

香港
昃臣道 8 號
立法會司法及法律事務委員會秘書
馬朱雪履女士

馬朱雪履女士：

司法及法律事務委員會
與人力事務委員會

2004年11月9日聯席會議的跟進事項

2004 年 11 月 12 日的來信收悉。現提供以下資料。

工作小組建議的實施進度

有關情況載於隨函夾附的進度表。

工作小組報告內第 5.6 至 5.8 段所提及的兩份判詞

隨函夾附以下兩份判詞：

- (a) *National Ebauch Ltd. v. Rishi Kaumar Bhatnagar* [1981] HKLR
- (b) *Panalpina (Hong Kong) Ltd. v. Ulrich Haldermann* [1983] HKLR

2003 年需時 7 個月或以上審結的案件分析

在 2003 年審結的 11,385 宗申索中，約 4%（即 402 宗申索）需時 7 個月或以上完結。該 402 宗申索平均每宗會進行 1 次過堂聆訊、3 次提訊和 2.5 次審訊。平均而言，每宗案件的申索項目約為 11.4 項，申索人數目為 5.7 人，而被告人數目則為 1.5 人。

執達主任在執行勞資審裁處案件的法庭命令方面的成功率

過去 12 個月，即 2003 年 11 月 1 日至 2004 年 10 月 31 日期間，執達主任辦事處共收到 122 項執行法庭命令的申請，當中有 22 項的申請人其後撤回申請或要求暫時不予執行。

在其餘 100 項經由執達主任執行的申請中，有 50 項（即 50%）成功收回拖欠申索人的全數債款。

司法機構政務長
（鄭陸山代行）

副本送：總裁判官
主任審裁官
勞資審裁處司法常務主任

2004 年 11 月 25 日

截至 2004 年 11 月 22 日止
檢討勞資審裁處工作小組報告》的建議實施進度

建議		實施進度
1.	應修訂《勞資審裁處條例》附表，清楚訂明勞資審裁處具有司法管轄權，處理已算定損害賠償及未經算定損害賠償的申索。	有待法例修訂。
2.	要與包括強積金局和勞工處的所有有利害關係的各方一同探討，修訂《勞資審裁處條例》的可能性，以擴大審裁處的司法管轄權，從而涵蓋強制性公積金管理局根據《強制性公積金計劃條例》（第 485 章）第 18(3)條所提出的申索。	有待法例修訂。已與強制性公積金計劃管理局進行初步討論。
3.	應與包括強積金局和勞工處的所有有利害關係的各方一同探討，修訂《勞資審裁處條例》以及有關法例的可能性，賦予勞資審裁處權力將《強積金條例》所規定的僱員供款作為裁斷的一部份，以及下令該筆款項可從審裁處支給強制性公積金管理局，把管理局當成審裁處席前申索的其中一方。	有待法例修訂。已與強制性公積金計劃管理局進行初步討論。
4.	審裁處應繼續為入稟的申索作出尋求和解的嘗試：若訴訟各方願意的話，審裁處應協助訴訟各方以和解去解決他們的糾紛。	已實施。
5.	除非申索的各方在向審裁處入稟申索之前不曾向勞關科尋求協助，否則在過堂聆訊時，審裁處只應作一次尋求和解的嘗試。	已實施。
6.	若在向審裁處入稟申索前，勞關科已嘗試調解的話，負責查訊申索的調查主任，不會嘗試協助訴訟各方尋求和解。	已實施。
7.	若在向審裁處入稟申索前，勞關科不曾嘗試調解，而訴訟各方希望在過堂聆訊前和解的話，和解調查主任會協助他們嘗試和解的。	已實施。

建議		實施進度
8.	在過堂聆訊時，審裁官會給訴訟各方解釋和解的選擇。若各方願意的話，審裁官會協助他們達成和解，或在合適的情況下，將他們轉介到和解調查主任那裡尋求協助。	已實施。
9.	參與某申索的查訊的調查主任，不應參與協助審裁官就該申索尋求和解。	已實施。
10.	曾在過堂聆訊嘗試就某申索尋求和解的審裁官，不應主持該申索的審訊。	已實施。
11.	預約制度應予以保留。	無需採取行動。
12.	審裁處應經常檢討預約制度下輪候時間的目標，在考慮過所有相關因素後，再決定是否需要作出修改。	已實施。現時輪候時間約為5-6天。
13.	應實施措施，讓訴訟各方提供詳細背景資料給勞關科，並將這些資料轉交審裁處。同時也應儘快落實勞工處和司法機構正在商討的新表格和轉介安排。	已實施。
14.	審裁處應製作小冊子、傳單或錄像，給予訴訟人清晰的指引，讓他們知道審裁處的有關常規和程序，準備案件和聆訊時他們必須做些甚麼，以及在審裁官席前應訊、強制執行裁斷和提出上訴時應要知道些甚麼。	籌備中。
15.	《勞資審裁處條例》第 13(1)條應予修訂，規定除非各方另有協議或審裁官另有指示，否則申索應擇定在入稟後不早於 20 天及不遲於 45 天進行首次聆訊。	有待法例修訂。
16.	過堂聆訊案件通常應分別編排於上午和下午兩節進行聆訊。此安排應定期作出檢討。	已實施。

	建議	實施進度
17.	<p>在與調查主任的會晤結束後，以及在審裁官席前進行過堂聆訊時，可給予訴訟各方一份清單，列明：</p> <p>(a) 他們須提供給審裁處和其他各方的文件和資料；</p> <p>(b) 他們應提供這些文件和資料的時限；以及</p> <p>(c) 沒有遵從交換文件和資料的指示，將帶來的各種後果，以收警告之效。</p>	已實施。
18.	<p>應修訂《勞資審裁處條例》和/或《勞資審裁處（一般）規則》，使審裁官能在適當的案件中，對不遵從指示的一方施加罰則。</p>	有待法例修訂。
19.	<p>在分開接見訴訟各方時，調查主任應指示他們必須在過堂聆訊前或最遲於過堂聆訊時，把所有相關文件、自己及證人之供詞的副本提供給審裁處，並送達其他各方。</p>	已實施。
20.	<p>在過堂聆訊中，如有某方還未遵從調查主任關於披露文件和供詞的指示，或有需要作出進一步披露，審裁官便應給予作出有關披露的指示。</p>	已實施。
21.	<p>應警告訴訟各方不按指示作出全面披露將帶來的各種後果。</p>	已實施。
22.	<p>《勞資審裁處條例》或《勞資審裁處（一般）規則》應予修訂，規定申索的一方有責任不把申索的另一方所披露的文件和資料，用於審裁處司法程序以外的用途上。</p>	有待法例修訂。
23.	<p>審裁官在管理聆訊和審訊時，應採用更主動的案件管理辦法，以及更為強調適當遵從指示和時限的重要性。</p>	已實施。

建議		實施進度
24.	一般應鼓勵訴訟各方和證人在審訊中採納他們的證人供詞作為證供，猶如已在庭上予以宣讀一樣。	已實施。
25.	應該減少審前聆訊的次量。應免除簡單申索的審前聆訊。申索如非簡單，應以進行一次審前聆訊為準則。只有非常特殊的案件，例如牽涉大量訴訟人和文件，或者涉及複雜的爭議點的案件，才應進行進一步的審前聆訊。	已實施。
26.	如果審訊超時而需日後續審，審裁處應盡量編排該續審案件早日恢復聆訊。	已實施。
27.	應立法擴大審裁官在聆訊押後時發出提供保證命令的權力，只要審裁官信納某方確是在拖延進程便可發出該項命令。	有待法例修訂。
28.	審裁官在某方申請覆核時，下令繳存款項於審裁處或提供保證的權力，應通過立法擴展至以下情況：當審裁官信納，申請毫無理據和/或申請人因欲拖延審裁處程序才提出申請。	有待法例修訂。
29.	在實施上文第 4 至 28 項的一攬子建議時，司法機構政務處應考慮，如何透過運用資訊科技，以及修訂審裁處登記處的工作流程和實務常規，予以配合。	勞資審裁處的資訊系統已經改良以配合精簡後的程序。各調查主任亦已因應工作的編排分成不同隊伍。新安排將有助加強工作隊伍成員之間的合作，以及促進隊伍成員與審裁官之間的溝通。
30.	把上訴時的訟費限定或限制為相類於在審裁處階段可以收回的訟費，這個建議不應採納。	無需採取行動。

建議		實施進度
31.	除非敗訴方曾作出無理取鬧、濫用權利、干擾或不合理的行爲，又或有關上訴是基於錯誤理解而提出或進行的，否則審裁處上訴的敗訴方不應被判須支付訟費，這個建議不應採納。	無需採取行動。
32.	應該廢除《勞資審裁處（一般）規則》第12條規則，使到勞資審裁處的裁斷可以在6年內進行登記和強制執行。	有待法例修訂。
33.	現行選擇和調配司法人員出任審裁處審裁官的做法，目的在於培養和維持一批對在審裁處處理勞資糾紛稱職和經驗豐富的審裁官，這個做法應該維持不變。	無需採取行動。
34.	應該通過司法人員培訓委員會給新委任的和在任的審裁官提供以下各方面的訓練：本地僱傭條件和各行業的慣常做法、勞資糾紛解決方法和僱傭法律的趨勢和發展、主動的案件管理方式和人際溝通技巧。	已經展開，並會持續進行。 2004年7月司法人員培訓委員會舉辦了一個研討會，主題為「從調解至申訴 — 經驗分享」，供審裁官（和準審裁官）及調查主任參與。
35.	司法機構政務長應該考慮為調查主任提供培訓和發展項目，目的是提高他們的調查技巧和進行和解談判的技巧。	已予安排，並會持續進行。 共有六位調查主任於2004年7月參加了由浸會大學舉辦為期兩天的基本調解課程。此外，又有九位調查主任自2004年10月起修讀由香港中文大學舉辦的「高級調解實務課程」。
36.	司法機構政務長應該考慮安排顧及審裁處登記處員工的特定需要的專門課程。	已予安排，並會持續進行。
37.	應該把勞資審裁處搬遷至一座專門為法庭用途而建造，並且地點適中的獨立建築物。舊南九龍裁判法院大樓是可供選擇的適合地方，值得詳加考慮。	已經取得所需撥款，現正計劃如何落實將勞資審裁處搬遷至前南九龍裁判法院大樓的安排。

National Ebauch Ltd.	Plaintiff
AND	
Rishi Kaumar Bhatnagar	Defendant

—————

(High Court)
(Civil Action No. 221 of 1980)

—————

Roberts, C.J.

19th January 1981.

Courts practice and procedure—Labour Tribunal—jurisdiction—claim for unliquidated damages—Labour Tribunal Ordinance, *Cap. 25, s. 7.*

In a statement of claim, the plaintiff alleged that the defendant, a former employee of the plaintiff, had terminated his employment in circumstances which amounted to a breach of his contract of employment. The plaintiff further alleged that before he left his employment the defendant induced some of his fellow employees to leave the plaintiff's employment thereby causing the plaintiff to suffer loss. The plaintiff claimed unliquidated damages for breach of contract.

Section 7 of the Labour Tribunal Ordinance confers exclusive jurisdiction on the Labour Tribunal in relation to a claim for a sum of money arising out of a breach of contract of employment.

On the hearing of a preliminary point as to whether the High Court had jurisdiction to entertain the claim the point at issue was whether "a claim for a sum of money" included a claim for unliquidated damages.

Held:

The phrase "a claim for a sum of money" does not include a claim for unliquidated damages.

The High Court had jurisdiction to entertain the claim.

Order accordingly.

J. Bleach instructed by Johnson, Stokes & Master for the plaintiff.

Mrs. P. Graham instructed by H.A. Hoosenally & Co. for the defendant.

Cases cited in argument but not mentioned in the judgment:—

1. James Marsh Thommos v. Spancer Stuart & Associates (H.K.) Labour Tribunal Claim 2352/79 unreported.
2. Lowther v. Clifford, [1927] 1 K.B. 130.

Roberts, C.J.:—

I have to decide a preliminary point of jurisdiction.

The statement of claim alleges that the defendant, a former employee of the plaintiff, terminated his employment in circumstances which amounted to a breach of his contract of employment in that he left before the end of the period of notice required by it.

The statement of claim further alleges that, before he left this employment, he induced some of his fellow employees to leave the plaintiff's employment, to the detriment of the plaintiff.

The pleading does not specify in terms, whether the claim for damages which the plaintiff is said to suffer as a result of the inducement was based on an implied term of good faith in the contract of employment between the plaintiff and the defendant or upon the separate tort of inducement of breach of contract, which does not depend on an employer/employee relationship.

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A A However, the prayer contains a claim for damages for breach of contract and makes no reference to tort. I must, therefore, conclude that what is alleged is that the defendant had induced persons to leave the plaintiff's employment in breach of the implied term of good faith.

B B It is perhaps worth nothing in passing that had the claim been framed in tort it would clearly have been excluded from the jurisdiction of the Labour Tribunal by virtue of paragraph 3 of the Schedule to the Labour Tribunal Ordinance (*Cap. 25*).

C C I agree with Mr. Bleach's submission that, although the plaintiff, in para. 8 of the statement of claim, includes an estimate of part of the damage which he has suffered, nevertheless, the nature of the prayer is such that it is a claim for unliquidated damages.

C C The question to be determined is whether such a claim falls within the jurisdiction of the Labour Tribunal or not.

D D Mrs. Graham submitted that the proper course for the plaintiff was to have instituted proceedings in the Labour Tribunal and to have waited for the Labour Tribunal to order its transfer to the High Court if it thought fit.

D D I do not think that this is so. The plaintiff is entitled to take the risk of starting in the wrong forum if he wishes to do so. If he has chosen the wrong forum, he will inevitably be penalized in costs and the action will be sent to the place where it should have started.

E E Section 7 of the Labour Tribunal Ordinance (*Cap. 25*) confers exclusive jurisdiction on the Labour Tribunal in relation to those claims which are specified in the Schedule to the Ordinance. Paragraph 1 of that Schedule confers jurisdiction on the Tribunal in relation to a "claim for a sum of money", which arises from the breach of a term, whether expressed or implied, in the contract of employment.

F F Is a claim for liquidated damages "a sum of money" within the meaning of that Schedule? Paragraph 1 of the Explanatory Memorandum, which was annexed to the Labour Tribunal Bill on its publication states—

"This Bill establishes a tribunal, to be known as the Labour Tribunal, the jurisdiction of which is at present restricted to claims in respect of liquidated sums arising out of a breach of contract of employment, though there is provision for its jurisdiction to be changed by resolution of the Legislative Council."

G G Paragraph 3 contains a passage, which is to the same effect—

"Part III deals with the jurisdiction of the tribunal. Clause 7 confers on the tribunal the jurisdiction set out in the Schedule. This is limited to claims for money arising out of a breach of contract of employment or statutory duty."

H H It seems to me that the ordinary meaning of the phrase "a sum of money" is that it is an ascertained sum. This view, so far as the Labour Tribunal Ordinance is concerned, is reinforced by the passages to which I have referred in the Explanatory Memorandum, which indicate that the intention of the Legislature was to exclude claims for unliquidated damages. This seems to me to be in accordance with the general intention of the Ordinance, which was to provide a simple informal forum without lawyers to deal with relatively simple claims which can be easily quantified.

I I I have, therefore, come to the conclusion that a claim for a sum of money arising from a breach of contract, does not include a claim for unliquidated damages. I thus agree with the ruling of Mr. Eric Li, the Presiding Officer in Labour Tribunal Claim No. 2352 of 1979 to the same effect.

J J In the result, therefore, I find that this court has jurisdiction to try the action.

Order accordingly.

The Inference of Risk of Disposal of Property and Destruction of Evidence

Once the allegation of fraud was removed from the case, there were in my judgment no facts from which the court could or should have drawn the inference that there was a real risk that property would be disposed of or evidence destroyed.

Application allowed, injunctions discharged.

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Panalpina (Hong Kong) Ltd.

Plaintiff

AND

Ulrich Haldemann

Defendant

(High Court)
(Civil Action No. 9664 of 1982)

Hunter, J.

16th May 1983; 16th June 1983.

Master and servant—claim and counterclaim in High Court—counterclaim for quantified but liquidated damages—High Court most suitable forum—but exclusive jurisdiction given to Labour Tribunal under Labour Tribunal Ordinance—no discretion in High Court—compelled to stay counterclaim contrary to merits. (*Stewart & Others v. The Hong Kong Philharmonic Society Limited* H.C. Action 3031/79, unreported followed; *The National Ebauch Ltd. v. Rishi Kaumar Bhatnagar* [1981] HKLR 114 not followed.)

The defendant was employed by the plaintiff initially for 26 months with provision for automatic continuance for a like period in the absence of prior determination; the terms of employment including remuneration and a wide variety of fringe benefits such as accommodation, travel etc. were contained in a written contract. This was automatically renewed for the further term of 26 months but defendant was then dismissed when there was some 14½ months still to run. During the contractual period the plaintiff kept a running ledger account in the defendant's name which was debited with various payments made to him or on his behalf. At the time of the defendant's dismissal this account showed a balance in the plaintiff's favour of \$35,828.02.

On 14th October 1982 the plaintiff issued a writ for this sum on "an account stated and acknowledged". The plaintiff sought summary judgment. The defendant put in a defence and counterclaim which:—

- (1) Admitted the debit balance in the account.
- (2) Asserted a failure to credit the account with a sum of \$40,936.00 and a contractual right of set off. Alternatively it sought set off.
- (3) Claimed the balance between these two sums and
- (4) Claimed damages for wrongful dismissal.

On 24th December 1982 the Master gave the plaintiff judgment on the claim under Order 14, but ordered a stay of execution on the counterclaim. The plaintiff then launched the present summons asking for

- (1) The striking out of the counterclaim on the basis that the Labour Tribunal has exclusive jurisdiction to determine it: and
- (2) The removal of the stay of execution.

The defendant argued that the High Court has jurisdiction to hear claims for unliquidated damages whilst the Lands Tribunal's jurisdiction is limited to claims for liquidated damages (*National Ebauch Ltd. v. Rishi Kaumar Bhatnagar* [1981] HKLR 114).

Held:

1. Section 7 of the Labour Tribunal Ordinance *Cap. 25* provides (1) The Tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the schedule and (2) Save as is provided in this ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong.

The operative words in the schedule are:—

- "1. A claim for a sum of money which arises from—
 - (a) the breach of a term, whether express or implied, of a contract of employment . . .
3. Notwithstanding paragraphs 1 and 2, the tribunal shall not have jurisdiction to hear and determine a claim for a sum of money, or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of duty imposed by a rule of common law or by any enactment."

2. Practically every case involving a breach of service agreement gives rise to a claim for unliquidated damages (*Yip Wan-chiu v. Magnificent Industrial Ltd.* [1974] HKLR 183). The phrase "sum of money" must be construed in the light of the fact that practically every claim for "breach of a term . . . of a contract" will be for damages unliquidated in law but quantified in practice. It follows that the phrase must cover such claims.
3. The legislature anticipated a "quantified" claim and a claim that was "ascertained" or ascertainable but this does not make the claim one for liquidated damages, nor does it limit the Tribunal's jurisdiction to such claims. The same conclusion was reached by O'Connor, J. on 18th December 1979 in *Stewart and Others v. The Hong Kong Philharmonic Society Limited*.
4. This case raises potentially difficult questions on measure of damages and mitigation and cries out for legal representation in the interest both of the parties and the court. It is to be hoped that the Tribunal will exercise its discretion to decline jurisdiction, and refer the matter back to the High Court.

Order that (1) all proceedings on the counterclaim be stayed.
 (2) the stay of execution on the judgment shall continue until the issues raised by the counterclaim are determined either by the Labour Tribunal or in the event of referral back by the High Court.
 (3) Liberty to apply.

Benjamin Yu instructed by Ronald Wong & Co. for the plaintiff.
 Miss Ma of S. P. Ma & Co. for the defendant.

Cases cited in the judgment:—

1. National Ebauch Ltd. v. Rishi Kaumar Bhatnagar [1981] HKLR 114
2. Yip Wan-chiu v. Magnificent Industrial Ltd. [1974] HKLR 183
3. Stewart and ors. v. The Hong Kong Philharmonic Society Ltd., H.C. Civil Action No. 3031/79, unreported.

Hunter, J.:—

This case has revealed what I regard as a very unfortunate omission in the drafting of the Labour Tribunal Ordinance *Cap. 25*, namely the failure to give any discretion to the High Court. Section 7 of the ordinance provides:—

- "7. (1) The tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the schedule.
 (2) Save as is provided in this ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong."

I can see no escape from the conclusion that this section draws a rigid line between this court and the tribunal, and that where the tribunal has jurisdiction this court is excluded. The tribunal is expressly given a discretion to decline jurisdiction, s. 10. No such discretion is given to the High Court. Sadly no one seems to have thought that the High Court ought to have such a discretion; or that a case might arise in the High Court which, it was manifestly more just and convenient, should be tried there, for example by reason of its size or complexity, the conduct of the parties, or the fact that it spanned the dividing line sought to be drawn in the schedule.

The facts alleged in the pleadings can be summarised simply. The defendant says that he was employed by the plaintiffs initially for 26 months, with provision for automatic continuance for a like period in the absence of prior determination. There was, he says, a detailed written contract containing provision for remuneration and a wide variety of fringe benefits such as accommodation, travel etc. The contract he says was automatically

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- AA renewed for the further 26 months but he was then dismissed when there was some 14½ months still to run. During the contractual period the plaintiffs kept a running ledger account in the defendant's name which was debited with various payments made to him or on his behalf. At the time of the defendant's dismissal this account showed a balance in the plaintiffs' favour of \$35,828.02.
- BB On 14th October 1982 the plaintiffs issued a writ for this sum on "an account stated and acknowledged". No particulars of the stating or acknowledgment were given. The plaintiffs sought summary judgment. The defendant put in a defence and counter-claim, verified on affirmation, which:—
- CC (1) Admitted the debit balance in the account.
(2) Asserted a failure to credit the account with a sum of \$40,936 and a contractual right of set off. Alternatively it sought set off.
- DD (3) Claimed the balance between these two sums and
(4) Claimed damages for wrongful dismissal. Full particulars were given of this starting with 14½ months salary and then listing the financial effects of a wide range of fringe benefits.
- EE On 24th December 1982 the Master gave the plaintiffs judgment on the claim under O. 14, but ordered a stay of execution on the counterclaim. This order would seem to me to be wrong in form having regard to the defence of set off raised and from my part I would have given leave to defend. But the practical effect was the same so there was no appeal. The plaintiffs then launched the present summons which asks principally for:—
- FF (1) The striking out of the counterclaim on the basis that the Labour Tribunal has exclusive jurisdiction to determine it: and
(2) The removal of the stay of execution.
- GG I am quite unable to see any merit in this application. The whole dispute arises out of the contract of employment. The so-called account stated and acknowledged was stated and acknowledged between master and servant, and the obligations in relation to it arose out of the service agreement. The plaintiff chose to sue in the High Court and has obtained the benefit of a judgment therein. The pleadings are nearly complete in this court. If well founded the counterclaim is potentially large, and is quite different from the simple, run of the mill, one month's notice type of case. It raises potentially difficult questions on measure of damages and mitigation. The case cries out for legal representation in the interests both of the parties and the court. But I have found no escape from this statutory strait jacket.
- HH The defendant relied principally on the decision of Roberts, C.J. in **National Ebauch Ltd. v. Rishi Kaumar Bhatnagar** [1981] HKLR 114, to the effect that the tribunal's jurisdiction was limited to claims for liquidated damages and that the High Court had jurisdiction to hear claims for unliquidated damages. The operative words in the schedule are:—
- II "1. A claim for a sum of money which arises from—
(a) the breach of a term, whether express or implied, of a contract of employment, . . .
3. Notwithstanding paragraphs 1 and 2, the tribunal shall not have jurisdiction to hear and determine a claim for a sum of money, or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of duty imposed by a rule of common law or by an enactment."
- JJ Liquidated damages arise "where the parties to a contract, as part of the agreement between them, fix the amount which is to be paid by way of damages in the event of breach, . . . as a genuine pre-estimate", per McGregor on Damages 14th edition paragraph 341. It is wholly exceptional to find such a provision in a service agreement. It is equally wholly exceptional to obtain specific performance of a service agreement. It follows that practically

every case involving a *breach* of a service agreement gives rise to a claim for unliquidated damages, see **Yip Wan-chiu v. Magnificent Industrial Ltd.** [1974] HKLR 183. Section 8A of the Employment Ordinance (*Cap.* 57) may have added in Hong Kong a special category of statutory liquidated damages in certain circumstances. But this is only since 1975 and it cannot affect the construction of a 1970 ordinance.

But to say that damages are unliquidated is not to say that they are general in the pleading sense, or at large. With very few exceptions, e.g. loss of reputation, and more recently loss of a holiday, damages for breach of contract are not general but special, and have to be precisely particularised and quantified. Contracts of service are no exception to this. The claim here was thus properly particularised and quantified. In an attempt to defeat this application and to bring himself specifically within the **National Ebauch** decision the defendant applied for leave to amend the counterclaim (*inter alia*) by deleting the particulars. But when I pointed out that these particulars were essential to the claim, whether it was pursued in this court or before the Labour Tribunal, the application for leave to amend was abandoned.

In my judgment the phrase "sum of money" must be construed in the light of the fact that practically every claim for "breach of a term . . . of a contract" will be for damages unliquidated in law but quantified in practice. It follows, I think that the phrase must cover such claims. I agree with Roberts, C.J. that the legislature anticipated a "quantified" claim and a claim that was "ascertained" or ascertainable. But I regret that I cannot agree that this makes the claim one for liquidated damages, or that it limits the tribunal's jurisdiction to such claims. This conclusion seems to me to be supported by paragraph 3. No claim "founded in tort" can be for liquidated damages. It may contain a calculated or special damages element; but the bulk is likely to be for general damages. I am much comforted to know that the same conclusion was reached by O'Connor, J. on 18th December 1979 in **Stewart and Others v. The Hong Kong Philharmonic Society Limited** H.C. Civil Action No. 3031/79. Unfortunately as this decision was not reported, it was not cited to Roberts, C.J.

A further complicating feature arose in **National Ebauch** because the claim there could be put both in contract and in tort. This raised the further problem as to whether the claim was "founded" in tort: How that concept was to be tested when both claims were equally open: And whether divided jurisdiction was inevitable with the tribunal being compelled to hear one part and the High Court the other. Such futile barren arguments would also be avoided by the granting of discretion to the High Court.

I am therefore constrained by the rigidity of the ordinance to make orders quite contrary to the merits of the case. I can only hope that the tribunal itself may agree with me and exercise the discretion it alone has to decline jurisdiction, and refer the matter back. I have not been asked to interfere with the judgment on the claim and it would now be futile to do so. I now order:—

- (1) That all proceedings on the counterclaim be stayed. This seems to me sufficient, and preferable to striking out. It would facilitate revival if the matter should come back.
- (2) That the stay of execution on the judgment shall continue until the issues raised by the counterclaim are determined either by the Labour Tribunal or in the event of referral back by this court.
- (3) There is to be liberty to apply. I am not prepared to give the plaintiff any further security in relation to the judgment, which would yet further ignore both the defence of set off, and the counterclaim. This liberty to apply will enable the plaintiff to come back if the defendant should fail to pursue his claims with reasonable diligence.

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*Order that (1) all proceedings on the counterclaim be stayed.
(2) the stay of execution on the judgment shall continue until the issues raised by the counterclaim are determined either by the Labour Tribunal or in the event of referral back by the High Court.
(3) Liberty to apply.*

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