DCPI 983/2020

[2023] HKDC 268

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 983 OF 2020

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BETWEEN

LO KWOK KIT SAM Plaintiff

and

LEUNG KWOK HUNG 1st Defendant

trading as KAISER (M&E) DECORATION

ENGINEERING CO

SHINRYO (HONG KONG) LIMITED 2nd Defendant

MTR CORPORATION LIMITED Non-Party

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Before: Master Louise Chan in Chambers (paper disposal)

Dates of Plaintiff’s Skeleton Submissions: 26 September 2022 &

31 October 2022

Date of Non-party Skeleton Submissions: 24 October 2022

Date of Decision: 20 February 2023

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DECISION

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*Background*

1. By a Writ of Summons issued on 8 May 2020, the Plaintiff brought a claim against the 1st and 2nd Defendants (collectively known as the “Defendants”) in a person injuries action arising out of an accident that occurred during his employment with the 1st Defendant on 18 January 2018 while he was working at the West Kowloon Terminus (“WKT”). The Plaintiff averred that the accident was caused by the negligence and/or breach of statutory duty and/or breach of common duty of care on the part of the Defendants and/or their employees and/or agents.
2. It is the Plaintiff’s pleaded case that he was provided with a ladder to install an electrical conduit inside a room at the basement of the WKT (the “Accident Room”). He was required to step onto a pipe that was fixed horizontally on the floor (the “Pipe”) while descending from the ladder. He alleged that he lost balance when stepping on a pipe and sustained a right knee injury as a result from the fall (“the Accident”).
3. It is the Defendants’ case that, *inter alia*, no pipes were installed in the Accident Room where the Plaintiff was injured and put him to strict proof.
4. Witness statements of the Plaintiff and the Defendants were exchanged on the 3 December 2020. A 吳家成who was employed by the 1st Defendant as an electrician (“Ng”) filed a witness statement. It is not disputed that he attended the scene of the Accident shortly after the Plaintiff called for help and found him sitting on the floor. Ng addressed the Accident Room where he found the Plaintiff as “環境控制系統機房” (the “機房”) and averred there were no pipes fixed on the ground of this 機房 when he was there[[1]](#footnote-1).
5. Evidence revealed that the Plaintiff personally contacted MTR Corporation Limited (“MTR”) on numerous occasions between August and September 2021 in an attempt to seek clarification and/or confirmation as to, amongst other things, the existence of the Pipe in the Accident Room. Later on 4 November 2021, MTR supplied two photos showing a close up of some pipe-like structure (the “2021 Photos”) and a pipe layout plan (the “Layout Plan”) of a room which they averred to be the scene of the Accident. Later on 16 and 18 February 2022, the Plaintiff’s solicitors wrote to MTR asking for further information and an inspection of the room where the 2021 Photos were taken. MTR, however, did not respond further to the Plaintiff’s request after the solicitors for the 1st and 2nd Defendants (“Deacons”) were confirmed to act on behalf MTR on 15 March 2022. The Plaintiff’s request for a site inspection was later rejected on 5 May 2022.
6. By a Summons issued on 12 May 2022 (“the Summons”), the Plaintiff sought, pursuant to section 47B of the District Court Ordinance (Cap 336) and O.29, r.7A of the Rules of District Court (“RDC”), an order that the MTR do allow the Plaintiff, together with no more than two representatives of his solicitors, to enter the WKT for purpose of inspecting and taking photographs of the room where the Accident happened. The Plaintiff in the Summons also sought (but was later withdrawn) that MTR do produce documents listed in the schedule thereto for inspection.

*General Legal Principles*

1. Section 47B of the District Court Ordinance sets out as follows:
2. A party to proceedings in an action, in which a claim is made, may apply to the Court for an order against a person who is not a party to the proceedings for, and the Court may order -
3. the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, a party to the proceedings but which is the subject-matter of the proceedings or as to which any question arises in the proceedings;
4. Whereas O.29, r.7A (6) of the RDC states the following:
5. No such order shall be made if it appears to the Court -
6. that compliance with the order, if made, would result in the disclosure of information relating to a secret process, discovery or invention not in issue in the proceedings
7. As set out in paragraph 29/8/5 of the Hong Kong Civil Procedure 2023, Vol. 1, under O.29, r.2(1), the court may *“make an order in relation to property which is the subject-matter of the cause or matter, or as to which any question may arise therein. The property must be bona fide the subject-matter of the action.[[2]](#footnote-2)”*
8. With the above principles in mind, I turn to the present case.

*Analyses of Factual Evidence*

1. In essence, the Plaintiff has the onus to prove that the inspection of the room where the Accident happened is a crucial issue arising out of the claim rather than a ‘fishing’ expedition as submitted by MTR, which would not assist the trial judge to resolve the disputes between the parties.
2. The Plaintiff in this present case alleged that the Defendants were, *inter alia*, negligent in allowing him to work in a condition in which he had no choice but to step on the Pipe that was fixed on the ground when descending from a ladder, thus causing him to slip and fall. On the other hand, Ng, the only eye-witness of this case, claimed that he saw no pipes at all. The discrepancy between these two witnesses gave rise to disputes in connection with the exact site of the Accident where the Plaintiff injured.
3. To complicate matters further, the location of the Accident that MTR has knowledge of was in fact imputed from an accident report and the Employees’ Compensation Form 2 (“Form 2”) submitted by the 2nd Defendant. The information supplied therein indicated that the Accident happened at 810A B1 GL K/L40-41 (Room F12P-02C), which was affirmed by Mr. Tang Pak Hung (“Tang”), who is the Chief Project Co-ordination Manager of MTR, being the ECS Plant Room situated on Level B1 of the WKT assigned with a unique room number F12P-02C[[3]](#footnote-3) (“the Plant Room”).
4. The 2021 Photos taken by MTR were, regrettably, only some close up images of “pipe-like” objects and it was impossible to understand the layout or condition of the Plant Room from the photos. Likewise, the extract of the Layout Plan of the Plant Room itself could not indicate any interior fittings and its location on the Basement level. I am therefore of the view that these pieces of information are not useful and do not enable the Court to draw any helpful insight.
5. Shortly after the Plaintiff took out the Summons, MTR arranged staff to take more photos of the Plant Room and provided the same to the Plaintiff’s solicitors on 10 June 2022[[4]](#footnote-4) (the “2022 Photos”). These ten odd photos which was taken on 18 May 2022 offered a wider viewpoint of the alleged Plant Room and showed a pipe that was fixed on the ground. The Plaintiff’s solicitors however wrote back on 15 June 2022 and averred that the room shown in those photos did not assemble the room where he injured himself[[5]](#footnote-5). The Plaintiff thereafter in his 3rd affirmation listed out 11 points[[6]](#footnote-6) to support his belief that the Plant Room is *not* the Accident Room.
6. From the factual evidence adduced by the parties as exhibited above, there are therefore three different rooms being alleged to be the site of the accident, namely the “Accident Room” described by the Plaintiff with ‘many pipes fixed on the floor’[[7]](#footnote-7), the 機房where Ng found the Plaintiff with no pipes found on the ground and the “Plant Room” being identified by MTR as Room F12P-02C of the WKT with at least one pipe showing fixed on the ground.

*Legal Analyses*

1. I reminded myself the *Peruvian Guano* test[[8]](#footnote-8) which applies to determine whether the documents (in this case, the inspection of the property) sought from the non-party are relevant to an issue arising out of the claim that has been made. I also borne in mind the need to ensure reasonable proportionality and procedural economy in the conduct of proceedings. I must also consider whether disclosure is necessary in order to dispose fairly of the claim or to save costs. As such, the Court took into account of the following considerations:
2. How important is the information/ inspection to the issues;
3. Has the Plaintiff taken appropriate steps to obtain the information within the proceedings before seeking discovery from MTR;
4. Whether such inspection, if granted, will allow the Plaintiff to embark on a fishing expedition to corroborate his claim;
5. If inspection is necessary and proportionate, whether such inspection would undermine or infringe any public policy;
6. Assuming that the court should ultimately decide to grant an order for inspection in the present case –
7. What should be the proper scope of the order; and
8. What, if any, restriction(s) regarding the inspection should be imposed on the Plaintiff.

*How important is the information/ inspection to the issues*

1. As in many personal injuries actions, the exact location of where the accident occurred and its surrounding condition are often important issues in the proceedings. The Plaintiff’s allegation that he stepped on the Pipe which caused him injuries demonstrated that the crux of this case depends, amongst other things, on the Court’s finding as to the existence of pipe(s) fixed on the ground at the time of the Accident.
2. Since Ng attended to the Plaintiff shortly after the Accident, there is no doubt that these two witnesses were both referring to the *same* room, thus what Ng referred as 機房 must be the Accident Room as averred by the Plaintiff. The inconsistent descriptions of the room could only give rise to one possibility that one of them is not telling the whole truth.
3. While there is no basis whatsoever to doubt the good faith of MTR, the information provided by MTR can hardly be seen as conclusive. As mentioned in paragraph 14, I have had the opportunity to study the 2021 Photos together with the Layout Plan but find them unhelpful towards allowing the trial judge to understand the surrounding condition of where the Accident happened. While the 2022 Photos show a wider perspective of the Plant Room, I must bear in mind that the location of such Plant Room was premised on some information given by Ng, who was the only witness attended the 機房. Considering the affirmations of Plaintiff and Tang, I could not rule out the possibility that the “Accident Room”, the “機房” and/or the “Plant Room” referred by each party are entirely different rooms. Rather than leaving this “he said, she said” puzzle for the trial judge to solve by assessing each witness’ veracity, the more direct and pragmatic way is for the Plaintiff to make inspection of the “Plant Room” and the “Accident Room” that he averred he could still locate.
4. Ms. Lui who acted for MTR, argued that the Form 2, which contained the code of the Plant Room has been in the Plaintiff’s possession as early as he issued the Letter before Action in October 2019. The Plaintiff, however, never raised queries as to the location of the Accident Room until after the parties exchanged their witness statements. The Court should therefore refuse to entertain his late application. With respect to Counsel, I disagree. First, the Form 2 was completed by the 2nd Defendant and secondly, the location of the Accident was described in a form of code that no laymen would be able to decipher. Thirdly, the Plaintiff was put to strict proof of the existence of the Pipe and Ng’s denial of the existence of any pipes in the Accident Room did not come to light until the exchange of witness statements. As such, it is perfectly reasonable for the Plaintiff to start raising queries as to the exact location of the Accident at times after he gained insights of the defence case.
5. Hence, the interior fitting of the Accident Room, especially as to the existence or non-existence of the Pipe, is the crucial subject matter of this personal injuries proceedings and inspection is necessary in order to dispose fairly of this important issue of the claim before trial and to save costs and time.

*Has the Plaintiff taken appropriate steps to obtain the information within the proceedings before seeking discovery from MTR*

1. With the benefit of reading all correspondence amongst the parties, including those queries made between the Plaintiff himself and MTR, the Court forms the view that the request for inspection was made after the Plaintiff exhausted all other reasonable ways to resolve the dispute as to the location of the Accident Room For example, the Plaintiff’s reasonable request for photos showing the Plant Room in its entirety for easy identification was denied by MTR.
2. I must also emphasise that the request for an inspection of the Accident Room, though being criticized as being late, was not without cause. It could be seen that correspondence were exchanged between the Plaintiff and MTR over a period of months, attempting to identify the Accident Room and its interior fitting, followed by another few months of ‘stay’ while Deacons waited for confirmation of instruction from MTR. After receiving MTR’s formal rejection of his request for an inspection, the Plaintiff issued the Summons expeditiously about one week thereafter.
3. I have no doubt that the Plaintiff took every possible step to obtain information from the non-party before making an application for discovery.

*Whether such inspection, if granted, will allow the Plaintiff to embark on a fishing expedition to corroborate his claim?*

1. Tang gave evidence that the Plaintiff was merely asking for inspection of the Plant Room back in February 2022 but the scope of inspection was widened in April 2022 *“allowing the Plaintiff to identify the room where he was injured”*. Tang said the Plaintiff did not identify the exact room in the WKT he wishes to inspect and since there are hundreds of plant rooms within the WKT, which included rooms that are under the control of various departments of the HKSAR Government or the mainland authority, to conduct the site inspection at the magnitude as requested by the Plaintiff is fishing, speculative and disproportionate.
2. Ms. Lui in her submissions contended that the Plaintiff has no evidence to suggest that the Plant Room was not the only room in the basement of the WKT with pipes installed and thus he should take such sworn evidence by Tang as true. In addition, there would be no probative value even inspection of the Plant Room is allowed, since MTR has already provided photos of the Plant Room to the Plaintiff. She commented that the Plaintiff was simply dissatisfied that all photos and the Accident Report/ Form 2 supplied by MTR do not corroborate his claim. Any inspection would only appear to be a quest to fish for evidence until he could find something to help him uphold his claim.
3. The Court, with much respect, disagrees with Ms. Lui’s argument. As explained earlier, Tang’s sworn evidence was premised on information supplied by the Defendants and their witnesses, who are obviously holding an opposing view to the Plaintiff. I do not see why the Court should inhibit the Plaintiff at this stage to gather evidence in a *reasonable* manner for advancing his own case.
4. So much so that Tang was trying to emphasise on the unreasonable magnitude of the Plaintiff’s request by explaining the inconvenience it would cause if hundreds of doors in the WKT were opened for his inspection, the Court is of the view that the true scope of inspection requested by the Plaintiff has been misconstrued and exaggerated by MTR.
5. One must study the conversations between the Plaintiff and MTR back from August 2021 to understand why there would be a so-called widened scope of inspection and thus to construe the real objective of the inspection the Plaintiff wishes to make.
6. The Plaintiff himself contacted MTR in August 2021 via email simply asking for their confirmation as to the existence of a pipe with an approximate 36-inch diameter near the ground in the Environmental Control System Engineering Room.[[9]](#footnote-9) Since MTR refused to provide details, the Plaintiff, quite remarkably, built a model mock-up of the layout of the Accident Room (the “Model”) and asked the MTR to confirm if his Model reflected the actual condition of the Plant Room on their record. This Model, despite being homemade and nothing sophisticated, showed precise details of the interior setting of the Accident Room, which included not only the location of the Pipe, but also exit doors, pillars, electrical conduit, platforms, ladder etc. And in fact, as confirmed by Tang, this Model *“generally matches the actual layout of the Plant Room”[[10]](#footnote-10).*
7. The Model therefore demonstrated that the Plaintiff has a good recollection of the layout of the Accident Room and this must be borne in mind *vis-à-vis* his doubts about the location reflected in those 2022 Photos. He substantiated his understanding of the layout of the Accident Room by spotting the missing “3rd Door”, an alleged hole and the bulging wall from those 2022 Photos. He further averred that the 2022 Photos did not depict the rectangular shape of the Accident Room. All these queries, as opposed being speculative, are justified when considering the Model the Plaintiff built was in a rectangular shape consisting of the alleged three doors, a hole and bulging wall which *were agreed* by MTR. Although I agree with Ms. Lui that the setting of the Plant Room in 2022 could be different to the time of the Accident, I believe the chances of architectural structure (i.e. the shape of the room) or interior fixtures such as doors and piping having been altered between 2018 and 2022 is not likely or probable. As such, I agree that every doubt the Plaintiff raised in his 3rd affirmation is valid and reasonable, although it does not necessarily mean that the Plant Room must be a different room from the Accident Room. One of the simple reasons why the Plaintiff could not agree with the 2022 Photos is because those photos did not actually cover the entirety of the Photo Room, which was admitted by Ms. Lui.
8. In light of the above, I believe those 2022 Photos could only be relevant and helpful if the trial court has the opportunity to understand the layout of the entire room and it would only be fair to the Plaintiff if he is offered the opportunity to locate the exact spot where he fell from the ladder.
9. Tang, in his affirmation, also contended that there are more than 900 plant rooms within the WKT and it is impractical and/or impossible to open all doors for the Plaintiff’s inspection. With due respect, this is an exaggerated concern and the Plaintiff’s scope of inspection has been completely misconstrued. First, it was never in dispute between the parties that the Accident happened in an ECS Room on Basement 1 level. Secondly, the Plaintiff in his 2nd affirmation averred that *“I could remember clearly the location of the accident. I verily believe that if I am allowed to enter the Terminus I would be able to identify the Room and confirm if it is indeed the room which the Defendants and MTR referred to as being the “ECS Plant Room” in Terminus.[[11]](#footnote-11)”* and this was neither the only nor first time he explained to MTR his ability to identify the Accident Room[[12]](#footnote-12). In light of the above, it never appeared to be the Plaintiff’s intention to expect MTR to have every door opened for his inspection but all he wanted is to ascertain if the Plant Room is the same room as the Accident Room which he could locate. As such, given the Plaintiff’s ability in recalling small and particular details of the Accident Room and to identify its location, I am not convinced that an inspection, if granted, will become a quest for him to fish for corroborating evidence.

*If inspection is necessary and proportionate, whether such inspection would undermine or infringe any public policy?*

1. Tang, on behalf of MTR, averred that since there are not less than 900 plant rooms within the WKT and if inspection is allowed for the Plaintiff, it may open the floodgates to more similar requests from the public. Tang also explained how various rooms or areas within the WKT are being prohibited areas that MTR may not have the sole power to grant such access.
2. Naturally every case is different and every set of fact must be regarded by the Court *de novo*. As explained, the Court is guided by certain principles when considering the requested inspection, which included the necessity of discovery and proportionality. There is no evidence from MTR that the Plant Room or any other rooms on the Basement 1 level is prohibited or under the control of other authorities. In any event, the scope of inspection, if granted, will be confined to areas that are under the control of MTR and any places that are within the control of other authorities will not be subjected to the discovery order.
3. Bearing in mind that the magnitude of such inspection is nothing close to what MTR suggested but potentially just the Plant Room and the Accident Room (which could well be the same room) and balancing all the relevant interests in the circumstances of this case, I am of the view that an order of access, with a well-defined scope of inspection, would not undermine or infringe any public policy.

*CONCLUSION*

1. Having considered all the above issues, it is the Court’s view that the location of the Accident and the interior fittings of the Accident Room are necessary issues to be considered in the trial. Therefore, it is desirable, *before the trial,* to clarify whether all parties in the proceedings are actually referring to the same room. The Plaintiff provided genuine reasons why he believed that the Accident Room could not be the Plant Room (which may well be the 機房 Ng referred to). Guided by what is fair and just in the circumstances, I see no reason why an inspection should not be granted to promote or ensure a fair contest within the trial.
2. I now turn to the last issue which is to give the order for inspection a more definitive scope. As explained in the foregoing paragraphs, the only possible room(s) that should be inspected are the Accident Room that the Plaintiff said he could identify and the Plant Room assigned with a unique room number F12P-02C, both on Basement level 1 of the WKT, which could well turn out to be the same room. I therefore grant the order as follows:
3. MTR do within 28 days from the date of this Order make arrangement with the solicitors for the Plaintiff to allow the Plaintiff to enter the West Kowloon Terminus for purpose of inspecting (a) the plant room assigned with Code 810A B1 GL K/L40-41 (Room F12P-02C) (“the Plant Room”) and (b) the one room he identified in the West Kowloon Terminus where the Accident on 18 January 2018 occurred (“the Room”);
4. In identifying and entering the Room, the Plaintiff should not trespass, enter or remain on any places which is not under the control of MTR;
5. For the purpose of the abovementioned inspection, MTR shall permit the Plaintiff to:
   1. be accompanied by not more than two representatives of the Plaintiff’s solicitors; and
   2. take photographs of the Plant Room and the Room; and
6. There be liberty to apply.

*Ex parte Application*

1. The Plaintiff wrote to the Court, in the form of a letter dated 20 January 2023 to request that he be allowed to file a further supplemental affirmation to provide particulars of the route to enter the Accident Room (the “Ex parte Application”). Not only is such an application procedurally inappropriate, it is superfluous. The Plaintiff, in his 3rd affirmation, has already given details as to his recollection of entering the Accident Room, so the intended further affirmation would not assist him in this Application and is unnecessary. The Plaintiff’s request is therefore denied.

*Costs*

1. MTR relies on section 47C of the District Court Ordinance and contends that the Plaintiff should pay costs even if the Court is to grant order for inspection. Section 47C provides that:

*“The Court shall award costs of and incidental to the proceedings to the person against whom an order is sought under sections 47A and 47B unless the Court otherwise directs.”*

1. Mr. Tommy Lo, Counsel for the Plaintiff argues that there ought to be costs implication for MTR since it engaged the same solicitors who act for the Defendants, as such they should be seen as “one camp of litigants”.
2. The Court bears in mind that non-party in general has no duty to assist the Plaintiff and has every right to deny his right to enter upon its premises. The Court also keeps in mind that the root of this Summons is due to first, the dispute as to whether pipe(s) existed in the Accident Room at the time of the Accident and secondly, the limited perspectives showing from the 2022 Photos.
3. This Court wonders whether the Summons would even have been necessary if MTR had provided a set of photos that showed the entirety of the Plant Room. After all, they provided photos of some parts of the Plant Room to the Plaintiff and what harm could have been caused by providing more comprehensive photos allowing him to gain the whole view of the Plant Room.
4. In this circumstances, I make a costs order nisi that the costs of the Summons, besides the Ex parte Application made on 20 January 2023 be paid by the Plaintiff to the MTR to be taxed if not agreed on a common fund basis, with certificate for counsel. The Plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. Such sum payable will form part of the costs in the cause in the main action. The costs incurred and incidental to the Ex parte Application will be paid by the Plaintiff to MTR.

( Louise Chan )

Master, District Court

Mr. Tommy Lo, instructed by Tang, Wong & Chow, for the Plaintiff

Non-Party : MTR Corporation Limited

Ms. Ann Lui, instructed by Deacons, for the Non-Party

1. Paragraph 7 of Ng’s witness statement dated 18 November 2020 [↑](#footnote-ref-1)
2. See *Scott v. Mercantile Accident Insurance Co. (1892) 8 T.L.R. 320* [↑](#footnote-ref-2)
3. Paragraph 5 of Tang’s affirmation [↑](#footnote-ref-3)
4. TPH-4 of Tang’s affirmation [↑](#footnote-ref-4)
5. TPH-5 of Tang’s affirmation [↑](#footnote-ref-5)
6. Paragraph 25 of the Plaintiff’s 3rd affirmation [↑](#footnote-ref-6)
7. Paragraph 5(c) of the Statement of Claim [↑](#footnote-ref-7)
8. *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA [↑](#footnote-ref-8)
9. Extracted from an email dated 26 August 2021 from the Plaintiff to MTR. The Plaintiff also asked MTR to explain the purpose of the ECS Room and the pipe which allegedly laying on the ground horizontally. See Item 2 of Plaintiff’s 3rd affirmation. [↑](#footnote-ref-9)
10. Paragraph 7 of Tang’s affirmation [↑](#footnote-ref-10)
11. Paragraph 25 of the Plaintiff’s 2nd affirmation [↑](#footnote-ref-11)
12. Earlier correspondence from two letters from the Plaintiff’s solicitors to MTR and Deacons dated 18 February 2022 and 5 May 2022 respectively [↑](#footnote-ref-12)