# DCPI 3309/2020

[2021] HKDC 1416

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 3309 OF 2020

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BETWEEN

CHAN CHIU TUNG Plaintiff

and

CHENG KA FAI PHILIP 1st Defendant

TAM KA BO 2nd Defendant

(Discontinued)

CHINA PING AN INSURANCE 3rd Defendant

(HONG KONG) COMPANY LIMITED (Settled)

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 21 September 2021

Date of Decision: 19 November 2021

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DECISION

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*INTRODUCTION*

1. This is the application of the plaintiff for leave to appeal to the Court of Appeal from the judgment which I handed down on 13 August 2021 (“the Judgment”) and for a stay of execution of the Judgment.
2. Mr Kenny Lin (who did not appear at the trial), appearing together with Mr Law Ka Sing (who represented the plaintiff at the trial) in this application. They submit that leave to appeal ought to be granted to the plaintiff, together with a stay of execution of the Judgment either based on the ground that the appeal has a reasonable prospect of success (as per the draft grounds of appeal attached to the inter partes summons filed on 1 September 2021 (“the Summons”)) or that there are some other reasons in the interests of justice that the appeal should be heard by the Court of Appeal.

*DISCUSSION*

*Relevant principles for leave to appeal*

1. The law on this is trite and not controversial. Mr Lin has summarized them in the following terms which are not disputed by Mr Andy Lam who represents the 1st defendant in this application.
2. Pursuant to section 63A(2) of the District Court Ordinance, Cap 336 (“the DCO”), if the Court is satisfied that either (1) the appeal has a reasonable prospect of success, or that (2) there is some other reason in the interests of justice for an appeal to be heard, then leave should be granted.
3. In *SMSE v KL* [2009] 4 HKLRD 125 (CA), when considering an leave to appeal application (under section 14AA(4) of the High Court Ordinance, Cap 4 which bears identical wordings to the relevant section of the DCO), Le Pichon JA held at §17 that:-

“Reasonable prospects of success involves the notion that the prospects of succeeding must be ‘reasonable’ and therefore more than ‘fanciful’, ‘without having to be probable’. ”

1. The threshold for a reasonable prospect of success is less stringent than a real prospect of success as it only requires the appellant to show *“a more than just arguable case”* without demonstrating that *“the appeal will probably succeed”*: (see *Civil Procedure 2021 Vol 11*, *§E1/14AA/5*).
2. It is further submitted by Mr Lin that even if an intended appellant fails to demonstrate a reasonable prospect of success on the proposed grounds of appeal, the Court may also grant leave if there are some other reason(s) in the interests of justice to do so. These reasons can be a case in which the Court should examine in light of public interest or a case that raises *“an issue where the law requires clarifying”*. (see *Hong Kong Civil Procedure 2021* *Vol 11*, *§E1/14AA/6*).
3. I have no difficulty in accepting the above general principles as summarized by Mr Lin.

*Draft Grounds of the Appeal*

*Grounds 1, 2 and 3*

1. At §43 of the Judgment, I found *“there were two distinct and separate causes of action arising out of the same traffic accident in this case, namely, one for the personal injuries claim and one for the property damage claim”*. I further found at §45 of the Judgment that *“(A)s the property damage claim of HK$11,421 in this case falls within the exclusive jurisdiction of the Small Claims Tribunal, I find the District Court has no jurisdiction to hear the case: see section 5 of the Ordinance.”*
2. The plaintiff argues that the reason why his claim was reduced to HK$11,421 was because of the Consent Order made on 4 June 2021 whereby the plaintiff settled the personal injuries claim with the 3rd defendant for the sum of HK$1.9 million. Mr Lin says that there has not been any suggestion that the claim was not properly brought in the High Court at the commencement of the action (which was subsequently transferred to the District Court as a result of the increase of its jurisdiction).
3. The plaintiff submits that I had erred in law in reviewing the question whether the plaintiff’s claim was within the jurisdiction of the Small Claims Tribunal (“SCT”) long after the commencement of the action. This question should be determined at the commencement of the action but not subsequently. The court’s jurisdiction cannot be deprived by reason of the subsequent conduct of the parties. The cases of *Chow Wai Fun Amy v Mckeon, Brendan Hugh*, unreported, DCCJ 15684/2000 (28 February 2001) and *Hoi Cheng Pan v Headstart Educational Group Ltd*, unreported, DCCJ 4028/2006 (24 April 2007) were cited in support. However, I note that both cases did not involve a combined claim of personal injuries and property damage in a motor accident case as was in our present case.
4. I have no problem in accepting the general principle that the question of whether a claim is within the jurisdiction of the SCT should be determined at the commencement of the action in a general civil case. However, if I was right in relying on the rules found in *Brunsden v Humphrey* (1884) 14 QBD 141 (“*Brunsden*”), ie there were two distinct and separate causes of action arising out of the same traffic accident, then it must be questionable whether the plaintiff should have commenced or maintained the property damage part of his claim in the High Court or District Court as that part of the claim could only come under the jurisdiction of the SCT from day one of the case.
5. Thus, I consider that the crux of this proposed appeal lies in whether there is any room for argument that the rules in *Brunsden* should be applied in Hong Kong rather than whether the plaintiff was correct in commencing the entire action (including the property damage claim) in the District Court or not.
6. In any event, I am of the view that once a party finds itself in the position that the remaining claim falls within the exclusive jurisdiction of the SCT, they should have taken steps to discontinue the case in the District Court and pursue it in the SCT. It is in my view ludicrous for the plaintiff to insist the Court to deal with the matter in open court involving 2 teams of counsel and solicitors over 2 days for a meagre sum of HK$11,421 only. In my judgment, this is a complete waste of time and costs and judicial resources. It also cannot be said to have met the underlying objectives of the Civil Justice Reform.
7. Therefore, I do not consider that Grounds 1 to 3 are arguable and I would not grant leave for the plaintiff to appeal to the Court of Appeal based on those grounds.

*Grounds 4 and 5*

1. However, I think there may be some merits in these 2 grounds.
2. Mr Lin submits that I had erred in law in relying on *Brunsden* and holding that there were two distinct and separate causes of action arising out of the same traffic accident in this case, namely, one for the personal injuries claim and one for the property damage claim.
3. Mr Lin is correct to state that the decision in *Brunsden* was not followed in Canada, something which I was aware of and had pointed out in §39 of the Judgment. In particular, he states that *Brundsen* was not followed by the Supreme Court of Canada in *Cahoon v Franks* [1967] SCR 455 and the Court of Session of Scotland in *Smith v Sabre Insurance Company Ltd* [2013] SC 569. It was also doubted by the English Court of Appeal in *Talbot v Berkshire CC* [1993] 4 All ER 9. Unfortunately, none of the above judgments were cited to me at the trial by the plaintiff’s then counsel Mr Law.
4. In *Cahoon v Franks, supra,* it was held by the Supreme Court of Canada that the tort of negligence involves a breach by the defendant of a duty owed to the plaintiff resulting in damage to the plaintiff and there is only one cause of action notwithstanding that the plaintiff suffers both personal injuries and property damage. The decision in *Brunsden* was expressly disapproved by the Supreme Court of Canada in that case.
5. Mr Lin submits that in the modern law of negligence, one tortious occurrence resulting in the victim suffering two types of damage, gives rise to one cause of action only. In this case, Mr Lin submits that the plaintiff’s cause of action is the negligence of the 1st defendant which caused the plaintiff to suffer damage, and it cannot be split to be made the subject of several causes of action or separate proceedings in the District Court and in the SCT respectively. He further submits that it would fall foul of the principles of the doctrine of *Res Judicata* and the principle against multiplicity of actions that gives rise to wastage of resources and the risk of conflicting findings by different courts if the courts in Hong Kong were to adopt the rules in *Brunsden*.

*Reasons behind Cahoon v Franks*

1. The Supreme Court of Canada in *Cahoon v Franks* (which was a decision made in 1967) has expressly discussed the case of *Brunsden* in its judgment. In that case, the respondent submitted that “*Brunsden v Humphry, supra*, is no longer good law; that there is only one cause of action for a single wrongful or negligent act and damages resulting from the single tort must be assessed in the one proceeding; that the distinction between the old causes of action for injury to the person and damage to goods has been swept away.”
2. Hall J who gave the judgment of the Supreme Court, having cited a passage from Lord Coleridge CJ dissenting judgment at p 152 in *Brunsden*, went on to state the following which is of significance to our case:-

“It is important to bear in mind that it was the “forms of action” that were abolished by the Supreme Court of Judicature Act, 1873. To apply Brunsden v. Humphrey to the facts here would be to revive one of the very forms of action which that Act abolished. The cause of action or, to use the expression of Diplock, L.J., “the factual situation” which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff’s real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

Of the five judges involved in Brunsden v. Humphrey, three disagreed with the judgment we are considering and one of the two that supported it declared himself in doubt. Actually, the majority judicial opinion expressed in the case disagreed in the result and one other doubted. Such a conflict of reasoning cannot be accepted as making the principles of the decision persuasive to this Court as far as I am concerned.

To deny this plaintiff the opportunity to have a court adjudicate on the relief which he claims merely because it lacks ancient form would be to return to those evils of practice which led to judicial amendment and the ultimate legislative abolition of “forms of action”. As Lord Denning, M.R. said in Letang v. Cooper, [1965] 1 Q.B. 232 at p. 239:

“I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century Maitland said ‘the forms of action we have buried, but they still rule us from their graves’ (see Maitland, Forms of Action, 1909, p. 296), but we have in this century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin, in *United Australia Ltd. v. Barclays Bank Ltd*. [1941] A.C. 1, 29, told us what to do about them:

‘When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.’ ”

I make reference again to the abstracts quoted by Johnson, J.A. from the judgment of Lord Denning in Letang v. Cooper at p. 240, and the judgment of Diplock, L.J. in Fowler v. Lanning [1959] 1 Q.B. 426. “*The factual situation” which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. The single cause of action cannot be split to be made the subject of several causes of action.*” ” [emphasis added]

1. Despite the fact that we are not bound by the Canadian authority, I am of the view that *Cahoon v Franks* has provided some very powerful reasoning why the antiquated rules in *Brunsden* should not be followed in modern tort of negligence involving both a personal injuries and property damage claim in a motor traffic case.

*Reasons behind Smith v Sabre Insurance Co*

1. Equally, in Scotland, *Brunsden* was not followed in *Smith v Sabre Insurance Co.*
2. It is a case involved a similar situation as in our case where the reclaimer (the plaintiff) was suing the respondents (the insurers) in respect of his personal injury as well as damage to his vehicle arising out of a collision between his vehicle and that driven by the respondents’ driver. This decision handed down in 2013 by the Session Court in Scotland has also discussed the case of *Brunsden* extensively.
3. The reclaimer’s argument was that in the absence of an unambiguous statement to the contrary in the Scottish authorities, the court in Scotland should follow the decision of the majority in the English Court of Appeal in *Brunsden*.
4. Lord Bannatyne having set out the arguments on both sides in §§30–35 of the judgment went on to state the following of why he considered *Brunsden* should not be followed in Scotland:-

“*Brunsden v Humphrey and Scots law*

[37] At least for the present, we take *Brunsden v Humphrey* to be part of the law of England and also Northern Ireland, as providing a qualification of the general rule that the damages to which a claimant is entitled from the defendant in respect of a wrongful act must be recovered once and for all, the rationale being that personal injury and property damage involve the violation of two distinct rights and therefore give rise to separate causes of action (see, eg Winfield and Jolowicz, *Tort*, paras 22.2, 22.3; Salmond and Heuston, *Law of Torts*, pp 550, 551), Charlesworth and Percy, *Negligence*, para 4.27). We do not consider that *Brunsden* is or should be part of the law of Scotland.

[38] That *Brunsden* is not part of the law of Scotland would seem to follow from the fact that no Scottish case was cited to us in which it had been approved let alone followed. At least as far as counsel’s researches have revealed, the only discussion of *Brunsden* in Scotland has resulted in it being disapproved by Lord Maxwell as turning on certain distinctions in English law between actions for damages to goods and actions for personal injuries having their origin in certain (obsolete) forms of action and as being contrary to *Stevenson v Pontifex and Wood* (*Aberdeen Development Co v Mackie, Ramsay and Taylor*).

[39] *Were it open to us to follow Brunsden it appears to us that there are compelling reasons for us not to do so. We would begin by observing that for all that the underlying policy may be identical and that the Latin maxims employed are the same, this is an area of the law where the English approach is rather more complex than ours.* A number of different concepts are in play, not all of which are familiar to a Scots lawyer (see, eg *Ulster Bank Ltd v Fisher and Fisher*; Zuckerman, *Civil Procedure*, paras 24.48 *et seq*). Looking more particularly at *Brunsden*, there is at least a suspicion, shared by Lord Maxwell in *Aberdeen Development Co v Mackie, Ramsay and Taylor*, that for all he claimed to be proceeding ‘not upon any technical consideration of the identity of forms of actions, but upon matter of substance’ the distinction as between two separate causes of action (bodily injury, on the one hand, damage to goods, on the other) which Bowen LJ felt able to make depended upon a mindset shaped by procedures which even in 1884 were obsolete. *That Lord Coleridge in a trenchant dissent considered it ‘a subtlety not warranted by law’ not to allow a man to bring one action for damage to his arm and another for damage to his leg and yet to permit an action for damage to the coat-sleeve that contained the arm and the trousers that contained the leg in addition to an action for the bodily injuries, indicates that the view adopted by the majority in Brunsden was not an inevitable one.* That conclusion is underlined when we find Griffiths LJ in *Buckland v Palmer* expressing his difficulty in following the reasoning of the majority. In modern English legal usage,’ [a] cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person' (*Letang v Cooper*, Diplock LJ, p 243 (a judgment in which Diplock LJ warned against the pre-Judicature Act (36 & 37 Vict cap 66) forms of action ‘[ruling] us from their graves’)). McGregor (*Damages*, para 9.006) is clearly of the opinion that in a situation where one party has suffered damage as a result of the negligent act of another the preferable view is that one cause of action and only one cause of action arises, irrespective of whether two separate interests are injured. We do not recognise ‘cause of action’ as a distinct term of art in Scots law. The more usually encountered equivalent is ‘ground of action’ although that expression perhaps has no very precise meaning. Translating ‘cause of action’ then as ‘ground of action’ we would see a rule that one act of negligence causing damage gives rise to only one ground of action as being at least consistent with the idea that in Scots law delictual liability can be subsumed under the single general principle, *damnum injuria datum*, as opposed to an analysis in terms of a number of individual torts (as is suggested by the reference by Bowen LJ in his judgment to trespass to the person and trespass to goods) (see, eg Reid and Zimmermann, *A History of Private Law in Scotland*, vol II, pp 479, 517–523). Moreover, it avoids the difficulty of a rule that allows a separate cause of action or ground of action for each distinct interest or right that has been injured, of determining what exactly is meant by a distinct interest or right. The present case only concerns injury to the person and injury to one item of tangible moveable property and the discussion was understandably restricted to the interest in bodily integrity on the one hand and the interest in property on the other. That is the distinction made in *Brunsden* and advocated by senior counsel for the reclaimer. Senior counsel did not suggest that in the event that damage was sustained to a number of different goods or to a variety of other proprietorial interests that there was a separate ground of action in respect of each damaged article or each adversely affected right, although it was not entirely clear why not if, as he argued, damage to separate interests gave rise to separate rights of action. However, be that as it may, while no doubt most interests can be categorised either by reference to the right to bodily integrity or the right to property, it does not appear to us that all interests which might be damaged by a delictual act necessarily fall into one or the other ca tegory. Stair (*Inst* I, ix, 4) identifies four categories of interests which might suffer damage: life, members and health; liberty; fame, reputation and honour; and goods and possessions. A developing law of personality rights, including rights of confidentiality and privacy, might see Stair’s list being extended (see Whitty and Zimmermann, *Rights of Personality in Scots Law*; Reid, *Personality, Confidentiality and Privacy in Scots Law*). If, as would be suggested by *Brunsden*, a separate action may be brought in respect of each sort of interest which has been damaged, it is not inconceivable that one delictual act might give rise to a number of actions, but just how many might be difficult to determine. A one action rule offers simplicity and certainty. Following *Brunsden* does not.” [emphasis added]

1. I consider the above case also provides some plausible grounds to argue that the rules in *Brunsden* may be outdated and therefore should not be followed and applied in Hong Kong.

*Brunsden doubted by the English Court of Appeal*

1. Lastly, *Brunsden* was expressly questioned in the 1993 decision of the English Court of Appeal in *Talbot v Berkshire Country Council* [1994] 4 ALL ER 290, at 296 F-G, although without expressly overruling it.

*Application of Brunsden in Hong Kong*

1. Upon the Court’s request, Mr Lin has very helpfully provided a list and summary of cases in Hong Kong where the case of *Brunsden* was mentioned or discussed. They are:-
2. *Tang Kwan Yee v Luo Xing Wen* DCPI 352/2008 (2 July 2008);
3. *Mitchell v Lemm* (1909) 4 HKLR 213;
4. *The Chai Ley Company v The Fung Cheong Company And Yam Kee* (1913) 8 HKLR 84;
5. *So Cheung v Lau An* (1931-32) 25 HKLR 22;
6. *The Union Trading Company Limited v Chu Kwok* (1938) 30 HKLR 41;
7. *Union (V-Tex) Shirt Factory Limited v Union V-Tex Realty Limited* [1985] HKLR 152;
8. *Yung Hong Wai v Ng Kam Shing* [1994] 2 HKLR 153; and
9. *Chan Siu Lun v Hui Cho Yee* CACV 171/1999 (13 October 1999).
10. As mentioned by Mr Lin, none of the above local cases have expressly analyzed and discussed the correctness of the majority judgment of the English Court of Appeal in *Brunsden* and held that the two distinct and separate causes of action arising out of the same traffic accident, namely, one for the personal injury claim and one for the property damage claim.
11. Thus, I think this is another good reason why this point should be decided by the Court of Appeal in Hong Kong as such situation is not uncommon in motor claim cases involving both personal injury and property damage elements. I consider the profession as well as the motor insurance industry will be benefited by an authoritative pronouncement of the law by a higher court on this issue.
12. In the aforesaid premises, I will grant leave to the plaintiff on Ground 4 & 5 of the draft Notice of Appeal.

*Ground 6*

1. Under this proposed ground of appeal, the plaintiff tries to appeal against the costs order I made at the end of the Judgment.
2. Mr Lin correctly stated that the approach of the appellate court to an appeal as to costs is set out in *§62/2/11 Vol 1 Hong Kong Civil Procedure 2021*. The Court of Appeal will not interfere with the exercise of a judge’s discretion in the award of costs unless it was shown that he failed to exercise the discretion, or exercised it upon a false principle, or did not exercise it judicially or the exercise of discretion was demonstrably flawed.
3. Mr Lin submits that without prejudice to the aforesaid grounds of appeal, even if I was right to strike out the property damage claim, it is submitted that the decision to order the plaintiff to pay the entire costs of the 1st defendant in this action was plainly flawed for the following reasons:-
   1. The plaintiff’s claim (both the personal injury claim and the property damage claim) was properly brought against the 1st defendant in the High Court at the commencement of the action and was later transferred to the District Court by reason of its increase in jurisdiction;
   2. by virtue of the 1st defendant’s conviction of careless driving on his own plea of guilty on 2 January 2015 relating to the traffic accident in question, the plaintiff had a very strong case against the 1st defendant. By reason of the conviction, the 1st defendant shall be taken conclusively to have committed the offences, for the purpose of the present proceedings, unless the contrary be proved by him. This operates so as to shift the legal burden of proof that the 1st defendant is required to prove, on a balance of probability, that he was innocent: see S*tupple v Royal Insurance Co* [1971] 1 QB 50;
   3. as the personal injury claim was only settled by the 3rd defendant by way of the consent order, the plaintiff’s claim against the 1st defendant was properly carried on and maintained by the plaintiff at the very least before 4 June 2021;
   4. even if most of the plaintiff’s costs have been covered by the consent order, the plaintiff was seeking to make the 1st defendant liable to pay whatever costs he could not recover from the 3rd defendant as held by the me at §59 of the Judgment, and this would not have justified my order that the plaintiff pays to the 1st defendant his entire costs of the action;
   5. I should not have ordered the plaintiff to pay to the 1st defendant his entire costs of the action without investigating the merits of the plaintiff’s claim and when there was no basis for him to do so; and
   6. even I was right to strike out the property damage claim, I should have at most made no order as to costs between the plaintiff and the 1st defendant for the whole action or at least up to the making of the consent order.
4. With respect to Mr Lin, the costs order made at the end of the Judgment really hinges on whether my interpretation of the rules in *Brunsden* is correct or not. If I was correct to hold that there were two distinct and separate causes of action, the property damage claim should not have been brought under the same proceedings in the first place. Instead, it should have been commenced in the SCT. Thus, I see no basis to say that the exercise of my discretion on costs was wrong in principle or demonstrably flawed.

*Other Reason in the Interest of Justice*

1. I agree with Mr Lin that the correctness of the principles as set out in *Brunsden* are important legal questions having significant ramifications for future cases and it appears that these questions have not been authoritatively considered by the higher courts in Hong Kong. Under such circumstances, I agree these questions ought to be submitted to the Court of Appeal for determination.

*Stay of Execution*

1. The legal principles concerning a stay of execution pending appeal is succinctly summarized in *Toeca National Resources BV v Baron Capital Ltd* [2013] 5 HKLRD 178 (CA) by Cheung JA at §6:-

“……The existence of a strong appeal or a strong likelihood that the appeal would succeed, will usually by itself enable a stay to be granted because this would constitute a good reason for a stay……”

1. For the reasons set out above, I shall allow a stay of execution pending the determination of the intended appeal in this case.

*Conclusion*

1. For the reasons set out above, I shall grant leave to the plaintiff under Grounds 4 & 5 of the draft Notice of Appeal.
2. Costs of the Summons will be in the cause of the appeal with certificate for counsel.
3. I would like to thank the plaintiff’s counsel for their very helpful submissions in this case.

( Andrew SY Li )

District Judge

Mr Kenny Lin and Mr Law Ka Sing, instructed by B Mak & Co, for the plaintiff

Mr Andy Lam, instructed by Ivan Tang & Co, for the 1st defendant