Yang Dan *v* Xian De Lai Shanghai Cuisine Pte Ltd
[2010] SGHC 346

Case Number : District Court Suit No 4289 of 2009 (Registrar's Appeal No 98 of 2010)

Decision Date : 25 November 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Harvindarjit Singh Bath (Hoh Law Corporation) for the Plaintiff/Respondent; Ooi Oon Tat (Wong Alliance LLP) for the Defendant/Appellant.

Parties : Yang Dan — Xian De Lai Shanghai Cuisine Pte Ltd

Employment Law – Workmen's Compensation Act

25 November 2010 Judgment reserved.

Woo Bih Li J:

Background

1 The Workmen's Compensation (Amendment) Act (Act 5 of 2008) ("Amendment Act") made amendments to the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA"). One of the amendments was to rename WCA as the "Work Injury Compensation Act". The amended and renamed Act, the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("WICA"), came into force on 1 April 2008 (see Workmen's Compensation (Amendment) Act (Commencement) Notification 2008 (S 164/2008)). Under s 41 Amendment Act, some provisions of WICA apply to injuries occurring before the coming into force of WICA.

2 Under WICA, an employee may sue in court for damages under common law ("General Law Claim"), even if the employee fails in his claim for compensation under WICA, provided that certain conditions are satisfied. WCA also has provisions dealing with the situation of a workman failing in his claim for compensation under WCA and then making a General Law Claim. I will refer to a claim for compensation under either WICA or WCA as a "Compensation Claim".

3 The case before me is governed by a mixture of WICA and WCA provisions. I have to decide whether the respondent, Yang Dan, who received an assessment of zero incapacity in his Compensation Claim is allowed to subsequently make a General Law Claim on the facts before me.

Facts

4 The respondent was employed by the appellant, Xian De Lai Shanghai Cuisine Pte Ltd, as a chef. On 13 December 2006, the respondent was injured in an accident ("the Accident") in the course of his employment as a chef. The respondent was using a handheld rotary grinder to sharpen kitchen knives and a saw. The grinding disc of the rotary grinder broke and a piece flew into the respondent's face, injuring him.

5 In December 2007, the respondent made a Compensation Claim. On 21 December 2007, Dr Ng Siew Weng ("Dr Ng") of the Singapore General Hospital issued a medical report entitled "Medical Report for Workmen's Compensation (Initial Assessment)" ("the Medical Report"). In that report, Dr Ng

recommended that "zero %" was to be awarded for permanent incapacity. The Medical Report stated that the *Guide to the Assessment of Traumatic Injuries and Occupational Diseases for Workmen's Compensation*, 5th Ed ("the Guide") issued by the Ministry of Manpower was to be used for the medical assessment. According to the Guide, a medical assessment is only required for permanent incapacity and not for temporary incapacity (see the Guide at 6).

6 On 17 January 2008, the Commissioner for Labour ("the Commissioner") issued a Notice of Assessment of Compensation which assessed that the respondent had no permanent incapacity resulting from accident arising out of and in the course of employment.

7 The respondent did not serve any notice of objection in the assessment. On the other hand, it appears that the insurer of the appellant did so on the basis that its policy did not cover the date of the Accident. The insurer's objection was unnecessary in the circumstances as the assessment was for no permanent incapacity. In any event, presumably as a result of the insurer's objection, a pre-hearing conference was held on 6 May 2008. At that conference, both the respondent and the appellant accepted that there would be zero compensation.

8 On 7 May 2008, the Commissioner issued a Certificate of Order made under WICA stating that by consent, the respondent's permanent incapacity was assessed to be zero percent for his Compensation Claim. The Certificate of Order referred to reg 11 Work Injury Compensation Regulations (S 165/2008) ("WICR"). WICR came into force on 1 April 2008 (see reg 1 WICR). Regulation 11 WICR provides, *inter alia*, for the form to be used for an order made by the Commissioner. I should add that s 25B(5) WICA allows the Commissioner to record any settlement reached by the parties at a pre-hearing conference and to make an order to give effect to the settlement. As I explain below, s 25B WICA applies retrospectively to injuries occurring before 1 April 2008 (see s 41(2) Amendment Act).

9 Nineteen months later, on 7 December 2009, the respondent's solicitors wrote to the Commissioner requesting to withdraw the respondent's claim for compensation. The Commissioner replied on 24 December 2009 that the respondent's claim could not be withdrawn because an order had been made in satisfaction of the Compensation Claim after a pre-hearing conference dated 6 May 2008.

10 On 9 December 2009, the respondent commenced this action against the appellant in the District Court for damages, claiming that the appellant breached its common law and statutory duties.

11 On 30 December 2009, the appellant applied to strike out the respondent's action under O 18, r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) on the ground that the respondent could not maintain this action in the light of the Commissioner's order dated 7 May 2008. A Deputy Registrar struck out the respondent's action on 20 April 2010. The respondent appealed. Leslie Chew DJ (the "District Judge") allowed the appeal on 3 June 2010 (see *Yang Dan v Xian De Lai Shanghai Cuisine Pte Ltd* [2010] SGDC 237 ("*Yang Dan*")).

The governing provisions of WCA and WICA

12 As stated above, the present case is governed by a mixture of WCA and WICA provisions. I should identify the relevant provisions and describe them in some detail before considering the District Judge's decision.

The provisions of WICA which are applicable in the present case

13 Section 41 Amendment Act sets out transitional and savings provisions to deal with the

transition from WCA to WICA. Section 41 Amendment Act provides as follows:

> **Transitional and savings provisions**
>
> 41. —(1) Subject to subsections (2) to (5) and any regulations made under subsection (6), the provisions of the principal Act as amended by this Act shall not apply with respect to claims for compensation, and any rights and obligations, in respect of personal injury caused by accidents happening before the date of commencement of this section, and the provisions of the principal Act in force immediately before the commencement of this section shall continue to apply with respect to those claims for compensation and rights and obligations as if this Act had not been enacted.
>
> (2) Sections 9, 11 (*a*) and (*b*), 15, 19, 21, 25, 26, 27, 28 (*a*), 30 (*b*), 32 and 35 of this Act shall apply with respect to claims for compensation, and any rights and obligations, in respect of personal injury caused by accidents happening before the respective dates of commencement of those sections.
>
> (3) Sections 13 (*b*), 23 (*a*), (*b*), (*c*), (*e*) and (*f*), 24 and 33 of this Act shall apply with respect to claims for compensation, and any rights and obligations, in respect of personal injury caused by accidents happening before the respective dates of commencement of those sections except where a claim for compensation in respect of the injury has been made before the respective dates of commencement of those sections (referred to in this subsection as an excepted claims); and the former provisions of the principal Act in force immediately before the commencement of those sections shall continue to apply to those excepted claims as if those sections had not been enacted.
>
> (4) Sections 23 (*d*), 28 (*b*) and 30 (*c*) of this Act shall apply with respect to claims for compensation, and any rights and obligations, in respect of personal injury caused by accidents happening before the respective dates of commencement of those sections except where an order has been made before the respective dates of commencement of those sections; and the former provisions of the principal Act in force immediately before the commencement of those sections shall continue to apply to all those claims and rights and obligations as if those sections had not been enacted.
>
> (5) Any subsidiary legislation made under the principal Act as in force before the commencement of section 22 of this Act and in force immediately before that commencement shall, so far as it is not inconsistent with the provisions of the principal Act as amended, continue in force until it is revoked or repealed by subsidiary legislation made under the principal Act as amended by section 22 of this Act.
>
> (6) For a period of 2 years after the date of commencement of this section, the Minister may, by regulations published in the *Gazette*, prescribe such provisions of a savings or transitional nature consequent on the enactment of this Act, as he may consider necessary or expedient.

Section 41 Amendment Act uses the words "this Act" to refer to the Amendment Act and "principal Act" to refer to WCA.

14 Section 41(1) Amendment Act provides, in effect, a general rule that WICA is *not* to apply to claims for compensation, and any rights and obligations, in respect of personal injury caused by accidents happening before 1 April 2008. The other subsections of the said s 41 provide for exceptions to this general rule.

15 Under s 41(2) Amendment Act, certain sections of the Amendment Act are said to apply to claims for compensation, and any rights and obligations, in respect of personal injury caused by accidents happening *before* 1 April 2008. From the said s 41(2), I note that the following sections of WICA, so far as material to the present case, apply retrospectively:

(a) **Sections 25A to 25D WICA**: This is because s 41(2) Amendment Act refers to s 25 Amendment Act. That section introduces ss 25A to 25D WICA.

(b) **Section 28(1) WICA**: This is because s 41(2) Amendment Act refers to s 28(a) Amendment Act. That section makes amendments to s 28(1) WCA.

16 The exceptions under s 41(3) Amendment Act are not applicable in the present case because the respondent's Compensation Claim was made before 1 April 2008.

17 The exceptions under s 41(4) Amendment Act are applicable because the Commissioner made an order after 1 April 2008. The said s 41(4) refers to s 28(b) Amendment Act. That section introduces s 28(1A) WICA.

18 I have so far stated the material provisions of WICA that are applicable in the present case. In the next section, I will describe the provisions of WCA and WICA that are relevant to the present case.

The relevant provisions of WCA and WICA

19 Under s 24 WCA, the Commissioner has the power to assess and make an order on the amount of compensation. Section 24(2) WCA provides for the Commissioner to serve a notice stating the amount of compensation payable in accordance with the assessment made by the Commissioner under s 24(1) WCA. Section 24(3) WCA provides that if no objection is received by the Commissioner within two weeks of service of the notice under s 24(2) WCA, then the employer and the person claiming compensation are deemed to agree to the assessment and the assessment of compensation shall have the effect of an order under s 25(2) WCA ("Deemed Order") but no appeal shall lie against such an order. Section 24(1) to (4) WCA are either not relevant or not applicable to the present case. It is useful to set out s 24(1) to (3) WCA in full:

> 24. —(1) Subject to the provisions of this Act, the Commissioner shall have power to assess and make an order on the amount of compensation payable to any person on any application made by or on behalf of that person.
>
> (2) The Commissioner shall cause to be served on the employer and the person claiming compensation personally or by registered post a notice stating the amount of the compensation payable in accordance with the assessment made by the Commissioner under subsection (1).
>
> (3) If no objection is received by the Commissioner within two weeks of the service of the notice under subsection (2), the assessment of compensation made by the Commissioner-
>
> (a) shall be deemed to have been agreed upon by the employer and the person claiming compensation; and
>
> (b) shall have the effect of an order under section 25 (2) but no appeal shall lie against such an order.

20 If written objection is made to the notice of assessment of compensation within the stipulated deadline, then s 25(2) WCA provides that the Commissioner shall as soon as practicable conduct a hearing of the case and may hand down a decision accordingly and in pursuance of that decision, make such order for the payment of compensation as he thinks just ("Post-hearing Order"). It is useful to set out s 25 WCA in full:

> 25. —(1) If any employer or person claiming compensation objects to the notice of assessment of compensation issued by the Commissioner under section 24, he may, within 14 days of the service of the notice of assessment, give notice of his objection in writing to the Commissioner stating precisely the grounds of his objection.
>
> (1A) The Commissioner may, in his discretion, allow an objection to be made after the period specified in subsection (1).
>
> (2) On receipt of the notice of objection referred to in subsection (1), the Commissioner shall as soon as practicable conduct a hearing of the case and may hand down a decision accordingly and in pursuance of that decision make such order for the payment of compensation as he thinks just.
>
> (3) The Commissioner may, before conducting any hearing under this section, require a preliminary investigation to be made by such public officer as he shall appoint in writing in that behalf into the circumstances of any workman and for this purpose section 30 shall apply to that officer.
>
> (4) Any public officer appointed under subsection (3) to make a preliminary investigation shall, upon completing the investigation, forward to the Commissioner the record of the investigation and that record shall form part of the record of the Commissioner.

21 Under s 25A WICA, which is applicable in the present case, the Commissioner may, *inter alia*, make such order at any time after a Compensation Claim is made. Under s 25B WICA, which is also applicable in the present case, the Commissioner is given the power to direct the parties to attend a pre-hearing conference. If the parties agree to a settlement of some or all matters for hearing, the Commissioner may record the settlement and make an order to give effect to the settlement (s 25B(5) WICA) . For present purposes, I will refer to an order to give effect to a settlement of all matters for hearing as a "Settlement Order". Section 25D WICA is also applicable in the present case. That section allows the Commissioner to conduct a hearing after a Compensation Claim is made, hand down a decision and make an order for payment of compensation at or after the hearing. This is a post-hearing order which is similar to the Post-hearing Order under s 25(2) WCA.

22 Section 28(1) WICA, which is applicable in the present case, provides that an order made or deemed to be made under, *inter alia*, ss 24, 25A, 25B, 25C or 25D must be enforced by a District Court in the same manner as a judgment of that court.

23 It is important to appreciate the difference between an assessment and an order in the scheme of the WCA and WICA provisions described above. The Commissioner's making of an assessment and his service of a notice of assessment under ss 24(1) and (2) WCA are, in effect, the first stage of the determination of a Compensation Claim ("the Assessment Stage"). After the Assessment Stage, the workman or the employer has two weeks to object to the Commissioner's assessment. If either party objects within that period, the Compensation Claim proceeds to a second stage. At this second stage ("the Hearing Stage"), the Commissioner conducts a hearing, makes a decision and makes a Post-hearing Order if there is no settlement of all matters before he makes that decision. If after the Assessment Stage, there is no objection to the Commissioner's assessment within two weeks, the

assessment becomes a Deemed Order. Furthermore, under ss 25A and 25B WICA, at any time after a Compensation Claim is made, the Commissioner may give such direction as he thinks fit and may require parties to attend a pre-hearing conference. If the parties agree to a settlement of all matters for hearing during a pre-hearing conference, the Commissioner may record that settlement and make a Settlement Order to give effect to the settlement under s 25B(5) WICA. All three types of orders, *ie*, a Deemed Order, a Settlement Order and a Post-hearing Order are different from the Commissioner's assessment.

24 Another provision that is important to this appeal is s 33 WCA. Section 33(2) WCA prohibits ("the Section 33 Prohibition") a workman from maintaining an action in court for any injury if he has applied to the Commissioner for compensation under WCA (s 33(2)(a) WCA) or if he has recovered damages for the injury in any court from any other person (s 33(2)(b) WCA). Section 33(3) deals with the reverse situation of a workman who commences a General Law Claim against his employer in court and fails in that claim but under circumstances where the employer would have been liable to pay compensation under WCA. In such a situation, s 33(3) WCA provides that if the workman chooses, the court must assess compensation under WCA and deduct from that amount all or part of the costs which in the court's judgment were caused by the workman maintaining a General Law Claim instead of a Compensation Claim. The relevant provisions of s 33 read as follows:

> (2) *No action for damages shall be maintainable in any court* by a workman against his employer in respect of any injury —
>
> (a) *if he has applied* to the Commissioner for compensation under the provisions of this Act; or
>
> (b) if he has recovered damages in respect of the injury in any court from any other person.
>
> (3) If an action is brought within the time specified in section 11 in any court to recover damages independently of this Act for injury caused by any accident and it is determined in the action or on appeal that the injury is one for which the employer is not liable but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court shall, if the workman so chooses, proceed to assess the compensation and may deduct therefrom all or any part of the costs which, in its judgment, have been caused by the workman instituting the action instead of proceeding under this Act.
>
> [emphasis added]

25 It is also helpful to bear in mind that in *Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu* [1983-1984] SLR(R) 212 ("*Ying Tai Plastic*"), a Court of Appeal decision that I will consider later, s 33(1) and s 33(2) WCA were both comprised in s 33(1) of the relevant legislation then.

The decision below

26 The District Judge first held that the case was governed by WCA and not WICA. This was an error. As I have noted above, the present case is governed by a mixture of WCA and WICA provisions.

27 The District Judge considered the argument that the respondent could not withdraw his application for compensation because his claim had been finally assessed. However, the District Judge found that WCA did not expressly bar a claimant from making a General Law Claim if he fails in his Compensation Claim. The District Judge's reasons were as follows:

(a) The District Judge noted that the respondent could not withdraw his Compensation Claim, because it had been finally assessed. In the view of the District Judge, it did not make sense to speak of *withdrawing* a claim for compensation when the claim had already been conclusively disposed of. The District Judge considered that the views of the High Court in *Rahenah bte L Mande v Baxter Healthcare Pte Ltd and Another* [2002] SGHC 320 ("*Rahenah*") and *Chua Ah Beng v Commissioner for Labour* [2002] 2 SLR(R) 945 ("*Chua Ah Beng*") supported his opinion that a Compensation Claim could not be withdrawn after the Commissioner finally assessed it. However, the District Judge considered that the real issue before him was whether the respondent could still maintain his General Law Claim having regard to the scheme under WCA and on general principles. Accordingly, it did not matter that the respondent could not withdraw his Compensation Claim, as such.

(b) Under s 25 WCA, an unsatisfied claimant has 14 days to make an objection to the Commissioner's assessment. The District Court in *Abdus Salam Hashem Miah v Utraco Pte Ltd* [2005] SGDC 231 ("*Abdus Salam*") took the view that a claimant who fails to make an objection within 14 days would be abusing the process of the court if he were to make a General Law Claim. The District Judge disagreed with *Abdus Salam*. In his view, the object of WCA was intended to make it easier for claimants to recover compensation and not to make it difficult to do so.

(c) Under s 25 WCA, a claimant who fails to object to the Commissioner's assessment within 14 days loses the right to have a hearing before the Commissioner. Section 25 does not provide that a further consequence of failing to object within 14 days is that the claimant will be barred from making a General Law Claim. In the District Judge's view, it would be incorrect to read s 25 WCA as imposing such a further consequence.

(d) It would not be correct to say that a claimant loses his right to make a General Law Claim unless WCA, or some other law, expressly says so. The District Judge did not find any provision in WCA (or under any other law) which expressly precluded a workman from instituting a General Law Claim if he should fail in his Compensation Claim. Neither would the availability of a General Law Claim in the present circumstances militate against the spirit of WCA.

(e) The District Judge opined that his reading of WCA does not prejudice employers. In his view, employers will not be exposed to multiple proceedings because the WCA regime is premised on no fault recovery. This is different from the scheme of recovery under general law.

(f) The District Judge was persuaded by the views of the High Court in *obiter* in *Chua Ah Beng* where the High Court remarked that a claimant who fails in his Compensation Claim may make a General Law Claim.

(g) The District Judge rejected an argument made by the appellant's counsel that the respondent would be "getting 2 bites of the cherry" if he were allowed to maintain his General Law Claim. The District Judge considered that the respondent would, instead, be getting "separate bites of two different cherries".

The Issue

28 The issue on appeal is whether the respondent is entitled to pursue a General Law Claim in the circumstances before me.

The case law

29 I should set out in some detail the previous case law on the interpretation of s 33(2)(a) WCA.

Ying Tai Plastic

30 The Court of Appeal in *Ying Tai Plastic* held that an application to the Commissioner does not "*ipso facto* abrogate a workman's common law right for damages" (*Ying Tai Plastic* at [26]). According to the Court of Appeal, a workman has the right to withdraw his Compensation Claim and make a General Law Claim (*Ying Tai Plastic* at [27]). However, it is important to bear in mind that in that case, no assessment for compensation had been made yet.

31 In the cases of Rahenah and Chua Ah Beng, it was also suggested (at [16] and [18] in Rahenah and [38] in Chua Ah Beng) that the workman would have to withdraw his Compensation Claim before proceeding with a General Law Claim. The suggestions in those two cases appear to have been influenced by what the Court of Appeal said in Ying Tai Plastic at [25]:

> 25 Under s 33(1)(a) the worker is debarred from bringing a common law action for damages so long as there is an application by the workman before the Commissioner for compensation. But this debarment in no way affects the cause of action already vested in him. The Act does not prohibit the withdrawal of the application for compensation. As soon as the application for compensation is *withdrawn*, the right to maintain an action revives and the workman can then proceed with his action for damages in the court. The workman's right to compensation under the Act lies dormant while he pursues his common law action but should he lose the action he may choose to ask the court, under s 33(2), to assess compensation under the Act.
>
> [emphasis added]

However, in Pang Chen Suan v Commissioner for Labour [2008] 3 SLR(R) 648 ("Pang Chen Suan"), the Court of Appeal said at [34] that the point was not decided in Ying Tai Plastic and suggested, obiter, at [33] that a workman may suspend or stay his Compensation Claim and proceed with a General Law Claim or vice versa. For brevity, any references to a withdrawal of a Compensation Claim in this judgment should be taken as including a reference to the alternative mechanism of suspending or staying a Compensation Claim.

32 I should also mention a point that was made in the High Court decision in Ying Tai Plastic (see Zahrin bin Rabu v Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd [1981-1982] SLR(R) 511 ("Ying Tai Plastic (High Court)")). At the High Court, A P Rajah J observed that the Commissioner in the case before him had not made an order for compensation. Rajah J further observed that if such an order had been made, it could have been argued that the order merged with other rights of action (at [22]):

> 22 In the instant case no order for compensation has been made by the Commissioner. *Had there been such an order made one might then, perhaps, have reasonably argued that the order operates to merge all other rights of action in respect of the injury in it*, more so in view of the provisions of s 28 of the Act which enacts:
>
> > Where an order has been made by the Commissioner under section 25 it shall be enforced by a District Court in the same manner as a judgment of that Court and all necessary processes may be served by the Court on behalf of the Commissioner:
> >
> > Provided that no sale of immovable property shall for the purposes of such enforcement be ordered except by the High Court.

[emphasis added]

33 I will return to Rajah J's observation on merger later. At this point, it is sufficient to note that Rajah J's view seemed to have been that an order made by the Commissioner under s 25 WCA would result in a merger of the workman's rights of action with the order. He did not seem to have addressed the possibility of the workman's rights of action merging with the Commissioner's assessment of compensation. As explained above, an assessment of compensation is different from an order under s 25 WCA.

High Court cases

34 Coming back to the issue before me, three High Court cases are relevant.

35 The first is *Rahenah*. In that case, Judith Prakash J held that a workman had to expressly notify the Commissioner that he is withdrawing his Compensation Claim before pursuing a General Law Claim. *Rahenah* concerned a workman who made a General Law Claim while her Compensation Claim was still pending. Of importance is the following statement at [18] of Prakash J's decision:

> 18 … Whilst I agreed with the District Judge that no formal mode of withdrawal was prescribed by the legislation, and also the plaintiff had the right to withdraw the claim at any time *before it had been finally assessed by the Commissioner*, I took the view that such withdrawal had to be expressly notified to the Commissioner. …
>
> [emphasis added]

36 This passage shows that Prakash J's view was that a workman could only withdraw his claim before the Commissioner *finally assessed* the Compensation Claim. The words "finally assessed" are ambiguous. Similar words were used by the District Judge. They could refer literally to a mere assessment by the Commissioner. That seemed to be the interpretation of counsel before me. Alternatively, Prakash J could have been using the words loosely to mean the stage where an *order* is made or deemed to be made by the Commissioner. This alternative interpretation is supported by Prakash J's use of the word "finally" in describing the Commissioner's assessment.

37 The next case that should be considered is *Chua Ah Beng*. The decision in *Chua Ah Beng* was released just nine days after Prakash J gave her grounds of decision in *Rahenah*.

38 *Chua Ah Beng* concerned the interpretation of s 33(3) WCA, which is described above. In that case, Tay Yong Kwang JC made *obiter* remarks on s 33(2) WCA.

39 At [31] of his decision, Tay JC remarked as follows:

> …(f) A workman may sue his employer in court if he withdraws his claim under the WCA *before it has been determined* (the *Ying Tai Plastic* case); …
>
> [emphasis added]

40 This suggests that Tay JC read *Ying Tai Plastic* as providing that in order for a workman to maintain a General Law Claim, he must withdraw his claim *before* the workman's Compensation Claim has been determined. It is not clear what Tay JC meant by the determination of a Compensation Claim. He could have been referring to either an assessment or an order.

41 At [32]–[33] of his decision, Tay JC said as follows:

> 32 In my opinion, *it is not clear* from the provisions of the WCA whether or not a workman who has made a claim under the WCA *but fails in that claim* may then commence an action in court against his employer. …
>
> 33 On 19 October 1971, the Minister for Labour, in moving the second reading of the Workmen's Compensation (Amendment) Bill, stated in Parliament:
>
> > [T]he most important amendment to the Ordinance related to the quantum of workmen's compensation. I would like to stress that the Ordinance is an essential piece of legislation which assures workers that, in the event of accidents arising out of or in the course of employment, they or members of their families would be compensated financially.
>
> Bearing this in mind, I am more inclined to hold the view that a workman who has applied for compensation under the WCA *but fails in his claim* (whether before the Commissioner for Labour or on appeal) *may then commence an action against his employer*.
>
> [emphasis added]

42 Here, Tay JC takes the view that a workman who "fails" in his Compensation Claim may proceed with a General Law Claim. It is not clear what he meant by failing in a Compensation Claim. Again, Tay JC could have been referring to a workman who obtains a zero compensation assessment or, alternatively, a workman who obtains a zero compensation *order*.

43 The third case of relevance was *Xu Jiang Lin v Tiong Seng Contractors Pte Ltd* DC Suit 3594/2004 ("*Xu Jiang Lin*"). In *Xu Jiang Lin*, the Commissioner assessed the plaintiff workman's compensation at $11,771.57. After the Commissioner's assessment, the plaintiff purported to withdraw his Compensation Claim within the stipulated time frame under WCA to object to the assessment. Aedit Abdullah DJ agreed that the plaintiff had withdrawn his Compensation Claim but held that the withdrawal was ineffective because of his failure to also object to the Commissioner's assessment. Abdullah DJ concluded that the plaintiff was barred from commencing a General Law Claim (see *Xu Jiang Lin v Tiong Seng Contractors Pte Ltd* [2005] SGDC 270 at [40]).

44 The plaintiff appealed against Abdullah DJ's decision. Prakash J allowed the appeal. Prakash J did not provide any written grounds of decision. However, she decided that the workman's withdrawal of his Compensation Claim was effective even though the withdrawal was made *after* the Commissioner's positive assessment and that the workman's General Law Claim should be reinstated.

45 It should be noted that if Prakash J's use of the words "finally assessed" in *Rahenah* are read as referring to a withdrawal before an *assessment* by the Commissioner, her decision in *Xu Jiang Lin* would be contrary to her view in *Rahenah*.

District Court cases

46 Two District Court cases are also relevant. They reached opposing conclusions.

47 The first is *Abdus Salam*. The facts in *Abdus Salam* are similar to the present case. The plaintiff workman made a Compensation Claim. The Commissioner assessed that zero compensation was payable. The plaintiff did not object to the notice of assessment within 14 days. The plaintiff then purported to withdraw his Compensation Claim 10 months after the service of the notice of

assessment and commenced a General Law Claim. Mavis Chionh DJ decided that the plaintiff could not withdraw his claim after the Commissioner's "final determination". Chionh DJ declined to follow Tay JC's remarks in *Chua Ah Beng*, considering his remarks to have been made in *obiter*. The words "final determination" are also not clear. However, it appears that Chionh DJ was referring to an order because she later relied on s 24(3) WCA as support for her holding. She seemed to have considered that the Commissioner's assessment had become a Deemed Order.

48 The second District Court case, *MD Sokon Uddin MD Nurul Bhuiyan v OES Constructions Pte Ltd and W.G. Prestige Associates (Pte) Ltd* DC Suit 4142/2006 ("*MD Sokon*"), came to an opposite conclusion. In that case, the workman gave a notice of objection to an assessment more than one year after the assessment. Toh Han Li DJ decided that the plaintiff workman could maintain a General Law Claim even after the Commissioner assessed that he had zero percent permanent incapacity. Toh DJ did not provide written grounds of decision. However, the following portion of Toh DJ's notes of arguments indicates his reasons:

> In the present case, the assessment by the Commissioner for Labour is 0 permanent incapacity. *There can be no danger of double recovery which is what the Act guard against* [*sic*]. In my view, the facts come under the scenario painted by Tay JC as a workman who has failed to get compensation under the Act. He should then be allowed to claim in Court.
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> [emphasis added]

The House of Lords in Young v Bristol Aeroplane Company

49 In the course of making further arguments, the appellant's counsel brought to my attention the House of Lords decision in *Young v Bristol Aeroplane Company* [1946] AC 163 ("*Young*"). In *Young*, a workman maintained a General Law Claim after having received payments under the Workmen's Compensation Act 1925 (c 84) (UK) ("UK WCA 1925"). The issue was whether the workman's bringing of a General Law Claim in those circumstances contravened s 29(1) UK WCA, given that the workman knew that he had an alternative right to pursue a General Law Claim. Section 29(1) UK WCA 1925 reads as follows:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

This provision is different from s 33(2)(a) WCA.

50 All their Lordships agreed that the workman could not maintain a General Law Claim if he continued to accept payments under UK WCA 1925 after knowing of his alternative right to pursue a General Law Claim. *Young* is not directly relevant to the present appeal because their Lordships were concerned with whether the workman's acts amounted to an exercise of his option to claim compensation under UK WCA 1925. Lord Macmillan, however, made some broader observations that are relevant to the present appeal. His views are worth reproducing at length (*Young* at 179-181):

> …In one case the Act permits a locus poenitentiæ. If the workman exercises his option by bringing

an action to recover damages independently of the Act and fails in that action, he may move the court to assess and award him compensation under the Act, if otherwise entitled to it, subject to deduction of the costs caused to his employer by his unsuccessful action. *There is no parallel provision in the case of an unsuccessful claim under the Act. The inference is clear that the workman cannot try his luck first under the Act and then if unsuccessful independently of the Act or vice versa, apart from the single special concession which I have just mentioned*. It would be a singular situation if the *employer could have no assurance that finality had been reached* in settling a claim either under or independently of the Act unless he had taken steps to satisfy himself of the state of the workman's mind and that the workman had made a fully informed "election" between the alternative courses open to him. It would be grotesque to suggest that the employer to whom a claim under the Act has been made must ask the workman if he has considered the possibility of bringing an action against him for personal negligence or wilful fault lest otherwise any settlement of the claim under the Act might have no finality because there had been no "election" on the part of the workman. The workman, like any other citizen, must be presumed to know the rights which the statute has given him, and must be judged according to what he does in the exercise of these rights and not according to the extent of his knowledge of them. …

…

I begin with the easiest case, on which there appears to be general agreement. If the workman's claim either under or outside the Act is contested and he institutes proceedings which are carried through to their conclusion and result in an award of compensation under the Act or in a judgment for damages outside the Act, all are apparently now agreed that finality has been reached. The workman cannot be heard to say that in proceeding in the one way or the other he was unaware of his rights and had never truly exercised his option. *But what if the workman fails in the proceedings which he has taken? Is he entitled then to resort to the alternative proceedings which he might have taken but did not take? The answer in my opinion is in the negative*. I quote and adopt the words of Cozens-Hardy M.R. in *Cribb v. Kynoch, Ld. (No. 2)*[(1)]: "I think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail and then proceed by common law action, and, also cannot proceed by common law action and having failed in that action then proceed under the Act," subject of course to the special right accorded under sub-s. 2 of s. 29. The workman by persisting to a conclusion in the proceedings which he has taken has irrevocably committed himself. *He cannot be heard to say that he has exercised his option only conditionally on success*. This view was emphatically approved in Scotland by a court of seven judges in the case of *Burton v. Chapel Coal Co., Ld*. [(2)]. But in that case a qualification was admitted, based on the Scottish decisions in *Blain v. Greenock Foundry Co*. [(3)] and *M'Donald v. James Dunlop & Co., (1909), Ld*. [(4)], and the English case of *Rouse v. Dixon*[(5)]. If the reason of the workman's failure to recover compensation in proceedings under the Act was that his case did not fall within the Act, then, it was said, he was not barred from proceeding outside the Act. The ground for this view, as stated by Lord Low in *Burton's* case[(6)], is that the enactments were "intended to meet the case of a workman who has, in fact, an option between a claim under the Act and a claim independently of the Act, and therefore have no application to the case of a workman who does not fall within the purview of the Act, and has no title to claim compensation under it." I do not accept this qualification. In contested claims for compensation the employer's most frequent answer, apart from questions of quantum, is that the claim does not fall within the Act because the accident did not arise out of or in the course of the employment. If the employer succeeds in this plea he is nevertheless, if the qualification is well-founded, to be exposed to entirely new proceedings outside the Act. This is, in my opinion, contrary to the true interpretation of the Act. I agree with Scrutton L.J. that if

the workman's case fails it makes no "difference whether the applicant fails because he is not, or fails although he is, a 'workman' or 'dependant' within the Act" (Bennett's case[(1)]). If the workman takes proceedings under the Act and carries them to a conclusion, then he has exhausted his rights, notwithstanding that the conclusion may be that his case does not fall within the Act, for example, because the accident did not arise out of or in the course of his employment. He cannot be heard to say that he has exercised his option only conditionally on his case being held to fall within the Act. The proceedings are under the Act none the less that the result of the proceedings may be that the workman's case is held not to come within it. "Proceedings carried to a determination are conclusive evidence of a final election" (*per* Bankes L.J. in *Bennett's* case[(2)]).

[emphasis added]

51 As the quoted portion of Lord Macmillan's speech reveals, his Lordship was of the view that a workman is *not* entitled to pursue a General Law Claim if he fails in a prior Compensation Claim. It appears that the motivation for this view is the need for finality.

52 It is important to note what Lord Macmillan meant by a failed claim under UK WCA 1925. In the passages quoted above, Lord Macmillan approved the words of Cozens-Hardy MR in *Cribb v Kynoch, Limited (No. 2)* [1908] 2 KB 551 (at 555). In that decision, Cozens-Hardy MR referred to a workman who "proceed[s] *to trial* under the Act and fail[s]" (emphasis added). Cozens-Hardy MR must have been referring to the mechanism under the Workmen's Compensation Act 1897 (c 37) (UK) ("UK WCA 1897") for the arbitration of any question on liability to pay compensation under UK WCA 1897 (s 1(3), UK WCA 1897). A similar dispute resolution mechanism is found in s 21 UK WCA 1925. That section provides for arbitration by a county court judge or a representative committee of any questions on liability under UK WCA 1925 if the parties were unable to reach an agreement. Any agreement reached by the parties or any arbitration award by the representative committee or the county court judge would be enforceable as a county court judgment (s 23 UK WCA 1925). Both these mechanisms are similar to the procedure under s 25 WCA in which the Commissioner conducts a hearing if the workman objects to his notice of assessment. It is worth also noting that s 28 WCA is the equivalent of section s 23 UK WCA 1925. The former provides that an order by the Commissioner under s 25 is enforceable in the same manner as a judgment of the District Court.

Section 33(2) – 33(2B) WICA

53 It is useful to refer to the equivalent of s 33(2) WCA in WICA. The equivalent provisions are ss 33(2), 33(2A) and 33(2B) WICA. I should add that those provisions do not apply retrospectively. The provisions are as follows:

(2) Subject to subsections (2A) and (2B), no action for damages shall be maintainable in any court by an employee against his employer in respect of any injury by accident arising out of and in the course of employment —

(*a*) if he has a claim for compensation for that injury under the provisions of this Act and *does not withdraw his claim within a period of 28 days after the service of the notice of assessment of compensation* in respect of that claim;

(*b*) if he and his employer have agreed or are deemed to have agreed to the notice of assessment under section 24(2)(a) for that injury; or

(*c*) if he has recovered damages in respect of the injury in any court from any other person.

(2A) Where —

(*a*) a claim for compensation under this Act is made for an employee's injury by accident arising out of and in the course of the employment;

(*b*) there is no objection by the employee to the notice of assessment of compensation in respect of that claim;

(*c*) the compensation ordered by the Commissioner thereafter in respect of that claim is of a lesser amount than that stated in that notice of assessment of compensation in respect of that claim;

(*d*) within a period of 28 days after the making of the order, the employee notifies the Commissioner and the employer in writing that he does not accept the compensation so ordered, and has not received or retained any part of such compensation earlier paid (if any) by the employer; and

(*e*) no appeal under section 29 is made against the order,

the employee may institute an action in any court against his employer for damages in respect of that injury and any order made by the Commissioner in respect of that injury shall be void.

(2B) Where —

(*a*) the Commissioner assesses or makes an order that no compensation shall be payable for a claim for compensation for an employee's injury by accident arising out of and in the course of employment because —

(i) the injury did not arise out of and in the course of the employee's employment; or

(ii) the injured person is not an employee within the meaning of this Act; or

(*b*) an appeal to the High Court under section 29 from an order made by the Commissioner has failed because of any reason mentioned in paragraph (a)(i) or (ii),

the employee may institute an action in any court to recover damages independently of this Act for injury caused by that accident.

[emphasis added]

54 I observe that WICA expressly allows an employee to withdraw his claim even if he has received a positive assessment of compensation, but provides that the employee is to withdraw his Compensation Claim within 28 days after the Commissioner serves him the notice of assessment.

55 The reasons for the amendments that introduced the above provisions were explained at the second reading of the Workmen's Compensation (Amendment) Bill (Bill 50 of 2007) ("the Bill") by Mr Gan Kim Yong (the Minister of State for Manpower) (*Singapore Parliamentary Debates, Official Report* (22 January 2008) vol 84 at cols 265–266):

Preferred route of compensation

Under the present Act, workers can only claim for injuries from the common law or the workmen's compensation system. They cannot do so from both. This makes sense because the WCA was indeed created to serve as an alternative and more expeditious route to avoid protracted legal proceedings. However, some claimants abuse the system by filing claims for both but withdrawing the WCA claims *at the last minute* to switch to a civil suit. This imposes significant commitment of resources, as time and effort would have been invested to investigate and prepare the case. *Involved parties such as witnesses would also have committed their time to the adjudication process. Employers will have to repeat part of the process in the courts*. Processing time for each case becomes unnecessarily prolonged and as a result, compensation is delayed. We will streamline the process, so that claimants through the WCA can have speedy compensation. Nevertheless, even after our amendments, we still allow adequate time for claimants to decide on either route whether to claim damages or compensation for their injuries through WCA or through the civil courts.

[emphasis added]

My Decision

The various possible interpretations

56 Having considered the case law, it appears to me that there are various possible interpretations of the Section 33 Prohibition:

(a) An application *per se* is sufficient to trigger the Section 33 Prohibition ("Interpretation 1"). This interpretation was rejected in *Ying Tai Plastic*.

(b) As long as the workman withdraws his Compensation Claim before the Commissioner *assesses* his Compensation Claim, he may proceed with a General Law Claim ("Interpretation 2"). This was Prakash J's view in *Rahenah*, if one were to interpret "finally assessed" as a reference to the Commissioner's assessment.

(c) As long as the workman withdraws his Compensation Claim before an *order* is made, he may proceed with a General Law Claim ("Interpretation 3"). Chionh DJ in *Abdus Salam* adopted this interpretation. This was also Prakash J's view in *Rahenah* if one were to interpret "finally assessed" as a reference to an order. This interpretation is also consistent with Prakash J's decision in *Xu Jiang Lin*. For convenience, an "order" under this para 56 and the rest of this judgment refers to a Deemed Order, a Settlement Order and a Post-hearing Order .

(d) The workman may withdraw his Compensation Claim even after an order has been made if he fails in that claim ("Interpretation 4"). This is Tay JC's view in *Chua Ah Beng* if his reference to a workman *failing* in his Compensation Claim is understood to mean a workman who obtains a zero compensation *order*.

(e) The workman cannot withdraw his Compensation Claim after an order has been made. However, the workman may *nevertheless* proceed with a General Law Claim ("Interpretation 5"). This was the District Judge's view in the present case (*Yang Dan* at [18]). He took the view that a Compensation Claim could not be withdrawn "as such" but that the workman could nevertheless maintain a General Law Claim, having regard to the WCA scheme and general principles on the right to maintain an action at common law (*Yang Dan* at [26]).

The correct interpretation

57 In my view, the scheme of the WCA and WICA provisions applicable to the present case shows that Interpretation 3 is the correct interpretation. My reading of the applicable WCA and WICA provisions in the present case is as follows:

(a) Under s 24(3) WCA, the Commissioner's assessment becomes a Deemed Order if there is no objection thereto within two weeks of the service of the notice of assessment. Section 25(1) WCA refers to a period of 14 days to do so which is the same as the two week period. Once there is a Deemed Order, it is then, in my view, too late for the workman to withdraw his Compensation Claim. In this regard, while the District Judge said that the consequence of a failure to object within the relevant time frame is that the workman loses his right to a hearing and cannot appeal (see *Yang Dan* at [32]) it is important to bear in mind that a further consequence of a failure to object within the relevant time frame is that the assessment becomes a Deemed Order.

(b) If however there is an objection to the assessment within the relevant time frame, the assessment does not become a Deemed Order. The workman's right to withdraw his Compensation Claim and proceed with a General Law Claim continues for the time being even if he was not the one who had objected to the assessment.

(c) If there is a pre-hearing conference and an agreement is reached to settle all matters for hearing in that conference, the Commissioner may record a Settlement Order. At that point, the workman will lose his right to withdraw his Compensation Claim and proceed with a General Law Claim.

(d) If the workman does not agree to a settlement of all matters at the pre-hearing conference, the workman's right to withdraw continues for the time being. However, after the Compensation Claim proceeds to a hearing and the Commissioner makes a Post-hearing Order, it will be too late for the workman to withdraw his Compensation Claim or to proceed with a General Law Claim.

58 The reason for my view that an order precludes withdrawal is that once an order is made, the Compensation Claim *merges* into the order. Once merger takes place, it is impossible for the workman to withdraw the Compensation Claim or to proceed with a General Law Claim. This was the view taken by Rajah J in *Ying Tai Plastic (High Court)*, though it should be added that he did not say that merger *only* takes place upon the Commissioner's order.

59 Interpretation 3 is also supported by considerations of finality and double jeopardy. The need for finality was mentioned in Lord Macmillan's speech in *Young* at 179. In my view, final determination of the Compensation Claim occurs once an order is made. No distinction should be drawn between the three kinds of orders. A Deemed Order is just as preclusive as a Post-hearing Order or, for that matter, a Settlement Order. The deeming provision in s 24(3) WCA would be meaningless if one were to draw a distinction between a Deemed Order on the one hand and a Post-hearing Order on the other hand. I should add that it is also not possible to distinguish between a positive assessment and a zero compensation assessment under s 24(3) WCA. The deeming provision does not draw a distinction between positive and zero compensation assessments. It might be thought that it is artificial to deem that a workman "agrees" to a zero compensation assessment if he does not object within the relevant time frame. However, that is the plain effect of the deeming provision.

60 As for double jeopardy, the District Judge alluded to this concern when he discussed an argument raised by the appellant's counsel that the respondent would be getting "2 bites of the cherry" if he were to be allowed to sustain a General Law Claim after withdrawing his Compensation

Claim (see *Yang Dan* at [37]). In my view, the employer will indeed encounter double jeopardy if he were made to defend a General Law Claim once an order has been made on the General Law Claim. Although a Compensation Claim is, as the District Judge observed, a "different cherry" from a General Law Claim, the employer faces double jeopardy because he faces a *risk* of having to pay something on two occasions. The degree and nature of that risk may be different. But it is clear that he faces that risk *twice*.

61 Interpretation 3 is also supported by an argument that counsel for the appellant made based on s 33(3) WCA. He pointed out that s 33(3) WCA expressly allows the court to assess compensation for the workman under WCA if he fails in his General Law Claim. Counsel then pointed out that WCA does not in an analogous way expressly allow a workman to maintain a General Law Claim if he fails in his Compensation Claim. Counsel argued that the inference to be drawn from the absence of such an express provision is that the workman should not be entitled to sustain a General Law Claim if he fails in his Compensation Claim. Lord Macmillan made a similar observation in *Young* in the portions of his speech quoted above at [50]. I reproduce the relevant portion again here (*Young* at 179):

> …If the workman exercises his option by bringing an action to recover damages independently of the Act and fails in that action, he may move the court to assess and award him compensation under the Act, if otherwise entitled to it, subject to deduction of the costs caused to his employer by his unsuccessful action. There is no parallel provision in the case of an unsuccessful claim under the Act. The inference is clear that the workman cannot try his luck first under the Act and then if unsuccessful independently of the Act or vice versa, apart from the single special concession which I have just mentioned. …

62 This argument has some merit. However, it is necessary to clarify when a workman will be considered as having *failed* in his Compensation Claim under the combination of WCA and WICA provisions. My view is that a workman fails in his Compensation Claim when there is an *order* and it matters not whether it is a zero compensation order or an order which is positive but falls short of the amount which he has claimed.

My reasons for not adopting the other interpretations

63 I am precluded from adopting Interpretation 1 by *Ying Tai Plastic*. It is clear from that decision that s 33(2)(a) WCA cannot be read literally as precluding withdrawal just because a Compensation Claim has been made.

64 I do not consider Interpretation 2 to be correct because the Commissioner's assessment, by itself, is not a final determination of the workman's Compensation Claim until it becomes an order. The fact that it is not meant to be final is apparent from the scheme of the WCA and WICA provisions applicable in the present case. Either party still has some time after service of the assessment to object to the assessment.

65 Interpretation 4 is not correct. Interpretation 4 was the interpretation adopted in *Chua Ah Beng*. Tay JC's reasons for his view in *Chua Ah Beng* were two-fold (*Chua Ah Beng* at [32]-[33]). First, he considered that it was not clear from the WCA provisions whether a workman who fails in his Compensation Claim may subsequently commence a General Law Claim (*Chua Ah Beng* at [32]). Second, Tay JC was persuaded by the speech of the Minister for Labour at the second reading of the Workmen's Compensation Amendment Bill (Bill No 3 of 1971) where the Minister mentioned that the purpose of workmen's compensation was to "assure workers" of compensation if they are injured in accidents arising out of or in the course of their employment (*Chua Ah Beng* at [33]).

66 My view is that a workman must withdraw his Compensation Claim before proceeding with a General Law Claim. If he is unable to withdraw his Compensation Claim, he cannot proceed with a General Law Claim. He will not be able to withdraw his Compensation Claim once an *order* is made on his Compensation Claim. As for the Minister's reference to assuring workers of compensation, my view is that while WCA was intended to facilitate the payment of some compensation to an injured workman, it still does not guarantee compensation. For example, a prerequisite to obtaining compensation under WCA is that the workman must have suffered a "personal injury by accident arising out of and in the course of his employment" (s 3(1) WCA).

67 Interpretation 5 is also not correct. Interpretation 5, in effect, gives *no substance* whatsoever to the Section 33 Prohibition because it allows a General Law Claim to be made even when it is no longer possible to withdraw a Compensation Claim. On Interpretation 5, the workman is free to pursue a General Law Claim even in the face of an order, with the only restriction being the limitation period for his General Law Claim under the Limitation Act (Cap 163, 1996 Rev Ed). Quite apart from the Section 33 Prohibition, this interpretation gives no weight to considerations of finality and double jeopardy. Furthermore, this interpretation glosses over the point that the Compensation Claim *merges* into the order made on the Compensation Claim. It is also not apt to say, as the District Judge has said in the present case (*Yang Dan* at [33]), that there is no express law prohibiting a workman from maintaining a General Law Claim once he has failed in his Compensation Claim. The scheme of the WCA and WICA provisions applicable in the present case, in particular ss 24, 25 and 33 WCA, provides the basis for the prohibition.

Conclusion

68 The correct interpretation of s 33(2)(a) WCA is that a workman may proceed with a General Law Claim even after the Commissioner has *assessed* that zero compensation is payable on his Compensation Claim provided that he first withdraws his Compensation Claim. However, once an order has been made on the Compensation Claim, it will be too late for the workman to withdraw his Compensation Claim to pursue a General Law Claim.

69 It follows from this interpretation that the appeal should be allowed because the respondent did not withdraw his Compensation Claim before the order of 7 May 2008 was made.

70 I had initially decided to allow the appeal after hearing arguments on 11 August 2010. My decision at that point was motivated by my concerns with finality and double jeopardy, as well as what seemed to me to be a conceptual impossibility of withdrawing a Compensation Claim after it has been *assessed*. The respondent then made an application for further arguments. In view of the fact that workers' rights were at issue, I decided to hear further arguments. After further arguments and further consideration, I have reached the conclusion that my initial decision was correct, albeit it is now my view that it is possible to withdraw a Compensation Claim even after assessment, provided that an order has not been made. I thank counsel for their assistance.

71 In the circumstances, I affirm my earlier decision on 11 August 2010 to allow the appeal. I will hear parties on costs.