* in AOD even after the Consent Order and the Judgment was made.
20. And D3’s solicitors had reiterated in D3’s Answer to RSOD that D3 is not liable for plaintiff’s *property damage* claim by reason of s.10 of the Ordinance.
21. The Notice of the Payment filed on the same day of the said Answer is, in my view, consistent with this stance of D3 before and after its joinder to these proceedings.
22. After the acceptance of the Payment made by D3, the plaintiff could, I think, continue to proceed with AOD against D1 and D2 for her claim for *property damage*.
23. If plaintiff succeeds against D1 and/or D2 for her claim for *property damage* and is paid for such claim, D1 and/or D2 could in turn by such separate action if see fit seek to enforce against D3 its *contractual* promise to provide indemnity to them for third party *property damage* covered by the Policy.
24. In such separate action on the Policy, the issues whether D1 and/or D2 had breached the Policy as alleged by D3 and whether D3 would be entitled to repudiate its liability under the Policy would be investigated and determined. Contrary to plaintiff’s submissions, they are not, I think, subject matter of these proceedings.
25. Indeed, Mr Chan had in his oral submissions reserved plaintiff’s right, after acceptance of the Payment made by D3, to proceed with AOD against D1 and D2 not only for property damage but also for *bodily injuries*.
26. Mr Chan so reserved having considered another judgment of Bharwaney J this court provided to invite submissions. The said authority is *Li Ka Yin v Atta-Trans Ltd & Another*, unreported, HCPI No.196/2009, 18 July 2011, paragraph 17 thereof.
27. In *Li Ka Yin*, supra, the plaintiff accepted the sanctioned payment made by the 1st defendant and elected to discontinue as against the 2nd defendant (in these proceedings, the plaintiff had not discontinued against D1 and D2). On this appeal against costs order made by Master below, his lordship analyzed O.22 r.18, Rules of High Court, as well the options open to a plaintiff accepting sanctioned payment made by one/more, but not all, of the defendants.

*Answer to the Question*

1. I therefore answer the Question as suggested by Mr Ho in paragraph 2 above.

*Costs on quantum issue*

1. Having considered *Li Ka Yin*, supra, in his oral submissions, Mr Chan no longer seeks costs on the quantum issue as against D1 and D2. AOD remains to be held as between plaintiff and D1 and D2, and such costs would be decided at AOD.
2. Mr Chan and Mr Ho both agreed that D3 should pay the plaintiff costs on the issue of quantum *up to 11 Oct 2018* on plaintiff’s acceptance of the Payment on *that* date.

*Disposition*

1. Accordingly, I make the following orders on P’s Summons:

(1) The sanctioned payment in the sum of HK$50,000 paid by D3 into court on 3 Oct 2018 be forthwith paid out to the plaintiff through plaintiff’s solicitors, Messrs. So Lung & Associates, in satisfaction of the entirety or whole of plaintiff’s claim of bodily injuries against D3;

(2) Plaintiff costs of this action on the issue of quantum as against D3 up to and inclusive of 11 Oct 2018 be paid by D3 to the plaintiff, to be taxed if not agreed;

(3) D3 be recused from attending the rest of these proceedings, including adjourned checklist review hearing scheduled on 25 Jan 2019 and assessment of damages; and

(4) This order be drafted, filed and served by plaintiff’s solicitors on all other parties.

*Costs of P’s Summons*

1. On costs of P’s Summons, I make orders nisi as follows:

(1) As between plaintiff and D3, D3 do pay plaintiff the costs of and incidental to P’s Summons, including costs of the hearing on 7 Dec 2018, to be taxed if not agreed; and

(2) As between plaintiff and D1 and D2, there be no order as to costs of P’s Summons.

1. Any party or parties seeking to vary the above costs orders nisi shall apply in writing within 14 days, failing which they shall become absolute and effective.
2. Finally, I thank Mr Chan and Mr Ho for their assistance on the Question.

(LEE Siu-ho)

Master, District Court

Mr J. Chan of Messrs. So, Lung & Associates for the plaintiff

The 1st defendant is unrepresented and absent

The 2nd defendant is unrepresented and absent

Mr K. C. HO of Messrs. Leung & Lau, Solicitors LLP for the 3rd defendant

1. and reserved D3’s right to claim for costs against the plaintiff should the plaintiff fails to beat the said offer at the end of the day. [↑](#footnote-ref-1)