## DCPI 1963/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1963 OF 2012

--------------------

##### BETWEEN

NG CHI WAI Plaintiff

### and

LAI MAN HOI TRADING AS Defendant

HOI FU ENGINEERING COMPANY

--------------------

Before: Deputy District Judge Ludwig Ng in Chambers (open to public)

Date of Hearing: 4 September 2013

Date of Written Closing Submissions: 2 October 2013

Date of Decision: 10 October 2013

--------------------

DECISION

--------------------

*Background*

1. This is an application by the defendant to strike out the plaintiff’s claim for common law damages for personal injuries on the ground that the parties have already entered into an agreement for settlement of all claims arising from the accident.
2. The claim arose out of an accident to the plaintiff on 25 May 2010 in the course of his employment with the defendant. On 10 February 2011, the plaintiff was assessed by the Employees’ Compensation (Ordinary Assessment) Board of the Labour Department to have suffered right index finger injury with permanent loss of earning capacity assessed at 2%. The Certificate of Compensation Assessment (Form 5) was issued on 3 March 2011. There was no appeal against this assessment. No court action was commenced by the plaintiff under the Employees’ Compensation Ordinance (Cap 282). The parties signed a discharge form on 12 April 2011 (the “Discharge Form”) pursuant to which the plaintiff was paid HK$128,116 by the defendant or his insurance company.
3. In February this year, the plaintiff served the statement of claim and statement of damages against the defendant on the same accident for common law damages. In the statement of damages, after deducting the “Employees’ Compensation received” of HK$127,296, the plaintiff claims an amount of HK$552,474. The sum HK$127,296 is the amount certified in the Form 5, not the actual amount received by the plaintiff from the defendant, which was HK$128,116, as stated in the Discharge Form.
4. The defendant denied being negligent. Further, the defendant pleaded that the plaintiff was debarred by the Discharge Form from making the present claim against him.

*The Discharge Form*

1. The terms of the Discharge Form are as follows:-

“(1) I, the undersigned Ng Chi Wai, …hereby acknowledge receipt of the sum of HK$128,116.00 only from Dah Sing Insurance Company Limited and/or my employer, Hoi Fu Engineering Co being full and final settlement of any claim lodged by me against the Dah Sing Insurance Company Limited and/or my employer, Hoi Fu Engineering Co for all loss, damages and bodily injury (including but not limited to Employees Compensation Ordinance and Common Law) sustained by me in respect of the accident on 25/05/2010 (said accident); and

(2) I also realize that such payment is made entirely on the basis of without admission of liability on the part of Dah Sing Insurance Company Limited and/or my employer Hoi Fu Engineering Co and all other persons be absolutely and finally discharged from all claims now or hereafter may have arisen out of or connected with or traceable to the said accident. I further state that the foregoing release has been carefully read by me or has been interpreted and read to me and I know the contents hereof and have signed the same as my own free and voluntary act without any undue influence in making settlement by any representation of the party or parties released.”

1. There is a Chinese translation of the above in the Discharge Form. But it is provided in it that the English version shall prevail in case of discrepancy. The parties have not pointed out any discrepancies between the two versions. Hence I shall deal with this matter only based on the English version and I shall take it that the plaintiff, who received only up to Form 2 education (paragraph 3 of his Affirmation) and knows little English, had read the above as if it were in Chinese. Indeed, the plaintiff affirms that he did read the Discharge Form, but he “did not read it carefully” and he “simply signed it without knowing its true nature and legal effect.”

*The striking-out summons*

1. On 4 June 2013, the defendant took out the present summons to strike out the plaintiff’s claim pursuant to Order 18 rule 19 of the Rules of the District Court.
2. The defendant’s case is simply that the Discharge Form has clearly provided that all claims against the defendant by the plaintiff arising from the accident, including common law claim for damages under the present action, have been fully settled. Hence, the plaintiff’s claim herein should be struck out.

*The original reply*

1. In the original reply filed by the plaintiff, the plaintiff pleaded that the defendant could not rely on the Discharge Form for the following reasons, which are reproduced here verbatim:-

“3.1 The Discharge Form signed by the plaintiff to settle the claim was on an amount much lower than the plaintiff’s rightful claim;

* 1. At all material times:-
     1. There was a breach of fiduciary duty in signing of the Discharge Form on the part of the defendant as the plaintiff’s employer;
     2. Further or in the alternative, the plaintiff relied on the guidance or advice or representation of the defendant, given immediately before or close to the signing the Discharge Form and/or settlement of his claim and the defendant knew that the plaintiff so relied;
     3. Further or in the alternative, the plaintiff was induced in signing the Discharge Form by the undue influence of the defendant and/or his insurers; and

3.2.4 Further or in the alternative, the defendant is unjustly enriched by the signing of Discharge Form by the plaintiff and it will be unjust to allow the defendant to retain the interest or enrichment and the defendant has neither a reason to stop the plaintiff from seeking to set aside the Discharge Form nor a defence to the same.

PARTICULARS

1. The defendant has an interest in the figure at which the claim was settled and that interest conflicted with the plaintiff’s interest;
2. It was incumbent on the defendant and/or his insurers to offer an appropriate figure in view of the severity claim;
3. The plaintiff did not receive independent legal advice when signing the Discharge Form;
4. The plaintiff only received Form 2 level education and the defendant was well aware of it;
5. The defendant and/or his insurers has much more knowledge and experience in dealing with injury related claims than the plaintiff;
6. The plaintiff did not have sufficient opportunity to read and seek independent advice on the contents of the Discharge Form;
7. The plaintiff was pressurized to sign the Discharge Form within a short period of time;
8. At the time, the defendant has been in default of periodical payments for about 3 months;
9. The plaintiff believed and/or was misled to believe that the Discharge Form only represented the payment of the employees’ compensation together with the medical expenses incurred and/or any surcharge for the delayed compensation of the stipulated amount as in Form 5 issued by the Labour Department under Employees Compensation Ordinance (Cap 282) on 3 March 2011;
10. The defendant knew that the amount in the Discharge Form was no more than the appropriate figure of employees’ compensation which the plaintiff was entitled to under the Employees’ Compensation Ordinance (Cap 282) as assessed by the Commissioner for Labour in accordance with s16A(2) as set out in Form 5 issued on 3 March 2011 and would not include any amount of common law claim which the plaintiff is entitled to in light of the severity claim as pleaded in the Statement of Damages filed and served in this action;
11. The nature of the common law claim has not been brought to the attention of the plaintiff at all; and
12. The plaintiff has not been given a copy of the Discharge Form, either signed or unsigned.
    1. As a result of the matters pleaded under Paragraph 3.2 above, the plaintiff has suffered loss and damage due to the misrepresentation made by the servant and/or agent of the defendant including but not limited to the officer of the defendant in signing the Discharge Form on or about 12 April 2011.”
13. One would have expected the plaintiff to be very careful in formulating grounds to challenge the Discharge Form as it could possibly kill the whole of his claim. Yet, it is apparent that the reply was not drafted in the most precise and orderly manner. The grounds relied on by the plaintiff to challenge the Discharge Form were not specifically set out one by one. The court is left to deduce for itself which ground(s) those 12 paragraphs of particulars relate to. Abstract legal concepts were used indiscriminately as if the mere mention of these magic words could unravel any transactions.
14. Doing the best one could, the following legal grounds may be gleaned from the reply to challenge the Discharge Form:-
15. Breach of fiduciary duty (3.2.1);
16. Undue influence (3.2.3);
17. Unjust enrichment (3.2.4); and
18. Misrepresentation (3.3, 3.2.2)
19. Mr. Gidwani for the defendant in his submissions launched vehement attacks on each of these grounds relied on the plaintiff. I do not propose to deal with these grounds at length save to say that I largely agree with Mr. Gidwani’s attacks. The reliance on breach of fiduciary duty and unjust enrichment is simply out of place. (I pause here to refer to an article by Professor Anselmo Reyes, formerly Mr. Justice Reyes: “*Fiduciary Duty in the Hong Kong Court: Where are we going?*” published on 18 March 2013 in his blog, in which he critiques the abuse of the concept of fiduciary duty.) The pleadings on undue influence and misrepresentation lack the essential and necessary particulars as expressly required by Order 18 rule 12(1)(a).

*Grounds advanced by plaintiff at the hearing*

1. Another reason I do not need to deal at length with the grounds identified in the original reply is that Mr. Cheung for the plaintiff himself also seems to have completely abandoned them in his submissions. Mr. Gidwani filed his submissions on 29 August 2013. Yet the submissions filed by Mr. Cheung on 2 September 2013 did not directly reply to Mr. Gidwani’s submissions. Instead, in his opening submissions, he advanced the following grounds to challenge the Discharge Form:-
   * 1. No consideration/no true accord and satisfaction;
     2. Mistake/unconscionable bargain; and
     3. Threat of unlawful act/economic duress
2. These three grounds could be briefly elaborated as follows.
3. The Discharge Form was meant to settle the plaintiff’s claim under the Employees’ Compensation Ordinance only. No consideration was provided by the defendant to settle his common law claims. Mr. Cheung relies heavily on the case of *Arrale v Costain Civil Engineering Ltd.* [1976] 1 Lloyd’s Rep 98 (CA), which bears some similarity to the present case. In that case, a worker who signed a discharge form “*in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from the accident*”, was allowed by the English Court of Appeal (Lord Denning MR presiding) to set aside the settlement and proceed with his common law claim. Lord Denning MR was of the view as the sum received by the claimant was just for his compensation under the Workmen’s Compensation regime, there was no consideration provided for settlement of the common law claim. The *Arrale* case has been relied on by plaintiffs in a number of Hong Kong cases without success: *Lo Wing Kwong v Wong Ka Wai Ruby* DCPI 1617/2006; *Tsui Chi Hung Tony v Hsin Chong Construction Company Limited* HCPI 145/2005. Yet the *Arrale* case established a recognised legal ground to overcome the effect of a settlement agreement and whether this ground would succeed depends ultimately on the particular terms and wording of the settlement agreement and the circumstances surrounding its signing.
4. The mistake/unconscionable bargain ground was premised on the allegation that the plaintiff mistook the effect of the Discharge Form as being a document he was required to sign for receiving his Employees’ Compensation only and the defendant, represented by an experienced and knowledgeable insurance company officer, knew of the mistake. Hence, it could be set aside for mistake (see *Chitty on Contracts*, 31st ed., Vol 1 para 5-075). The settlement was unconscionable as it was for such a low amount and the plaintiff’s disadvantages were being exploited. The principles in *Hart v O’Connor* [1985] AC 1000 were relied on.
5. The unlawful act/duress ground is based on the principles in the case of *D&C Builders Ltd V Rees* [1966] 2 QB 617. The allegation is that the defendant was threatening that if the Discharge Form was not signed, the plaintiff could not receive his Employees’ Compensation. Further, such threat was made at a time when the defendant was in default of his periodical payment to the plaintiff and had unlawfully delayed payment to the plaintiff after Form 5 was issued, when the plaintiff was desperately in need of money.

*The Amended Reply*

1. These arguments appeared the first time two days before the hearing when Mr Cheung filed his opening submissions. At the end of the hearing, I asked Mr Cheung if the plaintiff would amend the reply. Mr Cheung said he would, after taking instructions from the solicitor sitting behind him. Two weeks later, the plaintiff filed an application to amend the reply. The original reply was almost completely crossed out and the amended reply was broadly along the lines of the submissions advanced by Mr Cheung at the hearing.
2. In the written submissions filed by Mr Gidwani in relation to the application for amendment of the reply, he still maintained that the plaintiff’s claim should be struck out even the amendment is allowed. He even sought to adduce new evidence not before me at the hearing, in the form of letters from the Labour Department to the plaintiff, to show that the plaintiff must have been aware of the common law claim at the time he signed the Discharge Form. Arguments were also raised that the plaintiff should commence a fresh action to set aside the Discharge Form (see *Luk Por v Chau Kim Hung* HCA 10369 of 1997). Yet he concluded that if he has seen this amended reply before, the defendant would not have taken out the application to strike out. The plaintiff has filed an affirmation that provides certain factual basis for the pleadings in the amended reply. Mr. Gidwani did not go so far as to argue that there was completely no factual basis supporting the pleadings in the amended reply.
3. In view of this amended reply which set out several feasible legal grounds to oppose the Discharge Form in a succinct manner, and bearing in mind the high hurdle required for a striking out application to succeed, and the presumption of facts in dispute in favour of the plaintiff in such application, I would dismiss the defendant’s striking out application. I should add that in no way should my ruling on this point be regarded as signifying that the plaintiff did have a strong case on setting aside the Discharge Form. It is just that the grounds advanced by Mr Cheung are clearly maintainable as a matter of law and there is no way the court could at this stage go deep into the facts to assess their merits.
4. Irrespective of the propriety of the defendant in trying to adduce new evidence after the hearing, I do not think such new evidence is strong enough to enable the court to form the view, at this stage, that the plaintiff’s claim must fail. As for the necessity to commence a fresh action, this case is clearly distinguishable from the *Luk Por* case. In that case, the plaintiff sought to re-litigate an action which had already been settled. In the present case, no action had been commenced before. I do not see why the court in the present case could not deal with the validity and effect of the Discharge Form.
5. I shall accordingly give leave to the plaintiff to amend the reply.
6. The remaining question for me is costs. However, before dealing with that issue, I would like to set out my own observation on a further possible ground to challenge the Discharge Form. This point has not been picked up by either party. But it would have a bearing on the issue of costs.

*Ambiguities in the Discharge Form*

1. Mr. Gidwani contends that it is very clear from the wording of the Discharge Form that it has, on the face, extinguished all the plaintiff’s claims. I do not share such view. If one reads the Discharge Form carefully, it provides in the first paragraph that “*[the payment] being full and final settlement of any claim* ***lodged*** *by [the plaintiff] against the [insurer] and/or my employer … for all loss, damages and bodily injury (including but not limit to Employees Compensation Ordinance and Common Law) sustained by [the plaintiff] in respect of the accident ….*” I highlight the word “lodged”. To me, it clearly carries the past tense. A more careful drafter would have written “lodged or to be lodged” to dispel any doubt that all past and future claims are to be settled, if that indeed was the intention. Irrespective of whether the plaintiff would be regarded as having lodged an Employees Compensation claim, he certainly had not lodged his common law claim at the time he signed the Discharge Form.
2. Next, the first sentence in the second paragraph of the Discharge Form is ungrammatical and ambiguous. It provides that “*I also realize that such payment is made entirely on the basis of without admission of liability on the part of [insurer] and/or [employer] and all other persons be absolutely and finally discharged from all claims now or hereafter may have arisen out of or connected with or traceable to the said accident.*” Who are the subjects of the phase “be absolutely and finally discharged”? Is it just “all other persons”? Are the insurer and the employer included? Again, if the intention was that the insurer and employer plus “all other persons” are to be fully discharged, a more careful drafter would have written this: “I also realize that such payment is made entirely on the basis of without admission of liability on the part of [the insurer] and/or [employer]. They and all other persons are hereby absolutely and finally discharged from all claims ….”
3. The use of the words “*without admission of liability on the part of the [insurer] and/or [employer]....*” actually adds uncertainty rather than protect the insurer/employer. If no further claim is anticipated, why is it necessary to provide that the settlement is “without admission of liability”? These words are clearly intended to protect the insurer/employer in the event that the plaintiff brings further claim against them after signing the Discharge Form.
4. Further, if the second paragraph has the effect of discharging all future claims by the plaintiff, then it is inconsistent with the first paragraph which only covers “*any claim lodged*”. It is not unreasonable to interpret the second paragraph within the constraint of the first paragraph.
5. I may be criticized for being too pedantic. However, to overcome those ambiguities in favour of the defendant would involve the court trying to ascertain the real intention of the parties when signing the Discharge Form. In this case where the real intention is a hotly contested issue, the court simply could not do so at the striking out stage. Further, the Discharge Form was drafted by the insurer and is a standard form used by it. It is subject to the *contra proferentem* rule of interpretation so that, especially at the striking out stage, any ambiguity would be resolved in favour of the plaintiff.

*Costs of a failed striking-out summons*

1. Mr Gidwani contends that costs of the striking out application should be to the defendant even if I dismiss the application. Mr Cheung counters that the ‘feasible grounds’, though appearing the first time in his opening submissions, could be gleaned from the facts of the case, the affirmation filed by the plaintiff on 7 August 2013, and partly from the original reply, hence the striking out application should not have been taken out, at least it should be withdrawn after the defendant saw the plaintiff’s affirmation. I do not agree with Mr Cheung’s contention. It is well established that even a bad pleading should not be struck out if it is curable by amendment. But the test for deciding on the issue of costs should be whether the applicant was justified in taking out the application.
2. Considering the course of events in these proceedings, I consider that the defendant is justified in taking out the application. The original reply, at least a large part of it, is liable to be struck out. Mr Cheung himself crossed it out when he amended the reply. Even assuming the present feasible grounds to challenge the Discharge Form could be gleaned from the plaintiff’s affirmation, which I have considerable reservation, it is no answer to a striking out application if the such facts are not formally pleaded, especially when they are so expressly required under Order 18 rule 12(1)(a).

1. I echo with a passage from Hong Kong Civil Procedure 2013 cited by Mr. Gidwani: Commentary 18/8/3 says: *“Pleadings plays an essential part in civil actions, and their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal with it; and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off a criticism as ‘a mere pleading point’.”* In this case, to allow the plaintiff costs of the striking out application just because I dismiss it in light of the amended reply would tantamount to allowing the plaintiff to “shrug off a criticism as a mere pleading point.” This would be bad law and bad practice.
2. Practice Direction 19.1 paragraph 5 provides that:-

“In applications to strike out pleadings as disclosing no reasonable cause of action or where no letter has been written by counsel for the applicant to counsel for the respondent signifying his intention to make the application and the broad grounds upon which he will rely, the applicant shall inform the respondent of the said grounds in writing at least five clear working days before the day fixed for the hearing.”

The purpose of this direction is to make sure that the respondent should know the grounds for the application and, if thought necessary, amend his pleadings before the hearing. In this case, the plaintiff had ample opportunities to do that but just failed to do so.

1. But for one point, I would have awarded full costs of the striking out application to the defendant. This is the point about the ambiguities in the Discharge Form that I raised above. Such ambiguities in my view vitiate the defendant’s case to such an extent that it should not succeed in a striking out application. Although this point was not raised by the plaintiff, as those ambiguities are in the very document that the defendant’s whole case rests on, the defendant should first examine its own document carefully before launching a striking out application.
2. Taking the matter in the round, I would award the defendant 50% of the costs of the striking out application, including the costs of the written arguments submitted on the question of costs.

*Costs of the amendment summons*

1. As regards the costs of the amendment application, Mr Cheung argues that whilst the costs of and occasioned by the amendment should be to the defendant, the costs of the argument for the amendment application should be to the plaintiff as there is little ground for the defendant to oppose the amendment application, and the defendant has been irregular in trying to adduce new evidence after the hearing. I have some sympathy with Mr Cheung’s point here. The amended reply has clearly pleaded some feasible grounds to challenge the Discharge Form and the defendant should have sufficient time to consider it before filing his submissions. The new evidence, though certainly relevant at trial, is not strong enough for a striking out application and should not be adduced without leave after the hearing. Accordingly I do not think the defendant should have the costs for the arguments in relation to the amendment application. Yet as ultimately it is the plaintiff who is asking for indulgence from the court to cure its bad pleadings, and the amendment was only made after the hearing of the striking out summons, neither do I think it fair to award costs to the plaintiff in the circumstances of this case. The defendant is entitled to oppose it so long as his opposition is not entirely without merits, which I think is the case here. I rule that such costs should be costs in the cause.

*Conclusion*

1. In conclusion, and for clarity, I make the following orders:-
2. The defendant’s summons dated 4 June 2013 to strike out the plaintiff’s claim be dismissed;
3. The plaintiff shall pay the defendant 50% of the costs of the striking out summons, including arguments on the costs thereof, to the defendant, with certificate for counsel;
4. The plaintiff’s application to amend his reply be allowed;
5. Costs of and occasion by the amendment be to the defendant;
6. The costs of written arguments filed in relation to the amendment summons be costs in the cause;
7. All costs to be taxed if not agreed.

( Ludwig Ng )

Deputy District Judge

Mr Lincoln Cheung, instructed by B Mak & Co for the plaintiff

Mr Victor Gidwani and Mr Bosco Cheng, instructed by Keith Lam Lau & Chan for the defendant