DCPI2256/2006

# IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2256 OF 2006

BETWEEN

LAI KING YIU Plaintiff

and

ACCIONA INFRAESTRUCTURAS, 1st Defendant

S.A. (formerly known as NECSO ENTRECANALES

CUBIERTAS, S.A.)

CHINA STATE CONSTRUCTION 2nd Defendant

ENGINEERING CORPORATION

HIP HING CONSTRUCTION 3rd Defendant

COMPANY LIMITED

EASTWELL ENGINEERING 4th Defendant

LIMITED

TAM CHAU MING 5th Defendant

(transliteration) (譚秋明)

TAM CHAU YAT 6th Defendant

(transliteration) (譚秋日)

Coram: HH Judge Lok in Chambers

Date of Hearing: 25 April 2008

Date of Decision: 25 April 2008

D E C I S I O N

1. This is an application by the Plaintiff to amend the Revised Statement of Damages. Since the quantum of the Plaintiff’s claim, according to the proposed amendment, now exceeds the jurisdiction of the District Court, the Plaintiff also applies for the case to be transferred to the High Court.
2. The Plaintiff’s claim is for damages for personal injuries of hearing impairment caused when he worked at a construction site during the period from December 2003 to March 2004. According to the joint medical report prepared by the experts engaged by both the Plaintiff and the Defendants, the experts agree that the Plaintiff is suffering from noise-induced deafness and sensorial-neural hearing loss, and so it is possible that the Plaintiff will experience pain in his ears when exposed to loud noise. Further, the Plaintiff’s hearing loss should not prevent him from performing his previous kind of metalwork job, but he must wear hearing protection when the noise level is high.
3. Leave has been granted for this case to be set down for trial in the running list of the District Court not to be warned before 12 February 2008. However, the new solicitors of the Plaintiff assigned by the Director of Legal Aid made the present application on 18 February 2008.
4. In the Revised Statement of Damages, the Plaintiff claims the sums of $250,000 and $100,000 as damages for pain, suffering and loss of amenities (PSLA) and loss of earning capacity respectively. In the proposed amendment, the Plaintiff adjusts the figures of these 2 respective claims to $400,000 and $202,800. Further, it has been pleaded that the Plaintiff was not able to return to his pre-accident job and he could only work as residential casual maintenance worker earning a much lesser income. This forms the basis for his claim for pre-trial loss of earnings. In the proposed amendment, the Plaintiff also relies on the same allegation to claim for future loss of earnings in the sum of $850,200.
5. The Defendants object to the proposed amendment and the transfer of the case to the High Court on the grounds that:

(1) the Plaintiff has disclosed no evidence regarding his loss of earnings up to this stage;

(2) the medical experts agreed that the Plaintiff is able to perform his pre-accident job and so there is no basis for the Plaintiff’s claim for future loss of earnings; and

(3) contrary to the Plaintiff’s allegation that he could not resume his pre-accident employment, he still worked as a construction site worker after the accident, though for a brief period of time from November 2005 to January 2006.

1. In reply, the Plaintiff explains that his claim is now being handled by a new team of lawyers assigned by the Director of Legal Aid. As they see the need to increase the quantum of his claim, the Plaintiff has to make the present application before the court. Further, in his previous witness statement, the Plaintiff has already mentioned that his ears are now very sensitive to shrill tones and he is not able to resume his previous job as a construction site worker. He had worked in a construction site for a brief period of time after the accident, but he found that he could not work in such kind of noisy environment any further. Indeed, the Plaintiff has already lodged a claim for pre-trial loss of earnings based on the difference between the earnings of his former employment and that of a casual maintenance worker, and so the Defendants should not be taken by surprise by the proposed amendment in respect of the claim for future loss of earnings.
2. The principle for granting of leave to amend pleading is now well established. Unless the opposing party is suffering from a prejudice which cannot be compensated by an appropriate award of costs, leave for amendment should be granted.
3. In respect of the principles to be considered in an application for transfer of the proceedings from the District Court to the High Court under section 41 of the District Court Ordinance, Cap. 336, Suffiad J said the following in the case of *Wong Miu Kwan v FPD Savills Management Ltd.* [2006] 1 HKC 575 at paragraph. 21:

*“21. ...Quite apart from such statutory provisions, as a matter of practice, the court or a master should also consider the following matters:*

*(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. That exercise can only be carried out when all the evidence, cross-examination and submission has 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.”*

These principles have been adopted by 2 District Judges in *Ng Wai Sun v China Overseas (HK) Ltd. and Ors.*, unreported, DCPI1320/2004 (decision of H H Judge Marlene Ng on 27 September 2005 and *Wong Kwong Wa v Hip Hing Construction Co. Ltd.*, unreported, DCPI2039/2006 (decision of H H Judge Thomas Au on 11 July 2007).

1. Although the application has been made at a very late stage, it is clear that the Defendants will not suffer any prejudice arising from the proposed amendment of the Revised Statement of Damages which cannot be compensated by an appropriate award of costs. Further, the court should not conduct a mini-trial at this stage or to find that the Plaintiff’s claim for future loss of earnings is bound to fail. Indeed, whether an injured worker can resume his previous employment at a construction site is not a matter for the medial experts to decide, rather the court has to take into account the explanation of the Plaintiff and the working environment of a construction site to resolve this particular issue. At this stage, it is suffice for me to say that the Plaintiff has provided sufficient evidence to support his claim for future loss of earnings, and the Plaintiff should not be barred from arguing his case in a full trial. As mentioned by Suffiad J in *Wong Miu Kwan*, “the Plaintiff’s case on quantum as framed by him ought to be viewed at its highest”, and so the Plaintiff should be allowed to make the proposed amendment to the Revised Statement of Claim and to argue his case in the High Court.
2. Based on the reasons above, I allow the Plaintiff’s application. I now listen to parties’ submissions on the issue of costs.

(David Lok)

District Judge

Miss S. Cheng of Messrs Leung, Tam & Wong, for the Plaintiff

Mr R. Kwong of Messrs Winnie Leung & Co., for the Defendants