#### DCPI1323/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1323 OF 2006

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| BETWEEN | NG CHO SHING (the Administrator of the estate of WU HEUNG LIN, the deceased) | Plaintiff |
|  | and |  |
|  | CHAN YUNG CHI  WONG SHUN CHEONG  賴欽強trading as 強記運輸公司 | 1st Defendant  2nd Defendant  3rd Defendant |

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##### Coram: H H District Judge Marlene Ng in Chambers (open to the public)

Date of Hearing: 27th October, 2008

Date of Decision: 27th October, 2008

Date of Handing Down Reasons for Decision: 3rd November, 2008

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REASONS FOR DECISION

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###### I. Introduction

1. The Plaintiff is the son and administrator of Madam Wu Heung Lin (“Deceased”) who died on 18th August 2004. However, this is not a fatal accident but a personal injuries case. At the time of the alleged accident referred to below and shortly thereafter at the time of her death, she was about 86 years old.
2. All along the Plaintiff was represented by the same firm of solicitors, and the 1st, 2nd and 3rd Defendants acted in person.

*II. Plaintiff’s claim*

1. The Plaintiff claimed that at about 8:10am on 26th July 2004 the Deceased (who lived at an elderly centre) walked along the “pedestrian walk” at or near the junction of Po Fong Lane and Yuk Wah Street, Kowloon (“Scene”) and was knocked down onto the pavement by a wooden trolley loaded with fruits (“Accident”).
2. The Plaintiff claimed the Accident was caused by the 1st and 2nd Defendants’ negligent manoeuvring of the wooden trolley and their breach of statutory duty in driving the wooden trolley (ie a vehicle) carelessly on the road contrary to section 38(1) of the Road Traffic Ordinance Cap.374. The Plaintiff averred that the 1st and 2nd Defendants were the “servants, representatives and/or agents” of the 3rd Defendant, who was vicariously liable for their negligence and breach of statutory duty.
3. According to the Statement of Claim and Statement of Damages, the Deceased sustained personal injuries as a result of the Accident. After the Accident, she was taken to Queen Elizabeth Hospital (“QEH”). She suffered from tenderness over left wrist and hip. X-ray revealed fracture of left distal radius, left scaphoid and trochanter left hip. On the following day (ie 27th July 2004), operative fixation of the left hip was performed. Further conservative treatment of left wrist fracture with plaster application was performed. 4 days after the operation the Deceased was transferred to Kowloon Hospital (“KH”) for rehabilitation and further treatment. On 17th August 2004, the Deceased was transferred back to QEH for suspected gastrointestinal bleeding. She developed convulsion and died on 18th August 2004.
4. The Plaintiff claimed 3 heads of damages : (a) pain, suffering and loss of amenities (“PSLA”) (HK$450,000.00), (b) medical, tonic food and travelling expenses incurred by the Deceased and the Plaintiff (HK$5,000.00), and (c) interest thereon. Since the Plaintiff’s claim for damages for PSLA arose from the Deceased’s personal injuries and not her death, the Plaintiff is effectively claiming damages for personal injuries suffered by the 86-year-old Deceased over a 23-day period from 26th July to 17th August 2004.

*III. Progress of the claim*

1. On 26th July 2006, the Plaintiff’s solicitors applied *ex-parte* to Master T Chan for leave to issue the Writ of Summons on the basis that the 3rd Defendant’s address was unknown. At the hearing, the Plaintiff’s solicitors informed Master T Chan they had learnt from the police that the 3rd Defendant was in Hong Kong. Upon the Plaintiff’s solicitor undertaking to file an affidavit confirming such information, Master T Chan granted leave for the Plaintiff to issue the Writ of Summons.
2. On the same day, the Plaintiff filed the affidavit of his solicitor Mr Sun Po. Mr Sun deposed that according to the statements given by the 1st and 2nd Defendants to the police dated 12th and 15th October 2004 respectively (“D1’s and D2’s Police Statements”), he “…… verily believe that the [Accident] was caused by the 1st and 2nd Defendants who were in the employ of the 3rd Defendant”.
3. D1’s and D2’s Police Statements stated they were casual delivery workers of the 3rd Defendant from June 2003 to September 2004 (the 1st Defendant) or since early 2003 (for the 2nd Defendant). Mr Sun therefore deposed that the the 3rd Defendant’s last known abode or place of business was in Hong Kong.
4. Even though Mr Sun suggested D1’s and D2’s Police Statements led him to believe the Accident was caused by the 1st and 2nd Defendants, the 1st and 2nd Defendants actually denied the Accident in their statements to the police. In fact, they stated that (a) when they pushed the wooden trolley to the pavement of Yuk Wah Street near 榮記士多to unload goods, there was a gathering of persons in front of the wooden trolley and someone said “阿婆跌親快的幫佢報警” (2nd Defendant), “有個阿婆跌親” (1st Defendant) and/or “阿婆撞到你哋啲貨” (2nd Defendant), (b) they went forward and saw an old lady sitting on the pavement, (c) the 1st Defendant asked the old lady whether there was anything wrong and received no reply, (d) someone suggested making a report to the police, (e) the 1st Defendant made a telephone report to the police, and (f) later an ambulance arrived to take the still conscious old lady away.
5. As seen in paragraph 14 below, the Writ of Summons was not served on the 1st and 2nd Defendants until almost a year later in June 2007. Upon application by the Plaintiff’s solicitors by letters dated 5th December 2006 and 4th May 2007 respectively, the Check List Review (“CLR”) originally returnable on 14th December 2006 was adjourned to 13th May 2006 and then to 9th July 2007. In fact, the CLR did not take place until 30th July 2007. No reason was offered for the delay except that the Plaintiff was still looking for the 3rd Defendant’s address.
6. I pause here to say that in future such delay in progressing the case will not be countenanced without good and compelling reasons. Practitioners must carefully bear in mind the following guidance under paragraph 2 of the Guidance Notes to Practice Direction 18.1 :

“The Plaintiff must not delay the service of the Writ (and therefore of the CLR Notice). It is implicit (if not explicit) in §2.4 that the Writ is to be served with the Notice. The period of validity of the Writ does not override the requirement to act in accordance with this Direction. The onus will be on the Plaintiff’s solicitors to justify delay in service.”

It is difficult to appreciate any justifiable basis for the delay in serving the Writ of Summons in this case. There was no discernible difficulty in effecting service of the Writ of Summons on the 1st and 2nd Defendants, whose addresses for service were available and known to the Plaintiff. In respect of the 3rd Defendant, the Plaintiff should have gone on with his task of locating the 3rd Defendant’s address or alternatively should have applied for substituted service if the 3rd Defendant could not be located but (according to Mr Sun) believed to be within the jurisdiction. As it turned out, the Plaintiff’s affirmation dated 11th July 2007 (see paragraph 17 below) was silent on any step or action taken in this regard by him or his solicitors during the 8-month period from August 2006 and May 2007. Since the onus was the Plaintiff or his solicitors to justify the delay, if there were no satisfactory explanation, the court might well have to consider the impact of such delay on the Plaintiff’s claim for interest and costs even if the Plaintiff were successful in claiming damages against the 1st, 2nd and 3rd Defendants. In future, practitioners should expect that, even if the court sees fit to acceded to the plaintiff’s request to adjourn the CLR hearing, it will be short-scheduled and, in appropriate cases, conditional upon the Writ of Summons being served forthwith or within a specified deadline.

1. Returning to the chronology events, the Statement of Claim, Statement of Damages and Plaintiff’s List of Medical Reports were filed almost a year after the issue of the Writ of Summons (ie on 6th June 2007).
2. The Plaintiff’s solicitors served the Writ of Summons on the 1st and 2nd Defendants. On 15th June 2007, the Director of Legal Aid (“DLA”) filed Memorandum of Notification of an Application for Legal Aid in relation to the 1st and 2nd Defendants respectively. As a result of the legal aid automatic stay, the CLR scheduled for 9th July 2007 was further adjourned to 30th July 2007.
3. On 22nd June 2007, the 1st and 2nd Defendants gave notice of intention to defend. On 19th and 23rd July 2007 respectively, the DLA refused legal aid to the 1st and 2nd Defendants.
4. On 11th July 2007, the Plaintiff issued a *ex-parte* summons requesting the Director of Immigration (“DOI”) to disclose and produce particulars of the whereabouts/addresses of the 3rd Defendant or alternatively seeking leave to serve the 3rd Defendant by substituted service and for renewal of the Writ of Summons for another 6 months.
5. The Plaintiff’s affirmation in support of the application was filed on the same day. The Plaintiff verily believed that, according to D1’s and D2’s Police Statements, “…… the Accident …… was caused by the 1st and 2nd Defendants who were in the employ of the 3rd Defendant”. However, as explained above, such affirmation was silent as to any action taken to ascertain the whereabouts of the 3rd Defendant over the 8-month period from August 2006 (when the Plaintiff last spoke with the 3rd Defendant) to May 2007 (when the Plaintiff’s solicitors conducted company and business registration searches and wrote to the Commissioner of Police for information). No explanation was forthcoming as to why the company/business registration searches and enquiries with the police and the DOI could not have been done in August 2006. The unexplained delay is unsatisfactory.
6. Due to such inaction on the part of the Plaintiff, the validity of the Writ of Summons expired before it could be properly served on the 3rd Defendant. Yet the process server of the Plaintiff’s solicitors purported to serve the Writ of Summons and various other documents filed by the Plaintiff on the 3rd Defendant by inserting them into the letterbox at an address at Yuk Wah Crescent, Kowloon (“YWC Address”) on 27th July 2007. It give me pause and concern that such process server deposed in his affirmation of service filed on 28th July 2007 that he “verily believe he did effect service of the documents” when by that time the validity of the Writ of Summons had expired.
7. Coming back to the Plaintiff’s summons dated 11th July 2007, the Plaintiff could hardly have sought directions on an *ex-parte* basis requiring a third party to the proceedings (ie the DOI) to provide information without giving any notice of such application to such third party. It is therefore without surprise that the Plaintiff withdrew his application for discovery against the DOI on 27th July 2007.
8. On 10th October 2007, the Plaintiff filed the affirmation of his solicitor Mr Raymond Wong to explain how the Plaintiff’s solicitors came to know the YWC Address of the 3rd Defendant. So it was only 3 months after issuing the Plaintiff’s summons dated 11th July 2007 (ie on 29th October 2007) that Master C P Pang granted leave to renew the validity of the Writ of Summons for 6 months from 26th July 2007.
9. Meanwhile, the Plaintiff filed his List of Documents on 26th July 2007. All 3 Defendants were absent at the CLR on 30th July 2007, so it was adjourned to 20th September 2007.
10. On 9th August 2007, the 1st Defendant acting in person filed a homemade defence as follows :

“2003年6月，我開始在油麻地果欄強記運輸公司做散工。

2004年7月26日早上約8時10分，我和朋友黃順昌在毓華里幫我老闆強記運輸公司用手推車送幾箱水果去榮記士多。我落貨時聽見有人說「有個阿婆跌親」，之後我看見有個阿婆坐在行人路上。

當日送貨時，我很小心地推車，所以我沒有造成任何意外。我沒有撞倒任何人。

阿婆的意外是否因為自己滑倒在行人路上，或者是因為她年紀大而跌倒，或者是因為她踩到行人路上的東西而跌倒呢？

我認為原告人要求賠償的數目不對及太高。阿婆的意外不是我的錯，我不會付錢，我也沒有錢。”

1. On 10th August 2007, the 2nd Defendant acting in person filed a homemade defence as follows :

“本人與第一被告人陳勇枝的關係是一對認識很久的朋友。而第三被告人賴欽強trading as強記運輸公司的關係如下 – 是經朋友介紹認識並曾經約在2003年期間工作，約一年後離職，除工作以外沒有任何聯絡。

在2004年7月26月早上約7時，第一被告人致電本人說一起吃早餐，所以本人先協助他完成工作後才一起去。約在當天早上約8:10，我們正在最後目的地工作，我們一如以往將木頭車擺放在一個安全位置，當時我們小心地搬貨，沒有就控方所說的疏忽。在事件中更沒有就控方所說的撞到阿婆。本人在事件中不擔當僱主或僱員角色，只屬義務工作，所以在事件中實屬無辜，為何要在事件中負責。

為何阿婆跌到會是我的錯？難道沒有可能是因她年事已高，站不穩而跌倒或因她自己絆倒而跌？

我更加認為要賠償的金額太高及太不合理。我只是一個半工讀的學生 …我沒有錢，我亦不會賠償任何金錢，因為我不認為這是我的錯。”

1. It is plain that the 1st and 2nd Defendants by their pleadings both denied any accident involving the wooden trolley, and in particular they denied the alleged Accident whereby the Deceased was knocked down by the wooden trolley. On the issue of quantum, the 1st and 2nd Defendants also averred that the amount claimed was incorrect, excessive and/or unreasonable.
2. On 24th August 2007, the Plaintiff filed a Reply to each of the Defence filed by the 1st and 2nd Defendants, but such pleadings did not go much further than joinder of issues.
3. On 13th September 2007, the Plaintiff filed the CLR Notice. On 19th September 2007, the CLR scheduled for 20th September 2007 was adjourned to 29th November 2007 upon a letter request by the Plaintiff’s solicitors endorsed by the 1st and 2nd Defendants on the basis the Writ of Summons had not been served on the 3rd Defendant.
4. On 20th November 2007, the Plaintiff filed the CLR Notice. On 26th November 2007, the CLR was again adjourned to 24th January 2008 upon a letter request by the Plaintiff’s solicitors endorsed by the 1st and 2nd Defendants again on the basis that the Writ of Summons had not been served on the 3rd Defendant. The Plaintiff’s solicitors did not file any affirmation of service to prove that the notice of result from the court in respect of such letter application (ie adjournment of the CLR to 24th January 2008) was notified or served on the 1st and 2nd Defendants.
5. No explanation was forthcoming from the Plaintiff as to why, when the court already granted leave to renew the validity of the Writ on 29th October 2007 and when by that time the Plaintiff already knew of the 3rd Defendant’s YWC Address, prompt action was not taken to seek leave to amend the Writ of Summons and to serve the same on the 3rd Defendant. In fact, nothing was done until 30th November 2007 save to adjourn the CLR.
6. On 30th November 2007, the Plaintiff issued a summons seeking leave to amend the Writ of Summons and Statement of Claim to give the YWC Address as the 3rd Defendant’s address. On 5th December 2007, the Plaintiff issued another summons to withdraw the summons dated 30th November 2007 and to seek leave amend the Writ of Summons to give the YWC Address as well as another address in Sai Kung (“SK Address”) as the 3rd Defendant’s addresses. According to the Plaintiff’s 2nd affirmation filed on 6th December 2007, the property at the YWC Address had been sold and the conveyancing documents revealed the SK Address as the 3rd Defendant’s address. At the hearing on 12th December 2007, leave to amend was granted, and on 14th December 2007, the Plaintiff re-issued and amended the Writ of Summons to add the YWC and SK Addresses as the 3rd Defendant’s addresses.
7. Although the affirmation of the process server of the Plaintiff’s solicitors filed on 21st December 2007 stated that she served the Amended Writ of Summons on the 3rd Defendant at both the YWC and SK Addresses by registered post, there was no affidavit of service to show that the Amended Writ of Summons was served on the 1st and 2nd Defendants prior to the CLR on 24th January 2008.
8. On 15th January 2008, the Plaintiff filed the CLR Notice. At the CLR on 24th January 2008, the 1st and 2nd Defendants were absent, but, as explained in paragraph 27 above, there was no affidavit of service showing that the 1st and 2nd Defendants were notified of such hearing. Nevertheless, the hearing proceeded and the learned PI Master granted directions for the 3rd Defendant (who was present) to file/serve his Acknowledgment of Service and his Defence, and for the Plaintiff to file his Reply. The learned PI Master also adjourned the CLR to 7th April 2008.
9. It is important to note here that at the CLR on 24th January 2008, the Plaintiff’s solicitors gave an undertaking to the court that all further documents in this action would be written in the Chinese language (“Court Undertaking”), and it was so recorded in the CLR Order. I will return to the Court Undertaking below.
10. On the same day, the 3rd Defendant gave notice of intention to defend. On 31st January 2008, he filed his homemade Defence as follows :

“本人賴欽強身份證號碼Axxxxxx(x)

本人於2002年開始從事街頭搬運工作地點無固定，如果有客人須要搬運就打電話給我或行到我身邊問價，如果價錢合理就替客人送貨。

本人從未有聘請陳勇枝為本人做工，冇簽合約，冇工資支付記錄，冇稅單，冇僱傭關係，冇強制性公積金供款單。

有關這案件完全與我冇關。”

1. On 26th March 2008, the Plaintiff filed the CLR Notice. At the CLR on 7th April 2008, the 1st and 2nd Defendants were absent. Again, there was no affirmation of service to prove that the 1st and 2nd Defendants were notified of such hearing, so the learned PI Master directed the Plaintiff to file such affidavit of service within 7 days. So it was only on 9th April 2008 (ie 2 days after the CLR hearing) that the Plaintiff’s solicitors filed the affirmations of service of their process server deposing that (a) the Amended Writ of Summons was served on the 1st and 2nd Defendants on 5th February 2008 under cover of a letter of the Plaintiff’s solicitors giving notice of the CLR hearing on 7th April 2008 by leaving the documents outside the door of the 1st Defendant’s last known address and by personal service on the 2nd Defendant, (b) the CLR Order dated 24th January 2008 was served on the 1st and 2nd Defendants by post on 4th March 2008, and (c) the Plaintiff’s CLR Notice filed on 26th March 2008 was served on the 1st and 2nd Defendants by post on 27th March 2008.
2. At the CLR on 7th April 2008, the learned PI Master made *inter alia* the following orders :
   1. the 1st, 2nd and 3rd Defendants do disclose 6 items/classes of documents on or before 28th April 2008;
   2. the 1st, 2nd and 3rd Defendants do file/serve copy documents relevant to the present proceedings on or before 28th April 2008;
   3. the parties do on or before 19th May 2008 file and exchange witness statements of the Plaintiff and of the 1st, 2nd and 3rd Defendants;
   4. the Plaintiff do within 7 days serve treatment hospital reports in relation to the treatment and care of the Deceased;
   5. the Plaintiff do within 7 days serve copies of the police plan and photographs of the Scene;
   6. the CLR be adjourned to 5th June 2008.
3. Pursuant to the CLR Order of 7th April 2008, the 3rd Defendant on 15th April 2008 filed an affirmation confirming he did not have the specific documents sought by the Plaintiff.
4. On 20th May 2008, the Plaintiff filed his own witness statement. On 26th May 2008, the 3rd Defendant filed his own witness statement, the contents of which were along the lines of the averments in his Defence.
5. Although the CLR Order dated 7th April 2008 required *inter alia* the 1st and 2nd Defendants to disclose, file and/or serve/exchange certain documents by specified deadlines, there is no affidavit of service that such order was served on the 1st and 2nd Defendants to allow sufficient time for compliance. This was not done even when the Plaintiff filed the CLR Notice on 27th May 2008 in anticipation of the CLR on 5th June 2008.
6. At the CLR on 5th June 2008, the 1st and 2nd Defendants were again absent. Since there was no affidavit of service showing due service of the CLR Order of 7th April 2008 on the 1st and 2nd Defendants, the learned PI Master again directed that the Plaintiff file such affidavit of service within 3 days. So it was after the CLR hearing (ie on 6th June 2008) that the Plaintiff’s solicitors filed the affirmation of service of their process server confirming service of the CLR Order dated 7th April 2008 and the Plaintiff’s CLR Notice dated 27th May 2008 on the 1st and 2nd Defendants by post on 6th May 2008.
7. It is therefore plain from such affirmation of service that by the time of service of the CLR Order dated 7th April 2008, the deadlines imposed in such order for the 1st and 2nd Defendants to make general/ specific discovery have expired. Yet, the Plaintiff applied for and obtained *inter alia* the following “unless” order at the CLR on 5th June 2008 :

“除非第一被告人及第二被告人於收到本命令14天內將有關本案的文件副本送交法院存檔及送達對方及將第一被告人關於事實方面的證人陳述書及第二被告人關於事實方面證人陳述書送交法院存檔及與對方交換，否則法庭將判原告人勝訴，而第一被告人及第二被告人須支付原告人損害賠償，數額有待法庭評估。” (“Unless Order”)

1. There is no affidavit of service to prove that the Plaintiff had complied with the requirements of the CLR Order dated 7th April 2008 set out in paragraphs 35(d) and (e) above. Notwithstanding the absence of such affidavit of service and the fact that the 1st and 2nd Defendants were also absent at the CLR on 5th June 2008, the Plaintiff went ahead to apply for and obtained *inter alia* the following directions :
   1. the reports of the government hospitals as to the treatment and care of the Deceased be adduced as *agreed* evidence without calling the makers thereof to give evidence at trial;
   2. the plan prepared by the police of the Scene and the photographs taken by them were *agreed* and were to be admitted in evidence at the trial without calling the makers to give evidence.
2. I pause here to say that it is incumbent on the party having carriage of the claim or the application against the other party(ies) to satisfy the court that the relevant court orders have been properly drawn up, and that such orders have been duly served on and the relevant hearing date duly notified to the other party(ies) in good time for proper compliance. This is particularly important when the other party(ies) are absent at the hearing, and the court order expressly directs that the order be served and/or it is implicit from the nature of the court order that it must be served (eg an order requiring the other party(ies) to do certain things by a specified deadline). Normally, due service of a court order is proved by way of affidavit of service in the manner prescribed in Order 65 rule 8 of the RDC, and not by submissions from the Bar table at a subsequent hearing. Where there is a history of non-attendance of court hearings and/or non-compliance of court orders by the other party(ies), practitioners for the party having carriage of the claim/application should be astute in filing affidavit of service to prove due service of the relevant orders and/or other documents that are required to be served. Failure to do so may lead to abortion of the relevant hearing, which will inevitably cause delay and wastage of costs, and such delay/wastage may well be reflected in the relevant costs order.
3. Coming back to the chronology of events, the learned PI Master also granted *inter alia* the following orders at the CLR on 5th June 2008 :
   1. the Plaintiff do within 28 days file and serve a Revised Statement of Damages together with any further statements as to quantum and any documentary support not already disclosed;
   2. the 1st, 2nd and 3rd Defendants were to file and serve their Answer to the Plaintiff’s Revised Statement of Damages within 21 days thereafter;
   3. the Plaintiff do lodge agreed trial bundle within 80 days;
   4. CLR be adjourned to 8th September 2008.
4. On 3rd July 2008, the Plaintiff’s solicitors wrote to inform the court that the Plaintiff would rely on the Statement of Damages and not file any Revised Statement of Damages.
5. According to the affirmations of service of the process server of the Plaintiff’s solicitors filed on 15th and 26th July 2008, the CLR Order dated 5th June 2008 was served on the 1st and 2nd Defendants by post on 26th June 2008. According to such affirmations, the 1st and 2nd Defendants did not file/serve copies of documents or file/exchange witness statements pursuant to such CLR Order.
6. On 14th July 2008, judgment was entered against the 1st and 2nd Defendants for damages to be assessed as a result of default under the Unless Order (“Judgment”).
7. On 19th July 2008, the Plaintiff’s issued interrogatories without leave of the court against the 3rd Defendant even though leave is required pursuant to Order 26 of the Rules of the District Court (“RDC”). On 8th August 2008, the 3rd Defendant filed his answer to such interrogatories by affirmation.
8. On 29th August 2008, the Plaintiff filed the CLR Notice and Hearsay Notice. At the CLR on 8th September 2008, the learned PI Master fixed a Pre-trial Review (“PTR”) returnable before me on 15th October 2008. Pursuant to the directions of the learned PI Master, the Plaintiff filed the Notice of Appointment for Assessment of Damages and Notice of Application for Pre-trial Review on 11th September 2008. Despite the Court Undertaking, the Plaintiff’s solicitors prepared these documents in the English language.
9. I pause here to note that the CLR has been adjourned 9 times over a period of over 1½ years from December 2006 to September 2008 and still there is no trial date. There is no expert evidence (medical or otherwise) for this case, and the alleged Accident itself turns on a small compass of facts. The relevant documents are limited. That this case has taken this long to reach the current stage without a trial date being fixed is unacceptable. This really underpins the necessity of the Civil Justice Reform for minimising the ills of party-driven litigation by bold proactive case management control by the court.
10. To round off the chronology of events before the PTR, I should add that all CLR Notices of the Plaintiff signed by the Plaintiff’s solicitor have draft orders annexed thereto. Indeed, the Unless Order was proposed in the CLR Notice dated 27th May 2008. For the last CLR Notice dated 29th August 2008, the draft order proposed to set the case down for trial. Further, in all CLR Notices filed by the Plaintiff, the Plaintiff’s solicitor estimated the trial would take 2-3 days.

*IV. Plaintiff’s summons to enter final judgment against the 1st 2nd and 3rd Defendants*

1. On 29th September 2008, notwithstanding the Court Undertaking, the Plaintiff issued a summons in the English language (“Final Judgment Summons”) returnable at the same time as the PTR for the following reliefs with margin note “O.32, r.7 and O.42, r.2 of the RDC, Cap.336H and inherent jurisdiction of the District Court” :
   1. “[unless] the 1st, 2nd and 3rd Defendants do serve an Answer to the Plaintiff’s Statement of Damages within 7 days, the 1st, 2nd and 3rd Defendants be precluded from filing and serving the said Answer in the proceedings and judgment on liability be entered for the Plaintiff against the 3rd Defendant and the damages to be assessed at HK$455,000 as per the Statement of Damages”; and
   2. “costs of and occasioned by this Summons be paid by the 1st, 2nd and 3rd Defendants to the Plaintiff in any event”.
2. In short, unless the 1st and 2nd and 3rd Defendants served the Answer to the Plaintiff’s Statement of Damages within 7 days of the order to be made, the Final Judgment Summons sought the following 3 reliefs :
   1. the 1st, 2nd and 3rd Defendants be precluded from filing/serving Answer to the Plaintiff’s Statement of Damages;
   2. judgment on liability be entered for the Plaintiff against the 3rd Defendant;
   3. damages be assessed at HK$455,000.00 as *per* the Plaintiff’s Statement of Damages.
3. However, notwithstanding the Final Judgment Summons, the Plaintiff’s solicitors filed the PTR Notice on 8th October 2008 confirming the estimated length of trial was 2-3 days and annexing a draft order to the effect that the assessment of damages against the 1st and 2nd Defendants and the trial against the 3rd Defendant be set down to be heard before a bilingual judge.
4. At the PTR, Mr Raymond Wong, solicitor for the Plaintiff, and the 1st, 2nd and 3rd Defendants appeared before me. I expressed grave concern over the breach of the Court Undertaking in preparing the Final Judgment Summons (which by its terms sought final judgment against the 1st, 2nd and 3rd Defendants whom the Plaintiff’s solicitors well knew were not legally presented and prepared their Defence and other documents in the Chinese language) in the English language. The 1st, 2nd and 3rd Defendants informed me they received but did not understand the Final Judgment Summons.
5. Mr Wong admitted it was due to oversight by the Plaintiff’s solicitors, and I particularly reminded that there must be strict compliance of an undertaking to the court, particularly by a solicitor who is an officer of the court, and application must be made to the court for release from such undertaking on good grounds shown if it cannot be complied with. Breach of an undertaking to the court by its officer is a serious matter, which the court views with consternation and regret, and which may be visited with sanctions where appropriate.
6. Upon enquiry by the court, Mr Wong was unable to explain the relevancy of Order 32 rule 7 of the RDC (which requires interlocutory applications to be heard in chambers) and Order 42 rule 2 of the RDC (which deals with the date from which a judgment or order takes effect) to the substantive reliefs sought in the Final Judgment Summons. He was unable to cite any relevant rule that allows (or explain how the inherent jurisdiction of the court permits) the Plaintiff to enter (a) judgment on liability against the 3rd Defendant who has defended the Plaintiff’s claim on both liability and quantum all along, and (b) final judgment against the 1st, 2nd and 3rd Defendants for a liquidated sum without assessment of damages or trial in respect of the Plaintiff’s claim for unliquidated damages.
7. Indeed, Order 37 rule 3 of the RDC provides *inter alia* that where default judgment on liability is given, and the action proceeds against the other defendants, the damages under the judgment shall be assessed at the trial unless the court otherwise orders. Order 37 rule 1(3) of the RDC makes clear that assessment of damages is an open court hearing with attendance of witnesses and production of documents. Indeed, as evident from the draft order annexed to the Plaintiff’s PTR Notice (see paragraph 53 above), it is plain that the Plaintiff’s solicitors were well aware of the requirements of Order 37 rule 3 of RDC.
8. In taking out the Final Judgment Summons in breach of the Court Undertaking and with knowledge that (even on the Plaintiff’s own case) the assessment of damages against the 1st and 2nd Defendants should be heard at the same time as the trial against the 3rd Defendant, I fear the approach adopted by the Plaintiff’s solicitors gives an impression of overreaching.
9. Mr Wong at first sought to withdraw the reliefs set out in paragraph 52(b) and (c) above, thus leaving open the prayer of relief for an order that unless the 1st, 2nd and 3rd Defendants served an Answer to the Plaintiff’s Statement of Damages within 7 days, they would be precluded from filing and serving the said Answer in the present proceedings.
10. However, the 1st and 2nd Defendants have in their homemade Defence averred that the damages claimed were excessive, unreasonable and incorrect. In short, they have in their pleadings responded to the Plaintiff’s plea on damages albeit in layman’s terms and not in a separate document titled “Answer”. But the court is not concerned with procedural formality or rigidity, but with the substance of the plea. Further, in the particular circumstances of this case, apart from a relatively modest amount of special damages (ie HK$5,000.00), the bulk of the Plaintiff’s claim is for general damages for PSLA, which ought to be assessed by the court in any event notwithstanding the Plaintiff’s suggestion that HK$450,000.00 would be a suitable award under this head. I do not see how it could be said that the 1st and 2nd Defendants failed to answer the Statement of Damages.
11. In the end, Mr Wong sought leave to withdraw the Final Judgment Summons, and undertook not to charge the Plaintiff in respect of costs of and occasioned by the Final Judgment Summons. I therefore granted leave to the Plaintiff to withdraw the Final Judgment Summons with costs in favour of the 1st, 2nd and 3rd Defendants in any event to be taxed if not agreed.

*V. Judgment : regular or irregular?*

1. At the PTR, the 1st and 2nd Defendants informed me they still maintained the defence on liability as pleaded in the Defence. They have not applied to set aside the Judgment as they claimed to have been unaware of the effect of the Judgment, which regrettably was drawn up in the English language in breach of the Court Undertaking.
2. Of course, the court has power to strike out a defence and enter judgment on liability if a defendant fails to comply with a court order for filing and serving/exchanging list of documents and/or witness statements.
3. In respect of discovery, such power can be found in Order 24 rule 16(1) of the RDC which provides as follows :

“If any party who is required by any order or direction to make discovery of documents or to produce any documents for the purpose of inspection or for any other purpose or to supply copies thereof fails to comply with that order or direction, the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”

1. In respect of witness statements, I need go no further than to refer to the judgment of Chung J in *Kai Yip Air-Condition Engineering Company v Ma Hei Sun trading as Luen Wah Air Condition Engineering* HCA2969/2000 (unreported, 13th July 2001). However, in that case, both parties were represented and at one stage the defendant indicated that 6 witnesses as to fact would testify at trial. There was a history of extension of time and non-compliance for reasons which the court found unsatisfactory, and the defendant actively resisted setting the case down for trial pending the witness statements. Indeed, with the actual number of witnesses unknown, the court could not even estimate the length of trial. Whilst recognising there might be cases where it would be inappropriate to make “unless” orders even though there had been default in complying with directions to file/serve witness statements, Chung J granted an “unless” order in the case before him to the effect that unless the defendant filed/served its signed witness statements as to fact by a specified deadline, the defendant’s claim be struck out and the defendant’s counterclaim be dismissed, and judgment be entered in favour of the plaintiff with costs.
2. In my view, *Kai Yip Air-Condition Engineering Company* is a case where the default by the defendant frustrated the proper progress of the case towards trial. However, in less drastic circumstances, it is useful to refer to the helpful guidance by Reyes J in *Yeung Shu Lam Wilson trading as Wilson Yeung & Co v Chan Sui Ting & anor* HCA284/2002 (unreported, 7th December 2004) as follows :

“41. It is convenient to take the unless order as a starting point.  I find the order difficult to understand.

42. If a defendant fails to file a list of documents, one might have thought that, absent special circumstances, a sufficient and appropriate sanction would generally be that the defendant should be barred from adducing evidence at the trial.  Depending on the nature of the case, the bar might be against the defendant adducing of oral or documentary evidence or both.  In the last situation, the defendant’s role at trial would effectively be limited to cross-examining the plaintiff’s witnesses and making submissions on the quality and logic of the plaintiff’s case.

43. If relevant documents in the defendant’s possession cannot be produced at trial by reason of the defendant’s failure to make disclosure, the Court can be bold and presume the worst against the defendant in relation to the missing document.

44. Here, the master saw fit to specify that the entire Defence would be struck out and judgment would be entered against Chan.  But it is unclear why.  The “punishment” does not fit the “crime” of failing to file a list and verifying affidavit.  It is far too draconian.”

Reyes J’s views were upheld by Rogers VP at para.17 of his judgment when the matter went on appeal in CACV391/2004 (unreported, 24th February 2005) :

“…… However, what [Reyes J] was there considering was whether a peremptory order should have been made, i.e. one which provided that if there had been a failure to comply with the order which was made there would have been an automatic strike out of that party’s pleading and judgment against that party.  It is unnecessary to consider the full aspect of peremptory orders.  It is sufficient to say that it is highly unusual for a peremptory order to be made on the first application for an order of, for example, discovery.  When a court makes a peremptory order providing for judgment for failure to be observe the order, the court is necessarily put in a position where it has to consider whether each and every instance of failure, no matter what respect, should attract that penalty.  Reyes J was simply giving examples where in some cases it may not be appropriate even if full discovery has not be given for a defaulting party’s pleading to be struck out and judgment to be given against it.  In this case, if there were any failure to give discovery, it would, as far as can be determined, be a failure to give discovery of documents which were in the 1st defendant’s favour or at any rate documents which went to support the 1st defendant’s pleading in the further and better particulars.  In those circumstances the penalties suggested by Reyes J would be appropriate.  Furthermore if full discovery has in fact been given and the only failure was a failure to provide a confirmatory affidavit it would, it seems to me, be wholly out of proportion to enter judgment against that party without giving that party a further opportunity to file the affidavit, albeit the costs of any such application would have to be borne by the party in default.”

1. Here, the Plaintiff’s draft trial bundle reveals that the following documents were/are available to him even without discovery by the 1st and 2nd Defendants : (a) the records of the relevant police investigation including statements given to the police by the investigating officer, the 1st and 2nd Defendants, the ambulance officer who arrived at the Scene, the Plaintiff, staff of the elderly centre where the Deceased stayed, KH’s nurses, and QEH’s doctor, (b) the medical notes/records, medical reports and autopsy report of the Deceased, and (c) report to the Coroner in respect of the death of the Deceased. Given the Plaintiff’s access to the above documents on both liability and quantum issues, there is plainly a respectable argument that his preparation of the case is not frustrated by the 1st and 2nd Defendant’s non-compliance of the directions for filing and serving/exchanging copies of documents and witness statements, and the “draconian” Unless Order might be questionable.
2. But quite apart from such consideration, there is a more fundamental problem with the Unless Order and hence the Judgment. The Unless Order provides that unless the 1st and 2nd Defendants file/serve copies of documents and file/exchange witness statements as to fact by a specified deadline, judgment on liability would be entered against them for damages to be assessed. There is no mention in the Unless Order that the Defence filed respectively by the 1st and 2nd Defendants would be struck out before judgment was entered. So when the 1st and 2nd Defendants failed to file and serve/exchange copies of documents and witness statements by the specified deadline, the Plaintiff entered judgment against them but did not strike out their Defence.
3. However, since the respective Defence of the 1st and 2nd Defendants that raised disputes on both liability and quantum (ie denying the Accident and/or averring that the damages claimed were incorrect, excessive and/or unreasonable) still stands, their very existence ought to preclude judgment on liability from being entered without trial.
4. In *Lam Chi Fat v Liberty International Insurance* [2002] 3 HKLRD 480, 488-489, Ma J (as he then was) said as follows in relation to the effect of a default judgment :

“26. …… As I have noted above, the interlocutory judgment entered on 28 January 1995 pursuant to O.13 r.2 of the Rules of the High Court (Cap.4, Sub. Leg.) was made in default of acknowledgement of service. No reasons for the judgment were given in these circumstances. This judgment was therefore entered on the basis that the facts as contained in the writ of summons, were true and admitted by the defendants : see *Hong Kong Civil Procedure 2002*, Vol.1 at p.125 at para. 13/0/10, referring to *Cribb v Freyberger* [1919] WN 22 (English Court of Appeal). ……

27. The basis for default judgments I have just referred to, give rise to the obvious consequence that as the facts on which the plaintiff's claim is based are deemed to be admitted, judgment will only be given on the plaintiff's claim provided the pleaded facts give rise to the relief sought. Where, however, the facts do not give rise to the relief sought, then unless the writ or statement of claim is amended, no judgment will be given. In default judgment situations, the court looks to the pleaded facts alone and no other evidence will be permitted. As I have said, if the plaintiff wishes to rely on other facts, leave to amend will be required together with all that this entails (such as re-service, etc). See here : *Smith v Buchan* (1888) 58 LT 710 (English High Court); *Young v* Thomas [1892] 2 Ch 134 at p.136; *Hong Kong Civil Procedure 2002*, Vol.1 at p.318 at para. 19/7/11.”

1. The aforesaid principles in *Lam Chi Tat* were approved on appeal ([2003] 2 HKLRD 119). Cheung JA confirmed at p.174 that “[by] making default in giving notice of intention to defend the defendant admits all the allegations in the statement of claim indorsed on the writ (*Cribb v Freyberger* [1919] WN 22) : see *Hong Kong Civil Procedure 2002*, Vol.1, p.125 para.13/0/10.”
2. I see no difference between judgment on liability entered by default and judgment on liability entered pursuant to an “unless” order. In either case, there is no trial on the merits. Thus, judgment on liability entered pursuant to an “unless” order for default in compliance with interlocutory directions is also necessarily based on implied admission of the plaintiff’s pleaded claim. Such rationale logically requires the defence (which disputes the plaintiff’s claim) to be struck out before entering judgment on liability otherwise such judgment will be irregular and embarrassing. That is why Order 24 rule 16(1) of the RDC provides for striking out the defence and entering judgment on liability and in *Kai Yip Air-Condition Engineering Comapny* Chung J granted an “unless” order to the effect that unless the defendant complied with his directions the defence be struck out and the counterclaim be dismissed before entering judgment. So long as the Defence filed by the 1st and 2nd Defendants stand (and there is no question that they still stand), the Judgment appears to be irregular.
3. When I invited Mr Wong to address on the regularity of the Judgment and on why the Judgment should not be struck out for irregularity, he had no ready answer and instead sought leave to adjourn the PTR to take instructions. Upon explaining the position to the 1st and 2nd Defendants, they also indicated a need to consider whether they would apply to set aside the Judgment (if need be out of time). In the circumstances, I adjourned the PTR for 2 weeks to 6th November 2008.

VI. Other matters at the PTR

1. In the meantime, upon Mr Wong’s confirmation that the Plaintiff’s claim in this case was a personal injury and not fatal accident claim with no plea that the death of the Deceased was caused by the Accident, I struck out paragraph 25 of the Plaintiff’s first witness statement, which reads “這次意外導致母親最終失去生命，亦令本人失去母親，對本人及家人都有重大的影響。如果沒有這次意外，本人相信母親繼續安享晚年。”, and all documents relating to bank accounts and funeral expenses in Part D of the draft trial bundle. Pursuant to my PTR Order dated 15th October 2008, the amended witness statement of the Plaintiff reflecting that paragraph 25 therein had been struck out was filed on 22nd October 2008.

*VII. Legal aid stay*

1. On 20th October 2008, the DLA filed a Memorandum of Notification of an Application for Legal Aid to notify that the Plaintiff made an application for legal aid. In the circumstances, the present action is automatically stayed for 42 days (see section 15 of the Legal Aid Ordinance Cap.91).

*VIII. Summonses by the 1st and 2nd Defendants*

1. On 22nd October 2008, the 1st and 2nd Defendants respectively issued a summons to appeal against and to set aside the Judgment, and to lift the legal aid stay. Both of them filed their supporting affirmations on the same day. In his supporting affirmation, the 1st Defendant claimed that due to (a) his ignorance in relation to legal matters, (b) the refusal of his application for legal aid, and (c) his financial hardship which prevented him from engaging lawyers, he did not know how to comply with the Unless Order when he (i) had no documents to disclose and (ii) could not locate witnesses after so many years. It was only at the PTR that he realised the serious consequences of the Unless Order and the Judgment. He maintained his dispute against the Plaintiff’s claim, and he asked for the court’s permission to appeal against and set aside the Judgment out of time. He promised to file/serve any further document as required by the court on time. The 2nd Defendant’s affirmation was along similar lines.

IX. Lifting legal aid stay

1. Section 15(7) of the Legal Aid Ordinance Cap.91 provides as follows :

“The time during which proceedings are stayed by virtue of this section may be reduced or extended by order of the court in which the memorandum is filed.”

1. The relevant principles have been summarised in my judgments/rulings in *Ted Ohya also known as Ohya Takaaki v Abdo A Osman also known as Abdo Abdelhanned Osman* DCCJ4042/2005 (unreported, 23 March 2006), *Mak Siu Bo v Yeung Wai Fan (t/a Wai Hing Trading Co)* [2007] 1 HKC 357, and *Chan Shing Ching v Hong Kong District Security Limited & anor* DCPI910/2005 (unreported, 10th April 2007).  I will state the principles briefly.
2. Mr Recorder Kwok SC in the *Bank of China (Hong Kong) Limited v Fu Ming Kong Michael & anor* HCA7769/2000 and HCMP3909/2000 (unreported, 24 June 2005) stated that:

“The purpose of the statutory stay under section 15 of the Legal Aid Ordinance is to allow sufficient time:-

* 1. for the director to process an application for legal aid; and
  2. in the event of legal aid being granted, for the assigned lawyer(s), to effectively represent the assigned client, and, where appropriate, to apply for more time.

The statutory stay is an aid in, and not an obstacle to the administration of justice ……”

1. The Court of Appeal in *Lee Shiu Ming v Yeo Hiap Seng (Hong Kong) Limited* CACV39/1993 (unreported, 14 July 1993) set out the principles for the court’s guidance when considering whether to lift the legal aid automatic stay.  The guiding principle is to do what is fair and just between the parties.  Yuen J (as she then was) in *Re Ip Lai Fan and Ip Lam On* HCSD10&11/2000 (unreported, 3 November 2000) summarised Nazareth JA’s guidance in *Lee Shiu Ming*’s case as follows:

“…… the court should be slow to lift a stay before an application for legal aid is determined, especially if a point of law had to be dealt with by a layman.  However, if the court was satisfied that the application for legal aid was an abuse of process, then the court should exercise its discretion to lift the stay.”

1. As an initial observation, this was the first application for legal aid by the Plaintiff. According to the relevant Memorandum, such application appears to have been made a few days after the PTR on 15th October 2008. But notwithstanding such application, the Plaintiff is still represented by his solicitors. Further, there was no intimation by the Plaintiff’s solicitors to the court in the CLR Notice of 29th August 2008 or the PTR Notice of 8th October 2008 or by Mr Wong who appeared at the PTR on 15th October 2008 that there was already an application or there would be an intended application for legal aid by the Plaintiff. The silence is loud as the Plaintiff’s solicitors by both notices sought to set the case down for trial/assessment of damages with an estimated length of 2-3 days. No explanation is forthcoming for the lateness or suddenness of the application in light of the above.
2. Ms Gigi Mak, solicitor for the Plaintiff who appeared at the hearing of the 1st and 2nd Defendants’ summonses before me, accepted that if there were an extant application for legal aid, the Plaintiff’s solicitors should have informed the court about such application at the last CLR on 8th September 2008 or at the PTR on 15th October 2008 (as was appropriate) since it would have impact on the timeline for fixing the date for trial/assessment for damages or other case management directions.
3. Consequently, the court was surprised by Ms Mak’s submissions that in fact the Plaintiff approached the DLA prior to the PTR on 15th October 2008, but the DLA only issued the Memorandum subsequently on 20th October 2008. However, she was unable to tell the court the date when the Plaintiff approached the DLA or produce the acknowledgment card of the processing unit of the Legal Aid Department confirming receipt of the application for legal aid. Time was given to Ms Mak to take instructions and/or produce the acknowledgment card, but she was unable to bring the matter further except to say the Plaintiff told her by telephone he applied to the DLA by letter and it was on 20th October 2008.
4. Whilst bearing in mind the laudable purposes of the legal aid statutory stay, I have decided to lift the stay insofar as to enable the court to deal with the summonses issued by the 1st and 2nd Defendants. The following are my reasons :
   1. The 1st and 2nd Defendants’ summonses sought to challenge the Judgment against them. If such Judgment is irregular, then the court’s process should be regularised and the irregular Judgment be set aside as soon as possible.
   2. Ms Mak in the course of her submissions suggested that the Plaintiff might issue a fresh summons for leave to strike out the Defence of the 1st and 2nd Defendants, and such intended step would have to await the result of the legal aid application. Obviously, if it is reasonably arguable that such intended step might have an impact on the regularity of the Judgment and there was a reasonably arguable basis for such intended application, the court must carefully consider whether the stay should remain in place. However, Ms Mak was unable to say on what basis, if the Judgment is irregular, the Plaintiff can apply to strike out the Defence of the 1st and 2nd Defendants. It cannot be said that there was no reasonable cause of defence. If any such application is grounded on procedural default, one has to bear in mind the guidance by Reyes J in *Yeung Shu Lam trading as Wilson Yeung & Co* discussed in paragraph 66 above. In any event, Ms Mak acknowledged that any fresh application to strike out the Defence made after the hearing of the 1st and 2nd Defendants’ summonses on 20th October 2008 could not retrospectively regularise the Judgment (if found to be irregular) obtained in July 2008. Further, it is trite that an irregular judgment is to be set aside as of right for the court will not lend its process to maintain an irregular judgment.
   3. It transpired in the course of submissions that Ms Mak had in fact prepared skeleton submissions (unfortunately again in the English language) in relation to the 1st and 2nd Defendants’ summonses, and she confirmed that the entirety of the Plaintiff’s arguments in relation to such summonses was contained in the skeleton submissions. This meant that the Plaintiff, having legal representation, was ready to deal with the summonses.
   4. In such circumstances, no substantial purpose is served by maintaining the legal aid stay vis-à-vis the 1st and 2nd Defendants’ summonses. In other words, it is not unjust to lift the stay for such purpose.
5. I therefore ordered that the legal aid automatic stay be lifted in relation to the hearing and determination of the 1st and 2nd Defendants’ summonses dated 22nd October 2008.

*X. 1st and 2nd Defendants’ summonses*

1. I arranged for the Plaintiff’s skeleton submissions to be translated into punti language by the court translator to the 1st and 2nd Defendants. Fortunately, through the good services of the court translator, the English skeleton submissions have not caused prejudice to the 1st and 2nd Defendants. I reminded Ms Mak that attention should be brought to all members of the Plaintiff’s solicitors of the Court Undertaking and of the court’s expectation of compliance of such undertaking, and that repeated non-compliance will attract sanctions by the court in its jurisdiction over its officers as well as for breach of undertaking to the court.
2. The Plaintiff’s skeleton submissions reiterated the history of the proceedings referred to above and the 1st and 2nd Defendants’ failure to attend CLRs and to comply with court directions, including directions to file/serve copies of documents and to file/exchange witness statements. In contending that the Judgment was regular, the Plaintiff’s solicitors submitted that the court had power to make the Unless Order pursuant to Order 24 rule 16 of the RDC. I accept that the court has power under such provision to make an “unless” order (see paragraph 63 above). But such submission ignores the express provision in Order 24 rule 16 of the RDC that the court may make such order as it thinks “just”, including “an order that the defence be struck out and judgment be entered accordingly”. As explained in paragraphs 68-72 above, failure to strike out the Defence of the 1st and 2nd Defendants renders the Judgment irregular and the same ought to be set aside.
3. The Plaintiff’s skeleton submissions alternatively asks for an order that the Defence of the 1st and 2nd Defendants be struck out and fresh judgment be entered for the Plaintiff against the 1st and 2nd Defendants. Other than referring to the court’s power under Order 24 rule 16 of the RDC on non-compliance of directions for making discovery, no other grounds have been put forward to support why, as required under Order 24 rule 16(1) of the RDC, such order is “just” in all the circumstances. I need say no more than to refer the parties to Reyes J’s guidance in *Yeung Shu Lam trading as Wilson Yeung & Co* discussed in paragraph 66 above. In any event, I did not have to deal with the matter since I have not lifted the legal aid stay for consideration of such application by the Plaintiff made by way of written submissions.
4. In the circumstances, I made an order at the hearing that the Unless Order (which is the genesis of the Judgment) and the Judgment be set aside.

*XI. Costs of the 1st and 2nd Defendants’ summonses*

1. Since I have not given reasons for my decision at the hearing, I reserved the question of costs of the 1st and 2nd Defendants’ summonses to be dealt with on a *nisi* basis. I have set aside the Judgment on the basis that it was irregular, so there is no reason why the Plaintiff should not bear costs. I therefore grant a costs order *nisi* in favour of the 1st and 2nd Defendants in respect of the costs of their summonses dated 22nd October 2008 in any event to be taxed if not agreed.

XII. Consequential directions

1. As a result of the legal aid stay which is maintained for the rest of the present proceedings, I made the following consequential directions at the hearing :
   1. PTR hearing on 6th November 2008 be vacated;
   2. PTR be adjourned to 9:30am on 18th December 2008 before myself in chambers (open to the public) at Court no.9 with 1 hour reserved;
   3. the PTR Order be drawn up by the Plaintiff’s solicitors and served.
2. All parties should expect that at the PTR on 18th December 2008 the court will set a tight timetable for any outstanding interlocutory steps (if any) and, more likely than not, set the case down for trial. At the hearing on 27th October 2008, the 1st and 2nd Defendants enquired as to how they could “catch up” with the progress of the proceedings if they had documents or witness statements they wanted to rely on. They should take active steps to deal with these matters prior to the next hearing including giving the Plaintiff’s solicitors prior notice or even copies (if they see fit) of such documents and/or witness statements and seek the Plaintiff’s consent for their use of the same in the proceedings. If such consent is not forthcoming (and it is a matter for the Plaintiff), the matter will be considered at the next PTR. I also direct that all further interlocutory applications in this case (if any) be brought and fixed before me as the judge designated to hear the PTR (see paragraphs 8.2(a) and (c) of Practice Direction 18.1).
3. The alleged Accident happened in mid-2004 and it is now more than 4 years after the event. Whilst the Plaintiff has a pending application for legal aid, there is every reason for the case to proceed quickly upon expiry of the legal aid stay. To facilitate the DLA’s understanding of the case for the purpose of speedy progress, I direct the Plaintiff’s solicitors to forward a copy of these Reasons for Decision to the DLA and to confirm in writing to the court this has been done within 7 days.
4. I have instructed my clerk to liaise with the 1st and 2nd Defendants (if they so require) to arrange for a court translator to verbally translate these Reasons for Decision into punti language for them at the Wanchai Law Courts when they collect these Reasons for Decision or at a mutually convenient date and time.

# (Marlene Ng)

District Court Judge

Representation:

Ms Gigi Mak of Messrs Huen & Partners for the Plaintiff

The 1st Defendant in person and present.

The 2nd Defendant in person and present.