#### DCPI 1617/2010

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1617 OF 2010

BETWEEN

LAU SHING WAN (**劉成穩**) Plaintiff

and

UNIVAN SHIP MANAGEMENT LTD Defendant

##### Coram: Deputy District Judge Kent Yee in Chambers

##### Dates of Hearing: 7 December 2011

Date of Judgment: 15 December 2011

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JUDGMENT

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*Introduction*

1. In this action, the plaintiff Lau Shing Wan (“Lau”) claims against the defendant Univan Ship Management Ltd (“USM”) for damages for personal injuries allegedly sustained in the course of his employment with USM. USM applied by summons dated 26October 2011 (“the Summons”) to set aside the Amended Writ of Summons and/or strike out the Statement of Claim.
2. The application of USM was dismissed by Master S.P. Yip with costs to USM (summarily assessed at HK$2,600). Master S.P. Yip further granted leave to Lau to re-amend the Amended Writ of Summons by adding the endorsement of claim indorsed with the original writ dated 29 September 2010.
3. This was the appeal of USM against the order of Master S.P. Yip (“the Order”). After hearing arguments, I affirmed the Order and dismissed the appeal. I further ordered that costs of the appeal be paid by USM to Lau summarily assessed at $27,000. I indicated to the parties that my reasons in writing would be given by way of a judgment to be handed down later. This I now do.

*Background Facts*

1. There was no controversy about the background facts leading to the application of USM and they can be outlined as follows.
2. Lau met with an accident on 3 October 2007 while working on board a vessel for USM. He commenced employee compensation proceedings against USM and the proceedings were concluded by Lau’s acceptance of the sanctioned payment of USM on 22 October 2007.
3. Lau issued the Writ of Summons herein on 29 September 2010 (“the Writ”). It was indorsed with a general indorsement (“the said General Indorsement”) which was in the following terms:

“The Plaintiff’s claim against the Defendant are for damages for the Plaintiff’s personal injuries, loss and damage (together with interests and costs) suffered as a result of an industrial accident occurred on board a vessel called “Pacific Dhow” which was at Shell Terminal, Tsing Yi, Hong Kong on about 3rd October 2007, the said accident being solely caused by the negligence and/or the breach of statutory duty of care of the Defendant, their agents or servants for which the Defendant was vicariously liable, and/or the breach of employment on the part of the Defendant.”

1. The Writ however was never served on USM. On 27 September 2011, Lau amended the Writ pursuant to Order 20 r.1 of the Rules of the District Court (“RDC”). The amendments related solely to the registered address of USM.
2. The Amended Writ was filed without the said General Indorsement indorsed with the Writ. On the same date, the Amended Writ without the said General Indorsement (or any other general indorsement) was served on USM. It was served with a certificate of fee arrangement and a mediation certificate both dated 29 September 2010.
3. On 3October 2011, USM filed an Acknowledge of Service of Amended Writ of Summons indicating that it intended to contest the proceedings.
4. By letter dated 13 October 2011 to Lau’s solicitors (“the Letter”), Messrs. Tsui & Co. on behalf of USM raised a few objections to the Amended Writ. They complained, among other things, that the Amended Writ was without a general indorsement and they said this was in breach of Order 6 r.2 of the RDC and was liable to be struck out under Order 18 r.19 of the RDC on the ground that it disclosed no reasonable cause of action or was an abuse of process. They then demanded Lau to withdraw his claims.
5. Lau’s solicitors did not write back. Instead, on 17 October 2011, Lau filed and served his Statement of Claim, Statement of Damages and medical evidence.
6. On 26 October 2011, USM made the present application by taking out the Summons pursuant to Order 2 r.2 and Order 18 r.19 of the RDC. By the Summons, USM applied to set aside the Amended Writ on the ground that it had no indorsement of claim and was thereby in breach of Order 6 r.2.
7. USM also relied on all of the 3 grounds in Order 18 r.19. In support of the Summons, USM filed an affidavit of Lo Wai Yin Fiona on 26 October 2011 (“the Affidavit”). Ms. Lo is a partner of the firm of solicitors acting for USM.

*Defendant’s Contentions*

1. On the simple background facts narrated above, Mr. Lam, counsel for the defendant, mounted a scathing attack on the integrity of the Amended Writ. He first argued that since Lau amended and served the Amended Writ with the said General Indorsement taken away, the Amended Writ was was a nullity and not just being defective. In the latter case, a defect could be curable but in the former case, the document must be set aside. He relied on Order 6 r.2 of the RDC.
2. I cannot agree with this argument. Order 6 r.2 provides that before a writ is issued it must be indorsed with a statement of claim or a general indorsement. Order 6 r.7(3) provides that issue of a writ takes place upon its being sealed by an officer of the Registry. In the present case, there is no question that when the Writ was issued upon its being sealed by an officer of the Registry, it was indorsed with the said General Indorsement. It was validly issued and could not be said to be a nullity.
3. Upon the Writ was amended, the said General Indorsement was found missing from the resultant Amended Writ. It was obvious to me that it was an oversight on the part of Lau’s solicitors. Mr. Lam criticized them for not filing any evidence to explain why the said General Indorsement was not included with the Amended Writ. His criticism was valid. They clearly owed the court an explanation if not an apology.
4. Lau’s solicitors orally explained to the master and this court that it was an inadvertence. I have no doubt that it was, even in the absence of affidavit evidence to this effect. There could be no other plausible reasons.
5. Mr. Lam submitted that the exclusion of the said General Indorsement from the Amended Writ could mean that Lau had decided to abandon the original cause of action stated therein.
6. I cannot accept this submission. I cannot believe that any legal practitioner will attempt to abandon a cause of action stated in a general indorsement by simply taking away the document. As accepted by Mr. Lam, it is not a normal way of abandoning a cause of action. Further, there could be no reason why Lau decided to take the trouble to amend the Writ to include the new registered address of USM but at the same time decided to abandon the original cause of action without any replacement.
7. Therefore, I find that it was a mere irregularity when the Amended Writ was served on USM without the said General Indorsement. When the Statement of Claim, among other documents, was served on USM less than three weeks later, the irregularity was effectively cured.
8. In the Affidavit, Ms. Lo complained that there was no pre-action letter in contravention of Practice Direction 18.1 before the Writ was issued. When the Amended Writ without the said General Indorsement was served on USM, she claimed that USM had no idea of what the exact complaint of Lau was and hence USM was seriously prejudiced. That was, she said, a fundamental breach which could not be cured.
9. I find no substance in this complaint. I do not accept that USM was ever in the dark during the brief period between the service of the Amended Writ and the Statement of Claim and hence was materially prejudiced. In the Letter, the solicitors for USM even did not ask for the details of Lau’s claim and merely asked for its withdrawal.
10. Lau was no stranger to USM and Lau had previously sued USM in the employee compensation proceedings. The claim nature marked in the Amended Writ included “monetary claim” and “personal injuries”. The action was clearly commenced as a personal injuries action, as shown by its case number and its title. It must be clear to USM and its legal advisors that the Amended Writ related to a common law action arising from the alleged accident, which had been the subject matter of the previous proceedings. I do not understand Ms. Lo to suggest that there were other accidents involving both Lau and USM ever alleged by Lau.
11. I therefore do not agree that the Amended Writ should be set aside by reason of the irregularity.
12. As regards the striking out application, Mr. Lam confirmed that USM no longer complained that the Statement of Claim disclosed no reasonable cause of action and that it might prejudice, embarrass or delay the fair trial of the action. The only ground was that it was an abuse of the process of the court. To substantiate this ground, Mr. Lam relied on an assertion in the Affidavit to the effect that the validity of the Amended Writ had expired and hence the action was time-barred. Mr. Lam submitted that the Statement of Claim was served after the limitation period had already expired.
13. I find no substance in this complaint at all. Mr. Lam agreed that the Amended Writ was served before its expiry date and it needed no renewal. Further, Lau brought the present action by the issue of the Writ. Mr. Lam accepted that the Writ was issued within time. The present action was brought within the 3-year limitation period and is by no means time-barred.
14. Mr. Lam accepted the general rule that any amendment duly made takes effect not from the date when the amendment is made but from the date of the original document it amends: Hong Kong Civil Procedure 2012 at §20/8/2. The amendments and re-amendments in the present case do not alter the fact that Lau’s claim was made within time.
15. This holds true even if I accepted Mr. Lam’s contention that Lau had indeed abandoned the original cause of action and then the master allowed its restoration by granting Lau leave to re-amend: Hong Kong Civil Procedure 2012 at §20/8/32.
16. In the premises, I do not accept Mr. Lam’s submission that Lau’s present claim is a new claim made after the expiry of the limitation period. It calls for no disapplication of the limitation period pursuant to the Limitation Ordinance, Cap. 347. Ms. Lo agreed that the present claim and its causes of action do not differ in any material way from that stated in the said General Indorsement. I do not think that sections 30 and 35 of the Limitation Ordinance and Order 20 r.5(5) of the RDC are engaged or may assist USM.
17. Lastly, even if Lau’s claim is time-barred as contended by USM, it would only mean that USM has a defence under the Limitation Ordinance and that Lau may need to apply for disapplication of the limitation period in order to proceed with his claim. It cannot be plain and obvious that his action amounts to an abuse of the process of the court and should thus be struck out. The striking-out application was rightly dismissed.
18. I was given to understand by the parties that the leave to re-amend the Amended Writ was granted of the own motion of Master S.P. Yip. In his written submission, Mr. Lam complained that the Order would be a backdoor for Lau to circumvent the time bar. I do not agree.
19. As explained, I do not see any limitation issue and I do not think Master S.P. Yip has effectively disapplied any limitation period by allowing the re-amendment. I do not accept the submission that USM was thereby deprived of a chance to properly argue against such a disapplication.
20. Master S.P. Yip was in my view only right in exercising his discretion to take that sensible course to cure a procedural irregularity for housekeeping purpose. An alternative would be to allow Lau to file and serve the said General Indorsement out of time so that it can be formally included in the Amended Writ.

*Conclusion*

1. For those reasons I affirmed the Order and dismissed USM’s appeal with costs to Lau. This action has taken an undesirable digression due to the oversight of Lau’s solicitors and USM’s reaction thereto. I note that USM has yet to file its defence and I hereby direct USM to do so within 28 days from the date hereof. The parties should make a genuine effort to make up for the lost time so as to assist the court to secure the just resolution of disputes without further delay in accordance with the substantive rights of the parties.
2. It only remains for me to thank Mr. Lam and Ms. Cheung for their assistance.

# (Kent Yee)

# Deputy District Judge

Ms. Karen Cheung instructed by Messrs. Tang, Wong & Chow for the Plaintiff

Mr. Lam Chin Ching Gary instructed by Messrs. Tsui & Co. for the Defendant