## DCPI 1267/2006

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1267 OF 2006

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BETWEEN

LEUNG WING TAK Plaintiff

and

IT CATERING & SERVICES LIMITED Defendant

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

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

Date of Hearing: 22nd September 2006

Date of Handing Down Decision: 3rd October 2006

**DECISION**

1. The Defendant took out summons under Order 18 Rule 19 of the Rules of the District Court and/or under the ancillary jurisdiction under Section 48 of the District Court Ordinance, Cap. 336, to strike out parts of the Plaintiff’s Statement of Claim.
2. Subparagraphs (1) to (5), (6), (7), (9), and subparagraphs (11) to (13) on pages 17-22 of the Statement of Claim under the Heading “Particulars of Breaches of Statutory Duties” were asked to be struck out for the reason that it disclosed no reasonable cause of action. The Defendant Summons had also asked to strike out subparagraphs (8) on page 20 and subparagraph (10) on page 21 of the Statement of Claim but no submission was made on these subparagraphs and in the summary of the parts the Defendant sought to strike out submitted by Defence counsel in the hearing, subparagraphs (8) & (10) were no longer included. I presume the Defence was no longer pursuing to strike out subparagraphs (8)& (10) as these did not appear within the reasons of their argument.
3. Subparagraph (3) on page 9, subparagraph (4) on page 9, subparagraph (5) on 9, subparagraph (7) on page 10, subparagraph (12) on page 11, subparagraphs (18) & (19) on page 13, subparagraph (28) on page 15, and subparagraph (35) on page 17, were also sought to be struck out for being irrelevant or unnecessary repetitions and/or tend to embarrass or prejudice or delay the fair trial of this action.
4. The Defendant also asked for the costs of and incidental to this application in any event.
5. In Par. 18 of the Statement of Claim, the Plaintiff claimed on the basis of the following causes of action, viz. (1) breach of employment contract and/or breach of the employer’s common duty of care; (2) negligence; and (3) breach of statutory duties. Particulars of the alleged breach of duties were pleaded under the 2 headings, i.e. Breach of employment contract and employer’s common duty of care and negligence (subparagraphs (1) to (35) on pages 17-25 of the Statement of Claim) and Breach of statutory duties (subparagraphs (1) to (24) on pages 25-33). For breach of statutory duties, the following breaches were pleaded, viz. (1) ss. 6A(1)-(2) of the Factories and Industrial Undertakings Ordinance, Cap. 59; (2) ss. 32(1)(a), 35 and 39(1) of the Factories and Industrial Undertakings Regulations, Cap. 59A; (3) ss.5(1), 15(1) and 16 of the Food Business Regulations, Cap. 132X; (4) Occupational Safety and Health Ordinance, Cap. 509A; and (5) Occupiers’ Liability Ordinance, Cap. 314. The Defendant’s summons only concerned the breach of statutory duties under (1), (2) and (3) above, those under Cap 59, Cap. 59A and Cap. 132X.
6. The Defendant’s grounds for striking out for want of an actionable cause of action were that: **(1)** ss. 6A(1)-(2) of the Factories and Industrial Undertakings Ordinance, Cap. 59, did not confer a right of action in civil proceedings in respect of a failure to comply with Sec. 6(A), Sec. 19(a) of Cap. 59 expressly stipulated for that no civil action lies where there was a breach of this statutory duty; **(2)** S. 32(1)(a) of the Factories and Industrial Undertakings Regulations, Cap. 59A, imposed a statutory duty to remove from the floor daily accumulation of dirt and refuse by suitable method but the Plaintiff ‘s claim in Subparagraph (7) alleged “preventing the accumulation of water and/or fish scales on the ground floor of the kitchen immediately before the happening of the accident, and this allegation did not fall within the ambit of and therefore was not contrary to Rule 32(1)(a) of Cap. 59A”, that Subparagraph (6) pleaded the same thing as Subparagraph (7) and was therefore superfluous, and that Subparagraph (9) alleged a breach of Sec. 39(1) of Cap. 59A which relates to negligence and failure to maintain the ground of the kitchen floor to be in a good state of repair and free from spalls, the Plaintiff did not plead any assertion which amounted to any breach of this Sec. 39(1); and (**3**) Par. (9) and subparagraphs (11) - (13) of the Statement of Claim falls outside the ambit of Ss. 5(1), 15(1) and 16 of Food Business Regulations, Cap. 132X, in that Cap.132X were regulations relating to food and drug hygiene connected with sale of food for human consumption or drugs for use by man, and the manufacture, preparation, transport, storage, packaging, marking, exposure for sale, service or delivery of food intended for sale or sold for human consumption and drugs for use by man, and ice, or otherwise for protection of the public health in connection with any such matters, and was not legislation which was in any way related to the Plaintiff’s cause in this action.
7. The Defendant pointed out unnecessary repetitions of the particulars of breach of employment contract and/or breach of employer’s common duty of care and/or negligence under subparagraphs (1) – (35) of the Statement of Claim. Subparagraph (3) was repeated in subparagraph (13); subparagraph (4) was repeated in subparagraph (9) and essentially covered in subparagraph (30); subparagraph (5) was repeated in subparagraph (21) and also covered in subparagraph (6); subparagraph (7) was covered by subparagraph (8); subparagraph (12) was essentially the same as subparagraph (17); subparagraph (18) & (19) were covered by subparagraph (20); subparagraph (28) was essentially the same as subparagraph (27); and subparagraph (35) was repeated in paragraph 18 and paragraph (35) was not even a particular of breach. The Defence asked for these repetitive parts be struck out for reason of being irrelevant or unnecessary repetitions and/or tend to embarrass or prejudice or delay the fair trial of the action. It is also prolix and tends to embarrass the Defendant, and it is so obvious on the view of the pleadings that it ought to be struck out.
8. The Defendant further submitted that besides Order 18 Rule 19 of the Rules of the District Court, this court under Sec. 48 of the District Court Ordinance, Cap. 336, has the same ancillary power as the inherent jurisdiction of the Court of First Instance to strike out and not to condone such pleadings.
9. The Plaintiff opposed the Defendant’s application. The Plaintiff says that negligence and breach of statutory duties are inter related and must be read and considered as a whole when the trial judge comes to consider whether the Defendant has fallen below the reasonable duty of care as imposed on an employer. Their argument was that although the statute did not allow a breach of statutory duty to be actionable in a civil proceeding, it does not preclude the plaintiff in a civil claim for negligence to plead the breach of statutory duty and bring that out in the trial. There is no rule or case law to show that it is not permissible to plead a breach of statutory duty and to prove it as a fact in the trial. The Plaintiff says that breach of statutory duty in industrial safety legislation have often resulted in common law action based on both negligence and breach of statutory duties, and in striking out the breaches of statutory duties, the trial judge would be precluded from hearing evidence in this area and take these into his/her consideration.
10. The Plaintiff also says that superfluous parts or unnecessary repetitions in the pleadings were not a sufficient ground to allow an application to be struck out. The court should only do so when it was plain and obvious that the matter pleaded could not possibly be relevant and unarguable, and if there is doubt, the matter should be left to the trial judge.
11. In *So Pak Hung v. Cheung Chow (1997) 3 HKC 694* at 694H, 699C-F, the English case of *Mayor and Councillors of City of London v Horner (1914)* was referred to: “*For the purposes of the present case I take “embarrassing” to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the fair trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that the allegations should be struck out from a defence upon that ground, it seems to me that their irrelevancy must be quite clear and so to speak, apparent at the fist glance. It is not enough that on considerable argument it may appear that they do not afford a defence……… But the point rather is, and I think is the only point, whether it is so manifest on the view of the pleadings, merely reading through the pleadings, that it is one which does not admit of plausible argument and that on that ground it ought to be struck out as embarrassing to the trial of the real issue.”*
12. The Plaintiff says the Defendant’s application to strike out parts of the Plaintiff’s pleadings should be dismissed with costs of the application to the Plaintiff together with certificate for counsel, and also ask for costs of the Plaintiff summons to ask for time extension to file the Defence.
13. In addition to common law negligence pleaded in the statement of Claim (par. 18 therein), the Plaintiff had also alleged breaches of statutory duties, and, negligence and breaches of statutory duties were pleaded under different headings, each as a separate cause of action. It clearly appears that the Plaintiff’s claim is founded on distinct and separate causes of action.
14. Sec 19(a) of the Factories and Industrial Undertakings Ordinance, Cap. 59 expressly provides that “This Ordinance does not confer a right of action in civil proceedings in respect of a failure to comply with Section 6A, …..”. Section 6A and section 19(a) of Cap. 59 were the equivalent of Ss. 2(1)-(2) and 47(1) of the Health and Safety at work Act 1974 which also provides “…For breaches of such general health and safety duties, no civil action lay…” (see. Clerk & Lindsell on Torts (19th edition) at 13-28. The right to plead this as a cause of action in a civil claim is plainly precluded by statute. In the circumstances, the Plaintiff was clearly wrong to plead what had been precluded by statute as a cause of action. Therefore this part of their pleading should be struck out for want of cause of action.
15. Sec. 32(1)(a) of the Factories and Industrial Undertakings Regulations, Cap. 59A provides that “*accumulations of dirt and refuse shall be removed daily by suitable method from the floor*….”, and the Plaintiff in subparagraph (7) alleged a cause of action arising from a failure to “*prevent the accumulation of water and/or fish scales on the ground floor of the kitchen immediately before the happening of the accident, contrary to Rule 32(1)(a) of Cap. 59A*”. This is clearly wrong and misleading to be used as a viable cause of action. This part is clearly unarguable and should also be struck out for want of cause of action.
16. Likewise in subparagraph (9) of the Statement of Claim, it was alleged that the Defendant was being negligent in failing to maintain the floor of the kitchen in a good state of repair and free from spalls, contrary to Rule 39(1) of Cap. 59A. From what were pleaded in the Statement of Claim, there were no assertion which amounted to any breach of Rule 39(1) of Cap. 59A. It is hard to understand why subparagraph (9) had been put into the Statement of Claim. It appears to be irrelevant, unarguable and should also be struck out.
17. The Statement of Claim in paragraph (9) and subparagraphs (11) to (13) (pages 21-22) also alleged breaches of Ss. 5, (15(1) and 16 of the Food Business Regulations, Cap. 132X. and alleged causes of action from breaches of these sections. Cap. 132X are regulations made pursuant to Sec. 56 of the Public Health and Municipal Ordinance, Cap. 132, which empowered the Authority to make regulations as to food and drug hygiene, and Cap 132 basically made provisions for public health and municipal services. The Plaintiff action was based on a kitchen accident where he slipped on a wet floor that had newly scrapped fish scales and entrails on the floor. To frame a cause of action that alleged breaches of these statutory duties, the Plaintiff must show that “*the damage he suffered falls within the ambit of the statute, viz. that it was of the type that the legislation was intended to prevent and that the Plaintiff belonged to the category of persons that the statute was intended to protect*” (Clerk & Lindsell on Torts at 9-04). It is hard to see how the Plaintiff could have a cause of action based on alleged breaches of statutory duties that were not relevant to the circumstances of his case. Cap132X is to make provisions that regulate the food business and the hygiene of food and food premises for the protection of the public as consumers of food or at food premises. These parts are misconceived and should also rightly be struck out.
18. The Plaintiff’s Statement of Claim looks to be a blanket one that had not taken relevancy into account. It is out of focus that renders the contested parts of the Statement of Claim in this hearing to be unarguable.
19. It is also obvious from reading the particulars of alleged breach of employment contract and/or employer’s common duty of care and/or negligence in the Statement of Claim that there are far too numerous unnecessary repetitions rendering many parts of the pleading superfluous and the pleading prolix as a whole.
20. To allow the Defendant to strike out the offending parts, I must be satisfied that on the view of the Plaintiff’s Statement of Claim, it is manifest that the parts involved are prolix and embarrassing. “Embarrassing” was taken to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the fair trial of the action by involving the parties in a dispute that is wholly apart from the issues. The irrelevancy must be clear and obvious from first glance. Prolix in *Davy v Garrett (1877) 7 Ch D 473* at 486 was explained by the learned Lordship that *“…..the word prolix may* *be used to denote two different things; it may refer to the too lengthy statement of necessary facts; or to the statement of facts unnecessary to be stated. Where the only thing complained of is the statement at unnecessary length of things necessary to be stated, Order XIX rule 2 appears sufficiently to meet the case but the statement of unnecessary facts tend to embarrass the Defendant……”*  From reading the Plaintiff’s Statement of Claim, I agree that it is not just unnecessarily lengthy, it is also embarrassing to the Defendant in preparing its Defence. For this reason and on this ground, I agree that it ought to be struck out as embarrassing to the Defendant in answering to the Plaintiff pleading which is prolix, and which involves useless expense, and would unnecessarily prolong pleadings.
21. The Defendant took out this summons and also obtained an Order of Her Honour Judge M. Ng on 12th September 2006 that the time for filing the Defence be extended until the final disposal of this summons for striking out parts of the Plaintiff’s Statement of Claim.
22. The Defendant has written to the Plaintiff asking them to rectify the statement of Claim on 5th and 8th September 2006 and had the Plaintiff’s reply dated 7th September 2006 indicating disagreement to amend.
23. I therefore make order in terms of Paragraph 1, save that Paragraph 1(2) is amended to read “subparagraphs (6), (7) and (9) on pages 19, 20 and 21” instead, and Paragraph 2 of the Defendant’s summons herein dated 8th September 2006. I also order that the costs of and incidental to this application be to the Defendant, to be taxed if not agreed, with certificate for counsel. This is a cost order nisi to be made absolute in 14 days.

( W.C. Li )

Deputy District Judge

Representation:

Mr. Andy Lam instructed by Messrs. Ivan Tang & Co. for the Plaintiff

Mr. Simon Leung instructed by Messrs. Hastings & Co. for the Defendant