

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO 2109 OF 2013**

BETWEEN

CHEUNG YUEN YING

Plaintiff

and

INTEGRATED DISPLAY TECHNOLOGY LIMITED Defendant

Before: Deputy District Judge Liu Man Kin in Court

Dates of Hearing: 28-30 October 2015

Date of Judgment: 16 November 2015

JUDGMENT

INTRODUCTION

1. This is a personal injuries claim by the plaintiff (“Madam Cheung”) against the defendant (“IDT”), in relation to an accident (“the Accident”) happened at the Hong Kong Convention and Exhibition Centre in Wanchai (“the Exhibition Centre”) during the Hong Kong Electronics Fair 2010. IDT participated in that exhibition and had an exhibition

counter (“the Exhibition Counter”) in the Exhibition Centre, in which there was a booth (“the Booth”). The Accident occurred on 13 October 2010 at about 9:30 am. At the time of the Accident, Madam Cheung was employed by IDT to work as a cleaner at the Exhibition Counter.

2. A photo (“the Photo”) and a layout plan (“the Layout Plan”) exhibited to the witness statement of Madam Lo Yuen Kam (“Madam Lo”, IDT’s administrative manager) as “LYK-2” and “LYK-3” respectively would illustrate the Exhibition Counter and its environment. For ease of reference, the said photo and layout plan are annexed to this judgment as Annex 1 and Annex 2.

3. As shown in the Photo and in the Layout Plan, the Booth was inside the Exhibition Counter and had 2 floors. There were some display showcases inside the Exhibition Counter and around the Booth. The lower floor of the Booth was elevated from the ground. The height of the elevated platform (“the Platform”) was about 4 inches. There was concealed light (“the Concealed Light”) under the Platform. There was a pantry on the 2nd floor of the Booth.

4. On 13 October 2010, just before the occurrence of the Accident, Madam Lo instructed Madam Cheung to clean the showcase marked as Y (“the Showcase”) on the Layout Plan by using a designated cloth. Madam Cheung at that time stood at the position marked as X. I will set out my finding on the exact location of X later in this judgment. Having received the instruction from Madam Lo, Madam Cheung turned around to move towards the Platform to go to the Pantry to get the cloth. Madam Cheung fell at the edge of the Platform. The position where Madam

Cheung fell is marked as Z on the Layout Plan. This is the Accident.

MADAM CHEUNG'S CASE

5. Madam Cheung's claims that the Accident was caused or contributed by the negligence, the breach of common duty of care under the Occupier's Liability Ordinance, breach of statutory duties under the Occupational Safety Health Ordinance, and/or breach of implied terms of contract of employment by IDT. The essence of all these claims is that the Platform was unsafe. According to Madam Cheung's case, the Platform was unsafe because it was "an elevated platform of about the (sic) 4 inches high which had not been made conspicuous and distinct in the exhibition counter designed or set up by the defendant" – as per paragraph 4(d) of the statement of claim.

6. As per the revised statement of damages, Madam Cheung claims the following damages:-

| | <u>HK\$</u> |
|--|-----------------------|
| (a) PSLA | \$350,000.00 |
| (b) Pre-trial Loss of Earnings | \$361,633.24 |
| (c) Post-trial Loss of Earnings | \$510,678.00 |
| (d) Loss of Earning Capacity | \$100,000.00 |
| (e) Future Medical Expenses | reserved |
| (f) Special Damages | \$188,890.60 |
| Sub-total | <u>\$1,511,201.84</u> |
| Less: Employee's Compensation Received | \$218,468.60 |

| | |
|-------|-----------------------|
| Total | <u>\$1,292,733.24</u> |
|-------|-----------------------|

7. Madam Cheung expressly waived any amount of damages to be awarded which exceeds HK\$1 million to give this court jurisdiction to hear her claim.

IDT'S CASE

8. IDT denies liability. IDT's case is that the Platform itself was brown and the floor of the exhibition counter was covered by green carpet. The Exhibition Counter was well lit. The Concealed Light was on. The Platform was firm and secured. The Exhibition Counter was well spaced. Madam Cheung tripped because she was not paying attention to where she was walking and was oblivious of the environment at the Exhibition Counter.

9. As an alternative, IDT claims that the Accident was caused materially or contributed by the negligence of Madam Cheung.

10. On the question of quantum, as per IDT's answer to the revised statement of damages, IDT claims that even if IDT is entirely liable, the quantum should not be more than the followings:-

| | <u>HK\$</u> |
|--------------------------------|-------------|
| (a) PSLA | \$80,000.00 |
| (b) Pre-trial Loss of Earnings | \$12,453.38 |
| (c) Post-trial Loss of Earning | Nil |
| (d) Loss of Earning Capacity | Nil |

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| (e) | Future Medical Expenses | Nil |
| (f) | Special Damages | \$5,000.00 |
| | Total | <u>\$97,453.38</u> plus interest |

THE EVIDENCE

11. Each party has called 1 factual witness. Madam Cheung's has given evidence in support of her case. IDT's factual witness is Madam Lo. Apart from the evidence from these witnesses, the documents in the agreed trial bundles, including 2 joint medical reports prepared by Dr Ko Put Shui, Peter ("Dr Ko") appointed by Madam Cheung and Dr Tsoi Chi Wah, Danny ("Dr Tsoi") appointed by IDT dated 15 July 2013 ("the 1st Joint Report") and 22 August 2015 ("the 2nd Joint Report") respectively, and the video footages ("the Video Footages") produced by IDT showing the environment of the Exhibition Counter in the afternoon on 13 October 2010 and on 14 October 2010, are also evidence before this Court.

12. Both Dr Ko and Dr Tsoi are specialists in Orthopaedics & Traumatology. I accept that both of them are qualified to give expert evidence in this case.

13. The gist of Madam Cheung's evidence is as follows:-

- (a) Madam Cheung began to work in IDT on 31 July 2007 as a cleaner on contract terms.
- (b) One week before the Hong Kong Electronics Fair 2010, Madam Lo instructed Madam Cheung to go to the Exhibition Centre on 13 October 2010, which was the

first day of the exhibition, to clean the Exhibition Counter and to serve clients with tea.

(c) On 13 October 2010, Madam Cheung arrived the Exhibition Counter at around 8 am and started the cleaning work there. This is accepted by IDT.

(d) Before she finished the cleaning work, at around 8:45 am, the boss of IDT arrived and Madam Cheung had to prepare coffee and tea for everyone. Reporters and clients came one after another at 9:20 am. There were around 30 people at the Exhibition Counter. Madam Lo only arrived at around 9:30 am.

(e) After arriving the Exhibition Counter, Madam Lo found that the Showcase was not entirely clean, and she roared at Madam Cheung furiously and ordered Madam Cheung to get a designated cloth to clean the Showcase again.

(f) When Madam Lo was speaking to Madam Cheung, Madam Lo was facing the Platform and the Showcase was immediately behind Madam Lo. Madam Cheung was facing Madam Lo, with the Platform behind Madam Cheung's back. The distance between Madam Cheung and the Showcase was around 18 inches.

(g) Madam Cheung's evidence is that the distance between

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the Showcase and the Platform was about 1 meter. So according to Madam Cheung, position X would be a point around 21 inches away from the Platform.

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(h) Madam Cheung followed the order, turned around and rushed towards the Pantry to get the cloth. When she was about to reach the Platform, she tripped over and lost balance. She fell towards her right-hand side and fell on the ground. Feeling embarrassed, she got up by herself immediately. She endured the pain and continued to work.

(i) There was no lighting or special direction on the Platform. The colour of the floor and the colour of the Platform were very similar, i.e. grey in colour.

(j) After the Accident, a Japanese client also fell without noticing the Platform.

(k) At about 10:30 a.m. on 13 October 2010, the big boss of IDT, Mr. Chan, also tripped once because he did not see the elevated platform. Fortunately, he did not fall on the ground.

(l) On 14 October 2010, when Madam Cheung returned to work at the Exhibition Counter, there were black-yellow tapes and “mind your step” labels on the floor.

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(m) Madam Cheung continued to work in the Exhibition Centre until 16 October 2010. Thereafter, she sought various treatments.

(n) Madam Cheung injured her right knee in the Accident. Gradually, since she started to shift her body weight to the left side to alleviate the pain on her right knee, her left knee also started to have pain. Since the right knee pain was so bad, she decided to undergo an arthroscopic chondroplasty operation on 18 September 2014.

(o) In early 2015, Madam Cheung started to seek treatment for complaints of psychiatric symptoms.

(p) Madam Cheung said that as a result of the Accident, she was unable to do any job. She had found a job as a cleaning worker in the airport in September 2012, but she was unable to do the job and quitted after 2 days. She also tried to work as a salesperson at the tuck shop in a school on 2 October 2012, but since the job requiring her to stand for a long time and to move lunch boxes, she quitted the job after one day.

14. The essence of Madam Lo's evidence is as follows:-

(a) Madam Lo was and is the administrative manager of IDT.

(b) Madam Cheung was employed by IDT as an Amah

since 8 June 2009.

(c) Madam Lo and Madam Cheung were responsible for the cleanliness of the Exhibition Counter. The exhibition was from 13 to 16 October 2010.

(d) On 13 October 2010 at about 9:30 am, the exhibition had not yet started. There was no reporter or client inside the Exhibition Counter. The staff members were busily doing preparation at the Exhibition Counter. The lighting of the Booth, including the Concealed Light, had been switched on. Madam Lo was standing on the green carpet observing the display showcases.

(e) Madam Lo discovered that there was water stain on the glass of the Showcase. She asked Madam Cheung to come to see the water stain, and instructed Madam Cheung to clean it with a window cloth. At this point of time, Madam Lo and Madam Cheung were standing side by side, both of them were facing the Showcase, and Madam Cheung was standing at the right-hand side of Madam Lo. Both of them were standing around 2 feet away from the Showcase.

(f) Madam Lo did not shout at Madam Cheung, but she only asked Madam Cheung to get the cloth to remove the water stain. She did not ask Madam Cheung to do it urgently.

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(g) Madam Cheung turned around and went to the stairs. She was tripped by the Platform and fell on the Platform. She used one of her hands to support herself, and shortly thereafter, stood up and walked up the stairs.

(h) Madam Lo produced the Photo and the Layout Plan to show the environment of the Exhibition Counter and the Platform.

15. I find that Madam Cheung is an unreliable witness. Her evidence is contradicted by documents and the Video Footages in many aspects, and by medical evidence produced by her. There can be no satisfactory explanation as to these discrepancies. The only explanation is that Madam Cheung confused on some essential issues, and she has also exaggerated her injuries.

(a) Madam Cheung insisted that the Platform and the floor of the Exhibit Counter were of similar colour, ie grey. This is simply incorrect. As shown by the Photo and the Video Footages, the Platform was brown in colour, while the floor of the Exhibit Counter was covered by green carpet.

(b) Madam Cheung in her supplemental statement dated 13 February 2015 said that “there was no lighting or special direction on the platform”. Under

cross-examination, Madam Cheung agreed that the environment lighting was bright. However, when being shown the Photo and the Video Footages (which showed that the Exhibition Counter and the Platform were well lit), Madam Cheung kept on saying that there was no lighting. Madam Cheung's saying that "there was no lighting on the platform" is unreliable.

(c) As shown in the Video Footages, the distance between the Showcase and the Platform should be much more than 1 meter. That distance should be about 5 feet.

(d) When Madam Lo was telling Madam Cheung that a part of the Showcase was unclean, Madam Lo would point to that part to show it to Madam Cheung. In doing so, naturally both Madam Lo and Madam Cheung would face the Showcase and stand close to the Showcase. As to the respective positions of Madam Lo and Madam Cheung at this point of time, Madam Cheung's account is inherently improbable.

(e) It is inherently improbable that while there were reporters and clients inside the Exhibition Counter, Madam Lo would roar at Madam Cheung furiously.

(f) Mr Ashok Sakhrani, Counsel for IDT, referred Madam Cheung to a medical report produced by Madam Cheung dated 13 February 2014 ("the 2014 Feb Report"). That medical report was written by Mr Chu

Hong Man (“Mr Chu”), a registered Chinese Medicine Practitioner, concerning the consultation on 8 November 2010. In that medical report, Mr Chu said “The patient fell down floor carelessly 3 weeks ago, causing the above symptom.” Mr Sakhrani asked Madam Cheung why she told her doctor that she fell down floor carelessly. Madam Cheung denied she had told this to her doctor. I reject this explanation. The doctor would not state this in the report unless Madam Cheung told him. Further, if there is anything incorrect in the medical report, there was ample time before trial to ask Mr Chu to make the necessary correction.

(g) Mr Sakhrani also referred Madam Cheung to a physiotherapy report dated 15 June 2012 by Ms CN Chan of Kwong Wah Hospital. In that report, Ms Chan recorded that the first physiotherapy appointment was on 1 February 2011. Madam Cheung completed a total of 12 sessions of physiotherapy and was discharged on 11 May 2011 as her progression was static. Madam Cheung also reported 80% overall subjective improvement. Mr Sakhrani asked Madam Cheung that according to this report, her condition was much improved by May 2011. Madam Cheung denied and said she did not tell the physiotherapist these. For the same reasons set out in subparagraph (f) above, I reject this explanation.

(h) In the 1st Joint Report (concerning the examination of Madam Cheung on 30 April 2013), Dr Ko and Dr Tsoi said in paragraph 10.9 of the report:-

“Resumption of duty

Dr. Ko opines that Madam Cheung should be able to resume her work as a cleaning worker with mild impairment of her work efficiency and effectiveness as she may have difficulty in lifting of heavy weight, squatting and kneeling down. Regarding the effect of the soft tissue contusion of her right knee, Dr. Tsoi opines that Madam Cheung can resume her pre-injury job in almost full capacity.”

In the light of this joint report, Madam Cheung’s claim that she is unable to do any job as a result of the Accident is clearly an exaggeration.

(i) Paragraph 10.3 of the 1st Joint Report records the following:-

“At the time of this assessment, which is about 2.5 years after the alleged accident, Madam Cheung complains of persistent right anterior knee pain with limited walking tolerance and difficulty in walking on stairs. She also has similar complains on the left knee. Examination findings showed decrease active range of motion of the right knee and obvious resistance present on trying to have passive flexion further. The manifestation of signs and performance at the physical examination is quite disproportionate to the magnitude of the injury that she sustained on 13 October 2010. It cannot be fully explained on her MRI findings which only showed chondromalacia changes without any significant structural abnormality or injury. Some degree of magnification or exaggeration could not be excluded. It is not uncommon in this situation because of the long duration of treatment with persistent symptoms. It could be a gesture of the injured individual trying to impress

the examiner and may be taken as a means trying to express the degree of suffering and pain because of the poor communications skills, which is not unexpected in view of the education background.

Dr. Tsoi would like to summarize that Madam Cheung was exaggerating her disability. There is no medical explanation for her failure in single leg standing and loss of flexion 30 deg. The absence of muscle wasting further suggested that her “injured” right knee is not worse than the uninjured left one.”

Significantly, Dr Ko has not expressed any disagreement with Dr Tsoi on this point. This is clear evidence showing that Madam Cheung has exaggerated her injuries.

16. Since I have concluded that Madam Cheung’s evidence is unreliable, I do not accept the allegation that a Japanese client fell on the Platform, and the allegation that the big boss of IDT tripped by the Platform. Save and except the bare assertions by Madam Cheung, these allegations are unsupported by any evidence.

17. I reject Madam Cheung’s evidence. Save and except the matters accepted by IDT, the matters shown in the documents in the agreed trial bundles and in the Video Footages, and the admissions made by Madam Cheung which are adverse to her case, I would not rely upon Madam Cheung’s evidence to make any findings.

18. I find that Madam Lo is an honest and reliable witness.

(a) Madam Lo has given clear and consistent evidence.

She was not shaken in cross-examination. She was not evasive, and did not exaggerate anything. Her evidence is credible and inherently probable.

(b) As said above, in respect of the respective positions of Madam Cheung and Madam Lo when Madam Lo was asking Madam Cheung to clean the Showcase, I am of the view that Madam Cheung's account is inherent improbable. Madam Lo's account is the truth.

(c) Mr Albert Yau, Counsel for Madam Cheung, challenged Madam Lo during cross-examination that Madam Lo's account of the respective positions could not be true, for Madam Lo said that she was speaking to Madam Cheung face to face, and when 2 persons standing side by side, they could not speak to each other face to face. With respect to Mr Yau, I do not regard this as a valid challenge. When 2 persons are standing side by side, by slightly turning their heads, they can certainly speak to each other face to face.

(d) Madam Lo said when she spoke to Madam Cheung, she did not raise her voice and only spoke in a normal way because it was a public venue. When being pressed in cross-examination, Madam Lo said she would not say she would speak politely to colleagues but she would speak gently and that because she needed to manage her colleagues, and hence she would need to give

instructions. These answers are in accordance with common sense.

(e) Madam Lo said she did not urge Madam Cheung to clean the Showcase urgently. She said she made no complaint against Madam Cheung. She said she and Madam Cheung had cleaned together that morning, and there was nothing particular about the Showcase. I accept the evidence. Madam Cheung was continuously doing cleaning works at the Exhibition Counter that morning. In fact, Madam Lo said that all the staff members were busy at the Exhibition Counter. There was only a water stain on the Showcase. Being an administrative manager in charge of the cleanliness of the Exhibition Counter, Madam Lo certainly would be aware of the fact that Madam Cheung had to do other cleaning works (including cleaning other showcases inside the Exhibition Counter), which would not be less important than removing the water stain on the Showcase. It is unlikely that Madam Lo would instruct Madam Cheung to put aside all other cleaning works and to remove the water stain at once.

19. I accept Madam Lo's evidence.

20. Wherever there is conflict between Madam Cheung's evidence and Madam Lo's evidence, I prefer Madam Lo's evidence.

LIABILITY

21. Based upon the evidence which I found to be reliable, I make the following factual findings:-

(a) The environment of the Exhibition Counter and the Booth is shown in the Photo and in the Layout Plan.

(b) The height of the Platform was about 4 inches from the Floor.

(c) The Platform was brown and the floor of the exhibition counter was covered by green carpet.

(d) Before the occurrence of the Accident, the Exhibition Counter was well lit. The Concealed Light was on.

(e) The distance between the Showcase and the Platform was about 5 feet.

(f) Before the occurrence of the Accident, Madam Cheung had worked at the Exhibition Counter for about 1½ hours. The exhibition had not yet started. There was no reporter or client inside the Exhibition Counter. The staff members were busily doing preparation at the Exhibition Counter.

(g) Madam Lo asked Madam Cheung to come to the Showcase to see the water stain thereon. They were

standing side by side facing the Showcase, and Madam Cheung was standing at the right-hand side of Madam Lo. Madam Lo instructed Madam Cheung to remove the water stain with a window cloth. Madam Lo did not shout at Madam Cheung, and did not ask Madam Cheung to remove the water stain urgently.

(h) Both of them were standing around 2 feet away from the Showcase. In other words, at that time, the distance between the Platform and Madam Cheung was at least 3 feet. I find that position X on the Layout Plan should be at least 3 feet from the Platform.

(i) Madam Cheung turned around and moved towards the staircase, but was tripped by the Platform and fell on the Platform.

22. Mr Sakhrani told me that in the afternoon on 13 October 2010, at a time between 3-4 pm, IDT placed 2 labels (“the Labels”) near the edge of the Platform, each label bearing the wording “Mind the Step” and its corresponding Chinese. Further, IDT accepted that a yellow strip (“the Yellow Strip”) were added to the edge of the Platform after the Accident.

Platform not unsafe

23. Given my findings in paragraph 21 above, I hold that the Platform was not unsafe. The Platform has been made conspicuous and distinct by the different colours separating the Platform and the floor of the

Exhibition Counter. Further, the Exhibition Counter was well lit and the Concealed Light was on before the occurrence of the Accident. Anyone inside the Exhibition Counter could easily see the Platform. Further, the distance between the Showcase and the Platform was about 5 feet, which I consider to be sufficient distance.

Precautions taken later not proof of negligence

24. There is no doubt that IDT added the Yellow Strip and the Labels to the Platform after the Accident. However, there is equally no doubt that precautions taken after the accident is not proof of negligence. See *Jaguar Cars Ltd v Coates* [2004] EWCA Civ, [9]-[11]. See also *Gray v Admiralty* [1953] 1 LI LR 14.

25. In order to establish liability by relying on the addition of the Yellow Strip and the Labels after the Accident, Madam Cheung has to prove the absence of the Yellow Strip and the Labels caused or contributed to the occurrence of the Accident. The burden of establishing this causation is on Madam Cheung. The authority on the point is the Court of Appeal's decision in *Cheng Loon Yin v SJ and Another* [2006] 1 HKLRD 871.

26. There is no evidence establishing the causation.

27. The presence of the Yellow Strip and the Labels after the Accident cannot attribute any liability to IDT.

No failure in taking reasonable care for the safety of Madam Cheung

28. As Madam Cheung's employer, IDT had the duty to take reasonable care for the safety of Madam Cheung. However, whether IDT has breached this duty must be viewed in context.

29. In *Fong Yuet Ha v Success Employment Services Limited* (CACV 100 of 2012, Date of Reasons for Judgment: 28 December 2012), Kwan JA said at §19:-

"..... it is a question of fact in each case whether it is necessary for the employer to devise a system of work for the task in hand. The judge decided that in the circumstances of this case, the need for a system of work to be prescribed was not made out. In paragraph 38 of the judgment quoted above, the judge referred to *Winter v Cardiff Rural District Council* and some of the cases in Hong Kong that applied this case. They were all situations where the court held on the facts that the operation was simple and it was reasonable that the employee could be trusted to exercise his common sense to carry out the operation without the need for the employer to prescribe a system of work or give specific instruction or advice how the task should be done."

30. In *Lam Ka Lok Louis v Swire Properties Management Ltd* (HCPI 914/2003, Date of Judgment: 30 April 2005), Suffiad J said at §39:-

"The law does not require an employer to treat its workers, in the carrying out of their everyday normal jobs which do not entail any special risk or damage by the workers, as though they were kindergarten pupils who if not told, would not be aware of the kind of common everyday risks that a reasonable person should be aware of."

31. I have already held that the Platform was not unsafe. It was conspicuous and distinct, and was illuminated with the environment lighting and the Concealed Light. The distance between the Showcase and

the Platform was about 5 feet, which in my view is a sufficient distance. In my judgment, by providing all these, IDT has discharged its duty of taking reasonable care of its employees, including Madam Cheung. Anyone paying due care and attention would see the Platform. IDT could entrust Madam Cheung to exercise her common sense to pay attention to the Platform without giving her any specific instruction.

32. In his final submissions, Mr Yau submitted that if Madam Cheung was asked to work under a very tight schedule, corresponding warning or supervision should have been given so as to enable her to go about with her work in reasonable safety and not to expose her to unnecessary risk. With respect, I am unable to accept this submission.

(a) I have gone through Madam Cheung's pleadings, and I conclude that the point put forward by Mr Yau is an unpleaded point. That being the case, Madam Cheung is not entitled to run this point. As said by Ribeiro PJ in *Sinoearn International Ltd v Hyundai – CCECC Joint Venture* (2013) 16 HKCFAR 632 at §30:-

“..... A party must raise all the issues he wishes to raise to be dealt with at the trial. Parties are not entitled to have issues recently thought up dealt with separately and piecemeal. The other party is entitled to know from a clear pleading what is the entire case he has to meet so that he can decide whether particulars should be sought; how he should plead in response; what discovery he is entitled to; what evidence he should adduce to meet it; and what points of law should be taken

(b) Further, while the Platform was not unsafe and was conspicuous and obvious to the eyes, it would be

reasonable for IDT to trust Madam Cheung that she would exercise her common sense and pay due care and attention when stepping on and off the Platform.

- (c) It is not clear what is the “corresponding warning or supervision” in Mr Yau’s argument. Further, there is no evidence showing that the absence of the “corresponding warning or supervision” caused the Accident. Without evidence establishing causation, Mr Yau’s argument cannot succeed in any event.

Madam Cheung not paying due care and attention

33. In my judgment, IDT is not negligent and has not breached any duty. The Accident is not caused by any fault on IDT’s part.

34. I find that Madam Cheung did tell Mr Chu in the consultation on 8 November 2010 that she fell down carelessly, and I attach full weight to that description in the 2014 Feb Report.

35. The cause of the Accident is that Madam Cheung had failed to pay due care and attention to the Platform, which was conspicuous and obvious to the eyes, and would be seen by anyone paying proper attention.

IDT not liable

36. Accordingly, IDT is not liable to Madam Cheung. I would dismiss Madam Cheung’s claim.

QUANTUM

37. Although I am not with Madam Cheung on liability, for the sake of completeness, I would set out my opinion on quantum below.

Injuries caused by the Accident

38. Even if Madam Cheung can establish liability, she can only require IDT to pay damages in respect of injuries caused by the Accident but not anything else. This is an important point to be borne in mind.

39. In *Hung Sau Fung v Lai Ping Wai* [2012] 1 HKLRD 1, Bharwaney J said:-

“63. Salmon LJ, as he then was, posed the question of causation in these terms in *James v Woodall Duckham Construction Co Ltd* [1969] 1 WLR 903 at 906C-E:-

“... If a man pretends that he is suffering from great disability when he knows very well that he is not, and he tells his doctor he is suffering from pains all over when he feels no pain at all, he may well talk himself into believing that he is suffering from pain. He will suffer from pain in the future, and then he will not be malingering because the pain will be real. But that will not be a pain which has been caused by the accident: the accident will merely be the occasion out of which or after which the pain occurred, and the pain will have been caused by the man malingering – it will be self-induced.”

.....

65. Ashworth J in *Bowen v Mills & Knight Ltd* [1973] 1 Lloyd’s Rep. 580 said at p 586 :

“It is a truism in the law that the defendants who have injured a plaintiff must take him as they find him, and if

defendants injured a man of unusual personality, and that personality is adversely affected by the incident, then the defendants must pay compensation therefor where they would not have expected to do so with a man of normal personality. But equally, it is a true statement of principle that a plaintiff must take himself as he is and not seek to obtain compensation from the defendants for the results which are not from their wrongdoing, but from his own personality.”

.....

67. The question of causation is essentially a question of fact for the trial judge to determine, assisted by the evidence of the medical experts and the evidence of the claimant.”

40. In determining the injuries caused by the Accident, I have considered the 2 joint reports by Dr Ko and Dr Tsoi and other documents in the agreed trial bundles. The 1st Joint Report concerns the joint medical examination on 30 April 2013. The 2nd Joint Report is a response by the 2 doctors to some documents provided by the parties in 2015.

41. In the 2 joint reports, Dr Ko and Dr Tsoi have different opinions on some issues. These differences are due to the fact that Dr Ko’s opinion is based upon Madam Cheung’s words, while Dr Tsoi has declined to act on what Madam Cheung has said, for Dr Tsoi takes the view that Madam Cheung has exaggerated her injuries.

42. I have concluded that Madam Cheung is an unreliable witness and she has exaggerated her injuries. Accordingly, Dr Tsoi is right in declining to accept what Madam Cheung has said in making the medical assessment. For this reason, wherever there is difference between Dr Ko’s opinion and Dr Tsoi’s opinion, I prefer Dr Tsoi’s opinion.

43. The 2 doctors opined that Madam Cheung had the following diagnoses:-

- (a) Right knee contusion injury;
- (b) Chondromalacia right knee; and
- (c) Left knee pain.

44. The 2 doctors agreed:-

- (a) The right knee contusion injury should be the sole and direct result of the Accident.
- (b) The chondromalacia should be pre-existing and bear no direct causal relationship with the injury.
- (c) The left knee pain should bear no direct causal relationship with the injury.

45. In respect of the chondromalacia, Dr Ko in the 2nd Joint Report gave an opinion that the Accident triggered the pre-existing degeneration to become symptomatic. I do not accept this opinion.

- (a) Dr Ko has not explained why but for the Accident Madam Cheung would not have developed symptoms, while knee pain is a frequent complaint of people as they age.

(b) Dr Ko's opinion is contradicted by his reliance on the opinion of the treating doctors that the surgery in September 2014 was mainly for her degenerative changes at the patellofemoral joint and the medial tibiofemoral joint and this bears no causal relationship with the alleged accident on 13 October 2010.

(c) Dr Ko has failed to take into account that Madam Cheung has exaggerated her injuries.

46. In respect of the left knee pain, Mr Yau submitted that this should be regarded as caused by the Accident, as a person would naturally shift his or her body weight to the left-hand side after injuring his or her right knee. However, I have found Madam Cheung as an unreliable witness, and I have also found that she has exaggerated her injuries. There is no reliable evidence before me proving the existence of the left knee pain. Further, even if the left knee pain exists, both Dr Ko and Dr Tsoi did not say that the pain was caused by the Accident. The cause of that pain (if any) remains unknown.

47. There are documents showing that Madam Cheung started to seek treatment for complaints of psychiatric symptoms in early 2015. However, there is no plea in the Revised Statement of Damages suggesting that as a result of the Accident, Madam Cheung has suffered from any psychiatric illness. Further, there is no evidence showing that the Accident has caused Madam Cheung to suffer from any psychiatric illness. I am unable to find any causal relationship between the Accident and the psychiatric symptoms complained by Madam Cheung.

48. I find that the only injury caused by the Accident is the right knee contusion.

As a result of the injury

49. Dr Ko takes the view that Madam Cheung's sick leave should be up to around 18 months for treatment of contusion injury to a chondromalacia knee. Dr Tsoi's opinion is that for a simple soft tissue contusion knee, the sick leave should be limited to 3 months. I agree with Dr Tsoi.

(a) I have found in the above that only the right knee contusion is caused by the Accident. Accordingly, in considering the appropriate sick leave period, only the right knee contusion should be considered.

(b) Dr Ko's assessment is based upon Madam Cheung's words, which are found to be unreliable in this judgment.

50. Madam Cheung said that she had jogging 4 times in a month before the Accident. Dr Ko's opinion is that jogging is probably not a good choice to Madam Cheung. Dr Tsoi agrees but states that this is mainly due to the pre-existing bilateral chondromalacia. I accept Dr Tsoi's opinion. Accordingly, that Madam Cheung is unable to continue to enjoy jogging is not related to the Accident.

51. Both Dr Ko and Dr Tsoi are of the opinion that Madam

Cheung should have no problem in management of her usual activities of daily living and self-care activities. The 2 doctors also take the view that Madam Cheung would be able to resume her work as a cleaning worker.

52. For loss of earning capacity, Dr Ko's estimation of permanent whole person impairment is 2% - 3%, while Dr Tsoi's estimation is 1%.

PSLA

53. I am of the view that Madam Cheung's situation is similar to the situations in the following cases:-

- (a) In *Yip Leung Hoi v Tin Wo Engineering Co Ltd & Others*, (HCPI 1026/2004, Date of Judgment: 29 March 2007), in the 1st accident, the plaintiff suffered from left knee swelling due to joint effusion. There was no external wound or bruising. The plaintiff could not flex his left knee completely because of the effusion. Tapping of the effusion from the left knee was performed with about 20 to 30 cc of clear fluid yielded. The plaintiff could flex his left knee better after the tapping. In the 2nd accident, the plaintiff suffered from tenderness and decrease in the range of movement of his left shoulder. There were tenderness and swelling over both knees without loss of range of movement. His left shoulder and both knees showed no abnormality under X-rays. MRI examination showed mild left knee effusion, a small medial meniscus tear and swollen anterior cruciate ligament in

his left knee joint. In his judgment of March 2007, Master KH Hui awarded \$180,000.

(b) In *Chung Wai Hung v Chung Wai Ming* [2009] 4 HKLRD G5, the plaintiff, a general worker suffered a cut injury to his left knee and on examination it was found he had sustained a deep wound over the left anterior knee, deep to the proximal tibia with a minor crack over the lateral cortex, contamination of the wound, and a tear of the patella tendon over the left anterior knee. He was hospitalized for nine days during which he underwent operative exploration, removal of the debris, debridement, and repair of the tendon. He was a protective knee brace for 6 weeks after surgery. At trial he still complained of mild muscle wasting, walking with a slight limp, persistent pain in the left knee and pain with straightening his left leg, running, squatting and on stairs. In July 2008, HHJ David Lok awarded \$180,000.

54. I take the view that Madam Cheung's injury is relatively less serious than the injuries suffered by the plaintiffs in the aforesaid cases. However, I have to take inflation into account. I come to the conclusion that the appropriate award under this head should be HK\$180,000.

Pre-trial loss of earnings

55. IDT agrees that at the time of Accident, Madam Cheung was

earning HK\$7,188.10 plus MPF per month.

56. I have already found that the appropriate sick leave period should be 3 months.

57. Both Dr Ko and Dr Tsoi agree that Madam Cheung should be able to resume her work as a cleaning worker.

58. Accordingly, the appropriate award under this head should be HK\$7,188.10 x 1.05 x 3 months = HK\$22,642.50.

Post-trial loss of earnings

59. The medical evidence is clear – Madam Cheung can resume her work as a cleaning worker.

60. I refuse to make any award under this head.

Loss of earning capacity

61. It is true that Madam Cheung suffers from some permanent whole person impairment as a result of the Accident. However, in order to get an award under this head, Madam Cheung has to adduce reliable evidence to show how far her earning capacity as a cleaning worker would be adversely affected by the impairment. See *Chan Wai Tong & Another v Li Ping Sum* [1985] HKLR 176 at 183D, and *Cai Guoping v Yim Hok Wing*

and Another (CACV 96/2015, Date of Judgment: 9 September 2015) at §62.

62. There is no reliable evidence enabling me to make an award under this head.

Future medical expenses

63. Madam Cheung eventually does not make any claim under this head.

Special Damages

64. Madam Cheung's claim under this head is divided into 3 categories – hospitalization, medical follow-ups, and bonesetter treatments. The total of the expenses is HK\$177,571.10.

65. IDT objects to this claim on the ground that there is no evidence of efficacy of the bonesetter treatment. Further, Madam Cheung saw doctors for a long time because of her persistent complaints against all the medical opinions and her own admission of improvement to the physiotherapist. IDT says that Madam Cheung should only be entitled to have HK\$5,000.00 under this head.

66. Under the 1st category, there are 2 items: (a) expenses in relation to the hospitalization in Hong Kong Baptist Hospital on 20 December 2010, the total of which is HK\$6,525.00; and (b) expenses in relation to the hospitalization in Princess Margaret Hospital from 17 September 2014 to 20 September 2014, the total of which is HK\$450.00.

(a) I would allow the first item. The hospitalization in December 2010 is relatively close to the time of the Accident. The appropriate sick leave period is 3 months, and 20 December 2010 is within the 3-month period. It is reasonable that Madam Cheung would need medical care at this point of time.

(b) I disallow the second item. In the 1st Joint Report concerning the medical examination on 30 April 2013, Dr Ko and Dr Tsoi jointly express an opinion that Madam Cheung's condition should have reached maximal medical improvement and static condition. Hence, the hospitalization in Princess Margaret Hospital from 17 September 2014 to 20 September 2014 should not be related to the Accident.

67. The 2nd category is the medical expenses from 9 November 2011 to 6 October 2014, the total of these expenses is HK\$58,857.00.

(a) Based upon the 1st Joint Report, Madam Cheung has already achieved maximal medical improvement by 30 April 2013. I disallow all the medical expenses after 30 April 2013.

(b) However, Madam Cheung should have sick leave for 3 months. She would need to consult doctors from time to time during the 3-month sick leave period. Further,

after the 3-month periods, she would still need some medical follow-ups in order to have a full recovery.

(c) Madam Cheung has exaggerated her injuries. I agree with Mr Sakhrani that she attended medical consultations more than necessary.

(d) Being all these in mind, I would allow HK\$25,000 under this category.

68. The 3rd category is the expenses in relation to bonesetter treatments, the total of which is HK\$117,739.00.

(a) I accept that there is no evidence proving the efficacy of those treatments.

(b) I note that in respect of expenses on nourishing food, even in the absence of evidence proving the advisability or suitability of the food, the court may still allow a modest sum. See *Yu Ki v Chin Kit Lam* [1981] HKLR 419 and *King Light Industrial Ltd v Lo Wai Keung* [1994] 3 HKC 54.

(c) People in Hong Kong suffering from knee injuries would often consult Chinese bonesetters.

(d) Bearing all these in mind, I am prepared to allow HK\$2,000.00 under the 3rd category.

69. Accordingly, the award under this head would be
HK\$6,525.00 + HK\$25,000.00 + HK\$2,000.00 = HK\$33,525.00.

Findings on quantum

70. My findings on quantum are as follows:-

| | <u>HK\$</u> |
|---|---------------------|
| (a) PSLA | \$180,000.00 |
| (b) Pre-trial Loss of Earnings | \$22,642.50 |
| (c) Post-trial Loss of Earnings | Nil |
| (d) Loss of Earning Capacity | Nil |
| (e) Future Medical Expenses | Nil |
| (f) Special Damages | \$33,525.00 |
| Sub-total | <u>\$236,167.50</u> |
| Less: Employee's Compensation Received | \$218,468.60 |
| Total | <u>\$17,698.90</u> |

71. Had I found in favour of Madam Cheung on liability, I would
have had awarded the aforesaid sums plus interest to Madam Cheung.

CONCLUSION

72. For the reasons above, I dismiss Madam Cheung's claim.

73. I make the following costs order nisi:-

(a) Costs of this action be paid by Madam Cheung to IDT (including all costs reserved, if any) with a certificate for counsel, to be taxed if not agreed;

(b) Madam Cheung's own costs be taxed in accordance with the Legal Aid Regulations.

74. I thank both counsel for the helpful assistance rendered to this court.

(Liu Man Kin)
Deputy District Judge

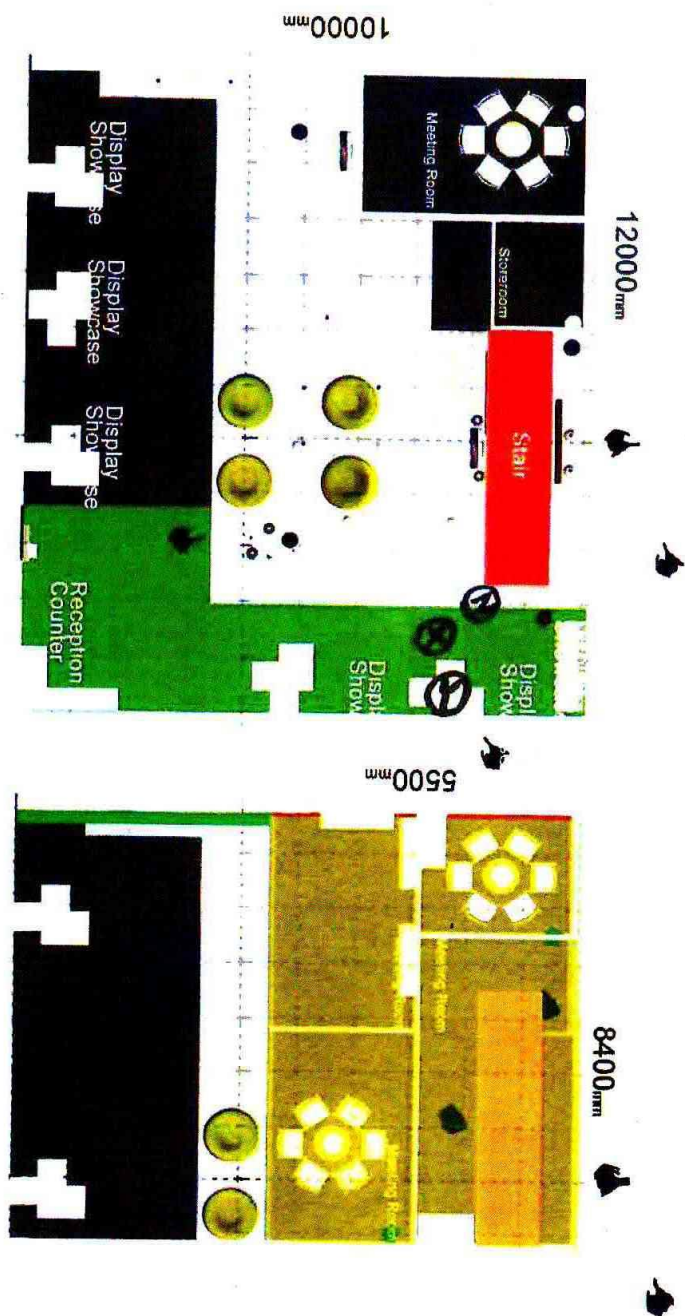
Mr Albert Yau, instructed by B Mak & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Ashok Sakhrani, instructed by Winnie Leung & Co, for the defendant



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