###### DCPI 2518/2011

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2518 OF 2011

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##### BETWEEN

WONG YIU LUNG LAWRENCE Plaintiff

and

FOK KIN KEUNG (also known as 1st Defendant

FOK KIN KEUNG trading as SKY

FORCE LOGISTICS COMPANY)

EASY TAKE EXPRESS COMPANY 2nd Defendant

#### LIMITED

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Before: His Honour Judge Alex Lee in Chambers

Dates of Hearing: 16 & 23 May 2013

Date of Decision: 23 May 2013

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DECISION

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1. This is an application by the plaintiff to amend his statement of claim. There are special features in this application in that: -
2. the action has reached the stage where the plaintiff has already obtained a default judgment against the two defendants who have failed to file any notice of intention to defence or defence and hearing dates had originally been fixed for the assessment of damages only;
3. the proposed amendment includes new pleadings that the plaintiff was an employee of D1 and/or D2 and that the traffic accident which resulted in personal injuries to the plaintiff, the subject matter of this action, occurred in the course of that employment;
4. there was also a proposed new cause of action, namely that D1 and/or D2 had breached their statutory duty owed to the plaintiff as his employer; and
5. the traffic accident took place on 14 September 2009 and as such the aforesaid new cause of action had already been time-barred by the time of the plaintiff took out the summons of the present application on 11 May 2013.
6. The plaintiff’s original causes of action, as pleaded in the statement of claim, were (i) negligence; (ii) breach of common duty of care; and (iii) breach of statutory duties under the Road Traffic Ordinance, Cap 374. Nothing was mentioned about the plaintiff’s alleged employment with either D1 and/or D2 or that the traffic accident occurred in the course of the alleged employment. I should also mention that the plaintiff also filed an employee compensation claim against the defendants and the EC claim has been settled already.
7. The reason for the proposed amendment is to enable the plaintiff, if necessary, to rely on s 20A of the Employees Compensation Assistance Ordinance, Cap 365 and to apply for relief payment from the Employees Compensation Assistance Fund, if he is unable to obtain any damages from the defendants or their insurers.
8. When the present application was first before me on 16 May 2013, I adjourned the hearing so that Mr Luk, solicitor acting for the plaintiff, could assist me by way of written submission addressing certain legal issues which arose from the application. I sought assistance from Mr Luk as to whether the statement of claim could and should be amended after the default judgment on liability had been entered and if so, whether the default judgment should be set aside in case leave was granted for the amendment. I also asked Mr Luk to address me as to whether the new cause of action was based on the same or substantially the same facts and if not, whether s 30 of the Limitation Ordinance, Cap 347, which extends the time limitation in relation to cases of personal injury, was applicable to the present case. I made reference to s 27 of the Limitation Ordinance, Order 20, Rule 5(5) of the Rules of the District Court and the judgment of the Court of Appeal in *Chan Sik Pan v Wylam’s Services Limited & Others*, CACV 108/2000 (unreported) which is apparently against the plaintiff’s application then.
9. I now have the benefit of Mr Luk’s written submission which is supplemented by his oral submission in court today. The plaintiff has since changed his position in that he no longer seeks leave to add the new cause of action about breach of employer’s statutory duty. However, the plaintiff still seeks leave to add the proposed pleadings that he was the employee of D1 and/or D2 and that the traffic accident occurred in the course of that employment. There is also now an application to delete a paragraph in the statement of claim, namely paragraph 14, that D1 was charged with the offence of careless driving which was not in fact the case.
10. The application to delete of the original paragraph 14 of the statement of claim presents no problem as it was included as a mistake and should not have been there.
11. During the course of submission, I raised with Mr Luk the relevancy of the alleged employment to the originally causes of action as pleaded. Mr Luk submitted that D1 had a dual role in the case both as the driver and the employer. It was submitted that the fact that D1 was the employer should be included in the pleadings for the sake of completeness in that the fact of the employment would help in establishing the existence of D1’s duty of care owed to the plaintiff and D2’s vicariously liability for D1’s negligence. The fact of employment would also be relevant to the question of contributory negligence as there was evidence that the plaintiff had at the time of the accident, which was in the course of his employment, fallen asleep. Mr Luk submitted that the proposed amendment only serves to add further particulars to the original cause of action, namely, negligence. Mr Luk said that he was not suggesting that as an employer, D1 owed a higher or wider duty of care to the plaintiff over and above that of an ordinary driver. Mr Luk confirmed that he was not alleging that either of the defendants had failed to provide a safe system of work or to provide safe or adequate tools. That was not the plaintiff’s case.
12. In considering whether to grant leave for the amendments, I do not think that I should take into account whether the defendants would be financially able to pay any damages or whether the plaintiff could in the future be able to rely on s 20A of the Employees Compensation Assistance Ordinance, if the defendants failed to pay. These, in my view, are not relevant considerations and I express no view on them whatsoever. In this application, I should concentrate on the rights of the parties and the controversy between them: see *Hong Kong Civil Procedure 2013*, §20/8/6.
13. Although the defendants have not responded to the statement of claim before and do not appear in the hearing of the present application, I will not speculate what they will do if leave is granted for the proposed amendment. I do not think that it is a relevant consideration as to whether leave should be granted.
14. In the present case, in view of what Mr Luk said, I am of the view that the proposed amendment as it now stands does not raise a new cause of action but serves only to provide further particulars to the original cause of action pleaded, namely negligence. The proposed amendment is also necessary for disposing fairly of the cause or matter: see *Hong Kong Civil Procedure 2013*, see §20/8/6A. As to the default judgment already entered, although Mr Luk has not specifically asked that it be set aside, he has asked that leave be granted to the defendants for them to file their defence to the amended statement of claim. That cannot realistically be done without setting aside the default judgment. I understand from Mr Luk that he does not disagree with the setting aside of the default judgment if leave is granted for the proposed amendment. In which case, I do not consider that there would be any prejudice caused to the defendants, if amendment were allowed, which could not be compensated by way of costs.
15. I grant leave for the proposed amendments on the following terms: -
16. the default judgment against the defendants on liability be set aside;
17. leave be granted to the plaintiff to amend the statement of claim as per the draft attached to the plaintiff’s skeleton submissions dated 21 May 2013;
18. the plaintiff to file the amended statement of claim and serve it on the defendants by all of their known addresses within 14 days from the date of this order;
19. leave be granted to the defendants for them to file and serve their defence to the amended statement of claim within 14 days after the service of the amended statement of claim;
20. the plaintiff to file the checklist and to seek directions from the court within 60 days from the date of this order;
21. there be no order as to costs between the plaintiff and the defendants for this application; and
22. the plaintiff’s own costs be taxed in accordance with legal aid regulations.

( Alex Lee )

District Judge

Mr Luk Kwok Wai of K W Luk & Co, assigned by the Director of Legal Aid, for the plaintiff

The 1st defendant was not represented and did not appear

The 2nd Defendant was not represented and did not appear