**DCPI 1842/2007**

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 1842 OF 2007**

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BETWEEN

WONG SHING Plaintiff

and

LOI KAM CHEONG 1st Defendant

THE EMPLOYEES’ COMPENSATION

ASSISTANCE FUND BOARD 2nd Defendant

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

Coram: Deputy District Judge Frederick HF Chan (in Chambers open to public)

Date of hearing: 24th October 2008

Date of ruling: 24th October 2008

Date of handing down reasons for ruling: 27th October 2008

**REASONS FOR RULING**

1. On 7th October 2004 at about 6:00 p.m. (“*the Date of Accident*”), the Plaintiff (a form worker) suffered personal injuries in an industrial accident. Whilst working for the 1st Defendant, he unfortunately fell from a height of 8 feet to the ground (‘*the Accident*”).
2. Subsequently, it was revealed that the 1st Defendant had not taken out a valid insurance policy to cover the Accident suffered by the Plaintiff. The Plaintiff obtained legal aid and issued a writ of summons (together with a statement of claim and statement of damages) against the 1st Defendant to claim for damages in respect of his personal injuries on 5th September 2007.
3. The Plaintiff’s solicitors duly alerted and notified the Employees’ Compensation Assistance Fund Board (“*the ECAF Board*”) of the present personal injury proceedings under the **Employees’ Compensation Assistance Fund Ordinance** (Cap. 365) and negotiations were undertaken by the Plaintiff and the ECAF Board on liability and quantum of damages.
4. The 1st Defendant failed to file the notice of intention to defend and on 15th April 2008, an interlocutory judgment with damages to be assessed plus costs was entered against the 1st Defendant by District Master K. Lo (“*the Interlocutory Judgment*”). According to the learned editors of the *Halsbury’s Laws of England* (4th Edition, Reissue), Volume 37, the Interlocutory Judgment has this legal effect:

“1224. **Conclusiveness of judgments**.

Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences”[[1]](#footnote-1).

1. Finally, the negotiations between the Plaintiff and the ECAF Board came to fruition and culminated into a consent order made by District Court Master K. Lo (“*the Consent Order*”) on 9th October 2008 whereby it was ordered that:
2. The ECAF Board be joined as the 2nd Defendant;
3. Upon the joinder of the ECAF Board as the 2nd Defendant, all further proceedings be stayed upon the terms of settlement (attached thereof as the Schedule) (“***the Settlement Terms***”).
4. The Settlement Terms embraced the following terms:
5. The ECAF Board (as the 2nd Defendant) shall pay a total sum of HK$824,500.92[[2]](#footnote-2) to the Plaintiff;
6. The ECAF Board shall make the payment of the net sum of HK$520,000 to the Director of Legal Aid within 21 days of the Consent Order;
7. Upon receipt of the net sum of HK$520,000 by the Director of Legal Aid:

“… the 1st and 2nd Defendants shall be fully discharged from all further liabilities, if any in respect of the Plaintiff’s claim in the action herein”.

1. On 10th October 2008, the Plaintiff issued an *inter parte* summons for leave of the Court to “discontinue this action against the 1st Defendant” (“*the Discontinuance Summons*”) pursuant to Order 21, rule 3, **Rules of the District Court** (Cap. 336, subsidiary legislation) (“*RDC*”) which stipulated that:

“(1) … a party may not discontinue an action … begun by writ … without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action … to be discontinued … against any party … against whom it is brought or made on such terms as to costs, the bringing of subsequent action or otherwise as it thinks just”.

1. The Plaintiff has duly served the Discontinuance Summons on the 1st Defendant given that the Consent Order provided that:

“… all further proceedings in this action between the Plaintiff and the [*ECAF*] Board be stayed”.

1. Patently, O. 21 r. 3 RDC provides the Court with an unfettered discretion on whether to allow a party to discontinue an action (whether in part or as a whole) against one or all of the other parties and to make other consequential orders (including orders on costs). A concise summary of the proper exercise of the Court’s discretion was provided by Graham J. in **Covell Matthews & Partners v. French Wools Ltd.** [1977] 1 WLR 877, 879E-F, where he stated:

“The principles to be culled from these cases are, in my judgment, that the court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved”[[3]](#footnote-3).

1. In the circumstances of the present case, the question which arises is thus:

“Is it just for the Court to grant the Discontinuance Summons to the Plaintiff?”

1. After carefully considering the circumstances of the present case, I would hold that the answer is *yes* for the following reasons:
2. The Plaintiff has indeed compromised *all* of his causes of action in the present personal injury action with *both* the 1st and 2nd Defendants under the Consent Order;
3. It is therefore crystal clear that, as matters stand, there is no *dominus litis* in the present personal injury action as between the Plaintiff and the 1st Defendant;
4. In law and fact, the Plaintiff could *not* proceed with the assessment of damages under the Interlocutory Judgment in view of the fact that the Consent Order (which has been fully complied with by the Plaintiff and the 2nd Defendant) constitutes an accord and satisfaction of all of the Plaintiff’s causes of action against the 1st Defendant;
5. To grant leave to discontinue the present personal injury proceedings would not deprive the 1st Defendant of any advantages.
6. In the premises, at the hearing on 24th October 2008, I granted the relief sought in the Discontinuance Summons to the Plaintiff and ordered that:
7. Leave be granted to the Plaintiff to discontinue the present DCPI 1842/2007;
8. Without the Court’s leave, the Plaintiff shall not make any application to assess damages and costs under the Interlocutory Judgment;
9. There shall be no order as to the costs of the Discontinuance Summons;
10. The Plaintiff’s own costs in respect of the Discontinuance Summons (including the hearing on 24th October 2008) shall be taxed in accordance with the **Legal Aid Regulations**.

Frederick HF Chan

Deputy District Court Judge

Representation:

Ms. Dao Yeung Yeung of Messrs. Cheung Yeung & Co., solicitors for the Plaintiff;

The 1st Defendant was absent.

1. This passage which appeared earlier in the Halsbury’s Laws of England (3rd Edition), volume 22, paragraph 1660, was endorsed by the New Brunswick Court of Appeal in **Brunswick Construction Ltée v. Michaud**, (1977) 17 NBR (2d) 86 (Westlaw Transcript). [↑](#footnote-ref-1)
2. The Plaintiff shall give credit to the sum of HK$304,500.92 of employees’ compensation received by the Plaintiff from the 2nd Defendant under DCEC515/2006. [↑](#footnote-ref-2)
3. The English Court of Appeal upheld Graham J’s decision (see: [1978] 1 WLR 1477). [↑](#footnote-ref-3)