# DCPI 3309/2020

[2021] HKDC 994

**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 Court

Date of Hearing: 23 June 2021

Date of Judgment: 13 August 2021

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JUDGMENT

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*BACKGROUND*

1. This is a claim by the plaintiff against the defendants arising out of a road traffic accident occurred on 30 June 2014 (“the Accident”) involving the motorcycle driven by the plaintiff (“the Motorcycle”) and the private car driven by the 1st defendant (“the Private Car”). Originally, the plaintiff’s claim was for both personal injuries to the plaintiff and the property damage to the Motorcycle.
2. The 2nd defendant was the registered owner of the Private Car. The plaintiff discontinued his claim against the 2nd defendant.
3. The 3rd defendant was the insurer of the 2nd defendant. It had joined as a party to the proceedings under the Order made by Master Roy Yu of the High Court on 24 May 2019.
4. The case was transferred to the District Court as a result of the increase of its jurisdiction in December 2018 pursuant to the Order made by Marlene Ng J on 17 September 2020.
5. Leave to set down for trial before a bilingual judge was granted by Master Louise Chan dated 23 March 2021 to allow the plaintiff to place the case on the running list not to be warned before 1 June 2021 with 3 days reserved.
6. Under a Consent Order dated 4 June 2021 (“the Consent Order”), the plaintiff settled the part of his claim for personal injuries (“the personal injuries claim”) with the 3rd defendant in the sum of HK$1.9 million which was inclusive of interest and costs (“the Settlement Sum”). The remaining part of the plaintiff’s claim, ie claim for the damage to the Motorcycle (“the property damage claim”) has not been settled. On the same day, the plaintiff’s solicitors and the 3rd defendant’s solicitors jointly wrote to the Court to confirm that the 3rd defendant would no longer going to attend the trial.
7. On the same day, the plaintiff’s solicitors made an “open offer” of HK$11,421 plus costs for the property damage claim to the 1st defendant.
8. Having not received any response from the 1st defendant, the plaintiff then proceeded with the property damage claim against him, despite the meagre sum of HK$11,421 was clearly not within the jurisdiction of the District Court.
9. The case was then placed on the running list by the Court to be warned for trial for the week commencing on 7 June 2021.
10. On 9 June 2021, the parties were informed by the listing office that the trial would take place on 23 June 2021 (with 24 & 25 June 2021 reserved) before me.

*DISCUSSION*

1. What has become clear to all parties concerned at the beginning of the trial is that the case revolves around the jurisdictional issue only as the remaining part of the plaintiff’s claim, ie the property damage claim, is for the sum of HK$11,421. Such sum would normally fall within the exclusive jurisdiction of the Small Clams Tribunal and should not be tried in the District Court. Thus, the central issue becomes whether the Court has jurisdiction to try the case when it involves that small sum only.

*The plaintiff’s submissions*

1. Mr Law Ka Sing for the plaintiff submits that this Court has jurisdiction to hear the property damage claim based on the following reasons stated in his opening submissions.
2. First, the plaintiff relies on §3 of the Consent Order which stipulates that:-

“Upon payment of the Settlement Sum [as defined in §1 of the Consent Order] and the Plaintiff’s agreed costs as aforesaid, the 3rd Defendant be fully and absolutely discharged from any or all further liability arising out of this action and the accident on 30 June 2014.”

1. The plaintiff submits that, as of the date of the trial, neither the settlement sum nor the costs had been paid to him through his solicitors. Hence, it is submitted that until and unless payment has been paid by the 3rd defendant, it is not absolved from its liability in relation to the personal injuries claim. Hence, according to the plaintiff, the personal injuries claim remains a viable claim and therefore the case is still within the jurisdiction of the District Court.
2. Secondly, Mr Law submits that the personal injuries claim and the property damage claim are different aspects of *one* *single* *claim*. He submits that there is only *one* cause of action involved, ie negligence. He further submits that there is no dispute that the claim was properly commenced in the High Court, before the increase of the jurisdictional limit of the District Court from HK$1 million to HK$3 million (in December 2018) and was properly transferred to the District Court after that date.
3. Mr Law further relies on section 8 of the Small Claims Tribunal Ordinance (Cap 338) (“the Ordinance”) which stipulates that no claim shall be split or divided and pursued in separate proceedings in the tribunal for the sole purpose of bringing the sum claimed in each of such proceedings within the jurisdiction of the tribunal.
4. The plaintiff also relies on the case of *Hui Kwun-sun v Chung Wing-cheung* [1979] HKLR 196 where the Court of Appeal held that two “claims” arising from the same transaction and contract were actually one single claim within the meaning of the Ordinance. It is therefore submitted on behalf of the plaintiff that, similarly, the personal injuries claim and the property damage claim in this case are *one* single claim arising from the same accident and same cause of action, which has not been ousted from this Court’s jurisdiction by virtue of section 5 and the Schedule to the Ordinance.
5. Thirdly, the plaintiff submits that, as a practical solution, this Court can hear the property damage claim in a manner similar to a split trial. As the personal injuries claim no longer needs to be heard given the settlement between the plaintiff and the 3rd defendant, the Court only needs to hear the property damage claim. Mr Law submits that, even if eventually the 3rd defendant does not pay in accordance with the Consent Order, there will be no prejudice to the 1st defendant in that the witnesses do not need to be recalled, nor the personal injuries claim needs to be re-heard, as in such a case, the plaintiff will have the “independent cause of action” to sue the 3rd defendant on the settlement agreement and/or the Consent Order.
6. Fourthly, the plaintiff submits that this Court has no jurisdiction to transfer an action to the Small Claims Tribunal under statute or under its inherent jurisdiction. Any action wrongly commenced in the District Court can only be struck out: See *Sit Ka Yee v Lai Wai Ho* (unreported, DCPI 271/2001, 29 October 2001) per HH Judge Carlson at §9. It is therefore submitted on behalf of the plaintiff that should the interpretation of the Ordinance be otherwise, it would produce an absurd and unfair result, depriving the plaintiff’s opportunity to have the property damage claim to be heard, especially when it was properly commenced in the first place.
7. Thus, based on the above, the plaintiff invites the Court to exercise its jurisdiction to hear the property damage claim, given the unusual situation that the plaintiff and the 3rd defendant only came into settlement terms when this case was already on warned list in the expectation of trial.

*The 1st defendant’s submissions*

1. Mr Andy Lam makes the following submissions on the jurisdictional issue on behalf of the 1st defendant.
2. The 3rd defendant, ie the insurer of the 1st defendant, has settled the personal injuries claim with the plaintiff in the sum of HK$1.9 million (which is *inclusive* of interest and costs) on 4 June 2021 under the Consent Order. The plaintiff then informed the Court that he would abandon his personal injuries claim against the 1st defendant but would continue to pursue his property damage claim in the sum of HK$11,421 against the 1st defendant.
3. Mr Lam submits that what has become clear was that the plaintiff was not really interested in going after the meagre sum of HK$11,421 (which represents the property damage to the Motorcycle) but the potential liability of the 1st defendant in paying part or whole of the plaintiff’s costs.

1. The 1st defendant’s stance is that this remaining part of the plaintiff’s claim has been legally misconceived and should be dismissed or struck out for the following reasons:-
2. The plaintiff’s claim against the 1st defendant has since the plaintiff’s settlement with the 3rd defendant has come within the exclusive jurisdiction of the Small Claims Tribunal and therefore the plaintiff’s claim should be dismissed. In particular, the 1st defendant relies on the following provisions and Schedule of the Ordinance:

“5. Jurisdiction of the Court

(1) The tribunal shall have jurisdiction to hear and determine the claims specified in the Schedule.

(2) Save as provided in this Ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any other court in Hong Kong.”

“Schedule

Jurisdiction of Tribunal

1. Any monetary claim founded in … tort where the amount claimed is not more than $75,000, whether on balance of account or otherwise…”
2. The 1st defendant questions the *bona fide* of the settlement of the personal injuries claim but deliberately left open the plaintiff to pursue an alleged property damage claim against the 1st defendant for HK$11,421 only.
3. Mr Law relies on the cases of *Jameson & Anor v Central Electricity Generating Board* [1999] 2 WLR 144; *Morris v Wentworth-Stanley* [1999] QB 1004 (English CA); *Heaton & Others v AXA Equity & Law Life Assurance Society PLC & Other* [2002] 2 UKHL 15 (House of Lords) to make good the point that the settlement/compromise reached between the plaintiff and the 3rd defendant should be in full and final satisfaction of the plaintiff’s claim in the present action.
4. Mr Law further submits that when the plaintiff and the 3rd defendant negotiated for the settlement, they should and ought to have settled the alleged property damage claim at the same time also.
5. He points out the alleged property damage claim in the sum of HK$11,421 is just at 0.6% of the Settlement Sum and there is no rationale or justification why the property damage claim could not be settled at the same time with the 3rd defendant on 4 June 2021.
6. By applying the *dicta* in *Heaton, supra,* the 1st defendant submits that the Court should take into account of the relatively large amount of the settlement sum in comparison to the insignificant amount deliberately and artificially left “unsettled”. No reason was offered to the 1st defendant as to why this tiny sum was not included in the Consent Order. Mr Law submits that on the true construction of the settlement between the plaintiff and the 3rd defendant stated in the Consent Order, the 3rd defendant had fully and satisfactorily paid for a full and final settlement of all of the plaintiff’s claim against all the defendants.

*Events which took place at the Trial*

1. At the commencement of the trial on 23 June 2021, the Court indicated to the parties that in its view this case principally involved with the jurisdictional issue only. Hence, the Court was going to hear the parties’ submissions on that matter as a preliminary issue and would make a ruling on it first. The Court would not go into the negligence issue at this stage.
2. The Court then questioned the legal basis of the plaintiff’s submission that there was only *one* single cause of action involved in this case, namely, negligence (according to the plaintiff). Mr Law was asked to provide the Court with any legal authorities which support that proposition.
3. When Mr Law was not able to do so (except by referring the Court to the sections contained in the Ordinance which were mentioned in his opening submissions), the Court provided the summary and copies of several authorities to him which clearly support the proposition to the contrary, ie that personal injuries claim and property damage claim are *two* separate causes of action in a traffic accident. The Court then adjourned the case for half an hour for him and his solicitors to study those materials.
4. When Mr Law and his team returned to the Court half an hour later, after having had the opportunity to study the above materials, he indicated to the Court that he would no longer going to pursue the proposition contained in his opening submissions which says there was only one single cause of action involved in this case.
5. He was specifically asked by the Court if, in light of the authorities provided to him, did he accept the proposition that there are in fact two separate causes of action in this case. Mr Law answered in the affirmative. In view of those authorities, he retracted the proposition contained in his opening submissions and conceded that there are in fact two separate causes of action involved in this case. He had no further submissions to make.
6. Mr Lam for the 1st defendant did not make any further submissions other than those which had already been contained in his written opening.
7. I reserved my judgment on the matter and at the same time gave the parties the opportunity to lodge a short supplemental submission on costs in the event that the Court should strike out / dismiss the plaintiff’s claim against the 1st defendant on the jurisdictional point.

*Findings of the Court*

1. The following are the summary and cases which the Court had provided to the plaintiff’s counsel and solicitors to study at the trial.
2. In *Brunsden v Humphrey* [1881-5] All ER 357; (1884) 14 QBD 141 (English Court of Appeal), the plaintiff sued the defendant for damage to his cab in a collision caused by the negligence of the defendant's servant and recovered damages. The plaintiff subsequently sued for personal injuries sustained in the same collision. The English Court of Appeal held by majority that the aforesaid claims for damages for property damage and for personal injuries constituted two distinct causes of action, so the earlier judgment was no bar to the subsequent action.
3. Bowen LJ in *Brunsden* held that according to the popular use of language the defendant’s servant had done only *one* act (ie driving a vehicle negligently), but in fact *two* separate kinds of injury were inflicted and *two* wrongs done. The mere negligent driving in itself if accompanied by no injury to the plaintiff or no injury to the cab was not actionable at all. Both causes of action might be said to be founded on one act of the defendant’s servant, but they were not on that account identical causes of action.
4. *Brunsden* was approved by Lord Pearce in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, but was not followed in the United States and Canada. Although Griffiths LJ in *Buckland v Palmer* [1984] 3 All ER 554, 559 confessed he always had difficulty in following the majority in *Brunsden*, he took “it to be settled by the decision of this court in [*Brunsden*] that if as a result of a car accident a plaintiff suffers both personal injury and damage to his car he has two distinct causes of action, one for his personal injuries and the other for damage to his property”.
5. *Davidson v North Down Quarries Limited* [1988] NI 214endorsed *Brunsden.* In that case, the plaintiff suffered personal injuries and damage to his motor car in an accident. Proceedings against the defendants in respect of the plaintiff’s personal injuries were settled without a hearing. Later, the plaintiff commenced proceedings against the defendants in respect of the car damage. It was held that both of the plaintiff’s claims, whilst arising from the same set of facts, gave rise to two causes of action and so there was no bar to the later action. In any event, the plaintiff’s first action was settled on a basis which excluded the claim for damage to the car.
6. Nicholson J reviewed the authorities and decided to follow *Brunsden* because he considered it was rightly decided. He observed there would obviously be cases where on the facts the causes of action completely overlapped, but he did not consider the causes of action merged. In his view, the existence or standard of duty owed might vary from case to case as between injury to person, injury to personal property and injury to real property. 
7. In my judgment, the plaintiff was wrong in thinking that there was only one single cause of action just because both the personal injuries claim and the property damage claim happen to base on the tort of negligence. With respect, the above authorities have clearly shown otherwise.
8. Based on the above authorities, I find that in fact 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.
9. In my view, this case can be distinguished from the situation in *Hui Kwun-sun, supra,* cited by the plaintiff’s counsel in his submissions where the Court of Appeal held the two “claims” made by the plaintiff arose from the same transaction in a property damage claim and therefore could be dealt with in the same case by the Small Claims Tribunal. In my judgment, as stated in *Brunsden*, the claim for personal injuries and claim for property damage are two separate causes of action which could arise out of the same traffic accident. It is different from the situation when they were two separate claims out of the same commercial transaction.
10. As 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.
11. Further, as stated in *Sit Ka-yee, supra,* the Court has no power or jurisdictions to transfer an action wrongly commenced or maintained in the District Court to the Small Claims Tribunal. Any action wrongly commenced or maintained in the District Court can only be struck out.
12. In my judgment, the above will be sufficient to dispose of the plaintiff’s claim against the 1st defendant in this case. However, I shall also briefly deal with the remaining submissions contained in the plaintiff’s submissions.
13. The plaintiff’s contention that eventhough he had signed the Consent Order with the 3rd defendant, he still had not received the Settlement Sum from the 3rd defendant as of the date of the trial. Thus, technically speaking, “until and unless” he has been paid by the 3rd defendant, the plaintiff can still maintain a “viable claim” against the 1st defendant.
14. With respect, that must be wrong. Once the Consent Order is signed, the plaintiff has “compromised” his claim against the 3rd defendant in the Settlement Sum. His claim or rights to sue will lie in the terms of the compromise. In the extremely unlikely event that the 3rd defendant would not pay up (which is the “insurer concerned” in the road accident case under the definition of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap 272), the plaintiff can sue it based on the agreement / compromise reached between the parties under the terms of the Consent Order. Thus, with respect, there is no basis to suggest that there is still a “viable claim” until and unless the 3rd defendant pays the Settlement Sum to the plaintiff.
15. Further, in my judgment, the plaintiff’s submission that the property damage claim could be dealt with in a manner similar to a “split trial” is also a misnomer. In my view, when the plaintiff was trying to settle the bulk of his claim with the 3rd defendant, he should have settled the property damage claim with the 1st defendant at the same time. If that very minor part of the claim cannot be settled, he should have withdrawn the claim in the District Court and pursue it as a separate cause of action, ie as the property damage claim, in the Small Claims Tribunal.
16. Mr Law is correct to submit that this Court has no jurisdiction to transfer the case to the Small Claims Tribunal. The only option opens for the Court is to strike out the claim: see *Sit Ka-yee, supra*. However, I do not agree with Mr Law’s submission that this would create an absurd and unfair result, and would deprive the plaintiff’s opportunity to have the property damage claim to be heard.
17. When the plaintiff was settling the case with the 3rd defendant, they should have taken this matter into account. As said, he could have separated the property damage claim and should have either commenced or maintained it in the Small Claims Tribunal. In my view, what he cannot do is to try to keep it or continue to run it in the District Court once it falls below its minimum jurisdiction.
18. Whether the plaintiff is still able to or should commence a separate action in the Small Claims Tribunal, it is a matter for the plaintiff and his legal advisers to decide. However, I note the comments of the learned editors of the leading text of *Bingham & Berryman on Personal Injury and Motor Claims Cases*, 15th edition at §§ [7.70] to [7.77] and the cases cited under the heading of *‘Res Judicata’* in those passages, including the case of *Brunsden, supra,* which I have cited above.
19. Based on the aforesaid, I will strike out the claim of the plaintiff against the 1st defendant at HK$11,421 accordingly.

*Costs of the 1st defendant*

1. In my view, the costs in this case should follow the event.
2. In striking out the plaintiff’s claim against the 1st defendant, the Court effectively is giving final judgment in favour of the 1st defendant.
3. In this case, I noted that the plaintiff’s settlement with the 3rd defendant at HK$1.9 million for the personal injuries claim (which was inclusive of interest and costs) was made on 4 June 2021, 19 days before the commencement of the trial. This is in the context of a claim of HK$3.5 million (exclusive of interest) made by the plaintiff under its amended re-revised statement of damages dated 19 June 2020 (with the plaintiff specifically waiving any award in excess of the District Court’s jurisdiction of HK$3 million). In settling his personal injuries claim with the 3rd defendant at HK$1.9 million (inclusive of interest and costs), the plaintiff (and his legal advisers) must have been satisfied that he would recover most, if not all, of his costs in this action from the 3rd defendant.
4. In my view, it is a cynical move on the part of the plaintiff to try to maintain the meagre sum of HK$11,421 against the 1st defendant after the settlement with the 3rd defendant.
5. As most of his costs would have been covered by the Settlement Sum, I am of the view that what the plaintiff trying to do was to obtain 2 sets of costs, ie one from the 3rd defendant and one from the 1st defendant in the same case. In my judgment, what the plaintiff and his solicitors really interested in was not about recovering the meagre sum of HK$11,421 as property damage from the 1st defendant but to make the 1st defendant liable to pay whatever costs he could not recover from the 3rd defendant.
6. Their intention is clearly demonstrated by the “open offer” made by the plaintiff on 4 June 2021. Despite what has been contained in §5 of the plaintiff’s opening submissions (which stated “the plaintiff’s solicitors made an open offer of $11,421 for the property damage claim”), I find that did not contain the complete picture and the statement was unfortunately a little bit misleading.
7. The “open offer’ actually consisted of the provision that the 1st defendant should pay the plaintiff HK$11,421 as property damage *plus* “costs of the action against the 1st defendant at the District Court scale up to 4 June 2021 and no order as to costs thereafter”. The plaintiff’s solicitors have enclosed their draft consent summons to the 1st defendant’s solicitors when putting forward the proposal for the settlement with the 1st defendant which contains the above costs provision. Hence, it is apparent what the plaintiff was really interested in was not the meagre sum of HK$11,421 as property damage claim but the 1st defendant’s liability to pay part of his costs in this PI action.
8. Thus, based on the above, I do not see why the plaintiff should not be liable for the costs of the 1st defendant since his claim against it has been struck out.
9. Further, I would reject the plaintiff’s submission that costs be reserved pending final determination of the proceedings in the Small Claims Tribunal in relation to the plaintiff’s property damage claim.
10. With respect, this has been totally misconceived.
11. First, the plaintiff does not say the issue on costs be reserved to whom. If it is proposed to be reserved to this Court, then it will contradict the principle of finality of judgment. If the plaintiff proposes to reserve it to the Small Claims Tribunal’s adjudicator, then it is again misconceived as the adjudicator simply does not have jurisdiction to determinate the issue on costs of this personal injuries claim in the District Court and formerly personal injuries claim in the High Court. In any event, it is not certain whether the plaintiff, who is not on legal aid, will commence his meagre claim of HK$11,421 against the 1st defendant or not at the Small Claims Tribunal at all.
12. With respect, the submission that the costs should be reserved to the Small Claims Tribunal’s adjudicator has no legal basis at all.
13. Based on the above discussions, I would order the plaintiff to pay the costs of the 1st defendant in this case, such costs to be taxed if not agreed on the High Court scale before the case was transferred to the District Court in September 2020 and thereafter at the District Court scale, with certificate for counsel.

( Andrew SY Li )

District Judge

Mr Law Ka Sing instructed by B. Mak & Co, for the plaintiff

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