LP 426/00/1 II

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Urgent By Fax
26 April 2001

Mrs Percy Ma,
Clerk to Panel on Administration of
Justice and Legal Services,
3rd Floor, Citibank Tower,
3 Garden Road,
Hong Kong.
(Fax No.: 2509 9055)

Dear Mrs Ma,

LegCo Panel on Administration of Justice and Legal Services
Special Meeting on 26 April 2001

Further to my letter dated 19 April 2001 to you on the above, the Judiciary Administrator has requested that we bring to the attention of the Panel, in respect of Agenda item IV (proposed amendments to the Small Claims Tribunal Ordinance, the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance) the case Chen Yuen v The Royal Hong Kong Golf Club [1997] HKLRD 1132 (copy attached) and the following points –

(a) If costs were capped, it would certainly discourage the Golf Club (the respondent) from bringing such a case to the CA when their appeal was dismissed by the CFI.

(b) On the other hand, if the claimant or the DLA had to bear the costs in any event, he/DLA would equally be discouraged to bring a further appeal beyond the CA to the Privy Council.

(c) Capping of costs will discourage parties at different stages of the litigation to lodge appeals notwithstanding that there is merit in the case. As such, difficult points like those in this case can

never be resolved.

(d) Not only the claimant's interest, but also the respondent's should be borne in mind. The general sentiment arising from So Sai Ming's case emphasises too much on the former. In considering limiting costs, both parties are entitled to equal treatment and it is only fair to do so.

As a comment on the above points from the perspective of the Administration, I would refer to paragraphs 32 and 33 of the AJLS Panel Information Paper dated April 2001 and add that had the claimant employee not been legally aided his personal liability to pay both his own costs and the costs of the respondent would have been massively disproportionate to the amount at stake. Such costs would be crushing for a poor litigant. The disproportionality would itself be the same for the Director of Legal Aid or for a claimant/respondent who was well able to afford the legal costs.

Given the above situation, the proposed amendments providing for the parties to pay their own legal costs are, in the Administration's view, a reasonable compromise as a safeguard against such serious disproportionality while still allowing for possibly important legal points to be resolved on appeal. As noted in paragraph 24 of the Information Paper, there is inherent fairness in this approach: if the parties bore their own legal costs they would then be able to quantify the costs of the appeal and to avoid the risk of disproportionate costs if they considered it would be a problem for them.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c.	Chairman, HK Bar Association	2869 0189
	Chairman, Law Society Civil Litigation Committee	2845 0387
	Mr Michael Bunting, SC	2840 0711
	Judiciary Administrator	2501 4636
	Secretary for Education and Manpower	2801 7825

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[1997] HKLRD 1132

Employment - wages in lieu of notice - long service payment - golf caddie - whether employee or independent contractor

From September 1986, C acted as a caddie for golfers at a golf course owned by R, a club. There was no written contract. C had merely filled out an application which was accepted. In October 1995, C's services were terminated. He was given no monetary compensation. C brought a claim before the Labour Tribunal claiming 26 days' wages in lieu of notice and long service payment. R's defence was that C was not an employee but an independent contractor.

The presiding officer of the Labour Tribunal decided that C was an employee of R. In arriving at this conclusion, he had regard to a number of well-established indicia for the existence of a contract of employment. These included the admitted facts that R had selected C as a cadddie, trained him, equipped him with a uniform and locker upon its premises, determined his rate of payment, established the system on which he would be allocated to individual members to carry their clubs, exercised disciplinary powers over him, paid him and had the right to dispense with his services. The tribunal found that these factors outweighed the indication to be drawn from the fact that he did not get the benefits normally provided by an employer for an employee such as insurance cover, holidays, sick leave and a pension scheme. R appealed to a judge of the High Court who upheld the tribunal's decision ([1996] 2 HKLR 302). On further appeal, the Court of Appeal allowed R's appeal on the ground that C was under no obligation to come to work and R was under no obligation to provide him with employment ([1997] HKLRD 219). C appealed to the Privy Council arguing that the Court of Appeal had no right to interfere with the decision of the Labour Tribunal and of the High Court. The tribunal had directed itself correctly in law and come to the conclusion that C was an employee under a contract of service with R and not an independent self-employed businessman working under a series of contracts for services. R contended that the only proper conclusion was that C was merely licensed by it to ply for hire on the course and that it paid the caddies only as agent for individual members who used the caddies' services.

Held, dismissing the appeal by a majority, that:

(1) It was plain from ss.32 and 35 of the Labour Tribunal Ordinance that the primary findings of fact by the Labour Tribunal must be accepted by the High Court and Court of Appeal. Whether or not a person was employed under a contract of service was a mixed question of fact and law. The finding of the tribunal on this issue, from <p.1133> which an appeal lay on a point of law only, could only be impugned if it could be shown that the tribunal correctly directing itself on the law could not reasonably have reached the conclusion under appeal (*Lee Ting Sang v Chung Chi Keung & Another* [1990] 1 HKLR 764; [1990] 2 AC 374 (see [1990] HKLY 584) and *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 followed). (See p.1137A - B, E.)

(2) In the present case, the Labour Tribunal proceeded on the basis that there was a contract of employment between R and C and considered only the question whether that contract was one of service or for the provision of services in the light of the authorities. In so doing, the tribunal carefully considered the test to be

adopted in drawing this distinction but it did not consider sufficiently or at all the question as to whether the contract (if any) between R and C was of a different nature and whether, if there was a contract of employment (whether of service or to provide services), it was with individual golfers rather than with R. Had the tribunal considered the alternative possibilities, the true and only reasonable conclusion to which it could have come contradicted the determination that C was an employee of R. C was not an employee of R whether on a continuing basis or by separate contracts, like a casual worker, each time he actually worked. The tribunal accepted "a view of the facts which could not reasonably be entertained" (*Edwards v Bairstow, supra*, applied). (See p.1138C - F.)

(3) The only reasonable view of the facts was that the arrangements between R and C went no further than to amount to a licence by R to permit C to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of R and its members. There was thus between C and R no mutual obligation that R would employ C and that he would work for R in return for a wage. Conversely C did, when his turn came in the line, offer to caddie for an individual golfer, who if he accepted C, was responsible ultimately for the payment of the caddying fees. It was that golfer who, subject to R's rules, could tell the caddie what he wanted and how he wanted it done during the round of golf. It was not artificial to regard R as an agent collecting the fee and guaranteeing its payment to the caddie. (See p.1138F - G, I - J.)

(4) There was no reason why there should not be a separate contract of employment each time C agreed to act as caddie for a particular golfer. (See p.1139A.)

Per Lord Hoffmann dissenting

(5) The presiding officer of the Labour Tribunal was not only entitled to make the finding he did, it was the only reasonable one in the circumstances. (See p.1139D.)

(6) It was sufficient for C to show that when working at the club, he had been a casual employee, employed from time to time as and when he presented himself for work and the club had work to offer. For the purpose of deciding whether he was a casual employee, the fact that neither party was under an obligation to employ or be employed was irrelevant. The whole purpose of Schedule 1 to the Employment Ordinance was to equate the position of a regular casual employee with that of a person engaged under a continuous contract of employment. (See p.1139E - G.)

(7) Not only was the presiding officer entitled to reject R's interpretation of the arrangements with C, it was quite unreal. The fact was that C had to work for the person to whom he was allocated according to R's system at a rate of pay fixed by R and in the manner determined by R. This was far removed from the status of either an independent contractor or a casual employee of the individual member. (See p.1139H - J.)

<p.1134>

(8) The caddies' status depended on the objective facts of their relationship to R. R's conduct in refusing holiday pay, insurance cover, bonuses or other benefits merely showed that it was consistent in denying the caddies the rights to which,

as employees, they were entitled. Such self-serving acts could not alter their legal status. (See pp.1139J - 1140A.)

CHENG YUEN v THE ROYAL HONG KONG GOLF CLUB [1997] HKLRD 1132 (Privy Council Appeal No 29 of 1997), 19 June and 28 July 1997, Privy Council, Lord Browne-Wilkinson, Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Steyn and Lord Hoffmann