

HONG KONG / JUDGMENT

HO SUK MAN v. SIT TIM MAU

COURT

Court of First Instance

DECIDED

3 September 2013

CASE / FILE NUMBER

HCPI122/2011

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bjbj HCPI 122/2011 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NO. 122 OF 2011

BETWEEN HO SUK MAN and SIT TIM MAU Plaintiff Defendant and CHEUNG TAK WAI NG KAM
SHEUNG NG MAN WAH KEE SEA LAND TRANSPORTATION LIMITED 1st Third Party
(Discontinued) 2nd Third Party (Discontinued) 3rd Third Party (Discontinued) 4th Third Party
(Discontinued)

Coram: Before Deputy High Court Judge Marlene Ng in Chambers Date of Hearing: 29 August
2013 Date of Decision: 29 August 2013 Date of Handing Down Reasons for Decision: 3 September
2013

REASONS FOR DECISION

I. BACKGROUND On 28 February 2008, the plaintiff was a passenger in a public light bus and suffered personal injuries in a collision between the public light bus and a medium goods vehicle driven by the defendant in Sham Tseng, Tsuen Wan, New Territories (Accident). On 17 February 2011, the plaintiff commenced the present action against the defendant for loss and damages as a result of the defendant s negligent driving of the medium goods vehicle. Pursuant to my order (as PI Master) dated 2 August 2011, the plaintiff herself is a witness as to fact for the trial. According to my order (as PI Master) dated 24 September 2012, leave was granted for the plaintiff to serve witness statements as to fact by [7_, f q_ essed. The defendant elected not to adduce witness evidence as to quantum at the assessment of damages. By my order (as PI Master) dated 12 November 2012, leave was granted for the plaintiff to set the present action down for assessment of damages. On 15 January 2013, the Listing Clerk fixed the date for hearing the assessment for damages in the present action, ie on 5 November 2013 with 4 days reserved. On 7 August 2013, the

plaintiff's solicitors wrote to the defendant's solicitors to seek their consent to _j tiff issued a summons (Summons) for leave to adduce the Yuen Statement, which Summons was returnable before me on 27 August 2013 (Hearing). II. PLEADINGS According to the Re-Revised Statement of Damages (RRSOD) filed on 12 March 2012, the plaintiff was an assistant accountant earning HK\$20,000.00 per month at the time of the Accident. She continued with her accountancy studies after the Accident. From March 2008 until 31 March 2010, she worked as an accountant for Aeroflex Asia Limited (Aeroflex) earning about HK\$22,750.00 per month. Aeroflex paid the plaintiff her full salary despite her absence from work for medical treatments. But after 31 March 2010 the plaintiff was unable to extend her employment due to her injuries, attendances for medical treatment and/or inability to cope with heavy work load and long working hours. On 1 July 2010, she joined WK Chan & Co, CPA (WKC & Co) as accountant earning about HK\$9,000.00 per month with reduced working hours and workload. After she obtained her Bachelor of Accountancy in February 2011, she was offered a job as a senior accountant with IPP Hong Kong Holdings Limited (IPP Hong Kong) earning about HK\$20,000.00 per month. The plaintiff therefore claimed pre-trial loss of earnings from 1 May 2010 up to April 2011 in the sum of HK\$151,250.00 (ie (HK\$22,750.00 HK\$9,000.00) x 11 months). As regards post-trial loss of earnings with notional trial date in June 2012, the plaintiff pleaded in the RRSOD that she would be 39 years old at the notional trial date, and would have a working life of 21 years ahead of her (ie up to her retirement at 60 years of age), so a multiplier of 14 would be appropriate. The plaintiff further averred the parties orthopaedic experts opined that she should be able to return to her pre-accident job as an accountant, but she should avoid carrying heavy object or sitting for prolonged period. She pleaded as follows: 21.2 According to the Plaintiff's knowledge in accounting field, she is unable to joint international accounting firm as Accountant II to gain audit experience (ie performing audit duty in the mainland which request long travelling prolonged sitting and carry heavy objects, such as luggage and accounting records) so as to allow her to be (a) a Chartered Accountant after a usual 4 years audit training experience and examinations and (b) a Financial controller/Chief Financial Officer in private corporation after qualified as Chartered Accountant with 2-4 years of experiences and examinations. 21.3 According to the Plaintiff's knowledge in accounting field, the career path and monthly salary of an international accounting firm are as follows:-

- (a) Fresh graduate (audit) Accountant II with salary from HK\$10,000.00 to HK\$13,000.00
- (b) After 1 to 2 years working experience (audit) promote to Accountant I with salary from HK\$15,000.00 to HK\$20,000.00
- (c) After further 2 years working experience and chartered promote to manager with salary from HK\$40,000.00 to HK\$60,000.00
- (d) After further 2 3 years working experience promote to Senior Manager / Financial controller with salary from HK\$60,000.00 to HK\$100,000.00

- (e) After further 23 years working experience promote to Partner / Chief Financial Officer with salary from HK\$100,000.00 to HK\$200,000.00 21.4 In about April 2011, the Plaintiff resumed her pre-accident employment as an in house accountant and earned about HK\$20,000.00 per month. Assuming the salary of the Plaintiff would have 10% increase per annum, the earnings of the Plaintiff would be HK\$22,000.00 per month in June 2012, HK\$29,282.00 per month in June 2015 and HK\$38,974.00 in June 2018. Had she not been injured on 28th February 2008, with years of accounting experience she had, she would be able to earn/capable of earning of at least about HK\$40,000.00 per month in June 2012; HK\$60,000.00 in June 2015 and HK\$100,000.00 in June 2018 according to 21.3 above. 21.5 The Plaintiff's Post-trial loss of earnings would be: $(HK\$40,000.00 + HK\$60,000.00 + HK\$100,000.00)/3$ $(HK\$22,000.00 + HK\$29,282.00 + HK\$38,974.00)/3 \times 12 \times 14 = HK\$6,145,776.00$ In the Amended Answer to the RRSOC (Amended Answer), the defendant disputed the plaintiff's claims for pre-trial and post-trial loss of earnings. In response to the plaintiff's pleaded claim for pre-trial loss of earnings, the defendant averred that: At the time of the Accident, the plaintiff was employed by GC Luckmate Trading Limited (GC Luckmate) as an assistant accountant earning about HK\$20,000.00 per month. Two days after the Accident on 1 March 2008, the plaintiff commenced working for Aeroflex as an accountant earning a monthly salary of HK\$22,750.00. The plaintiff remained so employed by Aeroflex until 31 April 2010, ie more than two years after the Accident. Except for the sick leave period between 17 and 20 January 2011 (ie four days) and between 20 and 24 May 2011 (ie five days), all other sick leave was issued to the plaintiff when she was under the employ of Aeroflex. Despite such sick leave, she received full salary from Aeroflex and suffered no loss of earnings. The plaintiff had recovered well from her injuries, which injuries and/or orthopaedic condition would not have prevented her from continuing with her job as an accountant with Aeroflex or any other companies. The plaintiff's subsequent change of job in early July 2010 and the subsequent drop in income were not caused by her mild injuries sustained in the Accident. The plaintiff took up the position of Senior Accountant with IPP Hong Kong in April 2011 earning a salary of HK\$20,000.00 per month. The defendant therefore claimed that the plaintiff was not entitled to any award for pre-trial or post-trial loss of earnings either as alleged in the RRSOD or at all. IV. WITNESS STATEMENT In the plaintiff's witness statement dated 26 July 2011, she set out her employment history with GC Luckmate, Aeroflex, WKC & Co and IPP Hong Kong. She also set out the academic and professional qualifications she attained between 1997 and 2011. V. YUEN STATEMENT According to the Yuen Statement, Mr Yuen claimed to have worked in the accounting field since 1994, and had 18 years working experience in respect of accounting and auditing work. He now operates and is the manager of an accounting and secretarial services company, and employs auditors to assist him. Mr Yuen stated that according to [his] knowledge , a practising accountant must complete the relevant courses (completion of five examination papers (that required a minimum period of 1 years) and one Wmif ,000 Junior Auditor after probation 15,000 Junior Auditor 1-2 years 19,000 Accountant 2-4 years Over 20,000 Senior Accountant depends on vacancy Over 30,000 Supervisor depends on vacancy Around 50,000-65,000 Manager * There would be one promotion per year. In the first two years, there would be increase in salary of about

HK\$4,000.00-HK\$5,000.00 upon each promotion. Upon reaching Senior Accountant level, there would be increase in salary of about HK\$8,000.00-HK\$10,000.00 on each promotion. Further, some experienced or qualified auditors would choose to start their own companies and form partnerships with others. Mr Yuen said his company was on a smaller scale, so it was different from the large accounting firms, but the promotion ladder was still similar. If accurate information on promotion or salary is needed, please make enquiries with relevant accounting firms. Mr Yuen said that according to [his] knowledge, to become a practising accountant a person must have worked in the auditing field, and such work included the following: After accepting a job, the auditor would collect the relevant documents (at least several box files) and other work equipment (eg computer, stationery etc) in a briefcase to bring over to the client's office for carrying out auditing work. In the course of the auditing exercise, the auditor would have to squat down quite often to pick up and carry documents. Sometimes, due to limited space at the client's office, it might not be possible for an auditor to work at his own desk. If the client had a factory in Mainland China, during the auditing exercise the auditor would have to take long-distance transport (not by luxury car but by one with a cramped cabin) and to bring with him the necessary documents and equipment that he had to use. All in all, Mr Yuen stated that an auditor had to regularly carry heavy objects for work outside the office, squat down to pick up documents, work at the client's office without proper work area (most of the time two to three persons would work in a small room), and he would often take long-distance transport to and from Mainland China. It was further said that according to [Mr Yuen's] knowledge and experience, if a person could not carry heavy objects or squat down to pick up documents it would be difficult to work in this field. If a person with such attributes applied to his company for work, Mr Yuen would not consider his application. There was an Annexure to the Yuen Statement (Annexure). In Annexure 1, extracts from Yahoo on 9 October 2008 and 24 January 2009, which appeared to be postings on internet forum, were described as Reference Information. However, no reference was made to Annexure 1 in the Yuen Statement, and the context from which such internet information was extracted was unclear.

VI. DISCUSSION Ms Chan, solicitor for the defendant, in her written skeleton submissions, complained of the lateness of the application and the lack of explanation for the delay. She reminded that the plaintiff's witness statements had been served for quite some time, and the case had been set down for assessment of damages to commence on 5 November 2013. The defendant did not give any account for the lateness and gave no explanation as to why such evidence could not have been obtained earlier. Mr Lee, solicitor for the plaintiff, accepted that the Summons was a late application. He also confirmed that no explanation for the lateness had been given to the defendant and/or the court prior to the Hearing. At the Hearing, Mr Lee explained from the bar table that people would not wish to be involved in litigation, so despite the plaintiff's efforts she was not able to locate a witness who was willing to give evidence on her behalf by providing a witness statement and/or attending the assessment of damages to give evidence. It was only recently that Mr Yuen expressed willingness to be her witness. Mr Lee said that the Yuen Statement was in fact largely prepared by Mr Yuen himself. In my view, the need for exchange of witness statements as to fact and quantum was known as early as the first

checklist review hearing on 3 August 2011 if not earlier. By my order (as PI Master) dated 24 September 2012, the parties were required to obtain counsel's advice on evidence and quantum and to seek all outstanding interlocutory applications as advised by counsel or handling solicitor of the case by 29 October 2012. By a letter dated 21 November 2012 to the Listing Clerk, the plaintiff's solicitors confirmed that all directions (save for paragraph 15 of my order (as PI Master) dated 24 September 2012 which is irrelevant for present purpose) had been complied with. On 23 November 2012, the plaintiff filed an Application to set a Case Down for Trial stating that the plaintiff anticipated five witnesses would be called on her behalf, i.e. the plaintiff herself, [7], [8] and obvious lateness has to be justified, and it behoves the plaintiff as applicant to provide the court and the other side, preferably on affidavit, with full and accurate information on the reasons why the witness statement was not served earlier, the relevance of the evidence to the issues before the court, and why such application should be entertained at all at such late stage notwithstanding the underlying objectives. Here, there is nothing before me from the plaintiff to explain when she approached Mr Yuen to invite him to be her witness or when Mr Yuen indicated his willingness to be such except for Mr Yuen's assertion that it was quite recent. In light of the above analysis, I am not satisfied there is good or justifiable reason for the lateness. Turning to the contents of the Yuen Statement, I shall first deal with the first paragraph thereof. Lee submitted that this was a matter of general knowledge which Mr Yuen could speak to. Ms Chan argued that Mr Yuen's assertions as to the career path or prospects of accountants in the big four accounting firms in Hong Kong carried little probative value since these matters were not directly relevant to the issues in this case. In my view, if it were a matter of general public knowledge, then there would have been no need for Mr Yuen to deal with the matter, and the plaintiff could have addressed the matter herself. Obviously, Mr Yuen purported to deal with matters which were not general knowledge, but specific information in relation to the accounting field and more particularly in respect of the big four accounting firms in Hong Kong. Although he himself had been an accountant for many years and has his own accountancy practice, there is nothing in the Yuen Statement that says that Mr Yuen had ever worked at or dealt with any of the big four accounting firms or how he had come to acquire the knowledge that he spoke to in paragraph 1 of the Yuen Statement. It is telling that at the end of first paragraph of the Yuen Statement, Mr Yuen stated (with emphasis in bold print) that [if] accurate information on promotion or salary is needed, please make enquiries with relevant accounting firms. This immediately raises a question as to Mr Yuen's source of knowledge of the information that he gave, which in turn raises further question as to the probative value of such information. Mr Lee had no submissions to make in respect of the above matters. In my view, there is serious doubt as to the admissibility of the first paragraph of Yuen's statement save for the first two sentences about Mr Yuen's personal career and experience in the accounting field. In any event, the obvious lack of probative value of such information does not justify its admission. In respect of the second paragraph of the Yuen Statement, Lee submitted that the matters stated therein concerned trade practice which were within Mr Yuen's own knowledge. Ms Chan complained that this was opinion and not factual evidence. I am not persuaded that what has been set out in the

second paragraph of the Yuen Statement is opinion evidence. Mr Yuen has his own accountancy practice, and he employs auditors. This provides the basis to suggest he has personal knowledge of auditing work. In the circumstances, the nature and scope of auditing work as described by Mr Yuen is necessarily factual evidence. In *Gurung an Parsad v Great Wealthy Engineering Company Limited & anor*, the plaintiff, who was employed as a scaffolder, sought leave to serve further witness statement from an additional witness who was a qualified scaffolder and contractor supplying scaffolding services. It was anticipated that in his statement he would be able to explain what the job of a scaffolder entailed, and whether the plaintiff would likely face practical disadvantages because of his injury if he were to attempt to obtain further employment in his pre-accident occupation. The Personal Injury Judge indicated that he might be prepared to grant leave to rely on a further statement from such additional witness insofar as such witness spoke in that statement of relevant factual matters such as practices in the work place and wage levels, but that [he] would not grant leave to allow the plaintiff to adduce into evidence the inadmissible opinion of [such witness] on whether or not his company would employ the plaintiff if, hypothetically speaking, the plaintiff were now to apply to work for his company (my emphasis). In that case, it turned out that the additional witness was not willing to sign the draft witness statement so the learned judge was not required to make a definitive ruling on the subject, but I respectfully agree with and adopt the approach outlined in his Practice Note. The second paragraph of the Yuen Statement contains information about the practices and scope of auditing work. At this pre-trial stage, I cannot say such information is not relevant to the disputed issues. Although the Summons is a late application, this aspect of the Yuen Statement is not something new or unexpected, but merely evidence on issues that have already been pleaded. Mr Lee was willing to let the defendant respond to this evidence by way of revision of pleadings and introduction of witness evidence if the defendant sees fit. Given the time available before the assessment of damages, I am persuaded there is time enough for the defendant to attend to these matters. The defendant may be disappointed by the introduction of new evidence by the plaintiff, but I do not think that he is prejudiced, especially when Mr Lee accepts that the defendant should be properly compensated as to costs arising out of this new development. At the Hearing, Mr Lee accepted that the following shall be redacted from the Yuen Statement and shall not be admissible at the assessment hearing: (a) Annexure 1, and (b) the last sentence of the second paragraph which deals with the hypothetical question as to whether or not Mr Yuen would employ the plaintiff if she were to apply for work at his company. VI. CONCLUSION In the circumstances, I granted the following order at the Hearing: retrospective leave be granted to the plaintiff to serve the Yuen Statement save and except that (i) all parts of the first paragraph of such witness statement apart from the first two sentences shall be redacted, (ii) the last sentence of the second paragraph of such witness statement shall be redacted, and (iii) Annexure 1 of such witness statement shall be redacted in its entirety; for the avoidance of doubt, the redacted parts of the Yuen Statement shall not be admissible at the assessment of damages; no leave is granted for Mr Yuen (if called as a witness at the assessment of damages) to amplify on the matters raised in the Yuen Statement redacted as aforesaid;

leave to the defendant (if so advised) to file and serve Re-Amended Answer to the Re-Revised Statement of Damages by reason of the redacted Yuen Statement within 28 days from the Hearing, and such Re-Amended Answer (if any) shall be accompanied by its statement of truth; leave to the defendant (if so advised) to serve witness statement(s) as to quantum in reply to the Yuen Statement redacted as aforesaid within 28 days from today, and such witness statement(s) (if any) shall be accompanied by their respective statement of truth; if the defendant shall serve any witness statement in reply pursuant to (e) above, the parties shall within 14 days thereafter respectively file and serve further revised certificate of time estimate for assessment of damages prepared and personally signed by counsel or handling solicitor of the case; the plaintiff shall on or before 29 October 2011 lodge and serve the assessment bundle for the assessment of damages; the plaintiff shall on or before 30 October 2011 lodge and serve written opening submissions; leave to the defendant to lodge and serve written opening submissions on or before 1 November 2013; costs of and occasioned by the Summons be paid by the plaintiff to the defendant to be taxed if not agreed. VII.

POSTSCRIPT It transpires that the plaintiff has made discovery of information downloaded from the internet described as follows: PayScale of Hong Kong Accountant and Certified Public Accountant (CPA) 09/04/2012 Salary Index Report in 2012-JobsDB.com Undated Internet research Accountant (6 pages) 25/04/2012 These documents have not been placed before me at the Hearing for the purpose of the Summons. I have asked the parties to be prepared at the trial to address on the issues of admissibility, relevance and probative value of such documents as evidence of the truth of their contents in contra-distinction to evidence as to the fact that such information had been posted on the internet. Parties should also pay attention to whether or not the contents of such documents amount to opinion evidence. Of course, if such hurdles can be crossed, there is still the question of the weight of such hearsay evidence. (Marlene Ng) Deputy High Court Judge Mr Peter Lee Ka Chun, of Au-Yeung, Cheng, Ho & Tin, for the plaintiff Ms Chan Yin Hang Helen, of T S Tong & Co, for the defendant see paragraphs h=Rg gd=Rg gd=Rg gd=Rg h=Rg h=Rg gd=Rg gd=Rg gd=Rg gd=Rg (#p# {j}|L h=Rg pi[TM?M?M7 hV:o h=Rg gdAL2 gd547 gd547 gd547 hAL2 h547 h547 hAL2 hAL2 hAL2 hG>q hG>q gdG>q gdG>q gd547 gdAL2 gdAL2 gdAL2 gdAL2 hAL2 h1iU h1iU h1iU h1iU hAL2 h1iU gd(+ gd547 gd547 gd547 gd(+ hAL2 h547 hAL2 hAL2 gd547 gd547 gd547 hAL2 gd547 gdaJr gd547 gdlF gdlF gdC& haJr hAL2 h547 haJr hAL2 hAL2 haJr haJr h547 haJr h547 haJr hAL2 hAL2 hPk0 hAL2 hPk0 h547 gdlF gd547 hAL2 h+2. hAL2 zncn h+2. hAL2 h+2. h+2. h+2. h+2. h+2. h+2. h+2. h+2. h+2. hAL2 h+2. hAL2 h+2. h+2. hAL2 hAL2 h{zX h{zX hAL2 h{zX h{zX h{zX h{zX gddLF gddLF gdlF gd_d gddLF gddLF ytdLF gddLF ytdLF ytdLF hAL2 wmi^TR^T^T^G 2-5 of the plaintiff's witness statement dated 26 July 2011 see paragraph 16 of the plaintiff's witness statement dated 26 July 2011 see Chung Hiu Bun, the administrator of the estate of Chung Hung Kong, the deceased v Yeung Yiu Seng & anor, HCPI 123/2010, Bharwaney J (unreported, 28 July 2011) and Liu Chen v Chan Poon Wing, HCPI 779/2006 (unreported, 7 October 2009) see paragraph 13 above see paragraph 14 above HCPI 687/2010, Bharwaney J (unreported, 18 June 2012) Gurung an Parsad at para.4 see paragraph 26 above - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N

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