#### DCPI 2039/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2039 OF 2006

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| BETWEEN | WONG KWONG WA | Plaintiff |
|  | and |  |
|  | HIP HING CONSTRUCTION COMPANY LIMITED | Defendant |

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##### Coram: His Honour Judge Thomas Au in Chambers

##### (open to public)

Date of Hearing: 11th July 2007

Date of Delivery of Decision: 11th July 2007

Date of Handing Down Written Decision: 11th July 2007

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### D E C I S I O N

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1. This is the Plaintiff’s application under s. 41 of the District Court Ordinance (cap 336) (“DCO”) to transfer the present proceedings to the High Court on the ground that the quantum of his claim for damages is above the District Court’s jurisdiction of HK$1,000,000.
2. The Defendant opposes the present application on the grounds that: (a) there is no prospect that the Plaintiff would be able to achieve an award more than HK$1,000,000, or alternatively (b) the Court should exercise its discretion to strike out the claim under s. 41(2) of DCO, given that the Plaintiff knew or ought to have known that the Court had no jurisdiction to hear the matter when the Writ was issued.
3. At the end of the hearing, I granted the Plaintiff’s application and said I would hand down my reasons for the decision later. This I now do.

Brief Background

1. For the purpose of this judgment, it is necessary for me to briefly set out the background leading to the issue of this action.
2. The Plaintiff was a foreman in a construction site when he suffered a personal injury in November 2003. The Defendant was allegedly the direct employer of the Plaintiff.
3. In about October 2005, the Plaintiff was granted legal aid and his present solicitors were assigned to him to take proceedings to claim damages for the personal injury suffered by him.
4. Other than the government medical reports, presumably for the purpose of making a claim against the Defendant, the Plaintiff also obtained a medical report from Dr Chan Sik Yuen (“Dr Chan”) (an occupational health expert) dated 12 January 2006 and a report from Dr Au Ka Kau (“Dr Au”) (an orthopaedic surgeon) dated 31 March 2006. In essence, Dr Chan was of the opinion that the Plaintiff could not return to his previous occupation while Dr Au came to the conclusion that the Plaintiff could, provided he received the proper rehabilitative treatments.
5. On 2 November 2006, the Plaintiff’s solicitors issued a protective generally endorsed Writ in the District Court. The Writ, the Statement of Claim and the Statement of Damages were only served on the Defendant on 6 July 2007.
6. In the Statement of Claim and the Statement of Damages, the Plaintiff now claims for damages in the region of HK$1.7 million, after taking into account of the EC award of HK$135,064. Within the claim, the Plaintiff seeks damages in the sum of HK$1,046,400 as future loss of earnings premised on the allegation that he could not return to his previous occupation as a result of the injury.
7. Given that the claim is now in excess of HK$1,000,000 as pleaded, the Plaintiff thus takes out the present application.

Applicable principles

1. In the respective skeleton submissions of the Plaintiff and the Defendant, of which I am thankful, both parties submit that the principles set out in the decision of Suffiad J in *Wong Mui Kwan v. FDS Savills* [2006] 1 HKC 575 at para 21 should apply in determining whether a matter should be transferred to the High Court under s. 41 of DCO.
2. In dealing with the question whether the Court of First Instance should exercise its power to transfer a claim to the District Court under s. 43 of the DCO (as opposed to s. 41) even though the pleaded claim was for damages above the District Court’s jurisdiction, the learned Judge says as follows:

“(a) In the absence of abuse, a Plaintiff should be entitled to frame his case in the manner that he wishes.

(b) At an interlocutory stage, it would not be proper for the court or a master to view the plaintiff’s claim in the same way as it would be viewed at trial by weighing the different evidence or by believing or disbelieving some or all of the evidence. The exercise can only be carried out when all the evidence, cross-examination and submission have been heard, particularly where there are factual and or other disputes between the parties, as for instance disputed expert opinion.

(c) Accordingly, the plaintiff’s case on quantum as framed by him ought to be viewed at its highest when determining the proper jurisdiction where the case should be brought.”

1. As I understand it, what the learned Judge is saying is that, in exercising the power under s. 43 of DCO and in deciding the question on whether the matter falls within or without the jurisdiction of the District Court, the Court should view the claim as framed at its highest, unless there is clearly an abuse in the way the clam is pleaded or that for one reason or another the Court, even at the interlocutory stage, is able to come to a clear view that the plaintiff would not be able to succeed in being awarded anything in excess of the District Court’s monetary jurisdiction.
2. In *Ng Wai Sun v. China Overseas (Hong Kong) Ltd* (unrep., DCPI 1320/2004, 27 September 2005), H. H Judge M Ng at paras 7-9 applied the above principles when she decided to exercise her power to transfer the matter to the High Court. Although not stated in the decision, Her Honour Judge was apparently exercising her power under s. 41 of the DCO.
3. Section 41 of DCO provides as follows:

“(1) The Court [i.e., the District Court] *shall*, either of its own motion or on the application of any party, order that an action or proceeding be transferred to the Court of First Instance where an action or proceeding commenced in the Court, not being a counterclaim, is outside the jurisdiction of the Court but is within the jurisdiction of the Court of First Instance.

(2) The Court may, if it thinks fit, instead of ordering that the action or proceedings be transferred, order that it be struck out where, on the application of defendant, it appears to the court that the Plaintiff or, if more than one, one of the plaintiffs, knew or ought to have known that the Court had no jurisdiction.” (emphasis added)

1. Thus, construing section 41 of DCO together with the principles laid down in *Wong Mui Kwan*, I am of the view that if the Court comes to the view that the claimed sum as framed, which say is above the District Court’s statutory jurisdiction, does not amount to an abuse and if there is nothing to conclusively contradict it at an interlocutory stage, the Court must and should transfer the matter to the High Court, unless it sees fit to exercise its discretion under s. 41(2) of DCO to instead strike out the action.

The present application

*Defendant’s submissions*

1. In the present application, it is submitted by Mr Sit for the Defendant that in November 2006 when the Writ was issued, the medical reports of Dr Chan and Dr Au had already been provided to the Plaintiff’s solicitors for some 10 months and 8 months respectively. With the information as contained in the reports coupled with the Plaintiff’s own employment history since the injury, the Plaintiff’s solicitors ought at least to have been aware of the fact that the claim for damages would be more than HK$1,000,000 and thus above the District Court jurisdiction. This is underlined by the fact that the Plaintiff’s present claim for future loss of earnings as pleaded is premised upon factual averments derived from these medical reports and the Plaintiff’s own employment history. Mr Sit therefore further submits that the issue of the Writ in the District Court amounts to an abuse and or that the Plaintiff knew or ought to have known that the District Court had no jurisdiction to hear the claim when the action was brought.

*Plaintiff’s submissions*

1. Mr Wong for the Plaintiff however submits that, given (a) the conflicting views of Dr Au and Dr Chan as to the suitability of the Plaintiff’s returning to his previous occupation, (b) the fact that the Plaintiff’s solicitors were concentrating on pursuing the Plaintiff’s EC claim at the material time, (c) the parties were at that time in dialogue and the Writ was issued to avoid the claim being time-barred, and (d) the potential costs consequence, it was not unreasonable for the Plaintiff to take a more prudent course in bringing the claim in the District Court first at the time of the issue of the Writ.

Discussions

1. Given that it is in the early stage of the proceedings, I clearly cannot form a view (as invited by the Defendant) that the quantum as now framed is bound to fail so as to take it within the District Court’s jurisdiction. The claim as pleaded is thus *prima facie* outside the jurisdiction of the District Court.
2. Further, I accept Mr Wong’s submissions that, in light of the conflicting views of Dr Au and Dr Chan, which would have a significant bearing on framing the claim for future loss of earnings, I cannot say it was unreasonable in November 2006 for the Plaintiff to issue the protective Writ in the District Court nor could it be said that the Plaintiff knew or ought to have known in November 2006 that his claim should fall outside the District Court’s jurisdiction. The Defendant’s own submission, in opposing the present application, that there is no reasonable chance for the Plaintiff to recover anything more than HK$1,000,000 underlines the position that the Plaintiff could not be regarded as unreasonable in bringing the action in the District Court in the first place.
3. For the same reason, I also cannot say that the issue of the Writ in the District Court amounted to an abuse.
4. In the circumstances, I do not regard this as an appropriate case where I should exercise my discretion under s. 41(2) of the DCO to strike out the Plaintiff’s action. I should therefore exercise my power under s. 41(1) to transfer the case to the Court of First Instance.

Conclusion

22. I therefore order that the present action be transferred to the Court of First Instance and costs of and occasioned by this application be in the cause.

# (Thomas Au)

District Judge

Representation:

Mr. Henry Wong of Messrs Henry H.C. Wong & Co. for the Plaintiff.

Mr. Gere Sit of Messrs Deacons for the Defendant.