## DCPI 1883/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1883 OF 2011

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##### BETWEEN

CHAN SHU WING Plaintiff

（陳樹榮）

### and

THE LINK MANAGEMENT LIMITED 1st Defendant

（領匯管理有限公司）

KONE ELEVATOR (HK) LIMITED 2nd Defendant

（通力電梯（香港）有限公司）

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Before: Deputy District Judge R Lai in Chambers (open to public)

Date of Hearing: 18 October 2013

Date of Decision: 26 November 2013

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DECISION

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*Introduction*

1. This is an appeal by the plaintiff from the learned master’s order made on 1 August 2013 dismissing the plaintiff’s application for leave to adduce expert evidence on liability at trial.
2. The plaintiff’s claim is a personal injury claim. The plaintiff claimed that on 19 December 2009, when he was taking a lift (the “Lift”) in Tin Shui Shopping Centre (the “Shopping Centre”) descending from the 2nd floor to the ground floor, the Lift suddenly dropped down by itself and stopped after dropping down. As a result, the plaintiff was injured.
3. The 1st defendant was the management company of the Shopping Centre. The 2nd defendant was the company responsible for maintenance of the Lift.
4. The plaintiff claimed that in failing to detect and put right the defect existing in the Lift which caused the Lift to drop down by itself, the 1st defendant had breached its common duty of care owed to the plaintiff and its statutory duty under the Occupiers Liability Ordinance (Cap 314). The plaintiff claimed against the 2nd defendant for breach of statutory duty under the Lifts and Escalators (Safety) Ordinance (Cap 327). The plaintiff also claimed against both defendants for negligence.
5. The defendants’ case was that the Lift came to a stop because its emergency stop function was activated. The emergency stop function was activated because a guide shoe of the Lift dislocated. The defendants denied that the Lift had suddenly dropped down before stopping. The defendants pleaded that the effect caused to the Lift when the emergency stop function had been activated was no different from the Lift being stopped by way of a normal landing. The design of such function was to ensure passengers’ safety and therefore, its activation (by nature of its design) would not otherwise cause harm or injury to the passengers. The defendants further pleaded that sufficient, reasonable and commonly recognized/acceptable maintenance plan had at all times been undertaken by the 2nd defendant on the Lift and its parts and components. The defendants denied the loss and injury claimed by the plaintiff as they were unforeseeable. The defendants also put the plaintiff to strict proof that his alleged loss and injury were caused by the accident.
6. The plaintiff issued the writ herein on 21 September 2011. Statement of Claim and Statement of Damages were filed on the same day.
7. The defendants filed their Defence on 17 November 2011. The plaintiff filed his Reply on 7 December 2011.
8. The plaintiff and the defendants filed their respective List of Documents on 3 January 2012 and 4 January 2012 respectively. The defendants filed their 2nd and 3rd Lists of Documents on 1 August 2012 and 28 March 2013 respectively.
9. Upon application of the parties by way of a consent summons, the court had on 21 February 2012 given case management directions including the following expert directions:-
10. No expert evidence as to liability should be adduced in written or oral form; and
11. The medical evidence was to be limited to one orthopaedic expert and one psychiatrist for each party.
12. Upon application of the parties by way of another consent summons, the court had on 6 July 2012 given further case management directions including further expert directions on quantum experts.
13. On 11 April 2013 the plaintiff took out a summons seeking, *inter alia*, leave to adduce expert evidence as to liability at trial (the “Application”).
14. The Application was dismissed by the learned master. The plaintiff lodged this appeal.

*Legal principles*

1. The parties had no disputes on the legal principles governing leave to adduce expert evidence. Expert evidence must be relevant, necessary and of probative value. (See *Law Kwong Keung v Cheng Chun Hang* (unrep, DCPI 1160/2012, 6 June 2013, HH Judge Alex Lee) and *Li Siu Ping & Anor v Perfecta Dyeing, Printing & Weaving Works Ltd* (unrep, DCPI 901/2006, 18 July 2007, HH Judge Marlene Ng))
2. Expert evidence is relevant if it will assist the court to resolve one or more relevant issues in dispute in the cause or matter and the issue is not one which the court can come to an informed decision without such expert evidence. (See *Ip Sau Lin (葉壽年) v Hospital Authority (醫院管理局)* (unrep, DCEC 584/2007, 9 April 2009, HH Judge Marlene Ng))
3. The expert must be qualified to give expert opinion outside the knowledge and experience of a layman on the relevant matter.

*The plaintiff’s case*

1. The plaintiff’s case was that the defendants pleaded in the Defence that the emergency stop function for the Lift was activated because a guide shoe was dislocated. In the witness statement of林志洋 (“Mr Lam”) served by the defendants, Mr Lam stated that it was the dislocation of a guide shoe that triggered the emergency safety device, resulting in a sudden stop of the Lift.
2. The defendants disclosed an occurrence report dated 31 December 2009 in their 3rd List of Documents filed on 28 March 2013 which stated that the cause of the accident was due to damage of a lower lift guide shoe. The plaintiff’s solicitor, Mr Poon Ka Lit (“Mr Poon”), stated in his affirmation supporting the Application that it was only after receiving the occurrence report that he realized that the cause of the accident was the damage of the guide shoe but not the dislocation of the guide shoe which might not involve a damaged component.
3. Mr Poon stated that the plaintiff should be entitled to verify and challenge the pleaded case and evidence of the defendants. He said that this would involve technical aspects of the operation of a lift and expert evidence was required on the following issues:-
4. Would the damage or dislocation of a guide shoe cause the Lift to stop? (“Issue 1”)
5. What could cause a guide shoe to be damaged or dislocated? (“Issue 2”)
6. Could that cause be discovered in a regular maintenance or examination? (“Issue 3”)
7. How long should a guide shoe be replaced? (“Issue 4”)
8. What consequence would there be if a guide shoe is not replaced regularly? (“Issue 5”)
9. If the guide shoe had been replaced prior to 19 December 2009, could the incident be avoided? (“Issue 6”)
10. What would be the effect on the Lift when the emergency stop was activated? (“Issue 7”)
11. At the appeal hearing, Mr Wong, representing the plaintiff, submitted that the expert evidence proposed to be adduced by the plaintiff would assist the court in determining Issues 3 and 7. He agreed that other Issues were either not relevant or not in dispute.
12. The expert proposed to be engaged by the plaintiff was Dr Cheung Kie Chung (“Dr Cheung”). Dr Cheung had issued a report dated 9 July 2013 on the aforesaid issues raised by the plaintiff. His opinion on Issues 3 and 7 were as follows:-

“(c) Could that cause be discovered in a regular maintenance or examination?

Worn out guide shoe linings can be detected during visual inspection. The “S” maintenance scheme [one of the maintenance scheme of the modular based maintenance scheme applied to the Lift] prescribed by Kone [the 2nd defendant] includes visual inspection of the guide shoes.”

“(g) The effect on life number 1 [the Lift] when the emergency stop is activated.

The lift car stops under a deceleration which is higher than that for normal stopping at landing.”

1. Mr Wong submitted that the above Issues related to the plaintiff’s allegation of negligence against the defendants for failing to detect the problem with the guide shoe and replace the damaged guide shoe prior to the accident.
2. Mr Wong further submitted that the defendants would call witness who was lift technician. He submitted that the evidence of such witness as seen from the witness statement would be full of technical knowledge, about which the plaintiff would be unable to reply or cross-examine without expert assistance.
3. Mr Wong submitted that the defendants had the advantage of calling their own technician to give evidence on technical matters but the plaintiff as a lay person was unable to say anything about the operation of the Lift. He said that this was neither fair nor just. He submitted that the plaintiff was entitled to call expert evidence to rebut the defendants’ case.
4. Mr Wong submitted that the Application was not too late as the Action had not been set down for trial.

*The defendants’ case*

1. Mr Sham, representing the defendants, submitted that the proposed expert evidence was not relevant or helpful in resolving the dispute between the parties. He said that the alleged breach of duty was that the defendants failed to detect and put right the defect exiting in the Lift which caused the Lift to drop down by itself but the proposed expert evidence dealt with the mechanism of stopping (as opposed to dropping down) due to the damage of the guide shoe. It was therefore not relevant or helpful to the court in resolving the issues in dispute.
2. He also commented that Dr Cheung did not carry out any inspection of the guide shoe and his opinion that the guide shoe was badly worn out on 19 December 2009 was speculation.
3. Mr Sham further submitted that the Application was made late as the parties were otherwise ready for trial. He criticized the plaintiff for failing to comply with Practice Direction 5.2 (“PD 5.2”) and for not providing a full and frank explanation for the delay.
4. He referred me to *Chok Yick Interior Design & Engineering* *Co Ltd* *v Lau Chi Lun* (unrep, HCA 1480/2005, 5 May 2010) when Lam J (as he then was) stated that the court expected a party seeking indulgence for new evidence to be admitted at a late stage to be full and frank in the explanation as to why the relevant evidence was not filed in a timely manner.
5. He said that the plaintiff’s solicitors had confirmed three times in the Check List Review Questionnaires dated 9 February 2012, 26 June 2012 and 2 April 2013 that the plaintiff did not intend to adduce expert evidence on liability at trial and the court had on 21 February 2012 ordered that no expert evidence as to liability should be adduced in written or oral form. The court had also limited expert evidence to one orthopaedic expert and one psychiatrist for each party.
6. Mr Sham said that the plaintiff’s explanation as stated in Mr Poon’s affirmation was not full and frank when Mr Poon said that the plaintiff did not realize that the accident was caused by the guide shoe being damaged (as opposed to dislocation) until disclosure of the occurrence report on about 28 March 2013. Mr Sham pointed out that the damage of the lower guide shoe being the cause of the breakdown of the Lift was made known to the plaintiff in the logbook records disclosed in the defendants’ List of Documents dated 4 January 2012 and Dr Cheung only referred to the logbook records in his report without reference to the occurrence report.
7. Mr Sham submitted that after the Civil Justice Reform, late application for expert evidence should not be allowed. He relied on *Fung Chun Man v Hospital Authority* (unrep, HCPI 1113/2006, 24 June 2011) when Bharwaney J refused an application for adducing expert evidence after taking into consideration that the application was late, the potential disruption to the trial and the absence of a good explanation for the late application.
8. Mr Sham submitted that if leave was granted for the plaintiff to adduce expert evidence on liability, the whole proceedings would be set back to the beginning of the case management. He further submitted that on the ground of lateness alone, leave should be refused.

*Discussion*

1. To determine whether expert evidence is required, the court has to identify the relevant issues in dispute and to see if the court will require expert evidence to resolve any of these issues. If the court is of the view that it will require assistance of expert evidence to resolve a relevant issue in dispute, leave to adduce expert evidence will be granted unless there are good reasons for the court to refuse such leave. Delay in making application for leave may in appropriate case constitute good reason for refusing leave.

*Whether the court requires expert evidence on liability?*

1. In this case, there were no disputes that the Lift suddenly stopped on 19 December 2009 when the plaintiff was travelling in it. There were also no disputes that the sudden stop was caused by the Lift’s emergency stop function being activated by dislocation of a damaged lower guide shoe. The relevant issues in dispute on liability are whether the Lift had dropped down before it stopped and whether the accident caused the alleged injury to the plaintiff. Of course whether the damaged guide shoe could be detected if there was no negligence on the part of the defendants is also a relevant issue in dispute.
2. The plaintiff identified seven issues which the plaintiff said that expert evidence would be of assistance to the court. Although Mr Wong relied mainly on Issues 3 and 7 to support the Application, I shall also briefly deal with other Issues identified by the plaintiff.
3. Issue 1 was: “Would the damage or dislocation of a guide shoe cause the Lift to stop?” It was a common ground of the parties that the emergency stop function of the Lift was caused by the dislocation of a damaged guide shoe. Though this is a relevant issue, it was not in dispute. No expert evidence on this Issue is required.
4. Issue 2 was: “What could cause a guide shoe to be damaged or dislocated?” The reasons for the guide shoe to be damaged or dislocated were irrelevant to the plaintiff’s claim and the parties had not put forward different reasons for that. In para 10 of Mr Lam’s witness statement, he stated that:-

“我們發現運送升降機的其中一條路軌内的導靴離位而導致升降機的緊急停機安全制啟動，而導致突然停。導靴之所以離位可能跟升降機使用情況有關。例如，如果該升降機曾遇上猛力踫撞，或使用該升降機的乘客曾運輸十分重或大型物件進入升降機而導致機身猛烈踫撞，該部件便有機會離位。如這情況發生，升降機内置的安全緊急制便會啟動，升降機便會立即停下來了。”

1. Dr Cheung in para 16(b) of his report stated that:-

“What could cause a guide shoe to be damaged or dislocated?

The nylon lining of guide shoes wears out under use. A guide shoe should not get dislocated under normal use.”

1. The first sentence of the above quotation in Dr Cheung’s report is common sense and not expert evidence. The second sentence only confirmed Mr Lam’s evidence that the guide shoes would not dislocate if the Lift was used in the normal way. This Issue was neither relevant nor in dispute. No expert evidence on this Issue is required.
2. Issue 3 was: “Could that cause be discovered in a regular maintenance or examination?” My understanding of the word “cause” in this Issue is the “cause” causing the Lift to stop suddenly, ie the damaged guide shoe. This is confirmed by the evidence of Dr Cheung proposed to be adduced which had been set out in para 20 above. The evidence of Dr Cheung was that worn out guide shoe linings could be detected during visual inspection.
3. In the affirmation of Mr Lam filed by the defendants in opposing the Application, Mr Lam stated in para 5 that:-

“A lower guide shoe is installed inside a bracket at the bottom part of the lift and it cannot visually be seen if it is in good condition and therefore, in place.”

1. Whether a worn out lower guide shoe could be detected during visual inspect is a factual matter to be determined by the trial judge after hearing evidence from the factual witnesses. There is no room for expert evidence on that issue.
2. Issue 4 was: “How long should a guide shoe be replaced?” The parties had never put this matter in issue whether in their pleadings or in their witness statements. This is not an issue in dispute. No expert evidence on this issue is required. In fact, the evidence of Dr Cheung in his report on this Issue was: “Guide shoes need not be replaced if worn out linings were replaced.” I do not see how such evidence will be helpful to the trial judge in resolving the relevant issues in dispute in this Action.
3. Issue 5 was: “What consequence would there be if a guide shoe is not replaced regularly?” The parties had never put this matter in issue whether in their pleadings or in their witness statements. This is not an issue in dispute. No expert evidence on this Issue is required.
4. Issue 6 was: “If the guide shoe had been replaced prior to 19 December 2009, could the incident be avoided?” Dr Cheung’s evidence as stated in para 16(f) of his report was that:-

“As mentioned in paragraph 13, I am of the view that the maintenance worker failed to see that the guide shoe lining was worn when the “S” maintenance scheme was carried out. If the guide shoe lining was replaced on 9 December 2009, the life car will not sway and hit the 1/F landing door lock.”

1. The first sentence of the above quoted paragraph of Dr Cheung’s evidence was factual matter to be determined by the trial judge after hearing evidence from the factual witnesses. No expert evidence is required or admissible on this matter. The second sentence was stating the obvious and is a matter of common sense. No expert evidence on this Issue is required.
2. Issue 7 was: “The effect on lift number 1 [the Lift] when the emergency stop is activated.” Dr Cheung’s evidence as stated in para 16(g) of his report was that:-

“The lift car stops under a deceleration which is higher than that for normal stopping at landing.”

1. The pleaded case of the plaintiff as set out in para 4 of the Statement of Claim was that:-

“While the Plaintiff was inside the Lift and while the Lift was descending, it suddenly dropped down by itself and stopped after dropping down. As a result, the Plaintiff got injured.”

1. The plaintiff’s pleaded case was that the Lift “suddenly dropped down”. My understanding of the plaintiff’s pleaded case was that he claimed that the Lift at the material times was descending at a speed higher than the normal descending speed. Of course this was denied by the defendants when they pleaded in paras 5 (c) and (d) of the Defence that:-

“(c) it is specifically pleaded that the effect caused to the lift when the emergency stop function has been activated is no different from the lift being stopped by way of a normal landing.

Particulars

1. The carpark complex in question comprises 4 levels of carpark. L1 [the Lift] serves 3 floors, namely Ground Floor, 1st Floor and 2nd Floor, only. By nature of it only serving a very low level, the speed of this lift is also very low which is only 1 metre per second and such speed is regarded as the slowest type of all lifts commonly in use.
2. The emergency stop function was a safety device which was built-in in most, if not all, lifts in Hong Kong. Whenever there is an issue in any component or part of the lift, regardless of its severity or it being very minor, the emergency stop function will automatically be activated. The design of such function is to ensure passengers’ safety and therefore, its activation (by nature of its design) will not otherwise cause harm or injury to the passengers.
3. When the emergency stop function was activated, L1 comes to a normal stop. It is specifically denied that L1 had suddenly dropped down before stopping.
4. When the emergency stop function was activated, L1 remains illuminated as usual and sign was displayed to inform the passengers that it was being temporarily not in service.

(d) It is averred by the 1st and 2nd defendants that it was impossible for L1 to have dropped down, given all its wirings and cables were found to be in order and in good condition at the time of incident.”

1. In the Reply, the plaintiff did not admit what were pleaded in paragraph 5 of the Defence and put the defendants to strict proof.
2. In his witness statement dated 26 May 2012 the plaintiff stated that:-

“4. 在2009年12月19日晚上大約8時許，我在天水圍天瑞邨停車場乘搭升降機由二樓落地下，…… 當升降機門關上後，升降機突然急跌而向下墮，當升降機突然下墮時我感覺失去重心，當時我亦聽到很大的聲響，但我不清楚聲響的來源及發出聲響的原因，當升降機突然下墮時我感覺到升降機摇了一摇，我身體因此而失去重心及正要跌在地上，當我正要跌下的一煞那，我的左手緊握扶手，因此我在升降機内沒有跌在地上，但我的頸部，左手及左邊身被重重的戳了一吓。

5. 升降機停定後並沒有打開門，我於是用手提電話致電999報警，…… 。”

1. It can be seen that whether the Lift had “dropped down” was in dispute but the plaintiff in not admitting that the Lift “stopped by way of a normal landing” did not put forward a different case. However, Dr Cheung in his evidence to Issue 7 did not address whether the Lift had “dropped down” but on the “stopping” of the Lift after the alleged “dropped down” by saying that the Lift “stops under a deceleration which is higher than that for normal stopping at landing”. It was not the plaintiff’s case in his pleadings or witness statements that at the material times the Lift was stopped under a deceleration higher than normal landing. Dr Cheung’s evidence was not on an issue raised in this Action.
2. Dr Cheung stated in para 9 of his report that in the case of emergency stop, the deceleration was higher than that when the lift car approached a landing in the normal manner. However, he did not explain the reasons for the Lift to stop under a deceleration higher than normal landing and he did not tell the extent of different of deceleration in this case and in the normal landing. Dr Cheung had not inspected the Lift and had not conducted any tests on the operation of the emergency stop function of the Lift. Even if the speed of deceleration is in issue, the evidence of Dr Cheung will not be helpful to the trial judge in resolving such issue.
3. In *Poon Kwok Wing Ernest v Airport Authority* (unrep, HCPI 305/2004, 30 June 2006, Suffiad J and CACV 257/2006, 28 February 2007) the claimant fell from an escalator whilst travelling on it. He claimed the escalator stopped suddenly causing him to lose his balance and fall. Nobody claimed to have seen the accident. The claimant was unclear how the accident happened. In the pleaded particulars of negligence, the claimant relied on improper repair and/or maintenance of the escalator by the defendant. The maintenance company found the escalator and safety switches to be in good condition during an overhaul a week before the accident and also immediately after the accident. The escalator was also restarted without activating the reset button. The relevant government department found no defects.
4. As in the case before me, the PI Master in that case had in August/September 2004 ordered that no expert evidence as to liability should be adduced in written or oral form when giving directions at a Check List Review hearing. The claimant did not appeal against that order but took out a summons in December 2005 for leave to adduce expert evidence on liability. The application was dismissed by the learned master. Suffiad J dismissed the claimant’s appeal and his Lordship’s decision was upheld by the Court of Appeal.
5. The claimant in that case wished to adduce expert evidence from a lift and escalator engineer on the cause of the sudden stoppage of the escalator. There was no particularized complaint of any alleged defect in the construction or design of the escalator and no request for inspection of the escalator for 6 years since the accident. The sole issue in that case was the cause of the sudden stoppage of the escalator. The court considered that it was a factual matter for the trial judge for which no special expertise was required. Hence expert reconstruction of what happen at the time of the accident was denied. Suffiad J stated in para 45 of his judgment that:-

“The law is quite clear that only in exceptional circumstances will a party be allowed to adduce expert evidence in trying to reconstruct what happened in an accident, and this case does not come within such exceptions.”

1. In the case before me, there was also no complaint on the construction or design of the Lift. The parties even had no disputes on the cause of the sudden stoppage being dislocation of a damaged guide shoe. The sole issue was whether the defendants should have detected the damaged guide shoe during the visual inspection of the maintenance service. Dr Cheung stated in para 13 of his report that:-

“13. It is very likely that the maintenance worker failed to check the state of wear of the guide shoe lining properly when he conducted the “S” maintenance scheme on 9 December 2009”

1. This is a factual matter for the trial judge for which no special expertise is required. The expert evidence proposed by the plaintiff is not necessary for resolving any relevant issues in dispute in this Action and it is of little, if not none, probative value. On this ground alone, I will dismiss the appeal.
2. Mr Wong submitted in para 17 of his skeleton submission that:-

“17. If the damage was a hidden defect which Ds could never have discovered (as pleaded in Defence [127, §8(a)]), P’s case must fail. On the other hand, if the defect could and should have been discovered by Ds, Ds’ failure to identify it and remedy it shows their negligence. But P has no technical knowledge about lift operation and is unable to prove the same without expert assistance.”

1. If the plaintiff or his legal team required assistance from technical experts to understand the case and to prepare the plaintiff’s case, it is up to them to consult experts. The court does not purport to control or inhibit a party’s right to consult experts. However, the fact that a party requires expert’s assistance to prepare its case is not a ground for the court to grant leave to adduce expert evidence if such evidence is not required for the court to resolve the relevant issues in dispute. As pointed out by HH Judge Marlene Ng in para 43 of her judgment in the *Ip Sau Lin* case that: “The court has a duty to restrict expert evidence to what is reasonably required for proper adjudication”.
2. If the evidence of a factual witness of a party contained expert opinion evidence, the other side shall seek appropriate directions from the court to deal with such evidence of the factual witness but not to seek direction to adduce expert evidence to rebut such evidence of a factual witness.

*Delay*

1. The defendants also criticized the plaintiff for making this application late and without full and frank explanation.
2. Mr Sham referred me to *So Cheuk Yi v Pang Harling Harry* (unrep, HCPI 526/2007, 3 June 2009, Fung J) where an application for leave to adduce new expert evidence from further expert was made to the court after the court had directed the case to be set down for trial. The claimant did not comply with the setting down order and made the aforesaid application when the case was supposedly to be warned in 2 weeks’ time in accordance with the setting down order. The court disallowed the application to adduce additional expert evidence by reason of lateness.
3. In the *Fung Chun Man* case, Bharwaney J was of the view that the new expert evidence was reasonably required to enable him to resolve the issue in dispute although he would not be seriously affected in his ability to resolve that case without such evidence. He nonetheless refused the claimant’s application for adducing new expert evidence made after the case had been set down for trial for reasons stated in para 31 above.
4. Mr Wong submitted that the application was “not too late” as this Action had not been set down for trial when the plaintiff made the Application.
5. To take out an interlocutory application after an action has been set down for trial is “very” late. I have no doubt that to take out an interlocutory application, which should have been taken out earlier, when the action is otherwise ready for setting down is “late”. Granting the Application will certainly postpone the setting down of this Action delaying the trial. It disrupts the parties’ readiness for trial. If the new evidence could disrupt the readiness for trial, there has to be good and cogent reasons for the court to allow such late interlocutory application.
6. The Check List Questionnaire was designed to draw the parties’ attention to matters which they should have considered at the stage of Check List Review. The information provided in the Questionnaire will be relied on by the court to exercise its powers and discharge its functions in case management. The parties shall not treat the Questionnaire as a mere formality.
7. The plaintiff had repeatedly informed the court (by his Questionnaires filed on 9 February 2012, 26 June 2012 and 2 April 2013) that he did not intend to adduce expert evidence on liability at trial. By a consent summons dated 14 February 2012, the plaintiff even jointly applied to the court with the defendants for an order that no expert evidence as to liability should be adduced in written or oral form in this Action. The court made the requested order on 21 February 2012.
8. Mr Sham fairly pointed out that pursuant to Order 38, rule 44 of the Rules of the District Court (the “RDC”), any direction given under Part IV of Order 38 (ie direction on expert evidence) might on sufficient cause being shown be revoked or varied by a subsequent direction given at or before the trial of the cause or matter.
9. The cause relied on by the plaintiff in support of the Application was that he did not know that the dislocation of guide shoe was caused by the guide shoe being damaged until after the defendants had disclosed the occurrence report in late March 2013. However, in the Check List Questionnaire dated 2 April 2013 (ie after disclosure of the occurrence report on 28 March 2013), the plaintiff’s solicitor still confirmed that the plaintiff did not intend to adduce expert evidence on liability at the trial. (Answer to F1) The plaintiff’s solicitor further confirmed that it was appropriate in all circumstances to set the case down for trial. (Answer to I1) The plaintiff changed his stance only on 9 April 2013 when the plaintiff’s solicitors wrote to the defendants’ solicitors seeking the defendants’ consent for the plaintiff to adduce new expert evidence on liability.
10. Mr Sham further pointed out that the plaintiff’s explanation was not supported by the report issued by Dr Cheung which only referred to the logbook entries (which had been disclosed in January 2102) but not to the occurrence report.
11. Mr Sham relied on the *Chok Yick Interior Design & Engineering Co Ltd* case to submit that the plaintiff was not full and frank in his explanation as to why the Application was not made earlier.
12. The logbook entries disclosed had the following records for 19 December 2009:-

“雞蘇膠爛 更換 OK”

1. The logbook entries had the following further records for 24 December 2009:-

“15:00收到天瑞商場管理處通知，就09年12月19日晚上20:05發生的升降 [sic] 困人事故需要報機電處。(管理處沒有閉路電視記錄)

事發: 09年12月19日20:05分收到天瑞商場通知L1 [the Lift] 困了一名乘客 [the plaintiff]，通力[the 2nd defendant] 員工鄭玉記及林志洋 [Mr Lam] 在20:27分到達，當時已見消防員放人但不成功，通力在20:30接手後在20:39放出乘客，放出時該名乘客並沒有表面傷痕。通力員工檢查後發現機底雞蘇爛引致機身向下行時撞1/F外閘鎖，當更換完雞蘇後再仔細檢查各層閘鎖位及安全制後，在00:15放回正常。”

1. The occurrence report contained the following paragraphs:-

“(5) Brief Description of Occurrence

At 20:05 hours on 19 December 2009, KONE [the 2nd defendant] service centre received a breakdown call of lift number L1 [the Lift] with man-trapped from the management office in Tin Shui Commercial centre. Our technician arrived upon the scene at 20:27 hours and released an old man [the plaintiff] at about 60 years of age with assistant from firemen at 20:39 hours. Without required any medical assistant, the man stated he would leave the scene. Then, Our technician carried out repair of the lift and replaced one of lower lift guide shoe. The lift resumed normal at 23:59 on 19 Dec 2009. ……

(7) Primary Cause

The cause of the breakdown was due to damage of lower lift guide shoe.”

1. It can be seen that the facts that the guide shoe was damaged and that the accident was caused by the damaged guide shoe had been clearly recorded in the logbook entries. The occurrence report was listed in Appendix 2 to Dr Cheung’s report as one of the documents considered by him before he prepared his report. However, Dr Cheung did not refer to the occurrence report in his report. Dr Cheung’s report supported Mr Sham’s contention that the records of the logbook entries had sufficiently showed that the guide shoe of the Lift was damaged and the accident was caused by the damaged guide shoe. If expert evidence on liability issue is required because of the aforesaid facts, the plaintiff should have made the Application at previous Check List Review hearings and should not have informed the court by his Questionnaires that no expert evidence on liability was required. The plaintiff also should not have applied to the court for an order that no expert evidence as to liability be adduced at trial.
2. I do not accept that the plaintiff did not know the guide shoe being damaged and the accident was caused by the damaged guide shoe until disclosure of the occurrence report. Although the plaintiff’s ground is not accepted for explaining the delay for the Application, I will not find that the plaintiff’s explanation was not full and frank.
3. In the *Chok Yick Interior Design & Engineering Co Ltd* case, the claimant sought leave to adduce new expert evidence on the ground of change of stance on the part of the defendant as intimated by the defendant’s draft supplemental witness statement served on 8 October 2009. It transpired that the claimant had engaged its expert on 23 September 2009 well before the defendant’s draft supplemental witness statement was served. The claimant’s solicitor further suggested that the claimant’s engagement of the new expert was in response to the defendant’s engagement of an expert to challenge causation of water leakage, subject matter of the claim in that action. However, the claimant’s counsel informed the court that the claimant would wish to seek leave to admit its new expert’s evidence irrespective of the outcome of the defendant’s application to adduce expert evidence to challenge causation. It was in those circumstances that Lam J (as he then was) came to the conclusion that the claimant’s solicitor in that case did not set out the full picture behind the engagement of the new expert by the claimant.
4. Whether the court accepts the plaintiff’s explanation is one matter. Whether the explanation was full and frank is another matter. There was no evidence suggesting that the plaintiff was hiding anything from the court in making the Application or that the plaintiff made the Application late because of other reasons. I only find that this is a late application and the plaintiff failed to show sufficient cause justifying this court to exercise the power under Order 38, rule 44 of the RDC to revoke or vary the expert direction on liability issue made on 21 February 2012.

*Non-compliance of Practice Direction*

1. Mr Sham criticized the plaintiff for failure to comply with PD 5.2 in obtaining expert evidence directions including the requirement to consider appointing a single joint expert.
2. Para 20(1) of PD 5.2 provides that the court will not give permission for a party to adduce expert evidence unless that party has, inter alia, considered the appropriateness of appointing a single joint expert.
3. Para 1 of PD 5.2 provides that:-

“1. This Practice Direction applies to all civil actions in the Court of First Instance (subject to Practice Direction 5.7) and the District Court, **except cases in the specialist lists** save to the extent that the Courts in charge of such lists may choose to adopt these directions in a particular case or in general.” (Emphasis added)

1. This is a case in the personal injuries list. The applicable Practice Direction is Practice Direction 18.1 (“PD 18.1”) instead of PD 5.2.
2. Paras 13 and 98 of PD 18.1 provides that:-

“13. The Directions contained herein shall also apply, with suitable adaption, to actions commenced in the District Court.”

“98. Subject to the provisions of this Practice Direction, RHC [Rules of the High Court and in the District Court the RDC], Order 25 shall apply whilst Practice Direction 5.2 (Practice Direction on Case Management) shall not apply to actions in the PI List [Personal Injuries List].”

1. As PD 5.2 is not applicable to this case, non-compliance of PD 5.2 is not a ground to resist the Application.
2. In respect of single joint expert, para 90 of PD 18.1 provides that:-

“90. If it is anticipated that a single joint expert is appropriate in light of the considerations identified in RHC, Order 38, rule 4A(5) [there are similar provisions in the RDC], the direction of the PI Judge or PI Master should be sought as soon as possible and preferably not later than the first Check List Review Hearing.”

1. In their 2nd letter dated 9 April 2013, the plaintiff’s solicitors suggested to the defendants’ solicitors that the parties either to jointly engaged an expert or separately retained their own experts on the issue of liability. It was the defendants’ disagreement to the new expert direction sought which stopped the parties from exploring further the appropriateness of appointing a single joint expert for the liability issue. In such circumstances, it is unfair to say that the plaintiff had failed to comply with the provisions on obtaining expert evidence directions as set out in the relevant Practice Direction, ie PD 18.1 in this case.
2. Further, para 137 of PD 18.1 provides that:-

“137. Where there has been a change in the circumstances since the directions were given and the timetable was fixed, the Court may set aside or vary a direction it has given or give further directions either on application or on its own initiative.”

1. As I do not accept that there was change of circumstances in this case justifying setting aside or varying the previous direction in respect of expert evidence on liability, para 137 of PD 18.1 does not assist the plaintiff.

*Other issues*

1. The defendants had in the affirmation of Kwan Long Yee Corrina filed herein on 12 April 2013 in opposition to the Application challenged the expertise of Dr Cheung and queried that the costs of engaging experts on liability was disproportionate to the plaintiff’s claim. Mr Sham did not pursue these issues at the appeal hearing and in view of my above rulings, I do not propose to deal with these issues in details. The Curriculum Vitae of Dr Cheung had been set out in Appendix 1 to his report and his fee had been set out in the aforesaid 2nd letter dated 9 April 2013 from the plaintiff’s solicitors to the defendants’ solicitors. Suffice it to say that it appears to me that Dr Cheung does have the expertise to give expert evidence on operation of the Lift and his proposed fee is not disproportionate to the plaintiff’s claim.

*Conclusion*

1. I am of the view that the proposed expert evidence is not necessary, relevant or of probative value. It does not assist the court in resolving the relevant issues in dispute but will disrupt the readiness of the case for trial. The plaintiff made the Application late without good reasons. In the premise, like the learned master, I will also refuse leave for the plaintiff to adduce expert evidence on liability. I dismiss the plaintiff’s appeal against the order dated 1 August 2013.
2. I make an order nisi that the plaintiff shall pay the defendants’ costs for this appeal with counsel certificate. As the plaintiff is legally aided, his own costs shall be taxed in accordance with the Legal Aid Regulations.
3. The above costs order nisi shall become absolute after 14 days from the date of this decision unless application to vary the order nisi is received from any party within this 14 days period.

( R Lai )

Deputy District Judge

Mr Simon Wong, instructed by Kenneth Poon & Co, for the plaintiff

Mr Walker Sham, instructed by Ip, Kwan & Co, for the defendants