

HONG KONG / JUDGMENT

LEE LOK KOON v. MAXIM'S CATERERS LTD

COURT

Court of First Instance

DECIDED

26 April 2007

CASE / FILE NUMBER

HCPI1129/2005

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bjbj HCPI 1129/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NO. HCPI 1129 of 2005

BETWEEN LEE LOK KOON Plaintiff MAXIM S CATERERS LIMITED Defendant

Coram: Before Master B Kwan in Chambers (Open to Public) Date of Hearing: 17 April 2007 Date
of Handing Down of Decision: 26 April 2007

DECISION

1. The parties settled this action by way of a Consent Summons dated 7 March 2007 for \$285,000 inclusive of interest and in full and final settlement of the plaintiff's claim herein.
2. The parties were unable to agree on the appropriate scale of costs to be applied, so directions were given for the matter to be set down for a half hour argument before me. At the time I alerted the parties to the latest judgment on scale of costs HCA 2132 of 2001, a decision of Deputy Judge Louis Chan.
3. At the hearing on 17 April 2007 it was common ground that HCA 2132 of 2001 did not apply in the circumstances of the present case, and counsel for the parties agreed that the appropriate test to be used was the one propounded in HCPI 63 of 2001, a decision of Mr Justice Seagroatt (hereinafter referred to as the Seagroatt test).

4. Therefore it was common ground that where an action is brought in the High Court is settled in an amount within the jurisdiction of the District Court, the usual order will mean that costs will be on the District Court scale unless the High Court is, in the exercise of its discretion, persuaded that there was a reasonable prospect of obtaining an award in excess of the District Court jurisdiction, see paragraph 21 of the Judgment of Mr Justice Seagroatt.
5. In Summary, the background of the claim is as follows:
 - (a) The plaintiff worked for the defendant as a deputy chef. On 26 September 2003 the plaintiff injured his back when he lifted a heavy rubbish bin. At that time the plaintiff was 30 years old and earning \$7600 a month.
 - (b) Complaining of pain radiating down his right leg, the plaintiff was admitted to Alice Ho Miu Ling Nethersole Hospital. There was tenderness over the lumbrosacral junction with paraspinal muscle spasm; the X-ray of the lumbar spine was unremarkable; no neurological deficits were detected; he was treated for acute back pain; an attempt was made to take a MRI but it failed as the plaintiff complained of claustrophobia; a CT scan was done on 5 November 2003 which suggested mild disc prolapse at L4/5 level without significant compression.
 - (c) The plaintiff's solicitors obtained a report from orthopaedic expert Dr Baldwin Chan dated 7 December 2004. Dr Chan found prolapsed discs at L4/5 and L5/S1 with radiculopathy. Even though the Waddell's test showed non-organic pain behaviour, Dr Chan accepted that the plaintiff suffered from leg symptoms and residual pain, and said that it is likely the pain will persist and prevent him to do strenuous work. He is unlikely to be able to return to his original occupation. Dr Chan endorsed the sick leave period of 14 months and 6 days that had been granted by the government hospitals.
6. The plaintiff's solicitors issued the Writ in the High Court on 13 December 2005, and served the full set of pleadings on the same day.
7. Mr Mumford appeared for the plaintiff. He accepted that it was for the plaintiff to establish the justification for starting the claim in the High Court; and that the material time to consider that justification was at the date the plaintiff issued the Writ. The defendant did not argue with those principles.
8. Mr Mumford submitted that if everything was taken into consideration, this was a case which clearly might exceed \$2 million. The defendant's counsel argued that on a reasonable assessment of all the factors then known to the plaintiff, the matter should not have been commenced in the High Court, especially since the sick leave period had expired a year before the Writ was issued.

9. In my view, applying the Seagroatt test requires the nominal plaintiff for the plaintiff to objectively and reasonably assess, at the time of the issue of the Writ, whether he has a reasonable prospect of recovering a sum that exceeds the jurisdictional limit of the District Court, i.e. whether he has a reasonable prospect of recovering a sum that exceeds \$1 million.
10. In order to apply the Seagroatt test and assess objectively and reasonably whether the claim will exceed \$1 million, it must be assumed that the nominal solicitor for the plaintiff is reasonably experienced in the field of personal injury litigation, and one who is armed with a working knowledge of awards granted by the courts for similar injuries.
11. This is a Summary of the plaintiff's claims as pleaded: PSLA \$400,000 The Pre-trial loss of earnings \$287,546 The Special damages \$10,000 Loss of earning capacity \$91,200 Post-trial loss of earnings \$1,532,160 Total \$2,320,906
12. I shall now apply the Seagroatt test to each of these heads of damages.
13. According to the various case digests and reports, the level of awards for prolapsed intervertebral discs in the lumbar region are between \$200,000 to \$350,000. It is difficult to understand how the plaintiff's nominal solicitor can have a reasonable prospect of an award of PSLA in the region of \$400,000 in the present circumstances, taking into consideration the contents of the report of Dr Baldwin Chan. Dr Chan's reference to the plaintiff's inappropriate use of the walking stick at the top of page 8 of the report should have sounded warning bells in the mind of a reasonably competent solicitor experienced in personal injury litigation. Dr Chan conceded that the way the plaintiff walked with a stick was not an antalgic gait. If he was alert and reasonably experienced, the solicitor for the plaintiff should have known that an antalgic gait means a limp adopted so as to avoid pain on weight bearing. Therefore, the nominal solicitor would have realized that Dr Chan was saying that the plaintiff did not display a genuine limp and did not really need the use of the walking stick. The crucial part of his report is the 3rd paragraph on page 10. This reads: Waddell test is used to identify non-organic sign of pain behaviour. A patient with 3 or more positive non-organic signs was said to have a clinical pattern of non-mechanical, pain focused behaviour. Mr Lee tested positive in 3 out of 5 categories which suggested his non-organic pain behaviour. However, his physical signs on examination were consistent with genuine radiculopathy and this cannot be denied. When a patient has suffered from genuine pain for a prolonged period of time, it is understandable that he could develop secondary behavioural change. This may explain his significant back pain component and prolonged requirement of walking aids.
14. In essence in that passage Dr Chan is providing reasons why the plaintiff should be believed when he alleged he suffered from severe pain even though there were no objective signs in support of genuine nerve root dysfunction. A reasonably competent solicitor should have noticed at this stage that Dr Chan did not make reference in his report to any of the usual words and phrases adopted when an orthopaedic expert discusses objective signs of

radiculopathy, words and phrases such as genuine nerve root dysfunction muscle wasting reflexes sensory deficits and so on. Therefore, a reasonable solicitor for the plaintiff should not have claimed a PSLA at the sum of \$400,000.

15. A reasonable solicitor for the plaintiff would have vetted the documentary support for the special damages claimed before seeking \$10,000 in the Statement of Damages filed together with the Writ. It must be implied that the plaintiff's solicitor did not have sight of any documentary support for the amount of \$10,000 claimed because such documents were not listed in the List of Documents filed on 24 April 2006, four months after the action commenced.
16. The sum for Post-trial loss of earnings was claimed at \$1,532,906. It was calculated as if the plaintiff had totally lost his ability to ever work again. On a fair interpretation of the contents of the report of Dr Chan, the plaintiff was capable of working, even though the doctor was of the view he was unable to resume the pre-accident job. I suggest that the nominal solicitor should have calculated the claim on the basis that the plaintiff would have a reasonable prospect of being awarded a sum in the region of around \$200,000 for example allowing a 24 month period on a full loss basis, say $\$7600 \times 24 = \$182,400$. Since the sick leave awarded was 14 months and 6 days, I believe an allowance of 24 month in this respect is fair.
17. The sums claimed by the plaintiff for Pre-trial loss of earnings of \$287,546 and Loss of Earning Capacity were not contested by the defendant, therefore I shall adopt the plaintiff's figures for those heads of damages in the calculation for the sum that the plaintiff had a reasonable prospect of obtaining an award in excess of the District Court jurisdiction. My suggested calculations are as follows: Pre-trial Loss of Earnings \$287,546 Loss of Earning Capacity \$91,200 PSLA \$350,000 Post Trial Loss of Earnings \$182,400 Special Damages \$5000 Sub-Total \$916,146 Less EC payment \$126,410.60 Total \$789,736
18. In the circumstances and for the reasons given, I find that there was no reasonable prospect of obtaining an award in excess of the District Court jurisdiction, and that this claim should not have been commenced in the High Court. Consequently, the scale of costs to be applied shall be the District Court scale.
19. There shall be an order nisi that costs of this application shall be to the defendant together with a certificate for counsel, which shall become absolute within 7 days of the handing down of this Decision. (Betty Kwan) Master of the High Court Mr C Mumford SC instructed by Messrs Francis Kong & Co for the plaintiff. Ms J Chao instructed by Messrs Christine Koo & Ip for the defendant. - PAGE - A B 1udk 1udk & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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