## DCPI 136 /2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 136 OF 2009

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##### BETWEEN

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| CHEUNG WAN HUNG | Plaintiff |
| And |  |
| FAI WONG CONSTRUCTION (ASIA) LIMITED | Defendant |

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Coram: District Judge S. T. Poon in Chambers

Date of Hearing: 13th January 2010

Date of Handing Down Judgment: 12th March 2010

D E C I S I O N

1. This is an application by the Defendant to re-amend the Amended Defence seeking to withdraw an admission made therein.
2. It is alleged in the Plaintiff’s Statement of Claim that he suffered personal injuries when worked in the employment of the Defendant. In the Defence and also the Amended Defence, the Defendant made express admission to the employment relationship. The Defendant now says that the employer was someone else and the Defendant was only the principal contractor.
3. In this action, the Plaintiff sues the Defendant for negligence, breach of expressed/implied terms of contract of employment and breach of statutory duties. The Plaintiff’s case is that he sprained his back when doing chiselling work on a substandard working platform.
4. In the affirmation filed on behalf of the Defendant by its director, he explained that he permitted the clerk of the Defendant to fill in the Defendant’s name as the employer on the Form 2[[1]](#footnote-1) to the Labour Department for “administrative convenience”. He described the admissions to the employment relationship in the Amended Defence as “clerical errors” and “he overlooked and failed to pay attention to them”.
5. Ms. Yuen, solicitor for the Defendant, deposed that the Amended Defence was prepared on the basis of the information in the Form 2. Upon the discovery of the incorrect information in it, the Defendant put in the witness statements the explanation of the mistake and took out the present summons for re-amendments.
6. It would be of assistance to set out the chronology of some events to have a better understanding of the backgrounds:

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|  | Date |
| Alleged accident | 20th April 2007 |
| Form 2 | 10th May 2007 |
| Statement of Claim | 19th January 2009 |
| Defence | 30th March 2009 |
| Amended Defence | 30th June 2009 |
| Witness Statement explaining the mistake | 14th August 2009 |
| Summons for re-amendment | 12th October 2009 |

1. The adjourned Checklist Review Hearing was heard on 16th October 2009 where Master K. Lo gave directions for parties to obtain a supplemental joint expert report from the orthopaedic experts.
2. Understandably, the Plaintiff objects to the Defendant’s application. Mr. Cheung, counsel for the Plaintiff, asked this Court to take into account the underlying objectives under Order 1A of the Rules of the District Court (“RDC”) in exercising its discretion whether to allow the re-amendments.
3. In his submission, Mr. Cheung invited this Court to borrow the principles set out in practice note 14.1.8 of the Civil Procedure 2009, Volume 1, on withdrawal of an admission made under Part 14 of the English CPR, for consideration of the present application.
4. Part 14 of the CPR provides a procedure for a party to make admissions, before or after commencement of proceedings. This part has not been fully adopted in the Civil Justice Reform in Hong Kong but a similar procedure for making admissions after commencement of proceedings is available here under Order 13A. It is specifically provided under the English rules that the permission of the court is required to amend or withdraw an admission. Similarly, Order 13A, rule 2(3) provides that “[t]he Court may allow a party to amend or withdraw an admission if the Court considers it just to do so having regard to all the circumstances of the case”.
5. The principles in practice note 14.1.8 were extracted from the decision of Summer J. in *Braybrook v Basildon & Thurrock University NHS Trust*, October 7, 2004 (Lawtel):

“1. In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective.

2. Amongst the matters to be considered will be:

(a) the reasons and justification for the application which must be made in good faith;

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospects of success of any issue arising from the withdrawal of an admission;

(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

3. The nearer any application is to a final hearing the less chance of success it will have even if the party making the admission can establish clear prejudice. This may be decisive if the application is shortly before the hearing.”

1. The present application is made under Order 20 of the RDC for re-amendment of a pleading. There is no specific rule under Order 20 concerning amendments to the effect of withdrawal of an admission. The existing principles seem to be that an admission made inadvertently may be withdrawn, and the pleading amended accordingly. However, an amendment sought to withdraw an admission will not be allowed if the application is not made in good faith. See *20/8/17, HKCP 2010*.
2. In *Li Fat Mui v. Able Engineering Co. Ltd.* [1998] 1 H.K.C. 469, Seagroatt J. has before him an application similar to the present one. In that case, the second defendants applied to re-amend the Defence to withdraw the admission that they employed the plaintiff at the material times and alleged that the plaintiff was in fact employed by another company. Equally, the name of the second defendants has been filled in as the employer in the Form 2 and the second defendants alleged that it was a mistake. The learned Judge was satisfied that on a balancing exercise the prejudice to the plaintiff far outweighs the prejudice to the defendants in that there will be an issue of limitation if the plaintiff is to join the alleged true employer as a defendant whereas the defendants can seek indemnity from the alleged true employer if they wish. The application for re-amendment of the Defence was refused.
3. The cases referred to in paragraph 20/8/17, HKCP 2010 (including *Li Fat Mui*) were all decided before the CJR. As a matter of course, those principles relating to Part 14 of the CPR should not have been considered in those cases. Nevertheless, as illustrated by *Li Fat Mui*, the approach taken by the Court in those cases pre-CJR is in line with the principles as applied by the English Court on withdrawal of Part 14 admissions.
4. Although an application for withdrawal under Order 13A, rule 2(3) is a distinct procedure from an application under Order 20, rule 5 for amendment of pleadings, if the application for amendment involves the withdrawal of a material admission, I see no reason why the same principles should not be applied in considering both kind of applications.
5. I am of the view that the approach of the English Court, as set out under paragraph 11 above, is also the proper approach for this Court to follow in considering whether to allow an application for amendment under Order 20 for withdrawal of a material admission.
6. The alleged accident happened on 20 April 2007. It is now nearly 3 years from the accident and parties are only one step before trial. Witness statements are exchanged and experts’ evidence is ready. The action can be set down for trial at anytime.
7. To allow the re-amendments means that the Plaintiff will have to consider whether to join the alleged true employer as a defendant in order to protect his interests. A substantial delay will inevitably be resulted. New rounds of pleadings and new witness statements will have to be filed. The prejudice to the Plaintiff is obvious.
8. On the face of it, if this application is not to be allowed, the Defendant will suffer prejudice in that an otherwise valid defence of it cannot be pursued. However, as indicated by Ms. Yuen, the insurance company has taken over the present proceedings and as the relevant policy covers also the workers of the sub-contractors of the Defendant, in the end the insurance company is the one who pays if damages are awarded, be it against the Defendant or any other direct employer. In reality, any prejudice that may be resulted will be to the insurance company rather than the Defendant. At the hearing, Ms. Yuen was only able to suggest that the insurance company may suffer prejudice for not being able to bring contribution/indemnity proceedings against the alleged true employer in this action. On this point, if the Defendant is found liable to the Plaintiff in this action and the insurance company paid the damages awarded, there will be nothing to stop the Defendant or the insurance company to then sue the alleged true employer for contributions/indemnity if they are entitled to it under the law.
9. On balance, the prejudice to the plaintiff outweighs the prejudice to the Defendant and the insurance company.
10. The reason provided by the Defendant for filling in the Form 2 incorrectly is that it was for “administrative convenience”. There has been no elaboration in the Defendant’s evidence as to what the so-called “administrative convenience” means. Clear enough is that the Defendant is not saying that its name was filled in by its staff inadvertently or by mistake. There was a purpose behind to fill in its name as the employer but the Defendant did not see fit to disclose it in its evidence. When questioned by this Court, Ms. Yuen sought to introduce an explanation from the Bar table that the purpose was relating to insurance. I am not prepared to consider such explanation as it is not evidence before the Court.
11. If the decision to fill in its name as the employer on the Form 2 was a deliberate one, it would be difficult to understand why the Defendant would “overlook and fail to pay attention to this” when reading the Defence, bearing in mind that the Defence has been verified by a statement of truth of its director. Furthermore, in the Defence the Defendant did not merely admit the employment with the Plaintiff. It even made a positive case against the Plaintiff for breaching the contract of employment.
12. The explanation provided by the Defendant for the so-called mistake is far from satisfactory. In any case, the Defendant itself was the author of it.
13. Ms. Yuen relied heavily on the “Notification of the Accident” filed by the Plaintiff with the Labour Department where the Plaintiff filled in the Defendant’s name as the principal contractor but left blank the name of the employer to suggest that the Plaintiff must have known that the Defendant was not the employer. With respect, it is not uncommon in the construction industry that a worker has no knowledge as to the identity of his actual employer. On the other hand, the principal contractor can easily be identified and there is no basis to assume that a principal contractor cannot be at the same time a direct employer.
14. There is certainly some evidence before me suggesting that someone else was the direct employer rather than the Defendant. The evidence is in my view not without force. However, the prospect of success is but one of the factors to be considered together with many others in the circumstances.
15. Applying the principles mentioned in paragraph 11 herein, the Defendant’s application to re-amend the Defence is refused.
16. As there will be no issue on the identity of the direct employer at trial, the Defendant’s summons to file the witness statement of Yip Sai Man is dismissed.
17. There will be an order nisi that costs of both summonses be to the Plaintiff with certificate for counsel for the summons to re-amend the Defence. This order nisi will become absolute upon the expiry of 14 days from the date of this Decision.
18. The Plaintiff is to file and serve the statement of cost for summary assessment within 7 days thereafter. A hearing for summary assessment of costs shall be fixed, if necessary, upon the filing of the statement of costs.

signed

(S. T. Poon)

District Judge

Mr. Anthony Cheung instructed by Messrs Pang, Wan & Choi for the Plaintiff.

Ms. Yuen Siu Chi of Messrs Paul C. K. Tang & Co. for the Defendant.

1. Notice under Section 15 of Employees’ Compensation Ordinance Cap.282. [↑](#footnote-ref-1)