DCPI 97/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 97 OF 2006

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BETWEEN

TSUI KWAN FAI Plaintiff

and

GOLDFIELD N & W CONSTRUCTION Defendant

COMPANY LTD.

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Coram : His Honour Judge Stanley Chan in Court

Dates of Hearing : 28th May 2007- 31st May 2007, 11th June 2007

Date of Handing Down Judgment : 24th August 2007

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J U D G M E N T

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Introduction

1. At the material time, the Plaintiff was carrying on the business of installation of electrical works of fire service system at Cheong Wong Wai Primary School, Phase 3, Sun Chui Estate, Shatin (‘the Site’). The Plaintiff worked as a sub-contractor. The Defendant was a company incorporated in Hong Kong and was carrying on the business of construction work as the principal contractor at the Site.

2. It was admitted by the Defendant that the Defendant had the control and occupation of the Site and was the occupier of and entitled to possession and control of the Site.

3. The Plaintiff now claims damages as a result of his personal injuries whilst working on the Site on 26 May 2004.

4. At the material time, the Defendant was employed by the Government of HKSAR under a contract, Contract No. AL L330, to carry out conversion and extension work to a number of existing aided schools listed as Group 1 under a School Improvement Program Final Phase Package 13. In October 2002, the Defendant sub-contracted the fire service installation works to Pyrofoe Engineers Limited (‘PEL’). Shortly before commencing the contractual work, the Plaintiff set up a company called Eclat E&M Engineering Company (‘Eclat’) which operated the fire service system (electrical) installation work. In or about August 2003, the Plaintiff was asked to submit quotations for the electrical work of the fire service installation for 8 different government aided schools in Shatin area. The time was before Eclat was formally incorporated. It is worthy to note that in or about September 2003, the Plaintiff had started to work in a different capacity by engaging labourers (代工) to work on the Site.

5. In or about December 2003, Pyrofoe (F.S.) Company (‘PFSC’), an associated company of PEL, prepared two Purchase Orders dated 13 December 2003 and 16 December 2003 respectively for the Plaintiff to sign. The first Purchase Order does not concern the present claim. These Purchase Orders incorporated details of the quotations submitted by the Plaintiff previously. Both PEL and PFSC were situated at the same commercial building. The annual return of PEL shows that the address was at Block B, 4/F of the same Building (p.327 of Bundle B). It also has the office address at 2/F, Hing Wah Commercial Building, Shanghai Street Mongkok (see p.227 of Bundle B). The address of PFSC was at 4/F, Block B, Hing Wah Commercial Building, Shanghai Street, Mongkok (see p.235 of Bundle B). Both companies shared the same office telephone number 27701078, the same fax number 27702456 and the same email address, pyrofoe1@netvigator.com. PFSC was wholly owned by World Best Services Limited (‘World Best’) which was also related to PEL as they had Madam Sham Shui Kuen as the common shareholder at the time. The registered address of World Best was Block A, 4/F, Hing Wah Commercial Building, 450 – 454 Shanghai Street, Mongkok (p.292 of Bundle B). In Form 1(d), the Business Registration document at p.295 of Bundle B, it was stated that World Best had a branch business carried on under the name of PFSC and the registered address was Block B, 4/F of the said Hing Wah Commercial Building, the same as PEL.

6. In early January 2004, the Plaintiff applied for a business registration certificate for Eclat (pp.256 to 257 of Bundle B) in which it was stated that the commencement date was 2 January 2004, although the ‘certificate of applicant’ of the said Certificate (p.257 of Bundle B) was dated 5 January 2004.

7. The sub-contracts in the form of the two Purchase Orders between PFSC and the Plaintiff were signed in the office of PEL and/or PFSC on 19 January 2004. The Plaintiff always referred PEL and/or PFSC in Chinese as “ 衛安 ” or “ 衛安消防 ”.

**Facts**

8. At the material time, the Plaintiff was responsible for part of the fire service system installation in Contract AL L330. At about 11:00am on 26 May 2004, the Plaintiff was to install an illuminated Exit signboard on the ceiling on 3/F of the Site. The Plaintiff used an A-shaped wooden ladder of 6 rungs to reach the ceiling of the corridor in order to perform his task. A number of the ladders were made available at the Site. Some of the ladders, it was claimed, bear the Chinese characters “聯 合 金 輝”, the Chinese name of the Defendant. The Plaintiff claimed that the ladder was provided by the Defendant as the ladder bears the name of the Defendant. The Plaintiff was standing astride on the ladder. Whilst he was installing the Exit signboard, the Plaintiff fell from a distance of about 2 meters onto the ground as one of the hinges of the ladder came off and, consequently, the ladder toppled.

9. The Plaintiff sustained multiple injuries to his face, right upper limb and right shoulder. X-ray examination showed that the Plaintiff had a fractured right radial head. The Plaintiff has a closed fracture of the head of the right radius and sustained soft tissue injury to his right wrist and right shoulder.

**Causes of Action**

10. The Plaintiff claims that the Defendant is liable for the personal injuries sustained by the Plaintiff on the basis:

1. that the Defendant was in breach of duties of care at common law and owed a common duty of care as an occupier of the Site under the Occupiers Liability Ordinance, Cap 314 (‘OLO’); and

2. that the Defendant was the contractor responsible for the site and was in breach of the statutory duties under the Constructions Sites (Safety) Regulations, Cap 59I (‘CSSR’).

11. The Defendant admitted in its Re-Amended Defence dated 9 May 2007 that it was the contractor responsible for the Site within the meaning of CSSR; that it had control and occupation of the Site and was the occupier having possession and control of the Site (para 3 and 4 of the Re-Amended Defence at p. 49 of Bundle A). But the Defendant denied that the Plaintiff was a lawful visitor at the Site and that there was no contract between PEL and the Plaintiff. The Defendant also alleged that the accident in fact was caused by the Plaintiff’s slipping and falling down on a flight of staircase as recorded in the Investigation Report (para.5 of the Report at p.265 of Bundle B).

12. To determine the issue of liability, it is necessary to consider the following 3 questions:

(1) Whether the Plaintiff was a lawful visitor at the Site?

(2) Whether the ladder in question was provided by the Defendant?

(3) Whether the Plaintiff fell from the ladder which was defective?

**The Plaintiff’s case**

13. The Plaintiff adopted his witness statement dated 8 August 2006 (pp.105 to 112 of the Bundle B) and his supplemental witness statement (pp.122-1 to 122-4 of Bundle B).

14. The Plaintiff said that he used to work as a worker for the ex-contractor of PEL and then for PEL sometime in 2003. On 8 August 2003, PEL sent an invitation for quotations to the Plaintiff whom was described as a contractor. It listed out 2 contracts, viz. AL L318 and AL L330, and asked the Plaintiff to submit quotations and graphs within 7 days (p.227 of Bundle B). Under Contract AL L330, Cheong Wong Wai Primary School was School No. P352 and was the Site in the present proceedings. Two Purchase Orders were issued by PFSC (not PEL) to Eclat dated 13 December and 16 December 2003 respectively. The last Purchase Order related to P352 with the amount of $48,750. Under the letterhead of PFSC finds the words “O/B World Best Services Ltd”. The Purchase Order specified that the quotations did not include materials and insurance premium.

15. The Plaintiff said that it was Johnny Chan of PEL who asked the Plaintiff to set up a company and submit quotations for the electrical work for the fire service installation at the Site. As a result, the Plaintiff set up Eclat. The Business record at p.256 of Bundle B shows that the date of commencement of the business was 2 January 2004; with the stamp chop of the Inland Revenue Department (BRO) dated 5 January 2004.

16. The Plaintiff said that all along he would refer PEL or PFSC by Chinese as ‘衛 安’ ‘衛 安 消 防’. On 26 May 2004, the Plaintiff was at the Site working on the fire services installation work. The Plaintiff was in the process of installing illuminated Exit signboards on the ceilings. He was on 3/F of the Site at the material time. He found three to five A-shaped wooden ladders on the Site, some of them were sprayed in blue colour on the 5th rung of the ladder with the Chinese name of the Defendant “聯 合 金 輝”. The Plaintiff did not bring along ladders to work. The Plaintiff said he was told specifically by Johnny Chan of PEL or PFSC that equipment, like working platform or ladders, would be provided by the Defendant who also employed a number of sundry workers working on the Site. At the time of accident, the Plaintiff and another worker Wong Cham (PW2) were working on the 3/F but they were working at different ends of the corridor. In order to affix the Exit signboard, the Plaintiff needed to fix a 900mm metal pipe onto the ceiling with anchor bolts. To do the job, the Plaintiff had to stand astride on the ladder. The Plaintiff drilled two holes on the wall. When he was about to drill the third hole, one of the hinges of the ladder came off suddenly because the screws were loosened and fallen off. The ladder toppled over to the right side. The Plaintiff fell a distance of about 6 feet onto the ground. The Plaintiff sustained injuries to the right side of his body. PW2 Wong heard the noise and came over to help the Plaintiff. The Plaintiff was taken to see Mr Lee who was the Defendant’s supervisor at the Site. At that time, the Plaintiff was bleeding. The Plaintiff went to see a bonesetter in the afternoon and was treated.

17. On the following day, as he found the swelling and pain in his right elbow and right wrist were getting worse, the Plaintiff went to seek medical treatment at the Prince of Wales Hospital (‘PWH’). The Plaintiff was found to have bone fracture, and was given a hinged elbow brace of his right upper arm. He had to put on the brace for 4 weeks. The Plaintiff was granted sick leave from 27 May 2004 to 30 July 2004. Sick leave was also granted to the Plaintiff on and off from September 2004 to March 2005. Physiotherapy treatments were required.

18. About one week later after the accident, the Plaintiff met the safety officer employed by the Defendant in the construction site of Buddhist Bright Pearl Primary School. During the meeting, the Plaintiff said that he was promised that the accident would be reported to the Labour Department and would be compensated. However, the Plaintiff was asked not to tell the truth to the Labour Department. Instead, the Plaintiff was asked to tell the authority that he was injured because he got slipped and fell while walking on the stairs.

**The Defendant’s case**

19. The Defendant called 3 witnesses to give evidence: Chan Chun Leung (DW1) a director of the Defendant, Li Chung Ming (DW2), the site foreman and Man Chi Ping (DW3) , the safety officer.

20. Basically it was alleged that the accident did not occur in the way put forward by the Plaintiff. It was alleged that the Plaintiff slipped in the staircase on 1/F while carrying an Exit signboard and walking his way from the upper floor to G/F on the Site. No ladder was used nor was there any ladder provided by the Defendant. The Defendant claimed that for work to be done at the height not exceeding 3.5 meters, metal scaffold platform rather than ladder should be used. It was argued that it was the Plaintiff who told DW2 Li and later DW3 Man in an interview on 28 May 2004 that the Plaintiff had an accident because he was tripped and fell on the 1/F. That was why it was recorded in the Investigation report and in the Form 2. DW3 said that he had jotted down the gist of the interview on a piece of paper and had the Plaintiff signed his name to confirm the content thereof. But that piece of paper could not be located. It is to be noted that DW3 Man has been practising as a safety officer since 1999. I find DW3’s evidence evasive and he is not credible. It was suggested that all along the Defendant expected that the matter of compensation arising from the accident would be handled by the insurance company. As such, the Defendant would have no motive to fabricate the version as to how the accident happened.

**The issue of liability**

(1) Whether the Plaintiff was a lawful visitor?

21. I have no difficulty to find that the Plaintiff was a lawful visitor at the Site at all time. He had been working there on behalf of PEL for some 9 to 10 months before the accident occurred. He was allowed to enter the construction site. He said he brought along his working helmet to work there. The Defendant argued that the Plaintiff was not a lawful visitor at the Site for the purpose of OLO (para.4 of the Re-Amended Defence at p.49 of Bundle A) on the premise that the Defendant subcontracted the fire services installation works to PEL, not PFSC which had the contractual relationship with the Plaintiff. I could not accept such an argument. Section 3 of OLO, which specifies the extent of the occupier’s ordinary duty, is in these terms:

“(1) An occupier of premises owes the same duty, the “common duty of care” to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

22. The Defendant admitted that it was the occupier of the Site. The 3 Defence witnesses did not say that the Plaintiff was a trespasser or was not a lawful visitor at the Site. DW1 Chan in his witness statement of 2 September 2006 (at p.141 of Bundle B) could only claim that “the Plaintiff may not be the Defendant’s lawful visitor to the Site…”. DW2 Li apparently treated the Plaintiff as a lawful visitor as he said, “after reporting the accident to me, I requested the Plaintiff to see a doctor.”( at p.132 of Bundle B) In the Accident Investigation report prepared by the Defendant (at p.265 of Bundle B), the Defendant was named as the main contractor, even though it was not the Plaintiff’s direct employer. It was DW1 Chan who signed the Form 2 which has the title ‘Notice by Employer of an accident to any employee’ for the purpose of complying the Employees’ Compensation Ordinance. All the evidence points to the fact that the Plaintiff, all along and at the material time, was a lawful visitor at the site. The fact that, prima facie, the contract was given to the Plaintiff by PFSC is, in my judgment, immaterial as the Plaintiff was treated either as a invitee or licensee by the Defendant through its subcontractor.

(2) Whether the Plaintiff fell from the ladder?

23. I find that the Plaintiff is a credible witness. I accept his evidence that he used the ladder with the Chinese name of the Defendant sprayed on one of the rungs of the ladder. The screws of the hinges loosened off and eventually led to his fall. His evidence was corroborated by PW2 Wong Cham whom, I find, is also a credible witness. I also noted that the medical report prepared by Dr Lam on 27 May 2004 (at P.413 of Bundle C) mentioned that the Plaintiff “fell from a ladder about 2 meters high and landed on his right trunk.” The 2 memos dated 14 and 18 January 2005 prepared by Dr Tse also mentioned that the Plaintiff sustained a fall from height during duty (at p.414 and 415 of Bundle C). Although this piece of evidence may be self-serving, I agreed with Counsel for the Plaintiff that there was no suggestion that the version of how the accident happened as painted by the Plaintiff was a fabrication. In fact, in the medical report prepared by Dr Chiang, the doctor appointed by the Defendant, it was also stated that the Plaintiff fell from the ladder when he was drilling the ceiling (at p.392 of Bundle C). The Plaintiff went to see the doctor on the following day of the accident. The Plaintiff’s evidence was supported by PW2 Wong who was also working on the same floor and who escorted the Plaintiff to report the matter to the site foreman DW2 Li. DW2 Li, in his statement date 18 August 2006 (at p.132 of Bundle B), said that it was the Plaintiff who told him that the Plaintiff had “slipped on the staircase while he was on his way from upper floor to G/F at the Site.” It was not mentioned in the statement that the accident allegedly occurred on 1/F. The safety officer DW3 Man’s witness statement dated 18 August 2006 mentioned that it was also the Plaintiff who informed DW3 that he slipped on the staircase on 1/F. The source of information allegedly come from the Plaintiff. They did not witness the accident. Taking the whole circumstances into accout, I accept the Plaintiff’s version of the event as I find it absurd that the Plaintiff had the motive to put forward two versions of the event relating to his injury

24. I find the evidence from both DW2 Li and DW3 Man far from credible. Although it was mentioned both in the Accident Investigation Report and the Form 2 that the Plaintiff slipped and fell down at the staircase of 1/F, the Accident Investigation report and the Form 2 were not signed nor confirmed by the Plaintiff. I was surprised to see that there was no photo taken or sketch plan drawn by the safety officer when the Accident Investigation Report was compiled. When asked, DW3 said that he did not enclose those documents that he mentioned at column 9 of the report, viz ‘Injured or witness declaration form’, ‘details of the injured’ and ‘proof of the Injured salary’, even though it was specifically stated that these documents were annexed documents to the report. It is obvious that this accident investigation report dated 30 May 2004 would be a good aid to DW3 when he prepared his witness statement dated 18 August 2006. However it is to be noted that a number of details were omitted in DW3’s statement e.g. the injured claimed that he was wearing safety shoes at that time and the injured was carrying a fire Exit sign box in his right hand. Both DW2 and DW3 said that they did make some notes about the accident and yet they were not able to produce them. It was said that a metal working platform should be erected if work on ceilings had to be carried out. But it was not denied that wooden ladders could also be found on the Site.

25. The Plaintiff said that DW3 had asked him not to tell the Labour Department about how the accident occurred. The Plaintiff agreed to do so and said that he slipped on the staircase because DW3 Man said that the Defendant would pay him compensation in any event. To this, DW3 Man denied. DW3 Man did not say in clear terms the difference in consequences between slipping on the staircase and falling from the ladder. Nevertheless, one would have no difficulty to distinguish the two scenarios. The falling from height while working on a ladder would no doubt be classified as an industrial accident. All in all, I am satisfied that the Plaintiff was telling the truth in court. I accept his evidence as to how the accident was happened.

(3) Whether the ladder used by the Plaintiff was provided by the Defendant?

26. I accept the Plaintiff’s evidence that he used the ladder with the Chinese characters of the Defendant. In the circumstances, I am satisfied that the ladder in question belonged to the Defendant. The Plaintiff in his examination in chief did mention that it was Johnny Chan of PEL who told him that equipment and tools, such as working platform or ladders, would be provided by the Defendant. It is worth to mention that Johnny Chan eventually decided not to give evidence in court when the Defendant closed its case.

**Conclusion**

27. As the occupier of the Site, the Defendant owed a duty of care to those working on the Site. The Defendant has failed to ensure that the Plaintiff, being the lawful visitor at the Site, was reasonably safe in using the premises. Wooden ladders could be found in the Site. One of the ladders was defective in that one of the hinges got loosened off which in the end caused the Plaintiff to fall down from the ladder. This defective ladder bears the Chinese names of the Defendant. In the circumstances and based on the reasons abovestated, I find that the Defendant was in breach of its duty under OLO.

28. I also find the Defendant negligent when it failed to provide the Plaintiff a reasonable safe working place and safe tool in the Site. It failed to ensure a proper or adequate inspection system to check the ladders if they were safe to be used. With the hinges coming off when being used, it also evidenced the lack of maintenance of the ladders. I accept that even if the ladder in question did not belong to the Defendant, the liability of the Defendant, being the occupier of the Site, would not be affected or diminished.

29. It is my judgment that the Defendant was also in breach of Regulations 38A(2), 38B(1), 38C and 38D of the Construction Sites (Safety) Regulations, Cap 59I. The Defendant, being the main contractor responsible for the construction site, should ensure that suitable and adequate safe access and egress from the place of work on the site was provided and properly maintained. It should take adequate steps to prevent any person on the site from falling from a height of 2 meters or more. The Plaintiff was one of the sub-sub-contractors working on the Site. I see no evidence from the Defendant to suggest that adequate steps were taken to prevent any person from falling from a height. Ladders were available and the evidence shows that at least some of the ladders bears the Chinese name of the Defendant. The Plaintiff used one of them which happened to have a defective hinges leading to his injuries upon his fall. The position was made clear in Rainfield Design & Associates Ltd v Siu Chi Moon [2000] 2 HKC 419 whereby the Court of Final Appeal ruled that:

“The purpose of the Regulations was clearly to provide for the safety of workman and the primary responsibility for this must rest with the contractor responsible for the site. Even where a subcontractor had a contractual duty to provide plant and equipment, the contractor responsible for the site would not be relieved from its duty under the Regulations. This duty, being a statutory duty under reg 38A of the Regulations, was to ensure that there was, so far as was reasonably practicable, suitable and sufficient safe access and egress on the construction site. Regulations 38A could not be read down to mean that the duty thereunder would be discharged if the contractor had made suggestions towards suitable and sufficient safe access and egress. Even if the finding that the respondent would not have complied with a suggestion that he used a ladder were to stand, it would not destroy the causal link between the appellant’s breach of statutory duty and the respondent’s accident.”

30. In the circumstances, it is clear that the Defendant, being the main contractor of the site, has the primary responsibility under the Regulations and could not be relieved from its duty.

**The issue of contributory negligence**

31. Contributory negligence was not pleaded in the Defence filed on 4 May 2006 and the Amended Defence on 23 May 2006. It was also not mentioned in the Re-Amended Defence on 9 May 2007. This is understandable as the Defendant all along pleaded that the accident happened on 1/F staircase when the Plaintiff slipped, contrary to what was said by the Plaintiff. As such, the Defendant pleaded that the alleged accident was solely caused by the Plaintiff’s own negligence as stated in the Investigation Report. It stated that the Plaintiff had slipped on the staircase on his way from 1/F to G/F at the site …” (para.8B of the re-Amended Defence at p.52 of Bundle A). During the trial, Counsel for the Defendant applied for leave to amend the defence and file a Re-Re-Amended Defence. The application was vigorously objected by the Plaintiff. I refused the application as all along the Defendant should know the stance of the Plaintiff. When the Defendant prepared and filed the Re-Amended Defence dated 9 May 2007, shortly before the trial commenced, there was still no mention of the issue of contributory negligence. I would like to add that even if the issue of contributory negligence was pleaded, I find the Defendant is liable for the injuries sustained by the Plaintiff and can see no basis for reducing the Plaintiff’s damages on the grounds of his own contributory negligence. As said by Denning LJ in General Cleaning Contractors Ltd v Christmas [1953] AC 180:

“You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which his employers expected him to do it and, if they had taken proper safeguards, the accident would not have happened.”

**Quantum**

32. The only item that could be agreed by the Defendant was the claim for pre-trial expenses for medical fees, bonesetter fee and travelling expenses in the sum of $2,570. The Defendant even specifically denied all the alleged injuries of the Plaintiff as pleaded (para.10 of the Re-Amended Defence at p.53 of Bundle A).

33. At the time of the accident, the Plaintiff was an electrical works subcontractor. Apart from supervising the daily operation of his business, the Plaintiff also involved in the actual work of installation of electrical system as an electrical worker with daily wage of $700. He used to work 24 days a month. Between December 2003 and May 2004, it was submitted that the monthly salary of the Plaintiff was about $16,800. The Plaintiff worked as a taxi driver between July 2005 and October 2005. He then resumed to work as an electrical worker earning about $550 per day and worked for an average of 26 days a month. The Plaintiff was dismissed from the job in or about January 2005 and then resumed to work as a full time taxi driver earning about $10,000 per month.

34. The Plaintiff went to see a bonesetter right after the accident in the afternoon of 26 May 2004. On the following day, as his situation did not improve, the Plaintiff sought medical treatment at the Accident and Emergency Department of PWH. X-ray showed fracture of the right radial head. He was then referred to the Orthopaedic Ward of PWH and treated with plaster immobilization of his right hand. The Plaintiff attended the Orthopaedic Department of PWH on 4 June 2004 and thereafter received 9 sessions of treatment up to 25 October 2005. The Plaintiff was found to have mild pain on forearm rotation and full right wrist motion despite mild pain over distal radius. In October 2004, X-ray examination revealed that the radial head fracture was healed.

35. The Plaintiff was granted sick leave for the period from 27 May 2004 to 11 March 2005 (about 9.52 months). Medical report dated 12 July 2005 by Dr Poon shows that the Plaintiff was diagnosed to have suffered from closed fracture of the head of the right radius and soft tissue injury to the right wrist and right shoulder. It was commented by Dr Poon that the Plaintiff might develop post-traumatic arthritis of the right elbow because of the deformed articular surface of the radial head caused by the fracture. Development of arthritis would lead to progressive pain and stiffness of the right elbow. The Plaintiff was assessed by Dr Poon to have a total body impairment of 6%.

36. The Defendant appointed Dr Arthur Chiang to examine the Plaintiff on 13 December 2006. A detailed medical report was prepared (at pp.390 to 406 of Bundle C). Dr Chiang was of the opinion that the right shoulder pain which appeared in about March 2005 was probably unrelated to the injury. However, Dr Chiang further remarked that the fracture of the head of the right radius and the soft tissue injury to the right wrist were consistent with the mode of injury described (para. 21 of the report at p.404 of Bundle C). In the report, Dr Chiang recorded (at p.392 of Bundle C) that:

“Mr Tsui described that, on 26 May 204, when he was standing on a ladder and drilling the ceiling, he fell and landed on the right side of the body, and sustained injury mainly to the right elbow. He had transient loss of consciousness. On the same day, he visited the bone setter for treatment.”

37. Dr Chiang said that, based on the objective part of the current examination, Mr Tsui should be able to return to the pre-injury job. And the permanent impairment of the whole person for the right elbow and wrist injury is suggested to be about 3%, and the percentage loss in the earning capacity for the right elbow and right wrist injury is estimated to be about 4%. Dr Chiang also found the sick leave given till 11 March 2005 was acceptable. (see pp.404 to 405 of Bundle C)

38. The Plaintiff claimed that he was an active person and used to play basketball at least once or twice a week. He also likes rock climbing. Subsequent to the accident, the Plaintiff ceased to have such activities.

39. On 16 January 2006, the Plaintiff filed the Revised Statement of Damages (‘RSD’). Counsel for the Defendant prepared a list attached to his closing submission and calculated the damages to be in the sum of $116,451 if the Defendant is found liable for the injuries sustained by the Plaintiff.

(1) Pain, Suffering and Loss of Amenities (‘PSLA’)

40. It was agreed that the injury suffered by the Plaintiff falls short of the “serious injury” category as defined in Lee Tin Lam v Leung Kam Ming [1980] HKLR 657. Taking into account of the percentage of impairment suffered by the Plaintiff which ranged from 3% to 6%, the extent of injury and the subsequent treatments undertaken, I would award a sum of $300,000.

(2) Pre-Trial Loss of Earnings

41. I accept that before the accident, the Plaintiff earned a regular income of $700 per day with 24 working days in his capacity as one of the electrical installation workers at the Site, making it a monthly salary of $16,800 per month. That could be evidenced by the documents entitled “Amount Received Records” prepared by the Plaintiff’s company Eclat for the period from December 2003 to May 2004 (at pp.430 to 439 of Bundle D).

42. In the circumstances, based on the RSD and the supplemental witness statement of the Plaintiff (pp.122-1 to 122-4 of Bundle B), I would award a total sum of $380,300 as claimed under this heading. The breakdown is as follows:

(a) From 26 May 2004 to end of July 2005

($16,800 x 14 months) = $235,200

(b) From end of July 2005 to mid-October 2005

($16,800 x 2.5 months) - $20,000 earne) = $22,000

(c) From mid-October 2005 to January 2006

($16,800 x 3 months) - $42,900 earned = $7,500

(d) From mid-January 2006 to mid-June 2007

($16,800 x 17 months) - $170,000 earned = $115,600

Total: $380,300.

(3) Pre-Trial Loss of Profit

43. At the time of the accident, the Plaintiff was the sole proprietor of Eclat. This was the first time the Plaintiff worked for PFSC as a subcontractor, and there were 8 electrical works contracts worth about $564,900. It was submitted by Counsel for the Plaintiff that a moderate profit of about $4,000 per month was reasonable and a claim of $126,233.10 ($4,007.40 x 31.5 months for the period from 26 May 2004 to 16 January 2007) was made.

44. As can be seen from the documents with the title ‘Amount Received Records’ (at pp.430 to 439 of Bundle D), the Plaintiff also performed as one of the installation workers and drew daily wages in the sum of $700 per day. Given the nature of the job, I consider that there is an overlap between the claim under Pre-Trial Loss of Earnings and the present heading. I find that the claim under this heading a bit speculative as this was the first time the Plaintiff worked as a subcontractor for the Defendant. In fact, this was the first time the Plaintiff ever set up a business entity. There was no profit and loss account or any tax returns filed. Setting up a business does not automatically make a transaction or a job a profitable one. There was no evidence to suggest that there was other business being offered to the Plaintiff. The Plaintiff, even if he could not perform as the installation worker, could still perform the supervisory role which was exactly what he did after the accident. In his witness statement dated 8 August 2006 (p.120 of Bundle B), the Plaintiff said that even after the accident, he continued to go back to the construction site to supervise the work until the whole fire electrical system was tested and approved by the Fire Services Department.

45. Taking all the factors into account, I would not allow the claim of $126,233.10 under this heading.

(4) Loss of Earning Capacity

46. The Plaintiff suffered a minor percentage of impairment and might have difficulty to perform his pre-accident job in full efficiency or capacity. As such, it was claimed that the Plaintiff has suffered a handicap in the labour market.

47. The Plaintiff does not make any claim for future loss of earning and claims a sum of $100,800 (being 6 months of his monthly salary of $16,800) under this heading.

48. The Defendant argued that since the Plaintiff is able to resume his work, the Plaintiff should be allowed a sum of $30,000 at most under this heading.

49. Given the minor degree of permanent impairment suffered by the Plaintiff and the nature of work of an electrical installation worker, I find it reasonable to award the sum of $100,800 to the Plaintiff for the loss of earning capacity.

(5) Pre-Trial expenses

50. The sum of $2,570 was agreed by the Defendant.

**Order**

51. I hold the Defendant liable for the injuries sustained by the Plaintiff and enter judgment for the Plaintiff. I award the Plaintiff the quantum of damages in the sum of $783,670. The breakdown of the award is as follows:

(1) PSLA $300,000

(2) Pre-trial loss of earnings $380,300

(3) Loss of earning capacity $100,800

(4) Pre-trial expenses $2,570

Total: $783,670

**Interests**

52. I would also allow interest at 2% from the date of issue of Writ to the date of Judgment for general damages and half of the judgment rate for special damages from the date of accident to the date of Judgment.

**Costs**

53. I grant an order nisi that the Defendant pays the costs of the action to the Plaintiff, to be taxed if not agreed, with certificate for counsel. Such order nisi is to be made absolute 14 days after the date of handing down of this judgment.

(Stanley Chan)

District Judge

Representation:

Mr. Andrew Li instructed by Messrs. Au Yeung, Cheng, Ho & Tin for the Plaintiff.

Mr. Louie Chan instructed by Messrs. Li & Partners for the Defendant.