#### DCPI1719/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1719 OF 2008

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| BETWEEN | LEE WAI MAN | Plaintiff |
|  | and |  |
|  | CHAN CHE MING  KWOK CHUNG MOTOR CAR LIMITED | 1st Defendant  2nd Defendant |

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##### Coram: H H District Judge Marlene Ng in Chambers (Open to the Public)

Date of Hearing: 8th July, 2009

Date of Handing Down Decision: 19th August, 2009

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DECISION

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###### I. Background

1. On 5th October 2007, whilst the 1st Defendant was driving a public light bus owned by the 2nd Defendant, he so negligently controlled the public light bus and made a right turn without ensuring traffic clearance that the public light bus hit the Plaintiff’s motorcycle (“Accident”). The Plaintiff suffered personal injuries as a result of the Accident.
2. On 7th August 2008, the Plaintiff commenced the present action against the Defendants for damages for personal injuries and for other loss and damages in respect of the Accident. The Statement of Damages (“SOD”) was filed on the same day. On 3rd November 2008, interlocutory judgment was entered in favour of the Plaintiff against the Defendants for damages to be assessed.
3. At the Checklist Review (“CLR”) hearing on 23rd February 2009, the PI Master ordered (“CLR Order”) *inter alia* that :
   1. the Plaintiff shall within 21 days make specific discovery of *inter alia* “records of salaries paid by Power King Logistics Ltd [“Power King”] to the Plaintiff from the commencement of employment up to the termination thereof” (“Pay Slips”);
   2. the joint orthopaedic expert report of Dr Fu Wai Kee (“Dr Fu”) for the Plaintiff and Dr Lam Kwong Chin (“Dr Lam”) for the Defendants (“Joint Report”) be filed on or before 16th March 2009;
   3. the Plaintiff shall file and serve Revised Statement of Damages (“RSOD”) together with any documentary support not already disclosed “within 42 days from the date thereof”, which presumably means within 42 days after filing the Joint Report.
4. Drs Fu and Lam completed the Joint Report on 23rd February 2009.
5. On 23rd April 2009, the Defendants issued a summons (“Ds’ Summons”) for *inter alia* the following reliefs :
   1. unless the Plaintiff comply with the CLR Order (i) by making specific discovery and (ii) by filing/serving the RSOD as specified in paragraphs 3(a) and (c) above within 7 days from the date of the order to be made, the Plaintiff’s claim shall be dismissed (“Issues A and B”);
   2. the Plaintiff shall pay such sum of money into court as the court saw fit due to his failure to comply with CLR Order as aforesaid (“Issue C”);
   3. costs of and occasioned by the Plaintiff’s failure to comply with the CLR order as aforesaid and by this application shall be paid by the Plaintiff to the Defendants to be taxed if not agreed.
6. On 29th April 2009, the Plaintiff issued a summons (“P’s Summons”) for *inter alia* the following reliefs :
   1. leave to the Plaintiff to adduce a supplemental orthopaedic expert report by Dr Fu and to lodge/serve such report within 14 days from the order to be made;
   2. leave to the Plaintiff to file/serve the RSOD within 21 days after receipt of such supplemental report.
7. On the same day, the Plaintiff filed the affirmation of his solicitor Yuen Siu Chi (“Ms Yuen”) in support of P’s Summons (“Yuen’s Affirmation”). On 5th May 2009, the Defendants filed the affirmation of their solicitor Chan Miu Lan Anita (“Ms Chan”) in support of Ds’ Summons and to oppose P’s Summons (“Chan’s Affirmation”).
8. At the hearing of P’s and Ds’ Summonses on 8th May 2009, the PI Master granted *inter alia* the following directions :
   1. costs of and occasioned by the Plaintiff’s failure to comply with the CLR Order and of Ds’ Summons (save for costs in relation to Issue C) shall be paid by the Plaintiff to the Defendants to be taxed if not agreed;
   2. P’s Summons and Issues B and C in Ds’ Summons be adjourned for argument before the PI Judge, and Issue B shall be dealt with immediately after the determination of P’s Summons;
   3. the CLR hearing scheduled on 20th May 2009 be vacated and adjourned to be heard by the PI Judge immediately after the hearing of P’s and Ds’ Summonses.
9. At the hearing on 8th July 2009 before me, with no objection from Ms Chan, I granted leave for the Plaintiff to file and serve his affirmation dated 6th July 2009 (“Plaintiff’s Affirmation”) to oppose Issue C of Ds’ Summons.

*II. Lifting legal aid stay*

1. On 4th July 2009, the Director of Legal Aid filed a Memorandum of Notification of an Application for Legal Aid in respect of the Plaintiff’s application for legal aid. So when P’s Summons, Issues B and C of Ds’ Summons and the CLR hearing came before me on 8th July 2009, the present action was subject to legal aid automatic stay.
2. At my invitation, both Mr Lam, counsel for the Plaintiff, and Ms Chan took a pragmatic approach and agreed to lift the legal aid automatic stay on terms, ie that the stay be lifted for hearing argument in respect of P’s Summons and Issues B and C of Ds’ Summons and for the CLR hearing, but such stay shall remain in place in respect of compliance with and/or enforcement of any order that might be made for payment of money into court by the Plaintiff for failure to comply with the CLR Order or for any costs order that might be made.
3. By now, the legal aid stay has expired and the agreed proviso is spent. In the circumstances, the orders made herein are fully effective without any stay.

*III. Hearing and submission bundles*

1. At the hearing before me, Mr Lam conceded that items 2-6 of the Plaintiff’s non-agreed bundle were not required for the applications before me. Ms Chan acknowledged that item 1 thereof being a letter from the Plaintiff’s solicitors to the PI Master dated 23rd April 2009 should be included in the hearing bundle as part of the Plaintiff’s conduct in the present action. Ms Chan further conceded that the Defendants’ non-agreed bundle was unnecessary. I therefore gave directions for item 1 of the Plaintiff’s non-agreed bundle to be inserted in the hearing bundle.
2. Item 1 of the Bundle of Parties’ Submissions is described as “Plaintiff’s Submission on seeking leave to adduce the supplemental medical report and draft RSOD” dated 19th May 2009. However, the draft RSOD included in such bundle is different from the draft served on the Defendants’ solicitors on 22nd May 2009 in that the former has been updated with information from Dr Fu’s solo supplemental report dated 12th May 2009 (“Dr Fu’s Report”). I therefore granted directions for the served copy of the draft RSOD to be inserted in the bundle.

*IV. P’s Summons*

1. At the hearing on 8th July 2009, I declined to grant leave to the Plaintiff to adduce Dr Fu’s Report, but extended time for 14 days for the Plaintiff to file and serve his RSOD together with any documentary support not already disclosed. I further directed that paragraph 8 of the CLR Order do stand. I set out the reserved reasons for such directions below.

*(a) Injuries and treatment*

1. After the Accident the Plaintiff received treatment at the accident and emergency department (“AED”) of Prince of Wales Hospital (“PWH”) for superficial abrasion over left shoulder and left elbow. He was granted sick leave from 6th to 10th October 2007. He re-attended PWH’s AED on 10th October 2007 complaining of left forearm numbness and neck pain. Clinically there was no definite decrease of pinprick sensation in his left upper limb and power was full, but the neck showed reduced range of movement in the direction of left lateral flexion. Gait and reflexes were normal, and x-ray of cervical spine showed no fracture. He was treated and discharged, and granted sick leave from 10th to 13th October 2007.
2. The Plaintiff was referred to PWH’s orthopaedics clinic on 12th October 2007 for outpatient follow up. It was noted that he had left knee, left shoulder and neck injury, and complained of left leg and foot numbness. He had multiple abrasions over left shoulder, left arm, and left leg and back. Physical examination revealed tenderness over left acromio-clavicular joint and supraspinatus fossa. His left shoulder abduction (90º) and internal rotation (up to 9th thoracic spine level) were decreased. Cervical spine examination revealed diffuse tenderness over left paraspinal muscle and upper cervical spine with decreased range of motion in all directions. There was no neurological deficit of upper limbs.
3. Left knee examination revealed tenderness over left medial proximal tibia, and pain while performing valgus stress test. There was positive Tinel sign over anterolateral aspect of left leg, distal to fibula head. Left ankle and big toe dorsiflexion power was decreased (4-/5). There was decreased sensation along left peroneal nerve distribution.
4. X-ray of left shoulder, cervical spine and left knee did not reveal any abnormality. The provisional diagnoses were left peroneal nerve palsy, left knee medial collateral ligament sprain, left acromio-clavicular ligament injury and neck sprain.
5. On 16th October 2007, the Plaintiff was admitted to PWH’s orthopaedics unit for neurology assessment, and discharged on 18th October 2007. Nerve conduction test was done on 15th November 2007 and confirmed diagnosis of left peroneal nerve palsy.
6. According to the orthopaedics clinic record dated 4th January 2008, the Plaintiff had “return to light duty (sedentary)”. His left shoulder pain improved, impingement was negative and forward flexion range of movement was 130˚. “Left foot: Tinel –ve; plantarflexsion 5/5 … eversion 5/5 (palpable peroneal muscle contraction)”. The impression was one of “left shoulder contusion; left peroneal nerve injury – improving trend”.
7. The Plaintiff was conservatively treated with physiotherapy and occupational therapy. His left shoulder pain improved with full range of motion. He was last seen at PWH’s orthopaedics clinic on 6th June 2008 with good progress of left peroneal nerve palsy. However, he needed to continue work hardening by occupational therapy. Sick leave was granted from 12th October 2007 to 11th July 2008.

*(b) Plaintiff’s complaints*

1. In the SOD, it was averred that the Plaintiff’s present complaints were (a) intermittent left shoulder pain, (b) reduced range of left shoulder movement with pain, (c) intermittent left ankle and left leg pain, (d) intermittent numbness in left ankle and left leg, and (e) “sometimes use analgesic”.
2. The Plaintiff in his witness statement claimed he had persistent left shoulder pain, left knee and left leg pain and numbness, and reduced range of shoulder movement and pain.

*(c) Joint Report*

1. According to the Joint Report, the Plaintiff complained of on and off left shoulder pain and weakness, and the pain was aggravated by exertion and elevation of the left shoulder. He claimed he could not lift weight heavier than 10kg. The Plaintiff also complained of left lower limb pain, numbness and weakness with continuous pinprick sensation over left shin and foot, and weakness and decreased range of movement of left ankle. But he said the condition had improved by 50% after he was discharged in June 2008.
2. Drs Fu and Lam agreed that the Plaintiff suffered a soft tissue injury of neck which had largely recovered. They further agreed that the left forearm numbness was a transient one with no evidence of neurological deficit of the upper limb. In respect of the lower limbs, Drs Fu and Lam agreed that the Plaintiff had soft tissue injury of leg with left peroneal nerve palsy (complete or incompletion division of nerve) due to the Accident. According to the reports there was good progress, but the Plaintiff still complained of left lower limb pain, numbness and weakness.
3. Both orthopaedic experts agreed that the Plaintiff did not need further treatment. Dr Fu considered the Plaintiff’s condition quite static with some residual symptoms for the left shoulder. He further opined that the shoulder pain and weakness would likely persist and might require orthopaedic treatment on a need-to basis. Further, some residual symptoms of the left lower limb injury would persist. On the other hand, Dr Lam was of the view that both the shoulder contusion and peroneal nerve palsy were associated with good prognosis, and they should recover (if not already done so) with very minimal residual symptoms though it might take 1-2 years after an injury.
4. I set out the opinion of the orthopaedic experts in respect of the Plaintiff’s working capacity in full since it goes to the heart of P’s Summons :

“56. We agree that [the Plaintiff] should be able to return to his original work.

1. Dr Fu: However, his efficiency will be decreased due to the left upper limb and lower limb symptoms. He should take some rest after long period of walking.
2. Dr Lam:

* The recovery is a good one and the present disability is very minimal. [The Plaintiff] should be able to work as a driver in a manner comparable to other drivers of his age and general health.
* He should pay attention to good working postures and have interval rest. Indeed, these are good activities for all professional drivers, with or without injury.”

*(d) Plaintiff’s supporting affirmation evidence*

1. In the letter dated 21st April 2009 from the Plaintiff’s solicitors to the Defendant’s solicitors, it was said that prior to the Accident the Plaintiff worked as a 16-ton truck driver responsible for delivery of goods by truck, but *post*-Accident he drove a 16-ton truck and performed manual delivery of goods from the truck to a roller platform with use of his neck, shoulders, lower and upper limbs. Since Dr Fu opined that the Plaintiff’s efficiency would be reduced and his pain and weakness would persist, the Plaintiff was of the view that a supplementary report by Dr Fu was necessary to address the issues of his limitations and disabilities on resuming *pre*-Accident work (which could “only be measured in medical terms”) as follows :

|  |  |  |
| --- | --- | --- |
|  | Limitations | Disabilities |
| (a) | Standing | bodily extent flexibility |
| (b) | Lifting | finger dexterity |
| (c) | Climbing | manual dexterity |
| (d) | Kneeling | sensitivity |
| (e) | Crouching | steadiness |
| (f) | Walking | trunk strength |
| (g) | Carrying | leg and ankle strength |
| (h) | Stooping | control precision |

The Plaintiff’s solicitors therefore proposed to obtain such supplemental report and to extend time for filing/serving the RSOD to 28 days after receipt of such supplemental report.

1. On 23rd April 2009, the Plaintiff’s solicitors wrote to the PI Master *inter alia* for leave to adduce a supplemental report by Dr Fu and for extension of time to 7 days after receipt of such supplemental report for filing/serving the RSOD. Yuen’s Affirmation filed on 29th April 2009 reiterated the above grounds in support of P’s Summons.

*(e) Defendant’s affirmation evidence in opposition*

1. Chan’s Affirmation stated it was only after the Plaintiff failed to file/serve the RSOD on or before 6th April 2009 pursuant to the CLR Order that the Plaintiff’s solicitors suddenly on 21st April 2009 proposed to obtain a supplemental report by Dr Fu in respect of the Plaintiff’s limitations and disabilities.
2. However, in the draft joint letter of instructions to the orthopaedic experts prepared by the Plaintiff’s solicitors and sent to the Defendants’ solicitors on 4th December 2008 for instructing Drs Fu and Lam to conduct joint medical examination and compile the Joint Report, the orthopaedic experts were asked to give opinion on *inter alia* the relevant diagnosis and prognosis, whether the Plaintiff could resume his *pre*-Accident job, and if not, what kind of job(s) would be more suitable for him. The draft joint letter of instructions was dispatched to Drs Fu and Lee after incorporating slight amendments proposed by the Defendants’ solicitors. Chan’s Affirmation pointed out that the Plaintiff’s solicitors did not by such joint letter of instructions ask the orthopaedic experts to comment on the Plaintiff’s limitations and disabilities on resuming *pre*-Accident work activities.
3. Chan’s Affirmation went on to assert that the court could rely on the physical examination findings in the Joint Report in assessing the Plaintiff’s working ability, and the court would also be able to determine the veracity of the Plaintiff’s subjective complaints with the assistance of the Joint Report. In the circumstances, the proposed supplemental orthopaedic expert report is unnecessary and of no probative value.

*(f) Dr Fu’s Report*

1. Although P’s Summons for leave to adduce a supplemental report by Dr Fu was still pending in face of the Defendants’ opposition, unbeknownst to this court and the Defendants, the Plaintiff’s solicitors on 8th May 2009 (ie the very day the PI Master adjourned P’s Summons for argument before me) issued instructions to Dr Fu to compile his supplemental report. Dr Fu’s Report was completed on 12th May 2009.

*(g) Legal principles*

1. Expert medical evidence (including supplemental expert medical opinion) can and should be admitted into evidence if it is necessary, relevant and of probative value (see *Arfan Muhammad v MPS Engineering Ltd* HCPI457/2003 (unreported, 30th June 2005) at para.6 where Deputy District Judge Muttrie referred to the observation by Suffiad J in *Chan Kwok Ming v Hitachi Electric Service Ltd* HCPI322/2002 (unreported)).
2. In *Wong Hoi Fung v American International Assurance Company (Bermuda) Ltd & anor* [2007] 3 HKLRD 507, 511-512, Chu J articulated the principles for admission or exclusion of expert medical evidence and on the requirement of “relevance” as follows :

“11.  Modern judicial authorities recognize that the court has inherent power to rule on the admissibility of expert evidence at a pre-trial stage : *Woodford and Ackroyd v Burgess* [2000] CP Rep 79*, Ko Chi Keung v Lee Ping Yan* [2001] 1 HKLRD 829 and *Lee Kin Yee & Others v Lee Wing Kim & Another* (unrep., HCA No 9522 of 1997, [2001] HKEC 1546). Where the proposed expert evidence is plainly inadmissible or irrelevant, the court ought to exercise its discretion to refuse the admission of such evidence. But where the court cannot form a clear view on the relevance of the proposed expert evidence or where it considers that the proposed evidence is clearly relevant, then it should grant leave for the evidence to be adduced at the trial : *Ko Chi Keung v Lee Ping Yanat p.833*and *Lee Kin Yee & Others v Lee Wing Kim & Another* at p.15.

12.  In deciding whether certain proposed expert evidence should be received, the relevant test has been stated to be a two-stage one. Firstly, the evidence has to be admissible as "expert evidence" for the purpose of s.58 of the Evidence Ordinance (Cap.8). Secondly, the evidence must be relevant, in the sense that it is helpful to the court in arriving at its decision on one or more of the issues to be resolved : *Barings plc (in Liquidation) & Anotherv Coopers and Lybrand & Others* (unrep., 9 February 2001), Evans-Lombe J at paras.44-45.”

Evans-Lombe J added that the court could still exclude expert evidence if it was of the view that calling such evidence would not be helpful to the court in resolving any issue in the case justly, eg where the issue to be decided was one of law or one on which the court could come to an informed decision without such expert evidence.

1. Where expert medical evidence is both necessary and desirable, it is the duty of the expert “to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence” (see *Davie v Edinburgh Magistrates* [1953] SC 34, 40, *per* Lord President Cooper). Proper discharge of such duty facilitates the judge in interpreting the factual evidence on the basis of the expert’s special skill and experience not possessed by the ordinary layman.

*(h) Discussion*

1. Mr Lam submitted that because Dr Fu opined that the Plaintiff would suffer reduced efficiency due to persistent pain and weakness, it was necessary for Dr Fu to address on the Plaintiff’s specific limitations and disabilities in taking up manual delivery of goods as well as driving his truck in the course of his *post*-Accident work.
2. In my view, both orthopaedic experts have already addressed the clinical issues in relation to the Plaintiff’s alleged limitations and disabilities in the Joint Report. First, they have recorded objective findings as to walking gait, range of movement, and power of shoulders, left knee, left ankle, and upper/lower limbs from their physical examination of the Plaintiff. The range of movement and power of these body parts are symmetrical, full and normal with no muscle wasting, deformity or swelling save and except for inability to squat fully on left side and positive Tinel sign and decreased sensation associated with peroneal nerve palsy of the left leg. X-ray findings show normal alignment and no bony lesion. Secondly, the orthopaedic experts noted the Plaintiff’s subjective complaints of pain/tenderness and weakness in relation to left shoulder and left lower limb. Thirdly, they have rendered opinion on medical diagnosis and causation in relation to the alleged neck and upper/lower limb injuries, the treatment received, the prognosis, and in particular the working capacity in light of such injuries (see paragraph 28 above). In light of the above, no further clarification is required since Dr Fu has already addressed the Plaintiff’s limitations and disabilities from a clinical perspective.
3. Further, it is plain that the Plaintiff’s *post*-Accident truck driving and manual delivery work involve little complexity or technical understanding. In my view, the trial judge can readily understand such tasks and assess the Plaintiff’s limitations and disabilities on the evidence placed before him/her. The trial judge will be facilitated by the Plaintiff’s own evidence as to the scope/nature and physical demands of his work duties and the alleged difficulties in matching such work duties. Such factual evidence will be tested by cross-examination at trial to assist the court in weighing the evidence and in drawing conclusions as to the Plaintiff’s limitations and disabilities (if any). The trial judge will be further assisted by expert medical evidence set out in the Joint Report as described above. In such circumstances, further expert medical evidence is not required.
4. The court has a duty to restrict expert medical evidence to what is necessary for proper adjudication. It is useful to bear in mind the reminder by Seagroatt J in *Wong Hin Pui v Mok Ying Kit & anor* [2000] 1 HKLRD 856, 874-875, against proliferation of expert medical evidence which is not essential, and his further reminder that legal practitioners should impute to the judge a degree of general knowledge, practical common sense, “an understanding of life, of disability and of what it is necessary to compensate in principle”.
5. It is perhaps apt to turn to Dr Fu’s Report now. Dr Fu frankly admitted that “[actually] it is difficult to define [the Plaintiff’s] limitations in fine detail just based on [the orthopaedic experts’] examination alone” as “[it] can only be assessed by performing detail assessment in work simulated environment”. No such assessment has been done, and neither party suggests it should be undertaken. So Dr Fu only gave his “estimate” for the Plaintiff’s “general” limitations and disabilities as follows :

“Limitation:

* + - 1. Standing- [The Plaintiff] has documented left lower limb weakness. He should have some rest after an hour of standing.
      2. Lifting- He complained of left shoulder pain when lifting more than 20kg. So he should avoid lifting more than 20kg.
      3. Climbing- In the presence of left ankle weakness, he should be very careful in climbing as he is prone to have fall due to sudden give way. For safety he should avoid climbing.
      4. Kneeling – He should have no problem in kneeling.
      5. Crouching- During our physical examination he could not fully squat on his left side. Therefore he should have difficulty in crouching especially on his left side.
      6. Walking- Due to his left lower limb weakness, he will have problem in long period of walking. I suggest he should have some rest after one hour of walking.
      7. Carrying- Due to the left lower limb and left shoulder pain, he should avoid carrying more than 20 kg.
      8. Stooping- He should have no problem in stooping.

Disabilities

1. Bodily strength- it should not be affected.
2. Finger dexterity- it should not be affected.
3. Manual dexterity- due to the left shoulder pain, left lower limb weakness and numbness, the manual dexterity will be affected.
4. Sensitivity- the sensitivity of the left lower limb will be affected.
5. Steadiness- Due to the left lower limb weakness, the steadiness will be affected.
6. Trunk strength- It should not be affected.
7. leg and ankle strength- The lower leg and ankle strength will be decreased about 50%.
8. Control precision- It should not be affected significantly.”
9. Some of Dr Fu’s “estimates” are dependent on documentation and on observations from the physical examination already set out in the Joint Report (eg items i, iv, v and viii for “limitations” and items i, ii, iv, vi and viii for “disabilities”). The rest of Dr Fu’s “estimates” are dependent on the Plaintiff’s subjective complaints of left shoulder and left lower limb (including left ankle) pain, weakness and numbness (eg items ii, iii, vi and vii for “limitations” and iii, v and vii for “disabilities”).
10. Under the basic principles of expert evidence, experts are permitted to give opinion evidence on the facts, matters and assumptions proved either by them in respect of their own tests and examinations or by documentary or witness evidence given by other witnesses. But the ultimate decision as to the veracity or otherwise of the primary documents/observations and of the Plaintiff’s evidence is a question of fact for the court. Whether the Plaintiff’s allegations of pain, weakness and numbness are genuine is a finding of fact by the trial judge on the basis of all the evidence and not just expert medical opinion.
11. On the other hand, it is for the orthopaedic experts to draw attention to clinically relevant factors, eg the documented complaints from the medical history, the results of the physical examination, the presence and extent of any objective or physical impairment, and comment on the diagnosis, aetiology, prognosis and/or extent of impairment in respect of any recognisable medical condition, but it is not for him to “prove” whether the claimant is telling the truth or not.
12. In my view, the trial judge can sufficiently deal with the the Plaintiff’s limitations and disabilities on the primary findings and clinical opinion set out in the Joint Report and on the factual evidence from the Plaintiff. I disagree with Mr Lam’s submissions that the court *cannot* determine the extent of the Plaintiff’s limitations and disabilities without Dr Fu’s Report.
13. In any event, expert witnesses are only allowed to give opinion on matters within their areas of expertise in order to furnish scientific or technical (and in this case medical) information likely to be outside the experience and knowledge of the judge or jury. Here, even Dr Fu admitted that he could only give general estimates rather than firm clinical opinion based on scientific criteria or reasoning drawn from a work-simulated assessment (which was not done). I am not convinced that specialised orthopaedic knowledge and expertise have been brought to bear on such “estimates”. In the circumstances, I do not find Dr Fu’s Report necessary, relevant or of probative value.
14. Further, in considering whether to allow Dr Fu’s Report to be adduced, case management considerations cannot be ignored. In order to manage cases properly, it is necessary to ensure that expense is saved and the case progresses expeditiously to trial. The CLR Order has set out a timetable for obtaining expert medical evidence and preparing the RSOD and Answer thereto so that upon completion of these tasks the present case can be promptly set down for assessment of damages.
15. Here, the Plaintiff sought leave to adduce supplemental expert medical evidence after expiry of the deadline for filing/serving the RSOD, and having done so he also took a decision, as it were, behind the back of the court and the Defendants to instruct Dr Fu to compile Dr Fu’s Report when he well knew (a) the court had yet to decide whether to grant leave for adducing supplemental orthopaedic expert opinion and (b) the Defendants opposed such application. In my view, the court should not endorse such attempt by the Plaintiff to force the court’s hand by commissioning and producing Dr Fu’s Report without permission of the court, especially in face of objection by the Defendants against such supplemental expert opinion.
16. Mr Lam further submitted that it was necessary to commission Dr Fu’s Report in order to show why supplemental orthopaedic expert opinion was necessary, and that in light of the Defendants’ opposition, it would save time and costs for the Plaintiff to proceed with obtaining the supplemental report on a solo basis. I am unable to accept Mr Lam’s submissions. The true question is whether the issues intended to be put to Dr Fu for his supplemental expert opinion deserve to be so put to him in the sense that such issues are relevant, necessary and of probative value to the final adjudication, and not what the ultimate expert opinion on such issues is. I am unable to agree that it is necessary to augment the application for leave by actually obtaining Dr Fu’s Report before the hearing before me on 8th July 2009.
17. Further, if the court had thought it desirable for the orthopaedic experts to canvass the suggested issues (but this court disagrees), the court would have to consider whether a joint instead of solo supplemental expert report would have been more appropriate. Very often, when the court allows a supplemental report, there is a question of who should have the last word, and a joint report neatly obviates any delay and costs generated by sequential supplemental reports in reply.
18. This is reflected in the new Practice Direction 18.1. In this respect I also reiterate the caution expressed by Fung J in *Thapa Krishna Raj v Wo Hing Construction Company Limited* HCPI309/2007 (unreported, 16th March 2009) :

“13. As to the solo report by Dr. Lam, it was given pursuant to an enquiry by the lawyer without any further examination.  It related to Plaintiff’s working life given the pre-existing condition, and also some augmentation to his opinion in the previous joint report.

1. I wish to sound a note of serious caution that the Plaintiff’s conduct in obtaining a further solo report subsequent to a joint report and without leave is in fact sabotaging the entire system of case management.  In any case, the issue of pre-existing degeneration is sufficiently dealt with in the joint report given the common understanding now indicated by the parties.  Be that as it may, the Plaintiff should not have gone off to obtain any solo report after a joint report without first discussing with the other side and seeking the leave of the Court.
2. In the event, leave is not granted to adduce the solo report of Dr. Lam.”
3. In summary, case management considerations also do not point to any cogent reason for allowing the Plaintiff to rely on Dr Fu’s Report. I am not persuaded that Dr Fu’s Report will be helpful to the trial judge in his/her adjudication, so at the hearing on 8th July 2009 I have declined leave to adduce the same.

*V. Ds’ Summons*

*(a) Specific discovery under the CLR Order and Issue C*

1. There is no dispute that the Plaintiff was in breach of the CLR Order in failing to make specific discovery and to file/serve the RSOD within the deadlines specified in paragraphs 3(a) and (c) above. However, all Pay Slips were disclosed by 24th April 2009, so there is no question of dismissing the action for breach of the CLR Order in making specific discovery. The true issue is whether under Issue C the Plaintiff should be ordered to pay a sum of money into court for failure to comply with the CLR Order in this respect on a timely basis.

*(b) Legal principles*

1. Order 2 rule 3 of the Rules of the District Court (“RDC”) provides *inter alia* that :

“(1) The Court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule or court order.

(2) When exercising its power under paragraph (1), the Court shall have regard to –

(a) the amount in dispute; and

(b) the costs which the parties have incurred or which they may have incur.

(3) Where a party pays money into court following an order under paragraph (1), the money is security for any sum payable by that party to any other party in the proceedings.”

1. Order 2 rule 5(1) of the RDC deals with relief from sanctions :

“On an application for relief from any sanction imposed for a failure to comply with any rule or court order, the Court shall consider all the circumstances including-

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure to comply;

(e) the extent to which the party in default has complied with other rules and court orders;

(f) whether the failure to comply was caused by the party in default or his legal representative;

(g) ……;

(h) whether the trial date or the likely trial date can still be met if relief is granted;

(i) the effect which the failure to comply had on each party; and

(j) the effect which the granting of relief would have on each party.”

1. The provision in Order 2 rule 3 of the RDC is similar to r.3(5)-(6A) of Part 3 of the English Civil Procedure Rules (“CPR”) which provides as follows :

“(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, *practice direction or a relevant pre-action protocol*.

(6) When exercising its power under paragraph (5) the court shall have regard to –

(a) the amount in dispute; and

(b) the costs which the parties have incurred or which they may have incur.

(6A) Where a party pays money into court following an order under paragraph (3) or (5), the money is security for any sum payable by that party to any other party in the proceedings.” (*italicised* parts different from Hong Kong provision)

1. In *Mealey Horgan plc v Horgan & anor*, The Times 6th July 1999, the defendants applied for and were granted extension of time to serve 2 witness statements. The witness statements were out of time for reasons which the court found were wholly unsatisfactory, but they were eventually ready and exchanged some 6 weeks or more before trial. There was no suggestion that the claimants could not conveniently deal with the matter in order to be ready for trial. The claimant urged the court to sanction the defendants by requiring them to pay money into court. Buckley J said as follows :

“…… The only reason for this I think is the spirit of the new rules, the thought that judges must be tough in ensuring from now on that rules are complied with, that timetables laid down are not just there for guidance but to be adhered to, and that if parties do not adhere to them there should be a penalty. To my mind the penalty for this type of situation is that the party in default has to come to court and obtain permission to use the statement. I think all are agreed that I have jurisdiction in an appropriate case to impose further sanction including a payment into court but I do not think it is appropriate in the present case. It may be appropriate if a party has behaved worse than the Defendants have here, *there is a history of repeated breach of timetables or of court orders or if there is something in the conduct of the party that gives rise to suspicion that they may not be bona fide and the court thinks the other side should have some financial security or protection. Again those are matters or examples that come to mind as it were off the cuff. I am sure there are many others.* But to my mind this is a straightforward case in which both parties did not adhere to the original timetable for witness statements. The Defendants took some days longer than the Claimants to produce theirs, which took them beyond the final agreed date, but *that default has not prejudiced the trial and has not significantly prejudiced the Claimants to my mind. There is no suggestion here of deliberate manoeuvring or that the Defendants are not likely to be good for the claim*. Indeed such evidence as I have seen is rather to the reverse; …… so scouting around quickly *I cannot see any reason other than pure punishment to order a payment in* and I do not think, subject to the Court of Appeal in due course saying that this is wrong, *I do not myself read the new rules as encouraging the court to punish this type of default by ordering payments into court*. I think that the position can otherwise be dealt with conveniently.” (my emphasis)

1. In *Olatawura v Abiloye* [2002] 4 All ER 903, a claimant was ordered to give £5,000 by way of security for the defendant’s costs and this was upheld by the Court of Appeal. It was held that under the CPR there was jurisdiction to make orders which were tantamount to orders for security for costs outside the provisions of Part 25. More specifically, rule 3.1(5) empowered the court to order a non-compliant party to pay money into court and rule 3.1(6) required the court, in exercising that power, to have regard to the costs incurred or to be incurred. When exercising such jurisdiction, the court should be alert and sensitive to the risk that, by making such an order, it might be denying the party concerned the right of access to the court. Other relevant considerations would be the party’s conduct in the proceedings, including in particular his compliance or otherwise with any applicable rule, practice direction or protocol (or any applicable rule or court order for the Hong Kong provision).
2. Simon Brown LJ at p.910 endorsed *Mealey Horgan plc* and went on to say that the court should not ordinarily penalise breaches of the rules and the like by making orders for payment into court under rule 3.1(5). “[A] party only becomes amenable to an adverse order for security under r 3.1(5) …… once he can be seen either to be regularly flouting proper court procedures (which must inevitably inflate the costs of the proceedings) or otherwise to be demonstrating a want of good faith – good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in according with the overriding objective” (p.911).
3. In *CIBC Mellon Trust Co and ors v Mora Hotel Corp NV and anor* [2003] 1 All ER 564, the Court of Appeal held that the judge fell into error when requiring the defendant companies to pay to the claimant trustees security in respect of past costs orders as a condition for allowing them to pursue the application to set aside default judgments by failing to consider (a) there could be injustice when the defendant could not make such payments out of his own resources and the only source of funding was a third party against whom no order for costs had been made, and (b) the proposed order would retrospectively improve the position of the claimant trustees in relation to past orders.
4. Peter Gibson LJ (with whom Mance LJ and Hale LJ agreed) said *Olatawura* “suggests that it is only appropriate for the court to exercise its power under Pt 3 to require a payment into court in limited circumstances and should not do so in the absence of want of good faith on the part of the party against whom the order is sought. ……” (pp.574-575).
5. In *Ali v Hudson (t/a Hudson Freeman Berg)* [2004] CP Rep 15 (or [2003] EWCA Civ 1793), Clarke LJ cited *Olatawura* and *CIBC Mellon Trust Co* with approval and held that rule 3.1(5) gave the court a separate and free-standing power to order a party to pay a sum of money into court if that party had, without good reason, failed to comply with a rule, practice direction or a relevant *pre*-action protocol. Clarke LJ went on to summarise the correct general approach as follows :

“i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;

ii) in any event,

* 1. an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ [in *Olatawura*] put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and
  2. an order will not be appropriate in every case where a party has a weak case. The weakness of a party’s case will ordinarily be relevant only where he has no real prospect of succeeding.”

1. Both Mr Lam and Ms Chan adopted and applied the approach in the English cases for the exercise of discretion under Order 2 rule 3 of the RDC. Given the similarity of the Hong Kong and English provisions, and given the sensible principles enunciated in the English authorities, I see no reason to depart from them.

*(c) Chan’s Affirmation*

1. Chan’s Affirmation contended that the Plaintiff’s failure/ refusal to disclose the 2 pay slips dated 5th November and 5th December 2007 issued by Power King in respect of the Plaintiff’s monthly earnings for October and November 2007 (“Subject Pay Slips”) until after the issuance of Ds’ Summons was a deliberate, intentional and blatant disobedience of the CLR Order with a view to conceal the fact that the Plaintiff (a) resumed work very soon after the Accident and (b) did not suffer *pre*-trial full loss of earnings (“Pre-trial FLOE”) as alleged in the SOD. After all, the Subject Pay Slips show that the Plaintiff worked for and received salaries from Power King since mid-October 2007. In the meantime, the Defendants through their solicitors have incurred considerable time, costs and effort investigating into the matter, which could have been saved had the Plaintiff made prompt and proper disclosure of the Subject Pay Slips.

*(d) Plaintiff’s Affirmation*

1. The Plaintiff claimed (and it was verified by Ms Lee of Power King (“Ms Lee”) over the telephone on 23rd April 2009) that the Pay Slips were given to him by Power King at the same time when he received his monthly salaries, but the Defendants’ solicitors misunderstood what Ms Lee told them and mistakenly believed she gave the Pay Slips to the Plaintiff the week before 20th April 2009.
2. Of the Pay Slips, the Plaintiff claimed he retained the 4 dated 3rd January, 5th February, 5th March and 5th April 2008 in respect of his monthly earnings from December 2007 to March 2008 (“Disclosed Pay Slips”), and promptly disclosed them to the Defendants’ solicitors on 25th November 2008. Further, on 13th March 2009, the Plaintiff agreed to produce to the Defendants’ solicitors an authorisation letter for retrieval of income records from Power King. The Plaintiff therefore denied that his failure to make timely specific discovery of the Subject Pay Slips was intentional, deliberate or malicious. He claimed that “[it] was [Ms Lee] who refused to produce the outstanding pay slips to [him]”, and “[all] outstanding pay slips were recently retrieved from [Power King] direct”.

*(e) Discussion on specific discovery and Issue C*

1. There is no dispute that this court has jurisdiction to order payment of a sum of money into court under Order 2 rule 3 of the RDC as security for costs. The narrower question is whether it is proper to make such an order in the particular circumstances of this case.
2. There is no doubt that the Plaintiff has a broadly genuine claim for loss and damages. After all, liability has been admitted and the remaining issue is the assessment of damages. However, that is not the crux of Issue C in Ds’ Summons. Instead the true question is whether there has been a demonstration of want of good faith, it being understood that good faith refers to a will to litigate the Plaintiff’s claim for Pre-trial FLOE as economically or expeditiously as possible in accordance with the underlying objectives, or whether there has been some conduct on the part of the Plaintiff giving rise to suspicion that such claim may not be *bona fide*, so that the Defendants should be entitled to some financial protection.
3. I say so because the specific discovery required under the CLR Order in paragraph 3(a) above is narrowly focused on documentary support for the Plaintiff’s claim for Pre-trial FLOE, and more particularly on the Plaintiff’s *post*-Accident employment with and earnings from Power King. With the Plaintiff’s disclosure of the Disclosed Pay Slips prior to the CLR Order that exposed (a) his earnings from December 2007 to April 2008 and (b) his period of employment with Power King from 15th October 2007 to 5th April 2008, the outstanding Pay Slips to be disclosed under the CLR Order necessarily relate to the remaining period from 15th October to 30th November 2007.
4. Before I proceed to consider the Plaintiff’s claim for Pre-trial FLOE, I must place his conduct in relation to such claim in the proper context. There is no doubt (and the Plaintiff must have known) that the Defendants do not have any knowledge of the Plaintiff’s *post*-Accident work and earnings, so their assessment of the quantum of damages necessarily turns on the Plaintiff’s good faith or *bona fides* in making out such claim by candid pleadings and witness statement, and by comprehensive discovery of all materially relevant documents.

*(1) Background facts leading to the CLR Order*

1. The starting point is the orthopaedics clinic record dated 4th January 2008 referred to in the Joint Report, which states that the Plaintiff has “return to light duty (sedentary)”. Such information given by the Plaintiff to the orthopaedics clinic is now exposed to be untrue by the Disclosed and Subject Pay Slips which show that the Plaintiff worked as a truck driver for Power King from 15th October 2007 to 5th April 2008 with overtime work and/or work on public holidays for every month during that period. Indeed, the RSOD filed on 21st July 2009 after the hearing before me (which the Plaintiff’s solicitors by their letter dated 20th July 2009 to the court urged me to consider) pleads that “[after] the accident, [the Plaintiff] started working at [Power King] from 15.10.2007 till 5.4.2008 as a 16-ton truck driver and deliveryman”.
2. It is plain from the above that even when the Plaintiff was actually still working as truck driver for Power King (so there can be no question of failed memory or recollection), he was quite prepared to tell untruths in relation to the nature of his *post*-Accident work to his treating doctor. There is no explanation for this in the Plaintiff’s witness statement or in the Plaintiff’s Affirmation.
3. Next, in the SOD filed on 7th August 2008, the Plaintiff claimed that as a result of the Accident he was granted 280 days of sick leave from 6th October 2007 to 11th July 2008, and “was unable to work during the sick leave period because of the injuries”. He claimed for Pre-trial FLOE during the whole sick leave period in the total sum of HK$150,769.00. This is the 2nd version of *post*-Accident work capacity given by the Plaintiff, which is obviously at variance with what he told the orthopaedics clinic as described above.
4. The Plaintiff goes on to say in the SOD that because he was unable to perform his duties satisfactorily *post*-Accident, he quitted his *pre*-Accident job and found work as a truck driver for Power King in/about February 2008 earning about HK$14,000.00 *per* month, but he became unemployed when Power King closed down in April 2008. In/about May 2008, he started to work as a peon truck driver at a daily wage earning no more than HK$11,000.00 *per* month. This is the 3rd version of *post*-Accident work given by the Plaintiff, which again is very different from his earlier versions.
5. In this respect, I cannot help but notice that right from the very beginning, the plea in the SOD that the Plaintiff suffers Pre-trial FLOE from 6th October 2007 to 11th July 2008 must be wrong because the same pleading admits that he worked for Power King from February 2008 until it closed down in April 2008 earning about HK$14,000.00 *per* month. The Plaintiff has not explained why he still pursues an inflated claim for Pre-trial FLOE for the whole sick leave period of 280 days in the sum of HK$150,769.00 in the SOD without giving any credit for earnings received from Power King.
6. There is no doubt the Plaintiff now accepts that the essential allegations in the SOD in respect of his claim for Pre-trial FLOE are incorrect. First, since (and as he now acknowledges) he actually worked as truck driver for Power King from 15th October 2007 to 5th April 2008, his pleaded case that he was unable to work during the whole sick leave period because of his injuries is plainly an untruth. Secondly, it is also incorrect to say that he quitted his *pre*-Accident job because he was unable to perform his duties satisfactorily after the Accident. In the RSOD filed on 21st July 2009, the Plaintiff admits he “was able to secure an employment contract with [Power King] *before the accident* ……” (my emphasis). Thirdly, since the Plaintiff started working for Power King on 15th October 2007, his plea that he only found work with Power King in/about February 2008 cannot be right.
7. No explanation is forthcoming from the Plaintiff as to why such palpably incorrect 2nd and 3rd versions of his *post*-Accident work have been pleaded in the SOD when he himself must have known that such pleas would have suggested erroneously to the Defendants that he was unable to work for a substantial period after the Accident and consequently suffered full loss of earnings from October 2007 to mid-July 2008 when in fact he worked and earned income during a substantial part of that period. As it eventually turns out, the Plaintiff’s claim for Pre-trial FLOE is now whittled down to a short period of 10 days from 5th to 14th October 2007 in the total sum of HK$4,469.00, ie less than 3% of the original claim of HK$150,769.00.
8. Irrespective of the availability of the Subject Pay Slips or otherwise, it is not contended that the Plaintiff’s memory or recollection has failed him. Indeed, as will be seen below, the Plaintiff only suggests that he has been mistaken, and I will return to this suggestion below. But no matter whether the Plaintiff has the Subject Pay Slips in his possession or not, how could he not have known that he resumed truck driving 10 days and not 9 months after the Accident? How could he have allowed a claim for Pre-trial FLOE for 280 days to be made? In my view, this certainly demonstrates a want of good faith or *bona fides* on the part of the Plaintiff in pursuing and litigating a genuine claim.
9. The Plaintiff’s List of Documents filed on 21st October 2008 does not disclose any of the Pay Slips. Yet there is no present dispute that Power King gave the Pay Slips to the Plaintiff at the same time he received his monthly salaries, and the Plaintiff has at the very least kept the Disclosed Pay Slips. Even if the Plaintiff has not retained possession of the Subject Pay Slips (as he now claims), no explanation is forthcoming as to why the Disclosed and Subject Pay Slips have not been properly and respectively disclosed in Schedule 1 Part 1 and Schedule 2 of the Plaintiff’s List of Documents.
10. On 25th November 2008, the Plaintiff’s solicitors sent copies of *inter alia* the Disclosed Pay Slips to the Defendants’ solicitors. It is expressly stated on each such pay slip that the Plaintiff joined Power King on 15th October 2007, and the last one expressly states that he left Power King on 5th April 2008. The Disclosed Pay Slips also show that at the very least the Plaintiff received monthly salaries from Power King from December 2007 to April 2008. The Disclosed Pay Slips, which are plainly at variance with the plea in the SOD that the Plaintiff only worked for Power King from February to April 2008, amount to a 4th version of *post*-Accident work given by the Plaintiff.
11. Mr Lam submitted that the Plaintiff’s disclosure of the Disclosed Pay Slips was a sign of good faith. However, 2 matters suggest otherwise. First, such disclosure before the CLR Order is not the subject matter of any breach of the CLR Order. The breach relates to failure to disclose the Subject Pay Slips prior to the specified deadline. Secondly, the Disclosed Pay Slips by showing the Plaintiff joined Power King on 15th October 2007 and worked for and received earnings from Power King since at least December 2007 are the very documents that cast doubt on the Plaintiff’s claim for Pre-trial FLOE and on the averment in the SOD that he worked for Power King from February to April 2008.
12. Yet the Plaintiff has made no attempt to explain or to intimate any intention to rectify the inflated claim for Pre-trial FLOE in the SOD, or in any other way inform the Defendants of the true position in relation to his *post*-Accident work even though (a) the Defendants’ solicitors wrote to his solicitors on 12th December 2008 to demand discovery of *inter alia* records of salaries paid by Power King to the Plaintiff from the commencement of employment to termination thereof, and (b) the Defendants subsequently secured the CLR Order requiring the Plaintiff to make specific discovery of such documents (see paragraph 87 below).
13. Drs Fu and Lam medically examined the Plaintiff on 12th December 2008. It is recorded in their Joint Report that the Plaintiff told them “he had returned to work in March 08. He said his company had arranged light duty for him, but the salary was decreased. He only worked in sedentary duties in warehouse and no driving is required. He was referred to have Assessment of Medical Fitness to drive on 11th April 2009. It was then recommended that he was *medically fit to drive but requires further driver assessment*. …… He said he changed to work in another company in June 2008 and resumed driving. ……” This is a 5th version of *post*-Accident work given by the Plaintiff, which is again at variance with his earlier versions.
14. Regrettably, the 5th version again turns out to be incorrect. The Plaintiff’s assertion that he has returned to work in March 2008 is even later in time than what has been pleaded on the SOD (ie he started to work for Power King in February 2008) or revealed in the Disclosed Pay Slips (ie he received earnings from Power King at least since December 2007). Further, although the information given by the Plaintiff to Drs Fu and Lam that he took up warehouse sedentary duties with reduced salary and no driving in March 2008 echoes what he has told the orthopaedics clinic in January 2008, it turns out that these assertions are all untrue. The Plaintiff now admits that he worked as a truck driver and deliveryman for Power King from 15th October 2007 until April 2008.
15. In my view, it is difficult to envisage how the Plaintiff could have recollected so clearly that he carried out sedentary duties at a warehouse since March 2008 with detailed embellishments of such version of events, ie particulars of (a) reduction in salary, (b) no driving at that stage, (c) a precise date for assessment of medical fitness to drive, (d) the result of such assessment, and (e) resumption of driving only in June 2008 after such assessment, when in fact he resumed truck driving 10 days after the Accident. I am persuaded this is another demonstration of want of good faith and *bona fides* on the part of the Plaintiff.
16. By the CLR Order dated 23rd February 2009, the Plaintiff was required to make specific discovery of the records of salaries (ie the Pay Slips) from the commencement of his employment with Power King up to termination thereof within 21 days (ie on or before 16th March 2009). Since the Plaintiff has already disclosed the Disclosed Pay Slips, he should have made specific discovery of the Subject Pay Slips on or before 16th March 2009. But he did not.

*(2) Events leading up to the disclosure of the Subject Pay Slips*

1. In response to the CLR Order, the Plaintiff’s solicitors wrote to inform the Defendants’ solicitors on 4th March 2008 that Power King was wound up, so the Plaintiff would not be able to provide the relevant Pay Slips but would deal with this in his witness statement.
2. Ms Chan saw this as a hollow attempt by the Plaintiff to put the Defendants off the scent of a vastly reduced claim for Pre-trial FLOE because the winding up and company searches carried out by the Defendants’ solicitors reveal (and it is not presently disputed by the Plaintiff) that Power King is in fact a subsisting company and not wound up at all.
3. I am, however, prepared to accept for present purposes that the Plaintiff (as he claims) was told that Power King would cease to carry on business when he was laid off in April 2008, and he mistakenly thought Power King was or would be wound up. One may be forgiven to think that given the need to comply with the CLR Order, it would have been natural and easy enough for the Plaintiff’s solicitors to carry out winding up and company searches (as the Defendants’ solicitors did) or even just to make a simple telephone call to Power King to check whether it has merely ceased business or has been wound up or not at all. Be that as it may, the Plaintiff’s solicitors are apparently content to assume that Power King has already been wound up without the slightest investigation.
4. Given the Plaintiff’s erroneous assertion that Power King has been wound up, it is understandable that the Defendants viewed the Plaintiff’s refusal to comply with the directions for specific discovery under the CLR Order with scepticism, and perceived such refusal as a suspicious attempt to divert them from proper investigations into the myriad discrepancies in the different versions given by the Plaintiff in relation to his *post*-Accident work and earnings. It is therefore no wonder that when the Defendants’ solicitors wrote to the Plaintiff’s solicitors on 12th March 2009 to tell them that Power King was still a subsisting company, they requested the Plaintiff to provide an authorisation letter (as *per* the draft enclosed) for obtaining the relevant records of salaries from Power King.
5. On 13th March 2009, the Plaintiff’s solicitors sent to the Defendants’ solicitors a certified copy of the Plaintiff’s earlier authorisation letter dated 24th February 2009. The Defendants’ solicitors did not find it acceptable, and on 19th March 2009 required a specific authorisation letter in the form provided under earlier correspondence. On 24th March 2009, the Plaintiff’s solicitors sent to the Defendants’ solicitors (a) the specific authorisation letter signed by the Plaintiff and (b) the Plaintiff’s witness statement both dated 23rd March 2009.
6. Mr Lam submitted that the Plaintiff’s willingness to give the abovementioned authorisation letters demonstrated there was no want of good faith. However, it should be remembered that the provision of such authorisation letters is not an answer or sufficient answer to the specific discovery under the CLR Order, and does not in any way diminish the Plaintiff’s duty to comply with the CLR Order to make specific discovery of the relevant Pay Slips. More importantly, the Plaintiff’s witness statement made on the very same day he gave the specific authorisation letter challenges Mr Lam’s submissions.
7. In his witness statement, the Plaintiff reiterates that his sick leave period was from 5th October 2007 to 11th July 2008 (ie 280 days), and goes on to say that his employment with his *pre*-Accident employer ceased on 10th October 2007 and he commenced employment with Power King on 15th October 2007, “但一直放病假至2007年11月30日，自2007年12月我回復上班，任職16噸貨車司機”. The Plaintiff adds that his earnings at Power King were as follows :

|  |  |
| --- | --- |
| 3rd January 2008 | HK$13,600.00 |
| 5th February 2008 | HK$13,500.00 |
| 5th March 2008 | HK$14,400.00 |
| 5th April 2008 | HK$17,266.70 |

This is the 6th version of *post*-Accident work given by the Plaintiff, which is plainly different from the earlier versions and which is also untrue on the Plaintiff’s present case.

1. Although the Plaintiff in his witness statement concedes for the first time that he commenced employment with Power King on 15th October 2007, he was in my view constrained to do so by the express notation of such fact on the Disclosed Pay Slips. What is more important is the fact that notwithstanding such concession, the Plaintiff still claims by such witness statement that (a) he remained on sick leave until 30th November 2007 and only resumed truck driving in December 2007, and (b) he received earnings from Power King from December 2007 onwards. But the subsequent disclosure of the Subject Pay Slips clearly show that the Plaintiff received earnings for truck driving for Power King in October and November 2007, and that the statements in (a)-(b) above are untrue.
2. No explanation is forthcoming from the Plaintiff as to why (a) he changed his story yet again, and (b) why in changing his story he gave another incorrect version to the court and the Defendants. There is no suggestion that his memory or recollection has failed him over such a straightforward matter, ie whether he started working immediately upon commencement of his employment with Power King or whether he did so quite some time later. The gravity of the untruths in the Plaintiff’s witness statement is compounded by the fact that (i) his solicitors by their letter dated 4th March 2009 have assured the Defendants he would deal with the issues of his work/earnings during his employment with Power King in his witness statement, and (ii) the Defendants were then questioning his claim for Pre-trial FLOE as evident by the CLR Order and the letter from the Defendants’ solicitors dated 12th March 2009. In my view, this is another demonstration of want of good faith or *bona fides* on the part of the Plaintiff in pursuing a genuine claim for Pre-trial FLOE.
3. According to Chan’s Affirmation, Ms Chan contacted Power King and spoke with Ms Lee on 20th April 2009, and Ms Lee told her the records of salaries (ie the Pay Slips) were sent to the Plaintiff the week before and asked her to obtain the same from the Plaintiff directly. So the Defendants’ solicitors wrote to the Plaintiff’s solicitors on the same day to request forthwith disclosure/production of the records of salaries without delay, and to warn that unless there was a reply within 3 days they would issue a summons for non-compliance of the CLR Order.
4. On 21st April 2009, the Plaintiff’s solicitors replied to deny having received the requested records of salaries from Ms Lee the week before, but said the Plaintiff was going to obtain such records from Ms Lee “if the said requested records are in existence”. So they urged the Defendants to withhold any summons application until end of the month.
5. According to Chan’s Affirmation, on 22nd April 2009 Ms Chan again called Ms Lee who clarified that (a) she in fact gave the records of salaries to the Plaintiff at the same time when the Plaintiff received his monthly salaries, and (b) she would remind the Plaintiff to give back the records of salaries in order for her to accede to the request by the Defendants’ solicitors.
6. On 23rd April 2009, the Plaintiff’s solicitors wrote to the PI Master in respect of *inter alia* the Defendants’ intention to take out a summons for non-compliance of the CLR Order. The Plaintiff’s solicitors explained that they telephoned Ms Lee who confirmed that the records of salaries were given to the Plaintiff not the week before but at the same time when he was paid his monthly salaries. “Notwithstanding this, we noticed that the requested records were in the possession of Power King’s auditor. On 21.4.09, we already sought [the Defendants’ solicitors’] indulgence for an extension of time to retrieve the said documents by the end of April, however, [they] threatened to issue a summons shortly. We were told by [the Plaintiff] that the requested receipts would be faxed to us tonight”.
7. Much play was made by Mr Lam over Ms Chan’s misunderstanding as to when the Pay Slips were given to the Plaintiff. In my view, such misunderstanding is a red herring.
8. First, there is no any present dispute that the Pay Slips were given to the Plaintiff when he was paid his monthly salaries. This has been clarified by Ms Lee. Secondly, the misunderstanding at best only caused the Defendants’ solicitors to write to the Plaintiff’s solicitors on 20th April 2009 to ask for forthwith disclosure of the relevant Pay Slips, which on any view must be a legitimate demand under the CLR Order.
9. Thirdly, irrespective of such misunderstanding, the Plaintiff himself must have known that he received the Subject Pay Slips in early November and early December 2007 when he received his monthly salaries for October and November 2007. Yet no attempt has been made in his solicitors’ letter dated 21st April 2009 to explain either that (a) he still has the Subject Pay Slips in his possession or (b) he once had but no longer has them in his possession custody or power. All that is said is that he will obtain the Subject Pay Slips from Ms Lee if they are in existence, which assertion plainly gives the impression that they may or may not be in existence, even though he must have known that either the Subject Pay Slips are in existence or they have once existed. Further, no explanation is forthcoming as to why the Plaintiff did not ask Ms Lee for the Subject Pay Slips in good time prior to the deadline for making specific discovery under the CLR Order if he thought she or Power King might have them. In my view, the Plaintiff’s assertions are nothing more than a poor attempt to stave off Ds’ Summons which the Defendants have threatened to issue in respect of the non-compliance of the CLR Order.
10. According to Chan’s Affirmation, the Defendants were worried that the Plaintiff deliberately concealed the Subject Pay Slips. After all, the then available documents show that he joined Power King on 15th October 2007 and received the Pay Slips from Power King together with his monthly salaries, and yet he failed to disclose the Subject Pay Slips. So on 23rd April 2009 the Defendants’ solicitors issued Ds’ Summons that included Issues A, B and C.
11. On the following day (ie 24th April 2009), the Plaintiff’s solicitors sent to the Defendants’ solicitors copies of the Subject Pay Slips, which re-affirm that the Plaintiff joined Power King on 15th October 2007 but reveal for the first time that he worked for and received salaries from Power King for October and November 2007.
12. On 30th April 2009, the Defendants’ solicitors received from Power King a schedule summarising the monthly salaries paid to the Plaintiff from October 2007 to April 2008 (with bonus) countersigned by him (“Schedule”). Chan’s Affirmation stated that upon receipt of the Schedule Ms Chan called Ms Lee who reiterated that the Pay Slips were given to the Plaintiff at the time when he received his monthly salaries, but explained that she kept the Schedule for record purpose.

*(3) Analysis*

1. Ms Chan argued that an order under Order 2 rule 3 of the RDC was justified because the Plaintiff deliberately failed to disclose the Subject Pay Slips in the List of Documents or pursuant to the CLR Order until he was constrained to do so by the Defendants’ determination to get to the bottom of things, ie by issuing Ds’ Summons which inevitably would have exposed his work and earnings for October and November 2007.
2. On the other hand, the Plaintiff claims that the delay in disclosing the Subject Pay Slips is because they were recently retrieved from Power King direct and it was Ms Lee who refused to produce such documents to him. Such explanation first surfaced in the written submissions of the Plaintiff’s solicitors dated 3rd June 2009 and was reiterated in the Plaintiff’s Affirmation.
3. But no information is forthcoming from the Plaintiff as to when he requested Power King to provide the Subject Pay Slips, when and why Ms Lee refused to produce such pay slips to him, and when and why Ms Lee or Power King later relented save and except for the assertion in the letter from the Plaintiff’s solicitors to the PI Master dated 23rd April 2009 that the Plaintiff would fax “the requested receipts” to his solicitors that evening.
4. More importantly, there is no explanation why such reason, ie Ms Lee’s refusal to give the relevant documents to the Plaintiff, has not been put forward in earlier correspondence with the Defendants’ solicitors and with the court given the deadline for making specific discovery under the CLR Order of 16th March 2009. Indeed, in the letter from the Plaintiff’s solicitors dated 23rd April 2009 to the PI Master, which refers to their conversation with Ms Lee confirming that the Pay Slips were given to the Plaintiff when he received his monthly salaries, there is *no* mention at all that Power King kept the Pay Slips but refused to produce them to the Plaintiff. Instead, the letter hints that “the requested records were in the possession of Power King’s auditor”. Yet just 2 days before, it is said in the letter from the Plaintiff’s solicitors to the Defendants’ solicitors that the Plaintiff would ask Ms Lee for the records of salaries “if the requested records are in existence”.
5. Further, the Plaintiff also has not explained why he thought Ms Lee would have the Subject Pay Slips when they were actually given to him at the same time when he received his monthly salaries. I also bear in mind that Ms Lee eventually only produced the Schedule and not the Subject Pay Slips to the Defendants’ solicitors. Although the Plaintiff’s Affirmation was made 2 days prior to the hearing before me, it fails to address the assertion in Chan’s Affirmation that Ms Lee told her that she only kept the Schedule for record purpose.
6. I am afraid the above assertions by the Plaintiff do not have a convincing ring, and cast doubt on his assertions set out in paragraph 108 above. Be that as it may, the most telling matter is that the Plaintiff could have disabused the Defendants of the incorrectly pleaded claim for Pre-trial FLOE in the SOD prior to the issuance of Ds’ Summons by full and frank admission (whether by way of solicitors’ correspondence or witness statement) that he worked for and received earnings from Power King as from 15th October 2007 instead of from December 2007 or February 2008 or March 2008 or not at all, but he has failed to do so. By not doing so and/or by not disclosing the Subject Pay Slips (whether in his actual possession or in his power through early liaison with Power King) until 24th April 2009, the Plaintiff must have known he is perpetuating a falsely inflated claim for Pre-trial FLOE.
7. In my view, the unravelling of the Plaintiff’s true case in respect of his Pre-trial FLOE (especially during the period he was employed by Power King) as a result of the Defendants’ investigative perseverance in demolishing untruths in version after version of *post*-Accident work and earnings given by the Plaintiff until he was constrained to disclose the Subject Pay Slips and to own up to the now hugely deflated claim speaks not of any true voluntary cooperation on the part of the Plaintiff but of manoeuvring of such claim and of the requirement for specific discovery under the CLR Order that reflects adversely on his good faith and *bona fides*.
8. Irrespective of whether the Plaintiff has retained the Subject Pay Slips or not, it is difficult to appreciate how he could have been mistaken that he did not work for 9 months (until 11th July 2008), 5 months (until March 2008), 4 months (until February 2008) or 2 months (until December 2007) after the Accident (according to the different versions he put forward) when in reality he resumed work within 10 short days (until 15th October 2007). Further, the Plaintiff must have known he received earnings and was given the Pay Slips on a monthly basis ever since he started to work for Power King in mid-October 2007 even if (as he claims) he no longer has the Subject Pay Slips in his possession. Hence, I am unable to accept the suggestion that he has been mistaken in his pleas in the SOD. The above analysis suggests manoeuvring on the part of the Plaintiff at the expense of the Defendants, and the court takes a dim view of such conduct as it offends the administration of justice.
9. Mr Lam submitted that breach of the directions for specific discovery in the CLR Order could not be said to be regular flouting of court order or repeated breaches of court-imposed timetable. But it is clear from the authorities that this is not the sole ground to justify an order under Order 2 rule 3 of the RDC. I am persuaded there is sufficient demonstration of want of good faith or *bona fides* on the part of the Plaintiff in the sense of litigating a genuine claim for Pre-trial FLOE as economically and expeditiously as reasonably possible in accordance with the underlying objectives, and there is no good reason for the non-compliance of the directions for specific discovery under the CLR Order.
10. As a result of the Plaintiff failing to put forward his true case on the Pre-trial FLOE fully and fairly, and his seeking to throw the Defendants off his true case by giving different versions which are now exposed to be untrue, the Defendants inevitably had to and did incur unnecessary costs in investigating into the matter, eg conducting company and winding up searches in respect of Power King, and liaising with Power King and the Plaintiff’s solicitors, which has the probative effect of pushing the Plaintiff to own up his true case but which necessarily inflate the costs of litigation.
11. Admittedly, the sole issue in the present case is the assessment of damages. But without proper discovery on matters which are solely within the knowledge of the Plaintiff, the Defendants are not able to determine whether they will be meeting a genuine claim for Pre-trial FLOE in the sum of HK$150,769.00 or one that is less than 3% of that sum, and consequently they will be left to wonder whether this is a fit case to consider settlement or any other means of disposal in light of all the other evidence and/or how to properly pitch any settlement offer or sanctioned payment. I do not agree that the Defendants have not been prejudiced in making proper assessment of damages in a timely fashion.
12. It has been said that since the specific discovery under the CLR Order has been complied with by now, and any “ambiguities” in the SOD can be rectified in the RSOD which by now has been filed, the Defendants suffered no prejudice. In my view, but for the Defendants’ dogged determination to get to the bottom of things, given the numerous stories given by the Plaintiff, such happy ending would not have resulted. It is true that the PI Master has granted a costs order in favour of the Defendants in relation to non-compliance with the CLR Order (see paragraph 8(a) above), but on the above analysis, I am persuaded that in respect of Issue C this is a fit case for directing that the Plaintiff to make payment of a sum of money into court under Order 2 rule 3 of the RDC.

*(f) Discussion on failure to file/serve the RSOD and Issue C*

1. Pursuant to the CLR Order, the Plaintiff should have filed/served the RSOD together with documentary support not already disclosed within 42 days, ie by 6th April 2009. The Plaintiff has failed to do so and instead applied for extension of time pending P’s Summons for leave to adduce a supplemental report from Dr Fu. With the dismissal of such application, the essential basis for deferring filing/serving the RSOD also falls away. At the hearing on 8th July 2009, I extended time for 14 days for the Plaintiff to file/serve the RSOD (see paragraph 15 above). There is therefore no question of dismissing the Plaintiff’s claim for such breach of the CLR Order. The true issue is whether the Plaintiff should be ordered to pay a sum of money into court for failure to comply with the CLR Order in this respect on a timely basis.
2. Chan’s Affirmation claimed that the Plaintiff’s request for leave to adduce a supplemental report from Dr Fu was in fact a delaying tactic. Such request was first made on 21st April 2009, ie (a) almost 2 months after the Joint Report dated 23rd February 2009, (b) almost a month after the Plaintiff’s witness statement dated 23rd March 2009 which referred to his *post*-Accident complaints and how they affected his *post*-Accident work, (c) 2 weeks after the expiry of the deadline on 6th April 2009 for filing/serving the RSOD, and (d) right after the Defendants’ threat on 20th April 2009 to issue Ds’ Summons, which led to disclosure of the Subject Pay Slips on 24th April 2009. Ms Chan argued that if the Plaintiff genuinely believed that further opinion from Dr Fu were required, he could have asked for a supplemental report at an earlier stage. She contended that the delayed request must have been motivated by a deliberate intention to delay the proceedings in order to obtain further medical opinion to bolster a deflated and weakened claim on Pre-trial FLOE, which claim would have been inevitably exposed as a result of the Defendants’ determination to get to the bottom of things.
3. In my view, there is no doubt that by reason of P’s Summons, the original CLR scheduled for 8th May 2009 was adjourned to be heard at the same time as the hearing of P’s Summons, and the present action was therefore delayed for about 2 months. But the true question is whether the delay in filing/serving the RSOD caused by the Plaintiff’s request for a supplemental report by Dr Fu gives rise to suspicion that he may not have been *bona fide* in making such request or whether his conduct demonstrates a want of good faith in litigating a genuine claim as economically and expeditiously as possible.
4. Although I have declined to grant leave to the Plaintiff to adduce Dr Fu’s Report, and the action has been delayed as a result of such failed application, it does not follow there must have been a want of good faith or *bona fides* in making such application. Further, although the Plaintiff’s failure to consider the sufficiency of expert medical opinion in a timely fashion is clearly undesirable, such delay is not necessarily motivated by lack of good faith or *bona fides*.
5. Much play has been made in respect of temporal proximity amongst (a) the request for a supplemental report from Dr Fu, (b) the threat to issue Ds’ Summons, and (c) the expiry of the deadline for filing/serving the RSOD. However, I am not convinced that temporal proximity is sufficient evidence of deliberate manoeuvring on the part of the Plaintiff to require him to pay a sum of money into court under Issue C for non-compliance with the directions for filing/serving the RSOD under the CLR Order.

*(g) Quantum of the sum to be paid into court*

1. I note that costs of and occasioned by the Plaintiff’s failure to comply with the CLR Order and of Ds’ Summons (save for costs in relation to Issue C) have already been the subject of a costs order in favour of the Defendants (see paragraph 8(a) above). As seen in paragraph 136 below, I also grant a costs order *nisi* in favour of the Defendants for costs of Issue C of Ds’ Summons insofar it relates to Plaintiff’s breach of the directions for specific discovery under the CLR Order.
2. The Defendants ask for payment into court of a sum of money as security for the above costs in their favour. However, they have been content to let the court determine the amount thereof, so no amount has been proposed until in the course of her oral submissions in reply Ms Chan proposed a sum of HK$30,000.00 (ie a rounded up figure for (a) 10 hours of work at her hourly taxation rate of HK$2,600.00 and (b) disbursements, eg company and winding up search fees) in response to my enquiry.
3. The starting point is that the court should not set an amount that will stifle the Plaintiff’s right of access to the court. Although the Defendants only proposed an amount for the court’s consideration at the last minute, the Plaintiff has not filed any affidavit evidence alluding to any inability to make payment into court. There is no evidence before me to suggest that an order for payment into court under Order 2 rule 3 of the RDC will stifle the Plaintiff’s claim.
4. Whilst the background and analysis above amply demonstrate the work undertaken by Ms Chan in unravelling the Plaintiff’s case on Pre-trial FLOE, the court cannot ignore the fact that judgment on liability has been entered in this case, and there is real likelihood that the Plaintiff will be entitled to some damages payable by the Defendants.
5. Mr Lam argued that such damages would be available for set-off against any costs payable to the Defendants. But Ms Chan submitted that the Defendants might eventually recover a substantial part of the costs of the action if their total payment into court would beat the amount of damages that would be awarded at the assessment of damages, so there would be a real risk that the award of damages might not be sufficient financial protection for the Defendants’ costs occasioned by the Plaintiff’s breach of the CLR Order.
6. There is no dispute that the Defendant has made payments into court. There is also substantial debate over the alleged diminution in Plaintiff’s physical and work abilities based on (a) his prompt return to work (truck driving and manual delivery) shortly after the Accident, (b) his increased *post*-Accident monthly earnings, and (c) the expert medical opinion. Such debate will have significant effect on the Plaintiff’s claims for pain, suffering and loss of amenities, loss of earnings and loss of earning capacity which constitute the bulk of his claim for loss and damages. This is reflected in the Plaintiff’s RSOD filed on 21st July 2009 which makes out a claim for HK$682,801.00 or HK$844,736.00 with interest, and the Defendant’s Answer thereto filed on 11th August 2009 which concedes a claim for only HK$35,190.30 with interest.
7. I accept the Plaintiff will be entitled to some damages to be determined by the trial judge. But at this stage of uncertainty pending the assessment of damages, even though there is real possibility that there may be some damages available for set-off against the costs orders in favour of the Defendant in paragraph 124 above, I am unable to dismiss Ms Chan’s argument as fanciful.
8. I take into account all of the above matters, the Plaintiff’s pleaded income, the amount of damages claimed in the SOD/RSOD, the amount of damages conceded in the Answer thereto, the nature of the relevant breach of the CLR Order and Issue C, the work undertaken by the Defendants’ solicitors in relation thereof, and Ms Chan’s hourly taxation rate. In my view, a fair amount to be paid into court in all the circumstances should be HK$5,000.00. I therefore direct the Plaintiff do within 14 days from the date hereof pay a sum of HK$5,000.00 into court pursuant to Order 2 rule 3 of the RDC in respect of Issue C.

*VII. CLR*

1. At the hearing on 8th July 2009, Ms Chan considered that the case was not yet ready for assessment of damages because (a) the RSOD and Answer thereto were not yet filed/served, and (2) there were outstanding interrogatories yet to be answered by the Plaintiff. She was also concerned that further investigation and/or interlocutory applications, eg request for further and better particulars or further interrogatories, might be necessary when the RSOD was filed. Hence she asked for the CLR to be adjourned.
2. On the other hand, Ms Yuen, who appeared for the Plaintiff in respect of the CLR hearing before me, asked for the case to be set down for assessment of damages on the basis that there were no other outstanding matters apart from filing/service of the RSOD and Answer thereto.
3. As at 8th July 2009, the court was unable to view the Plaintiff’s case with confidence in light of the different versions of *post*-Accident work and earnings given in the course of the proceedings. The RSOD will not be a matter of simply tying up loose ends, but a substantial overhaul of the Plaintiff’s case. Fairness dictates that the Defendants should be given the opportunity to consider the Plaintiff’s properly pleaded case before the case is set down for assessment of damages.
4. By now, the RSOD and Answer thereto have been filed and served. I therefore direct that this case be restored for CLR hearing before the PI Master at 11:00am on 3rd September 2009 at Court No.46 in chambers (open to the public) with a view to set the case down for assessment of damages if appropriate.

*VIII. Costs*

1. There is no reason why costs should not follow event. I grant a costs order *nisi* that the Plaintiff do pay to the Defendants costs in respect of (a) P’s Summons and (b) Issue C of Ds’ Summons in respect of non-compliance with directions for specific discovery under the CLR Order to be taxed if not agreed.
2. In respect of Issue C of Ds’ Summons insofar as it relates to the failure to file/serve the RSOD within the deadline specified in the CLR Order, the Plaintiff succeeds in resisting the Defendants’ application, and I therefore grant a costs order *nisi* that the Defendants do pay to the Plaintiff costs in relation to the same. However, such costs took up a very small part of the hearing before me, and I apportion 15 minutes of the hearing time to assist the Taxing Master.
3. As regards costs of the CLR on 8th May 2009, I grant a costs order *nisi* that the Plaintiff do pay the Defendants costs of such hearing. Had the Plaintiff not applied for leave to adduce a supplemental report by Dr Fu (which application I have refused), he should and would have filed the RSOD in compliance with the CLR Order, the Defendants would have filed the Answer thereto, and the CLR would not have to be adjourned. In my view, the wasted CLR hearing was due to the Plaintiff’s failed attempt to adduce supplemental expert medical opinion and his failure to file the RSOD pending such failed application, so costs should follow event.

# (Marlene Ng)

District Court Judge

Representation:

Mr Vincent Lam instructed by Messrs Alan Wong & Co for the Plaintiff for P’s and Ds’ Summonses, and Ms Yuen Siu Chi of Messrs Alan Wong & Co for the Plaintiff for the CLR.

Ms Anita Chan of Messrs Y T Chan & Co for the 1st and 2nd Defendants.