



Chapter 3

Cases of Public Interest or Concern

HKSAR v. Lam See Chung Stephen

[2022] 5 HKLRD 118; CACC 225 / 2020, CACC 5 & 9 / 2021 (heard together)

In this appeal against sentence, the Court of Appeal dealt with the question whether the District Court has power, and if so, the manner to impose sentences on a convicted defendant exceeding the District Court's jurisdictional limit of 7 years, where the defendant is sentenced by the same District Court Judge in separate cases.

The appellant, whom the Court of Appeal described as "an unrepentant recidivist- with a long list of convictions for offences involving fraud and dishonesty", was brought to the District Court in three separate cases, each involving multiple counts of fraud and related offences. The three cases were heard together on plea day where the Appellant indicated a guilty plea to all charges in each of the three cases. The prosecution requested that the three cases be heard by the same judge but at different times in order to address the jurisdictional limit of the District Court of 7 years' imprisonment. The prosecution's application was granted despite objection from the defence.

At the hearing of the first case, the defence renewed its application for the three cases to be heard at the same time but it was refused. The Appellant was dealt with by the same judge in three separate hearings, where sentences were imposed on him in respect of each one, taking into account the totality principle and the sentence which had been passed in the previous case.

Eventually, on his own plea, the Appellant was convicted of a total of 47 charges by the same District Court Judge in three separate hearings. He was given a total sentence of 7 years and 3 months' imprisonment.

With the assistance of legal aid, the Appellant appealed against his sentences to the Court of Appeal. Two grounds of appeal were advanced by the Appellant. Firstly, the Appellant argued that the resultant sentence exceeded the District Court's jurisdictional limit by 3 months. It was complained that the prosecution had deliberately and unfairly broken up the case into three separate cases as a means of achieving a sentence that exceeded the jurisdictional limit of the District Court.

The second ground was in relation to the complaint that the Judge had failed to give a meaningful discount of the sentence for the Appellant's guilty pleas, bearing in mind the jurisdictional limit of the District Court, rendering the total sentence a manifestly excessive one.

The Court of Appeal noted that on a proper construction of section 82 of the District Court Ordinance (Cap.336), it was permissible for the District Court to impose and direct a sentence to commence at the expiration of a term of imprisonment that an accused was already serving, even if the aggregate period of imprisonment that was imposed on two occasions amounted to a term greater than the District Court's jurisdictional limit of 7 years.

The proviso under s.82(2)(a), as constructed by the Court of Appeal upon considering various case authorities, means that the aggregate of sentence may not exceed 7 years, if the accused is sentenced to consecutive sentences on the same occasion; and that the proviso does not however apply to consecutive sentences imposed on separate occasions.

The Court of Appeal found that in the circumstances of the present case, the Judge was dealing with three separate charge sheets and the Judge sentenced the Appellant separately on each of the charge sheets. In this sense, the sentence imposed in respect of each charge sheet was a separate occasion from the other but not on the same occasion. It follows that there was indeed no need to have the three cases separately dealt with at different times.

It was held that when an accused is dealt with by the same judge on separate charge sheets which are dealt with separately from each other, it will not be on the same occasion unless they have been consolidated or agreed to be heard together.

With respect to the Appellant's complaint that he was deprived of a meaningful discount for his guilty pleas, as the starting points and the ultimate sentences imposed in each of the three cases did not exceed the jurisdictional limit of the District Court, the Court of Appeal found that the issue did not arise and this ground was thus rejected.

The appeal was accordingly dismissed.

Employees Compensation Assistance Fund Board v. Fong Chak Kwan (FACV 5/2022)

Not only grassroots can enjoy the benefit of legal aid, assistance may also be extended to the middle-class, regardless of whether they may be working in Hong Kong or employed by a foreign company.

The Plaintiff was a Hong Kong permanent resident and a site service specialist working in a PRC sewage treatment plant. He was employed by, inter alia, the 2nd Defendant, a company incorporated in the United States (“D2”). He suffered serious personal injuries whilst working there, but returned to Hong Kong to receive extensive medical treatment. He commenced proceedings in Hong Kong against the Defendants to claim damages for negligence. Interlocutory default judgment was subsequently entered against D2. The Employees’ Compensation Assistance Fund Board (“the Fund Board”), a statutory body established to provide a last resort for the protection of the entitlements of injured workers or eligible family members of deceased employees, intervened and applied to set aside the order granting leave to the Plaintiff to serve the Writ on D2 as well as the interlocutory judgment.

Under the Employees Compensation Assistance Ordinance (Cap. 365), the Fund Board may be liable to make relief payment to an eligible applicant who is an employee injured at work and fails to receive common law damages for which the employer is liable after exhausting all legal and financially viable means of recovery from the employer or its insurer. Given the difficulty in enforcing the potential judgment overseas against a foreign defendant, the Fund Board may have a high risk to be liable for payment, hence its solicitors took measures to protect the Fund Board’s interests. The measure they took was to attempt to bar the Plaintiff’s claim by challenging the leave granted by the Court to the Plaintiff to serve the writ overseas on D2 in the United States under, *inter alia*, Order 11, rule 1(1)(f) of the Rules of the High Court (“RHC”) which establishes a jurisdictional gateway (“Gateway F”).

Gateway F allows the writ to be served on a defendant situated outside Hong Kong and the Hong Kong court to assume jurisdiction if the claim is founded on a tort and “*the damage was sustained within the jurisdiction*”. In essence, the Fund Board’s solicitors attempted to argue that the damage was not sustained in the jurisdiction.

With the assistance of legal aid, the Plaintiff successfully opposed the Fund Board's application and appeal all the way up to the Court of Final Appeal. The Court of Final Appeal was also able to utilize the case to clarify the applicability of the split decisions of the United Kingdom ("UK") Supreme Court in *Brownlie v Four Seasons Holdings Inc* ("*Brownlie I*") and *Brownlie v FS Cairo (Nile Plaza) LLC* ("*Brownlie II*") and enabled further developments in Hong Kong law as to the jurisdictional test for service-out. As a result, Plaintiffs (whether legally aided or not) in similar situations may find themselves in a better position to commence proceedings against foreign defendants in the future.

Proceedings below

The Court of First Instance held that "*the damage sustained*" under Gateway F includes indirect or consequential damage ("*wide interpretation*"), such as the medical expenditure and the pain, suffering and loss of amenities suffered by the Plaintiff in Hong Kong. In so doing, the judge preferred the majority view in *Brownlie I* over the minority view, which is that the phrase is limited to direct damage only ("*narrow interpretation*"). The Court of Appeal upheld the Court of First Instance's decision on this issue. The Fund Board obtained leave to appeal to the Court of Final Appeal.

Wide interpretation endorsed

The Court of Final Appeal endorsed the wide interpretation of the majority in both *Brownlie I* and *Brownlie II*. Drawing support from overseas and local authorities, the wide interpretation is founded on the "*natural and ordinary*" meaning of the word "*damage*" in the context of the tort gateway as viewed against its purpose, namely "*the actionable harm caused by the tortious act, including all the bodily and consequential financial effects which the claimant suffers*". That means no distinction between direct and indirect damage needs to be drawn when considering whether Gateway F has been satisfied. Hence, where the plaintiff is able to show a good arguable case that some significant "*actionable harm caused by the tortious act*" had been sustained by him in the jurisdiction (such as the incurrence of substantial medical expenditure consequent on personal injuries suffered abroad), he would be able to show that "*the damage*" had been sustained within the jurisdiction.

As to the Fund Board's argument that the wide interpretation might encourage forum-shopping or permit claims founded on only a tenuous amount of damage sustained in the jurisdiction, the Court confirmed that the discretionary *forum conveniens* factors will play a guard-dog role in mitigating any excesses that may result from the wide interpretation of Gateway F. Thus, it is now established that before the court will give permission to serve proceedings out of the jurisdiction, not only must a claim pass through one of the gateways, it must also be shown that Hong Kong is the *forum conveniens*.

Thirdly, it is also established that the claim must also fall within the "*spirit of the rule*" by virtue of Order 11, rule 4(2) of the RHC, which provides that no leave to service out shall be granted "*unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order*". This principle is nowhere mentioned in both *Brownlie I* and *Brownlie II* but the Court explained it may be due to the assumption that the same have become obsolete following the replacement of Order 11, rule 4 of the UK Rules of the Supreme Court by the requirement in UK Civil Procedure Rules r. 6.37(3). However, the Court considered the same should remain part of Hong Kong law, and is irrespective of the *forum conveniens* factors.

Summary

In summary, the wide interpretation as to whether "the damage" had been sustained within the jurisdiction, as adopted by the majority of the UK Supreme Court in *Brownlie I* and *Brownlie II*, was held by the Court of Final Appeal to be good law in Hong Kong. "*The damage sustained*" under Gateway F includes indirect or consequential damage. In the event that the Court considers that Hong Kong is not the *forum conveniens* or the case is outside the *spirit of the rule* of Order 11, rule 4(2) RHC, the Court can exercise its discretion to refuse or set aside leave to serve out the jurisdiction. In this case, upon the adoption of the wide interpretation, the Plaintiff succeeded on the Gateway F issue.

Disposition

The Fund Board's appeal was thus dismissed unanimously.