## DCPI 1622/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1622 OF 2015

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##### BETWEEN

WONG YAU SUI Plaintiff

and

MORAL ACCORD LIMITED 1st Defendant

LUNG TANG TAK FAT LOGISTICS LIMITED 2nd Defendant

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Before: Deputy District Judge Gary C C Lam in Chambers

Date of Hearing: 16 May 2017

Date of Decision: 16 May 2017

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DECISION

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*Introduction*

1. This is the Plaintiff’s application by paragraph 1 of the summons dated 13 March 2017 for leave to appeal against my judgment handed down on 17 February 2017 (now reported in [2017] 2 HKLRD 322; [2017] 2 HKC 303). In that judgment, while I awarded HK$164,031.25 to the Plaintiff for the personal injury he suffered in the course of employment with the Defendants, I dismissed the Plaintiff’s action because I found that a defence of tender would apply in unliquidated claims by virtue of section 30 of the *Law Amendment and Reform (Consolidation) Ordinance (Cap 23)* (the “*LARCO*”) enacted under the CJR and that the Defendants established the defence of tender.
2. In the enhanced draft notice of appeal filed on 2 May 2017, the Plaintiff set out 5 grounds of appeal, in gist:-
3. In the interest of justice under section 63A(2)(b) of the District Court Ordinance (Cap 336), because the applicability of the defence of tender in unliquidated claims arose for the first time in Hong Kong and my judgment on the applicability of the defence in unliquidated claims was inconsistent with the English Court of Appeal’s decision in *Ayton v RSM Bentley Jennison & ors* [2016] 1 WLR 1281, leave ought to be granted so that the Court of Appeal could consider and clarify the legal position of the defence.
4. I failed to interpret section 30 of the *LARCO* by ascertaining its intention as expressed in the language of the provision, and erred in referring to the legislative background and the other settlement regimes in the Rules of the District Court;
5. I erred in finding that the defence of tender applied here where the Plaintiff did not make any pre-action demand for any specified sum and/or where the award I made did not satisfy the claim pleaded in the Statement of Claim;
6. I erred in holding (a) that the Defendants’ tender was unconditional and/or (b) and (c) that the tender was valid while the Plaintiff had not fully paid the amount pleaded by the Defendants.
7. I erred in assessing the loss of earning capacity in that I departed from the authorities of similar injuries and circumstances as the Plaintiff.

*Grounds 1 – 2*

1. Grounds 1 – 2 constitute a pure question of law arising for the first time. This in itself should not be sufficient to constitute “the interest of justice” for the purpose of section 63A(2)(b); otherwise, for those legal questions arising for the first time the answers to which are very clear and thus any appeal for which would not even have *some* prospect of success would have to trouble the Court of Appeal for no real purpose.
2. As I concluded in paragraphs 22 and 34 of my judgment, the language of section 30 is clear enough that it should apply in all unliquidated claims (my references to other materials in paragraphs 12 – 14 and 22 – 33 of my judgment merely setting out the background and dealing with the Plaintiff’s arguments). That said, given the legislative background and the English Court of Appeal’s decision in *Ayton*, I accept that there is room for argument that the defence of tender should not apply in unliquidated claims or unspecified unliquidated claims. Taking into account that this would be the first opportunity for the Court of Appeal to consider the matter, I am satisfied that in the interest of justice, I should, and so I do now, grant leave to the Plaintiff to appeal as per Grounds 1 – 2.
3. Pausing here, I should add that the Plaintiff raised an argument for the first time in paragraphs 6 – 9 of his Skeleton Submissions today that a defence of tender could apply only where there pre-existed some contractual relationships and/or obligations between the parties. I am not entirely sure to which grounds of appeal these submissions are related, although the Plaintiff submitted that these related to Grounds 2 – 3. In any event, I have no difficulty rejecting such bold submissions – such submissions mean that the defence would be applicable to very limited situations. This is absurd, and cannot sit well with the language of section 30 (on which the Plaintiff repeatedly urged me to focus).

*Grounds 3* – *4*

1. Grounds 3 – 4 arise from the fact that the defence of tender was made applicable to unliquidated claims. While they are specific to the present case, these are also concerning how a defence of tender practically operates in unliquidated claims. For the same reasons for Grounds 1 – 2, I am satisfied that in the interest of justice, I should, and so I do now, grant leave in respect of Grounds 3 – 4.

*Ground 5*

1. For Ground 5, the amount of loss of earning capacity is always fact-sensitive. The peculiar feature of the present case, according to my fact-finding which the Plaintiff does not seek to overturn, is that the Plaintiff now earned more from the new employer after the accident. In none of the authorities the Plaintiff cited to me, the victims were as lucky as the Plaintiff to earn more from such a sympathetic employer after the accident, which is evidence showing that the loss of his competitiveness was not as significant as in those authorities. Thus, I cannot see that my award of 2 months’ income can be faulted. Therefore, I refuse leave in respect of Ground 5.

*Adjournment of costs hearing*

1. Besides leave for appeal, the Plaintiff applies by paragraph 2 of the summons dated 13 March 2017 to adjourn the 1 June 2017 hearing fixed to determine the costs order pursuant to paragraph 91 of my judgment. This application is akin to an application to stay the execution of my order concerning costs. It is trite that unless there are good reasons, a monetary judgment will not be stayed despite pending appeal. Here I see no such good reasons at all. On the contrary, I see it desirable to determine the costs order prior to the appeal proper. This is because at the appeal proper, the Court of Appeal will have the jurisdiction to determine costs in the appeal and below. If the Court of Appeal thinks it necessary to make any determination of the costs order, certainly it has to consider all the relevant materials (which have yet to be produced for the 1 June 2017 hearing) as well as my reasoning for costs. Thus, I refuse the Plaintiff’s application to adjourn the 1 June 2017 hearing.

*Order*

1. In the circumstances, I make the following order:-
2. Leave shall be granted to the Plaintiff to appeal my judgment as per Grounds 1, 2, 3 and 4 of the enhanced draft notice of appeal filed on 2 May 2017.
3. Paragraph 2 of the summons dated 13 March 2017 be dismissed.

[submissions on costs]

1. Having heard counsel’s submissions on costs, I make the following costs order:-
2. 90% of the costs of this application be in the appeal.
3. The Plaintiff shall pay to the Defendants 10% of the costs of this application with certificate for counsel, to be summarily assessed on 1 June 2017.

( Gary C C Lam )

Deputy District Judge

Mr Forest Fong, instructed by Kenneth W Leung & Co, for the Plaintiff

Mr Leon Ho, instructed by Au & Associates, for the 1st and 2nd Defendants