#### DCPI 2620/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2620 OF 2008

BETWEEN

HO KIN KEUNG Plaintiff

and

TONG KIN WA Defendant

##### Before: Her Honour Judge Mimmie Chan in Chambers (Open to public)

Date of Hearing: 26 February 2010

Date of Delivery of Decision: 26 February 2010

## D E C I S I O N

1. This is a very marginal case on costs.
2. Whilst I made low awards of damages on the basis of what I found essentially to be exaggerated and warranted claims, the unwarranted claims for loss of pre-trial earnings were withdrawn at the commencement of the trial, and I cannot fairly say that the exaggeration of the Plaintiff’s claims regarding his left limb and low back pain can be said to be dishonest. Nor can I justly conclude that his conduct in general amounts to a dishonest abuse of process. The Plaintiff did have a genuine claim relating to the injuries he suffered and the loss he sustained, and the trial had to be conducted to pursue his legitimate claims.
3. Nor can I say that in all the circumstances, including the time of the sanctioned payments and the time when the supporting documents were sought by the Defendant, that the trial time and costs were wasted as a result of the claims which were withdrawn at the opening of the trial, or even by the exaggerated claims.
4. It is true that the Plaintiff had just barely beaten the sanctioned payment made into court shortly before trial, but beat it he did by a small amount.
5. However, parities are encouraged, particularly under the Civil Justice Reform, to make realistic sanctioned offers or payments and to reasonably consider settlement of unrealistic claims, and the court should not be indulgent of parties making unjustified claims, or being careless or simply reckless as to the contents of documents they lodge in court or permit their lawyers to lodge in court.
6. Bearing in mind that this Plaintiff received his full salary from his employer throughout the 74 days of his sick leave, there was no basis at all upon which he could have made a claim for loss of pre-trial earnings. Yet he included or allowed to be included such a claim in the Revised Statement of Damages, which was verified by his Statement of Truth. This is not a question of his being over-optimistic as to the amount of damages recoverable, nor a question of abandoning or withdrawing an otherwise legitimate claim, for costs reasons or lack of evidence, or otherwise. It is a case of his making an improper and unnecessary claim, and even on the recognized *Elgindata* principles, such a plaintiff may not only be deprived of his costs, but may also be ordered to pay the whole or part of the unsuccessful party’s costs.
7. Hence, having regard to all the circumstances, I consider that an appropriate order would be to deprive the Plaintiff of his costs in relation to the claim for pre-trial loss of earnings, and to order that he pays to the Defendant such costs, if any, as are attributable to the defence of the claim for loss of pre-trial earnings.
8. Such an order should duly reflect, in my judgment, the spirit and objectives of the Civil Justice Reform.
9. I will therefore vary the costs order nisi which I made in the Judgment of 24 November 2009, and order that: the Defendant do pay the Plaintiff’s costs of the action, save and except the costs in relation to the Plaintiff’s claim for loss of pre-trial earnings; and the Defendant’s costs of defending the Plaintiff’s claim for loss of pre-trial earnings are to be paid by the Plaintiff, all such costs to be taxed, if not agreed, with certificate for counsel.
10. The costs of this application will be to the Defendant, with certificate for counsel.

# (Mimmie Chan)

# District Judge

Mr Walker Sham, instructed by Messrs Chan & Tsu, for the Plaintiff

Mr Patrick Lim, instructed by Messrs Krishnan & Tsang, for the Defendant