DCPI611/2006

# IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 611 OF 2006

BETWEEN

TSOI WA LUNG Plaintiff

and

LAM HON WAI 1st Defendant

SAM FOON ENGINEERING 2nd Defendant

COMPANY LIMITED

(三丰工程有限公司)

Coram: Deputy District Judge W.C. Li in Chambers (Open to public)

Date of Hearing: 24 August 2006

Date of Decision: 24 August 2006

D E C I S I O N

1. I have heard counsel for both plaintiff and the 1st and 2nd defendants. The plaintiff initially brought action against D1 and D2. In the defence filed, the 2nd defendant denied being the plaintiff’s employer and relied on particulars which they listed in paragraphs 2(a) to (d) of the defence. In their particulars, the names of parties were disclosed and the parties disclosed are now the intended D3 to D5 sought by the plaintiff to be added as defendants in this action. I also noted that the limitation period is due shortly.
2. D3 to D5, as well as D2, could well be the plaintiff’s employer and they might be equally liable for liability in one way or another, not necessarily just being a direct employer, they could be statutorily liable as well: occupier’s liability, for instance, or under the Employment Ordinance; there are various liabilities, not necessarily just be employers alone.
3. The other reason I have considered is the locus standi of the 1st and 2nd defendants to bring in this opposition. I can see no locus standi on their part to oppose the plaintiff bringing in further defendants. In fact, I fail to see that they have any right to dictate to the plaintiff who to sue or who not to sue, especially it was they, the defendants, who brought in D3 to D5 or brought D3 to D5 to light in their particulars for denying D2 being the employer, and now oppose D3 and D4 to be brought in as parties to the action.
4. The general rule is that the plaintiff has the right to decide who to proceed or who not to proceed and at this early stage it is very dangerous for the court to make any interference, and this is so especially when the limitation period is due very shortly. So this court has no intention at all to interfere with the plaintiff’s right in deciding who should be brought in as defendants.
5. Defence ground for opposing the plaintiff’s application in the inter partes summons is that the adding of defendants had no merits, no grounds, no justification and no necessity. I do not think they have really substantiated their claim but, on the other hand, the plaintiff, in the affirmation of his solicitors, Mr K.Y. Woo, has clearly stated the grounds, the merits and the necessities. Bringing in D3 to D5 as defendants is wholly justifiable. I therefore allow the plaintiff’s summons and make order in terms of paragraphs 1 to 9 of the inter partes summons.

(Submissions on costs)

1. On paragraph 9 of the plaintiff’s inter partes summons on costs, the parties have made further submissions to me in chambers and asked for variation of this order. Indeed, the plaintiff’s case has been made out regarding this costs application. It is justifiable in the circumstances to make two separate sets of costs order.
2. The defendant resisted the plaintiff’s application in this inter partes summons to add further defendants. They had not disclosed their grounds. Solicitors for the plaintiff wrote to them and eventually indicated that counsel would be briefed. The plaintiff had to presume or guess what the ground for resisting was and they were guessing that it would be on the limitation period. The limitation period is a crucial and vital issue and to brief counsel on this is vital to the plaintiff’s case - vital to the subsistence of their case - and briefing counsel on this matter is wholly justifiable.
3. It is obvious to me by reading the pleadings that the plaintiff was on the wrong track when they argued vigorously that the bringing of the action against all the defendants was within the limitation period. This was not a point or issue taken by the defence at all, so the defence have misled them. It is only appropriate, in the present circumstances, that two separate costs orders be made.
4. The case referred to me by the defence solicitor is very helpful. This is the case 1993, A11705, *Lessy S.A.R.L. v Pacific Star Development Ltd and Pacific Linkway Textile Manufactory (Holding) Ltd and between* *Pacific Star Development and Pacific Linkway v Paul Rachou and Lessy S.A.R.L.* This was heard before his Lordship, the Honourable Yam J in chambers. In paragraph 4, the rationale for ordering two sets of costs was clearly spelt out and I could not agree more with it. It says:

“the rationale behind in differentiating these two sets of costs is not to encourage the other sidewho has decided to resist an application to amend to have a try-on. Otherwise the resisting party would be under an impression that, win or lose, they will get their costs any way. The resisting party should be deterred to adopt such an attitude. In deciding to resist the amendment, they should know that in the event they have lost the argument, they would be ordered to pay the cost of the argument and that is the costs of the hearing whilst the first set of costs (i.e. the costs of an occasioned by the amendment), would be to them in any event.”

And this is exactly as I have mentioned what Mr Mughal for the plaintiff is asking the court to do today and I wholly agree with it.

1. I therefore order costs to be on the following terms. First of all I will add for the sake of clarity, paragraph 9 of the inter partes summons is set aside: I am not making a costs order on that basis. Costs ordered on the following terms:

(1) defendant is to have costs of and occasioned by the summons heard on 15 June 2006 before Master Chan;

(2) costs of today’s hearing on the inter partes summons be to the plaintiff, to be taxed if not agreed, with certificate for counsel.

(W.C. Li)

Deputy District Judge

Mr Hanif Mohamed Mughal, instructed by Messrs K.Y. Woo & Co., for the Plaintiff

Miss Joyce Ho of Messrs W.K. To & Co., for the 1st and 2nd Defendants, the Intended 3rd Defendant (China Road and Bridge Corporation), the Intended 4th Defendant (Tin Fung Engineering Company Limited) and the Intended 5th Defendant (Lam Shing Kin trading as Kin Lee Engineering Company)