## DCPI 1464 /2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1464 OF 2009

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##### BETWEEN

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| --- | --- |
| YASER ALI | Plaintiff |
| And |  |
| LEE TAI ENGINEERING (HK) COMPANY LIMITED | Defendant |
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Coram: Acting Chief District Judge S. T. Poon in Court

Date of Hearing: 6th and 7th December 2010

Date of Handing Down Judgment: 30th December 2010

JUDGMENT

**Background**

1. The Plaintiff injured his back when he was moving a heavy lump of concrete at a construction site. By this action, he claims against the Defendant as his employer, for personal injuries. With the consent of the parties, I heard evidence for determination of a preliminary issue as to whether the Plaintiff had entered into a discharge agreement with the Defendant and thereby barring the Plaintiff from bringing this action.
2. The accident was happened on 8th March 2008. On 22nd January 2009, the Plaintiff signed in person a document entitled “Discharge Agreement”. A Mr. Lam Wing Fung (“Mr. Lam”) of Toplis and Harding (Case Management) Ltd (“Toplis”), agent of the Defendant’s insurer, also signed as a party.
3. The “Discharge Agreement” provides, inter alia, the followings:
4. *Entirely without prejudice for the question of liability on the part of the Employer and the Insurers, the Injured Worker now accepts a gross compensation sum of HK$331,700.00 inclusive of periodical payment already received as the aforesaid sum HK$31,700.00 in the full and final discharge of all his claims under the Common Law including compensation under Employees’ Compensation Ordinance for the subject accident against the Employer and/or the Insurers and/or their staff, agents and representatives.*
5. *As the Injured Worker has received the employees’ compensation of HK$31,700.00, the Insurers shall pay the balance of HK$300,000.00 to the Injured Worker. After receipt of this payment, the Injured Worker shall forever waive the rights to take whatever nature of legal action arising out of the subject accident.*
6. *The Injured Worker had granted with legal aid assistance and had retained Massie & Clement to handle the case. He is(sic.) insisted to finalize the case of his own will. The Insurers agreed to settle his legal costs separately [upon] presentation of the same from the [Injured] Worker. The actions in withdrawal of legal aid should be [borne] by the [Injured] Worker including all the associated withdrawal costs.*
7. *The Injured Worker will receive the balance of total compensation under the Common Law including the compensation under Employees’ Compensation Ordinance in sum of HK$300,000.00 within 30 days since the Injured Worker signs the Full and Final Claim Settlement Discharge Agreement.*
8. According to Mr. Lam, on the date of signing the agreement, the Plaintiff was all along accompanied by one Mr. Rana, allegedly an interpreter of the Plaintiff. Mr. Rana had explained to the Plaintiff the content of the “Discharge Agreement” and he also signed as a witness.
9. On the other hand, the Plaintiff said Mr. Rana had left before the signing of the document and he signed only because Mr. Lam told him that the agreement concerned only his employees’ compensation claim and would not affect his right to bring his common law claim against the Defendant.
10. Mr. Rana was admittedly an employee of the solicitors representing the Plaintiff in this action, Messrs Shea & Company.
11. As agreed by counsel, the issue here is very narrow. If the Plaintiff can prove that he signed the agreement out of the alleged misrepresentation of Mr. Lam, the Plaintiff is not bound by the agreement and able to proceed with his common law claim against the Defendant. If not, the Plaintiff’s claim stands to be dismissed.

Evidence

1. The Plaintiff in his supplemental witness statement[[1]](#footnote-1) gave his account as to how he came to sign on the “Discharge Agreement”. He was granted legal aid on 25th August 2008 for his claims against the Defendant for both the employees’ compensation and common law actions. Messrs. Massie and Clement was assigned as his solicitors at that time. In or about late December 2008, he received a telephone call from a Mr. Rana who told him that the insurance company wanted to see him and was willing to pay him advanced payments. Mr. Rana also told him that he would help him to get HK$500,000 in a week. According to the Plaintiff, he did not know Mr. Rana before.
2. He went to meet Mr. Rana in Wanchai on 2nd January 2009. Mr. Rana took him to the office of Toplis in Kwun Tong and introduced him to Mr. Lam. The two then did some calculations before him. Mr. Rana then told him in Punjabi that his employees’ compensation and common law claims worth in the region between HK$700,000 and HK$800,000. He then told Mr. Rana that his solicitors told him that it worth more than that but Mr. Rana told him that if the insurance company offers him HK$500,000 to HK$600,000, he should think about it.

1. In the course of discussion between Mr. Rana and Mr. Lam, the Plaintiff saw Mr. Rana wrote down a figure of HK$500,000 on a piece of paper. Mr. Lam then offered a sum of HK$200,000 but Mr. Rana refused to accept. In the end, Mr. Lam wrote down a figure of HK$400,000 and HK$370,000 on the paper and according to the Plaintiff, HK$370,000 was the final offer of Mr. Lam after deducting HK$30,000, the approximate amount representing the periodical payment received, from the amount of HK$400,000. No agreement was reached on 2nd January 2009.
2. The Plaintiff telephoned Mr. Lam two weeks later. A meeting was arranged on 22nd January 2009 at a McDonalds Restaurant in Wanchai. Again, the Plaintiff, Mr. Rana and Mr. Lam were present at the meeting. According to the Plaintiff, when Mr. Rana noticed that the amount stated on the agreement was HK$300,000 instead of HK$400,000, Mr. Rana refused to sign and went away. When questioned about why Mr. Rana went away, the Plaintiff said because Mr. Rana felt he was cheated by Mr. Lam as the original agreed amount was HK$400,000.
3. After Mr. Rana went away, Mr. Lam told him that if he did not sign the agreement, he would receive no employees’ compensation for his injuries. Mr. Lam also told him that the agreement concerned only his claim for employees’ compensation and would not affect his common law claim against the Defendant. Although he cannot read English, as he was in a very serious financial position, he relied upon Mr. Lam’s representation and signed the agreement. Mr Lam also asked him to sign a name in his language as a witness to the agreement. Although the Plaintiff refused to do so initially, upon Mr. Lam’s threat that the employees’ compensation would not be released otherwise, he signed the name ‘Tahir’ in Urdo on the agreement.
4. In Mr. Lam’s version, the name ‘Tahir’ was signed by Mr. Rana. Mr. Lam explained that as Mr. Rana did not want Messrs Massie & Clement to know that he was involved in this matter, he signed in someone else’s name as the witness.
5. The Plaintiff agreed that after the agreement was signed and in the course of preparing for this litigation, Mr. Rana had been assisting him as an employee of his solicitors including but not limited to accompanying him to see the medical experts. However, he could not explain why Mr. Rana was not asked to be a witness in this action.

**Findings**

1. I have no hesitation in rejecting the Plaintiff’s version of facts.
2. It would be apparent to the Plaintiff and his solicitors at the outset that Mr. Rana is a crucial witness in this action. As the whole case of the Plaintiff is premised on the fact that his interpreter, Mr. Rana, had walked away and he had to rely on Mr. Lam’s representation at the time of signing the ‘Discharge Agreement’. It is inconceivable as to why no statement of Mr. Rana has been obtained by the Plaintiff or his solicitors given that Mr. Rana was their employee. In this situation, an adverse inference can readily be drawn against the Plaintiff.
3. Furthermore, in the Plaintiff’s own evidence, at the start of the negotiation between him and Mr. Lam through Mr. Rana, the subject amount was all along referring to the overall amount including the Plaintiff’s employees’ compensation and common law claims. In his own version the amount was negotiated down from HK$500,000 to $400,000 and HK$500,000 was the amount Mr. Rana asked him to “think about it” for an overall settlement. It would be unrealistic for the Plaintiff to think that Mr. Lam would agree to settle with him in the amount of HK$331,700 for the employees’ compensation claim only, leaving him the right to sue the Defendant or insurance company afresh in common law.
4. It is also unbelievable that the Plaintiff would agree to sign as a witness of the agreement knowing that it was false. In that case it would be obvious that Mr. Lam was playing trick and the Plaintiff would not possibly have believed in Mr. Lam’s representation leading him to sign the agreement.
5. Last but not least, the Plaintiff had given different versions when being cross-examined by counsel. It is not necessary to list them all out here. In my view, the Plaintiff is definitely not an honest witness and is ready to change his evidence anytime.
6. On the other hand, Mr. Lam impressed me as an honest witness and was unshakened in cross-examination. I prefer his evidence against the Plaintiff’s.

**Conclusion**

1. I find that the Discharge Agreement is a valid settlement agreement entered into voluntarily by the Plaintiff free from any misrepresentation by Mr. Lam and the Plaintiff is bound by it.
2. In the circumstances, the Plaintiff is debarred from suing the Defendant in common law for his injuries and the Plaintiff’s action is hereby dismissed.
3. I see no reason why costs should not follow the event. I make a cost order nisi that costs of this action be to the Defendant to be taxed if not agreed, with certificate for counsel. This order nisi shall become absolute 14 days after the handing down of this judgment.

(S. T. Poon)

Acting Chief District Judge

Mr. Wilson Lau instructed by Messrs Shea & Company for the Plaintiff.

Miss Julia Lau instructed by Messrs Ho & Ip for the Defendant.

1. The supplemental witness statement was dated 10th November 2010, some months after leave to set down being granted by Master Chow on 18th May 2010. In fact, the Plaintiff has given notice to set down on 20th July 2010 and the case was set down in the Running List not to be warned before 30th August 2010. The case was warned on 1st September 2010 but a memorandum of notification of an application for legal aid was filed on 7th September 2010. On 1st November 2010, which was originally the trial date, the Plaintiff took out a summons to apply for filing of a supplemental witness statement on the issue of the “Discharge Agreement” and leave was granted. [↑](#footnote-ref-1)