# DCPI 2197/2020

[2021] HKDC 718

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2197 OF 2020

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BETWEEN

YIP KAM CHUN Plaintiff

and

WELLGAIN INTERNATIONAL Defendant

INDUSTRIAL LIMITED

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

Date of Hearing: 7 June 2021

Date of Decision: 7 June 2021

Date of Reasons for Decision: 18 June 2021

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REASONS FOR DECISION

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*A. THE STRIKING OUT SUMMONS*

1. By summons dated 17 May 2021, the Defendant applied to strike out this personal injuries claim.
2. Before the hearing, the court received from the unrepresented Plaintiff a letter dated 28 May 2021 together with his submissions attached to the letter. In the letter, the Plaintiff stated that he was not in Hong Kong and asked to be allowed to be absent from the hearing.
3. The Plaintiff was absent at the hearing, which was only attended by Mr Cheng, counsel for the Defendant, and Ms Yuen for the Official Receiver. Ms Yuen’s attendance was due to the Defendant’s recent discovery of the bankruptcy order made against the Plaintiff on 19 September 2018.
4. As no application or request had been made by the Plaintiff to adjourn the hearing, I proceeded to hear the summons in the absence of the Plaintiff. At the end of the hearing, I made the following orders:-
5. The Plaintiff’s Statement of Claim be struck out and this action be dismissed for the reasons that:-
6. It was an abuse of the process of the court; and
7. No consent had been obtained from his trustee-in-bankruptcy to proceed with this action after the Plaintiff had become an undischarged bankrupt.
8. The trial of this action fixed for 27, 28 and 29 July 2021 be vacated;
9. The Plaintiff do pay the Defendant’s costs of this action, including the costs of the summons with certificate for counsel, on a party and party basis. The costs before 16 July 2020 be paid on the High Court scale, and thereafter on the District Court scale;
10. The costs payable by the Plaintiff be summarily assessed in lieu of taxation on 6 September 2021 at 2:30 pm; and
11. The Defendant do lodge and serve its Statement of Costs within 14 days. Within 28 days of being served with the Statement of Costs, the Plaintiff shall lodge and serve his objections to the Statement of Costs.

These are the reasons for my decision.

*B. THE GROUNDS FOR STRIKING OUT*

*B.1 Abuse of process*

1. The application to strike out arose from the judgment[[1]](#footnote-1) (“**Judgment**”) that this court handed down on 5 May 2021 in the related employees’ compensation claim involving identical parties, DCEC  1069/2017 (“**EC Action**”).
2. In the Judgment, I found (at §52) that the applicant met an accident at work when he fell from an office swivel chair on which he was sitting, and suffered personal injuries. I determined that the carpet upon which the chair was placed was in good condition and the chair had no malfunction. Hence, I concluded that the Defendant had unlikely contributed to or caused the accident, but found that the accident had likely been caused by the Plaintiff’s own carelessness[[2]](#footnote-2).
3. In this personal injuries action, the cause of action was, in the main, negligence. The Plaintiff’s pleaded case, according to the Statement of Claim, was based on his allegations that the floor mat was not in good repair, and that the chair was not in good working condition.
4. Since the parties in this action and the EC Action were identical, Mr Cheng submitted that the doctrine of issue estoppel should apply. As the issue of negligence relied on in this action had already been resolved by the Judgment, the Plaintiff would be estopped from re-litigating the same issue by way of the trial of this action: see *Wong Wang Sum v Lee Kam Engineering Co (a firm) & Anor* [1996] 3 HKC 627.
5. By the court’s finding in the Judgment that the Defendant was not negligent, it would, Mr Cheng submitted, rule out any prospect of a finding of negligence in this action. The Plaintiff’s claim is therefore doomed to fail.

*B.2 No consent was obtained from the Official Receiver*

1. After the trial of the EC Action was concluded, the Defendant conducted a bankruptcy search, and discovered that the Plaintiff was adjudged bankrupt on 19 September 2018. The writ of this action was issued in the High Court on 31 October 2018 after the Plaintiff was adjudged bankrupt. The Plaintiff’s former solicitors informed the Defendant’s solicitors that they had no knowledge that the Plaintiff was an undischarged bankrupt when they instituted this claim, and they further confirmed that this action was issued without the prior consent of the Official Receiver.
2. After the Official Receiver was informed by the Defendant’s solicitors of this action as well as the Judgment, the Official Receiver wrote to this court on 31 May 2021, confirming that the Official Receiver was still the trustee-in-bankruptcy of the Plaintiff’s estate. As the Plaintiff’s claim includes a property claim for loss of earnings, and not just a personal claim for general damages for pain, suffering and loss of amenities, it constitutes a hybrid claim rendering the whole cause of action of this action having been vested in the Official Receiver as trustee-in-bankruptcy: *Ord v Upton* [2000] Ch 352. That being the case, it is trite that the Plaintiff had no locus to proceed with this action unless the Official Receiver’s consent or her agreement to assign the right of action to the Plaintiff had been obtained.
3. It was the Official Receiver’s stance that this claim had no merits. Owing to the lack of funds in the Plaintiff’s bankruptcy estate to cover costs in the event that this action failed, the Official Receiver informed this court that she had decided not to adopt this action or give her consent or assign the right of action in this action to the Plaintiff.
4. At the hearing, Ms Yuen reiterated the Official Receiver’s above position, and supported the Defendant’s summons to strike out.

*C. DISCUSSION*

*C.1 The Official Receiver’s stance*

1. In view of the unequivocal stance of the Official Receiver stated above, I did not think that this action could be maintained: see the Court of Appeal decision in *陳鈺麟 v 謝婉明[[3]](#footnote-3)*. In his written submissions, the Plaintiff seemed to be totally oblivious to the Official Receiver’s stance, and made no submissions in relation to the unfavourable stance the Officer Receiver had taken. In the circumstances, without the consent of or the adoption of the action by the Official Receiver, this action would have to be dismissed.

*C.2 Issue Estoppel*

1. Issue estoppel “may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue”: see *Wong Wang Sum v Lee Kam Engineering Co (a firm) & Anor* [1996] 3 HKC 627 at 631 quoting the speech of Lord Keith of Kinkel in *Arnold v Nat West Bank plc* [1991] 2 AC 93 at 104.
2. In the Judgment, I have already determined the issues of causation, some of which are identical to the issues pleaded by the Plaintiff in this action: the issues of whether the Defendant was negligent, and whether the condition of the floor mat and the chair was defective and in need of repair. By the operation of the doctrine of issue estoppel, the Plaintiff in this action is therefore estopped from reopening the same decided issues again. The Plaintiff’s contention that it would be unfair to dismiss the action based on the Judgment without a full trial clearly does not constitute special circumstances precluding the operation of this estoppel doctrine.
3. I therefore concluded that it would constitute an abuse of process if this action were allowed to proceed to a trial of the already decided issues.

*C.3 Costs*

1. In his submissions, the Plaintiff asked this court to penalize the Defendant for the delay it had allegedly caused in this case by ordering it to pay his costs upon dismissal of this action. In his supplemental submissions, the Plaintiff seemed to have alternatively suggested that there be no order as to costs.
2. When a court strikes out an action, a defendant should normally have the costs of the action and the application. I see no reason for this court to depart from this usual costs order.
3. I reject the Plaintiff’s submissions, and do not accept that the Defendant had caused delay. On the other hand, I find that the Plaintiff seemed to have been the main culprit for the delay. The Plaintiff was all along privately represented from the time when the writ was issued in October 2018 until 30 October 2020 when the Plaintiff became unrepresented. During this 4-year period of litigation, I noted from the case file of this action that the Plaintiff had on more than one occasions failed to comply with the timetables imposed by the court. As a result, the Plaintiff had to obtain retrospective leave from the court for his late filing of documents (such as his Revised Statement of Damages) and, on another occasion, was ordered (on 29 June 2020) to make discovery by way of an unless order.
4. I therefore rejected the Plaintiff’s contentions, and considered that it was appropriate to order him to pay the Defendant’s costs of this action and the summons. Since this action was first commenced in the High Court, the Defendant should be entitled to the costs on the High Court scale before its transfer to the District Court.
5. For the purpose of saving costs and the expense of taxation, I further exercised my discretion by ordering summary assessment of the Defendant’s costs in lieu of taxation.

( Katina Levy )

District Judge

The plaintiff was not represented and did not appear

Mr Alfred Cheng, instructed by Hastings & Co, for the defendant

Ms Mabel Yuen, of the Official Receiver’s Office, for the Official Receiver

1. [2021] HKDC 503. [↑](#footnote-ref-1)
2. *Supra*, at §§63, 73, 76, 77 and 85. [↑](#footnote-ref-2)
3. [2018] HKCA 182. [↑](#footnote-ref-3)