###### DCPI 126/2004

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 126 OF 2004

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##### BETWEEN

## HO SAU CHUN Plaintiff

### and

#### ASAT LIMITED Defendant

### and

#### GUARDIAN PROPERTY

#### MANAGEMENT LIMITED Third Party

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Coram: H.H. Judge Chow in Court

Date of Hearing : 28th, 29th & 30th September 2005

Date of Handing Down Judgment : 14th December 2005

Judgment

1. This is an application by the Plaintiff to claim for damages for personal injuries sustained in the course of employment as an operator in the employment of the Defendant on 18th January 2000. She alleged that she sprained her back when she tried to move a heavy trolley fully loaded with integrated circuit chips from the 9th floor to the 10th floor of QPL Industrial Building, 138 Texaco Road, Tsuen Wan, N.T. (“the Building”) where the Defendant carried on its business of integrated circuits assembly. She complained that when she was about to push the trolley into the lift, she found that the lift had stopped about 2 inches above the floor level of the 9th floor. She could therefore not push the trolley into the lift. She had no alternative but to go into the lift and lifted the trolley up so that it could be moved inside, and as a result she sustained serious personal injuries. The Defendant filed its defence against the claim. It had also issued a Third Party Notice against the Third Party for indemnity or contribution against the Plaintiff’s claim. Eventually the Plaintiff settled her claim with the Defendant.
2. In the Third Party Notice, the Defendant alleges that the accident was caused by the negligence and/or breach of common duty of care under the Occupiers Liability Ordinance on the part of the Defendant, particulars as follows :-
   1. Failing to maintain the lift properly to ensure that it is safe to use;
   2. Failing to take reasonable care to ensure that the lift functions properly;
   3. Failing to give sufficient warnings to the Plaintiff of the dangers arising from the malfunctioning of the lift;
   4. Exposing the Plaintiff to a risk of injury or danger of which the Third Party knew or ought to have known;
   5. Exposing the Defendant to a risk of failing in its duty to the Plaintiff in providing a safe working environment; and
   6. Failing to take any or any adequate, reasonable and proper precautions for the safety of the lift.
3. The hearsay statements of the Plaintiff and Li Tze Ying (another operator employed by the Defendant) produced under a hearsay notice served by the Defendant revealed that previously two employees were assigned to move the trolleys but that in around 1998/1999 only one employee was assigned to move them. On the day of the accident the cart was fully loaded and the Plaintiff had to move a number of such trolleys; the work was very busy on the day of the accident and she had to work without stop. In the hearsay statement the Plaintiff said that the Defendant failed to provide “sufficient and experienced staff so that I can perform my duty safely. Otherwise, I would not have had to push and pull the heavy cart alone……..”. She also said that the Defendant failed to provide her sufficient and proper instruction, guidance, warning and training to teach her how to push and pull the cart.
4. The evidence of Madam Lau Kwong Ping, witness for the Defendant, revealed:-
   1. in about 1998/1999 the operator was required to push the heavy laden trolleys alone;
   2. she could not disagree with the Plaintiff’s claim that the fully laden trolley weight 200-300 lbs;
   3. no assessment was made to ascertain whether the fully laden trolley was too heavy for one person;
   4. it was dangerous for one person to lift the trolley of 200-300 lbs into the lift;
   5. she agreed that on the day of the accident the Plaintiff would have had to push several trolleys between 9/F and 10/F and that it was so busy so the Plaintiff could not stop working that evening;
   6. because they were busy the workers had to move quickly;
   7. no assessment was made by her or her loss of the potential danger of these working conditions;
   8. no specific instructions were given what the worker should do if she came across a height gap when pushing a trolley to the lift lobby;
   9. if another worker had assisted this accident would not have happened;
   10. the Plaintiff’s claim that there was insufficient manpower and the accident would not have happened if there had been sufficient manpower is true;

So the Plaintiff’s evidence that the Defendant’s system of work was inadequate and that the Defendant failed to provide sufficient manpower was supported by the evidence of Lau Kwong Ping.

1. The Defendant alleged that the Third Party did not deploy anyone to patrol the lift lobby in question, hence the Third Party did not take any steps to discharge its duties towards the Defendant, hence exposing the Defendant to a risk of breaching its duty as the Plaintiff’s employer. The Third Party was unable to discharge its duties Clause 9(h)/(i) of the Deed of Mutual Covenant of the Building in relation to the common areas of the floors occupied by the Defendant (namely, 7th – 12th Floors of the Building) because these floors were occupied by the Defendant, which has its own security, cleaning and facility/engineering departments to perform the duties in these sub-clauses. Mr. Chan Hung Wan of the Third Party said by the time he started to work in this building it was part of the practice/custom in the building that the Defendant assumed responsibility for these duties. The Third Party had no authority to prevent the Defendant from occupying the common areas of these floors. He said that he personally conducted random inspection of the lifts every two days and his staff below him also did this. The security guards of the Third Party would also report any defects. For 97% of the time, the height gap in the lifts was less than 1 inch and this was safe. It only 3% of the time it exceeded 1 inch when he would stop the lift and call Hang Fung Lift Limited to come and repair it. Lau Kwong Ping said that in the 9 years she had been employed by the Defendant there were only about 2 occasions when she had to call for assistance in lifting the trolley into the lift. In this respect her evidence supports the evidence of Chan Hung Wan that this type of situation where the height gap was 2-3 inches was extremely rare.
2. The burden is on the Defendant to prove on the balance of probabilities that the allegations contained in the Third Party notice are substantiated. There is no evidence that the Third Party knew about the existence of the gap in the lift in question, so that it had to take immediate action to remove the gap height, because such a gap very rarely happens. The particulars of negligence contained in the Third Party Notice are simply not substantiated.
3. At the material time the Third Party was the manager of the Building. It exercised its power under clause 8(c) of the Deed of Mutual Covenant of the Building to employ professional persons for the purpose of carrying into effect the terms of the deed. It employed a reputable lift contractor, the Hang Fung Lift Limited, to provide professional specialist skills to the maintenance of the lifts in the building. There is nothing more it could have done. It has discharged its duty under the Deed of Mutual Covenant.

Exemption clause

1. Clause 9(z) (cc) of the Deed of Mutual Covenant provides:-

“(cc) Neither the Manager nor any servant agent or other person employed by the Manager shall be liable to the Owners or any of them or to any person or persons whomsoever whether claiming through, under or in trust for any Owner or otherwise, for or in respect of any act, deed, matter or thing done or omitted in pursuance or purported pursuance of the provisions of this Deed not being an act or omission involving criminal liability or dishonesty or wilful negligence and the Owners shall fully and effectually indemnify the Manager and all such persons from and against all actions, proceedings, claims and demands whatsoever arising directly or indirectly out of or in connection with the management of the Building or any act, deed, matter or thing done or omitted as aforesaid and all costs and expenses in connection therewith and not involving criminal liability, dishonesty or wilful negligence on the part of the Manager or any such person or persons aforesaid.

PROVIDED FURTHER the Manager shall not be liable for any compensation or claims as a result of the malfunctioning of any public utility system which is beyond the control of the Manager.”

1. Even if the Third Party was negligent in avoiding the said gap height to be created, it is exonerated from liability under the above clause, because in order to be liable, the act must involve criminal liability or dishonesty or wilful negligence. This is not the case here.
2. The Defendant relies on the doctrine of res ipsa loquitur to prove that the accident was caused by the negligence of the Third Party, its servants or agents. Since there was no negligence on the part of the Defendant, this doctrine does not apply in this case.
3. Due to the reasons above-said, I dismiss the Defendant’s claim of indemnity or contribution against the Third Party.

Costs

1. I make an order nisi for costs, to be made absolute in 14 days’ time, that the Defendant is to pay costs of this claim for indemnity or contribution against the Third Party to be taxed, if not agreed, with certificate for Counsel.

(S. Chow)

District Judge

The Defendant: represented by Mr. Victor Gidwani, instructed by M/S. Christine M. Koo & Ip, Solicitors.

The Third Party: represented by Mr. Ashok Sakhrani instructed by M/S Dibb Lupton Alsop, Solicitors.