###### DCPI 1706/2009

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1706 OF 2009

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##### BETWEEN

## TING SIU WING Plaintiff

### and

#### CHAN KWOK BUN (陳國斌) Defendant

formerly trading as

Perfect Clean Mobile Care

(洗白白專業汽車美容)

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Coram: H.H. Judge Chow

Date of Hearing: 25 August 2011

Date of handing down Decision: 14 September 2011

Decision

1. This is the Defendant’s application for leave to appeal against the Decision made on 12 July 2011 (“the Decision”) when this Court dismissed the Defendant’s application to sit aside the interlocutory judgment dated 25 March 2010.
2. The defence counsel, Mr. Lo, submits that the interlocutory judgment was irregular, and should be set aside as of right. He submits that if the claim arises out of a tort, the endorsement should state “the date and place of occurrence, and the nature of the tort alleged”. The claim was based on some alleged tortious conduct of the Defendant which was continuous from December 2003 to November 2004. The general endorsement of claim does not state the continuous nature of the alleged wrong or the place of its occurrence. Hence it does not comply with Order 6, rule 2 of the Rules of the District Court.
3. The endorsement of claim reads as follows:-

“The Plaintiff’s claim against the Defendant is for damages for personal injuries sustained by him as a result of an incapacity happened in or about February 2004 arising out of and in the course of his employment with the Defendant, which was caused by the negligence and/or breach of contract of employment and/or breach of statutory duty and/or breach of common duty of care on the part of the Defendant, their servants and agents.”

The endorsement does not mention that the personal injuries were sustained because of the happening of an accident which occurred on a particular day. It refers to personal injuries sustained by the Plaintiff as a result of an incapacity which happened in or about February, in the course of his employment. The phrase “in or about February” covers a period of time, whereas the phrase “in the course of his employment” denotes “continuity”. The nature of the tort is that it was an incapacity caused by a continuous tortious conduct on the part of the Defendant in the course of the Plaintiff’s employment with the Defendant, and not caused by an accident which happened on a particular day. The endorsement therefore reveals the continuous nature of the tort committed by the Defendant. The Plaintiff was employed by the Defendant as a car washing company apprentice. He was responsible for car washing and waxing work at the Defendant’s company. It is implied in the endorsement that the place where the tort occurred took place where the Plaintiff did the work under his employment with the Defendant. The Defendant’s submission hence cannot stand.

1. Mr. Lo submits that the Plaintiff’s case hinges on whether the Plaintiff was exposed to a heavy workload during employment and hence was an injured. The parties evidence on the workload presented two conflicting pictures. Defendant’s evidence described Plaintiff’s workload as light and hence unlikely to cause injury. This submission is not correct. It is not just the workload that matters. It is a combination of factors that caused patellofemoral arthritis. This is shown by the opinions of Dr. Peter Ko Put Shui and Dr. Chan Ka Wah (extract reproduced by Dr. Peter Ko Put Shui in his medical report dated 31 Jan 2011). In his report, Dr. Chan says:-

“Opinion: as osteoarthritis is mainly a disease of degeneration in old people, osteoarthritis in young patient is very uncommon unless as a consequence of trauma or overuse. With consideration of the time relationship between the job and the conset of the illness, the nature of the job, and by excluding acute trauma and other inflammatory conditions, I believe Mr. Ting’s knee problem is directly occupational.”

In his medical report, Dr. Peter Ko Put Shui states:-

“Based on the above information, Dr. Ko opines that it is obvious that from the literature and also clinical experience, the cause for patellofemoral arthritis in Mr. Ting’s condition is highly likely to be multi-factorial including intrinsic and extrinsic factors. Considering his age, general health status, body built, physique, past health, pre-morbid, activities and sports, etc, he does not have any high risk factor for developing patellofemoral arthritis. The extrinsic factors: his job as a garage apprentice in an automobile cleaning service company requiring frequent squatting, kneeling, lifting of heavy weights with the possible intrinsic factors of weak quadriceps muscles, his chance of developing patellofemoral excessive wear and tear is very high which results in his symptoms typical of patellofemoral arthritis.”

(Underlines provided)

1. Mr. Lo argues that Dr. Ko’s opinion was flawed if based on wrong factual background. Dr. Ko thought that the Plaintiff had to “frequently require to lifting weight up to 30-40 lbs”. By using the word “if”, the defence counsel cannot definitely point out that Dr. Ko’s opinion was flawed. There is no evidence to show that his opinion was based on wrong factual background. The information must have been given to him by the Plaintiff.
2. In respect of paragraph 39 of the submission, I have already dealt with it under paragraphs 10 and 11 of the Decision.
3. Under paragraph 41 of his submission, Mr. Lo avers that it is not immediately clear whether Dr. Ko arrived at his opinion on the basis that the Plaintiff had worked strenuously for the Defendant for about one year. If he did, such error would be significant. Mr. Lo has not shown that Dr. Ko’s opinion is wrong. Dr. Ko’s opinion set out above is self-explanatory. The Defendant has not provided any expert evidence to say that his opinion is wrong.
4. Regarding the issue of limitation, Mr. Lo submits that limitation issues would arise if the Plaintiff knew of his occupational injury on or before 16 August 2006. The claim of time bar may well be established by the Defendant at trial. It is for the Defendant to show at this stage, and not wait until trial, that the Plaintiff’s claim was time barred. Under paragraph 16 of the Decision, it is stated:-

“About the limitation period, it is quite clear that the plaintiff came to know about his situation, namely, the injury was caused in the course of his employment after consulting Dr Cheng in February 2009, and then shortly thereafter, within a period of three years, he commenced the present action.”

The above-said submission must fail.

1. In respect of contributory negligence, Mr. Lo submits:-

“54. At trial, Plaintiff could be cross-examined as to whether he had worked as instructed and as to whether he himself was negligent in carrying out his work.

55. Defendant’s defence of contributory negligence which could well be established at trial.”

It is for the Defendant to show at this stage that there was contributory negligence on the part of the Plaintiff at the material time. He has failed to do so.

1. All the arguments of the Defendant cannot stand. There is no real prospect for him to succeed in the Court of Appeal even if leave to appeal is granted to him. I therefore dismiss his application.

Costs

1. I order that the Defendant do pay the Plaintiff costs of this application, to be taxed, if not agreed, with certificate for counsel. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations. The Defendant’s own costs be taxed in accordance with Legal Aid Regulations.

(S. Chow)

District Judge

The Plaintiff : represented by Mr. Damien Wong, instructed by Messrs. Szivina Pang, Edward Li & Co., Solicitors

The Defendant: represented by Mr. Tommy Lo, instructed by Messrs. Tang, Wong & Chow, Solicitors