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With Chinese Translation

25 November 2004

Mrs. Percy Ma
Clerk to Panel on Administration of
Justice and legal Services
Legislative Council
8 Jackson Road
Hong Kong

Dear Mrs. Ma,

**Panel on Administration of Justice and Legal Services
And Panel on Manpower**

Follow-up to joint meeting on 9 November 2004

Thank you for your letter of 12 November 2004. I provide the information in the following paragraphs.

Progress of implementation of the recommendations of the Working Party

The progress is set out in the attached table.

Two judgments referred to in paragraphs 5.6 to 5.8 of the Working Party Report

I attach the following two judgments :

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

Analysis of the cases which took 7 months or more to conclude in 2003

Of the 11,385 claims concluded in 2003, about 4% (402 claims) took 7 months or more to complete. On average, these 402 claims underwent 1 callover hearing, 3 mention hearings and 2.5 trial hearings. The average number of claim items for each case was about 11.4, involving an average of 5.7 claimants and 1.5 defendants.

Success rate of Bailiffs in executing court orders in respect of Labour Tribunal cases

For the past twelve months from 1 November 2003 to 31 October 2004, the Bailiffs' Office received 122 applications for execution. Of these applications, 22 were subsequently withdrawn by or withheld at the request of the applicants.

The Bailiffs proceeded with the execution of the remaining 100 applications. In 50 cases (i.e. 50%), they fully recovered the debts due to the claimants.

Yours sincerely,

(Augustine L.S. Cheng)
for Judiciary Administrator

Encl.

c.c. CM
PPO
Registrar, Labour Tribunal

Progress of Implementation of Recommendations in the
Report of the Working Party on the Review of the labour Tribunal
as at 22 November 2004

Recommendation		Progress
1.	The Schedule to the Labour Tribunal Ordinance should be amended to put it beyond doubt that the Labour Tribunal has jurisdiction to deal with both liquidated and unliquidated claims.	Pending legislative amendment.
2.	The possibility of amending the Labour Tribunal Ordinance to extend the jurisdiction of the Labour Tribunal to cover claims brought by the Mandatory Provident Fund Authority under section 18(3) of the Mandatory Provident Fund Schemes Ordinance, Cap. 485 should be explored with all interested parties including the MPFA and the Labour Department.	Pending legislative amendment. Initial discussions held with the MPFA.
3.	The possibility of amending the Labour Tribunal Ordinance and other relevant legislation to enable the Labour Tribunal to include as part of an award, the employee's contribution under the MPFSO, and to order the amount to be paid out of the Tribunal to the Mandatory Provident Fund Authority as if the Authority is a party to the claim before the Tribunal should be explored with all interested parties including the MPFA and the Labour Department.	Pending legislative amendment. Initial discussions held with the MPFA.
4.	Attempts at settlement should continue to be undertaken in the Tribunal: Where the parties wish, the Tribunal should assist the parties to resolve their disputes by settlement.	Implemented.
5.	After a claim is filed in the Tribunal, except in those cases where the parties had not previously sought the assistance of the LRD, there should only be one attempt by the Tribunal at settlement at the call-over hearing.	Implemented.

Recommendation		Progress
6.	Where the LRD has attempted conciliation before the claim is brought in the Tribunal, the TO dealing with inquiry of claims will not attempt settlement with the parties.	Implemented.
7.	Where the LRD has not attempted conciliation before the claim is brought in the Tribunal, the Settlement TO will assist the parties to attempt settlement if the parties wish to do so before the call-over hearing.	Implemented.
8.	At the call-over hearing, the PO would explain the option of settlement and where the parties wish, assist them to reach settlement or in appropriate cases, refer them to the Settlement TO for assistance.	Implemented.
9.	A TO who is involved in the inquiry of the claim should not be involved in assisting the PO in settling a claim.	Implemented.
10.	A PO who has attempted settlement at the call-over hearing of a claim should not preside over the trial of it.	Implemented.
11.	The appointment system should be maintained.	No action required.
12.	The Tribunal should keep under constant review the target waiting time for the appointment system to see if any revision should be made having regard to all relevant factors.	Implemented. The waiting time is currently about 5-6 days.
13.	Measures enabling detailed background information to be supplied by the parties to the LRD and to be forwarded to the Tribunal should be implemented. The New Form and the referral arrangement under discussion between the Labour Department and the Judiciary should be put in place as soon as practicable.	Implemented.

Recommendation		Progress
14.	Pamphlets, leaflets or videos should be produced to give the parties clear guidance on the practice and procedure in the Tribunal, what they are expected to do to prepare for their case and for hearings and what they should know in attending before the PO, in enforcing an award and in lodging an appeal.	Being pursued.
15.	Section 13(1) of the Labour Tribunal Ordinance should be amended to provide that a claim shall be fixed for hearing not earlier than 20 days and not later than 45 days from the filing of the claim, unless the parties agree or the Presiding Officer directs otherwise.	Pending legislative amendment.
16.	Call-over cases should usually be listed separately in the morning and afternoon sessions. This arrangement should be reviewed on a regular basis.	Implemented.
17.	At the conclusion of the interviews with the Tribunal Officer and at the call-over hearing before the Presiding Officer, a list should be given to the parties setting out: <ul style="list-style-type: none"> (a) The documents and information that they are required to provide to the Tribunal and the other parties; (b) The time within which they should provide the documents and information; and (c) A warning about the consequences if a party does not comply with the direction for exchange of documents and information. 	Implemented.
18.	The Labour Tribunal Ordinance and/or the Labour Tribunal (General) Rules should be amended to enable the Presiding Officer to impose sanctions in appropriate cases for failure to comply with directions.	Pending legislative amendment.

Recommendation		Progress
19.	The TO should, at the separate interviews with the parties, direct the parties to provide the Tribunal and serve on the other parties copies of all the relevant documents, his own statement and witness statements either before or the latest at the call-over hearing.	Implemented.
20.	If the TO's direction on disclosure of documents and statements has not been complied with or if further disclosure is called for, the PO at the call-over hearing should give direction for such disclosure.	Implemented.
21.	The parties should be warned of the consequences of failure to make full disclosure as directed.	Implemented.
22.	The Labour Tribunal Ordinance or the Labour Tribunal (General Rules) should be amended to provide that a party is under a duty not to use the documents and information disclosed by another party in the claim, other than for the purpose of the Tribunal proceedings.	Pending legislative amendment.
23.	Presiding Officers should exercise more proactive case management in managing the hearings and the trial, and should move towards greater emphasis on due observance of directions and time limits.	Implemented.
24.	In general, the parties and the witnesses should be encouraged to adopt their witness statements as evidence at the trial so that they can be taken as read.	Implemented.
25.	Pre-trial hearings should be reduced. It should be dispensed with in simple claims. For claims that are not simple, one pre-trial hearing should be the norm. Further pre-trial hearings should only be conducted in exceptional cases involving large number of parties and documents or complex issues.	Implemented.

Recommendation		Progress
26.	If a trial overruns and has to be part heard, the Tribunal should endeavour to list the resumed hearing on an early date.	Implemented.
27.	The power of the Presiding Officer to order security upon adjournment should be extended by legislation to cases where the Presiding Officer is satisfied that a party is guilty of delaying the process.	Pending legislative amendment.
28.	The power of the PO to order payment into the Tribunal or to give security upon application for review should be extended by legislation to cases where the PO is satisfied that the application is devoid of merit and/or is made with a view to delaying the process.	Pending legislative amendment.
29.	The Judiciary Administration should consider how the implementation of the package of Recommendations 4 to 28 above will benefit from the application of information technology and be supported by revised workflow and work practices in the Tribunal Registry.	The information systems in the Labour Tribunal have been revamped to cope with the streamlined process. The Tribunal Officers have been reorganised into teams for the purpose of work assignment. The revised arrangements will also promote collaborative efforts among team members and facilitate communication with the Presiding Officers.
30.	The proposal to cap or limit the costs on appeal to the same kinds of costs as are recoverable in the Tribunal itself should not be introduced.	No action required.
31.	The proposal of not awarding costs against an unsuccessful party in a Tribunal appeal, except where that party has acted vexatiously, abusively, disruptively or unreasonably, or that the bringing or conducting of the appeal have been misconceived, should not be introduced.	No action required.

Recommendation		Progress
32.	Rule 12 of the Labour Tribunal (General) Rules should be repealed so that an award of the Labour Tribunal may be registered and enforced within 6 years.	Pending legislative amendment.
33.	The present practice on the selection and posting of judicial officers to act as POs in the Tribunal that aims at developing and maintaining a pool of POs competent and experienced in dealing with employment disputes in the Tribunal should be continued.	No action required.
34.	Through the Judicial Studies Board, training on local employment conditions and common trade practices, trends and development in employment disputes resolution and employment law, pro-active case management and interpersonal skills should be provided to newly appointed and serving POs.	Being pursued on an on-going basis. In July 2004, the Judicial Studies Board organised a seminar “From Mediation to Complaint – Sharing of Experience” in which Presiding Officers (and potential ones) and Tribunal Officers participated.
35.	The Judiciary Administrator should be asked to consider introducing training and development programmes for TOs with a view to enhancing their skills in relation to investigation and in conducting settlement discussions.	Being pursued on an on-going basis. Six Tribunal Officers attended a two-day basic mediation course organised by the Hong Kong Baptist University in July 2004. Nine Tribunal Officers are attending an Advanced Training Course in Mediation Practice organised by the Chinese University of Hong Kong from October 2004.
36.	The Judiciary Administrator should give consideration to developing tailor-made courses for Registry staff in the Tribunal that meet their specific needs.	Being pursued on an on-going basis.

Recommendation		Progress
37.	The Labour Tribunal should be relocated to a separate and purpose-built premises in a convenient location. The old South Kowloon Magistrates Court Building is a possible and suitable location that should be explored.	Necessary funding obtained. Plans being drawn up to implement the relocation to the old South Kowloon Magistrates Court Building.

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."
- J 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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