DCPI 1503/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1503 OF 2007

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| BETWEEN |  |  |
|  | CHAN WAI TUNG  （陳偉東） | Plaintiff |
|  | AND |  |
|  | TANG KWOK KWONG | 1st Defendant |
|  | KWOK LEUNG formerly trading as KAM HING ENGINEERING COMPANY | 2nd Defendant |
|  | KIN WO CONSTRUCTION MACHINERY LIMITED | 3rd Defendant |
|  | AND |  |
|  | KWOK LEUNG formerly trading as KAM HING ENGINEERING COMPANY | Third party |

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Coram: Her Honour Judge Mimmie Chan in Court

Date of Hearing: 12 January and 18 March 2010

Date of Handing Down Judgment: 22 April 2010

# JUDGMENT

Background

1. On 23 July 2004, the plaintiff Mr. Chan (“Chan”) was engaging in the work of removing garbage and debris in a construction site situated at Lot Nos.1008, 1009 R.P. in DD244, Nam Pin Wai, Sai Kung (“the 1st construction site”). At the material time, Chan was squatting while at work. Suddenly, he felt that his back was hit by something which came from behind and instantly he felt great pain in his back. Subsequently, he learnt from people who were present at the scene that at the time of the accident, the 2nd defendant Kwok Leung (“Kwok”) was driving and operating an excavator in a neighbouring construction site, namely Lot Nos. 2150-2153 R.P. in DD 244) (“the 2nd construction site”). He used the excavator to pull a metal pole out of the ground. In the course of doing so, the metal pole hit Chan’s back, thereby injuring him.

2. Chan claims against the 3 defendants in this case for damages, saying that he was employed by the 1st defendant Tang Kwok Kwong (“Tang”) to work at the 1st construction site, and that he and Tang were responsible for building an enclosing wall on the 1st construction site for the owner. Chan averred that Tang, being his employer and the occupier of the 1st construction site, owed him a duty of care to ensure that he would be safe in the course of his work.

3. Chan stated that the 3rd Defendant Kin Wo Construction Machinery Limited (“Kin Wo”) was the contractor for the site formation works in the 2nd construction site and that it subcontracted the works to Kam Hing Engineering Company (“Kam Hing”), which was run by the 2nd defendant Kwok Leung (“Kwok”). Chan averred that Kin Wo and Kwok were the occupiers of the 2nd construction site and that under the law they owed him a duty of care.

4. Chan’s case is that he was injured in an accident that happened in the course of his work, and that the accident was the result of carelessness or negligence on the part of Kwok when he was operating the excavator to remove the metal pole. He therefore claims against Kwok, his employer Tang and Kin Wo for damages.

5. Neither Tang nor Kwok gave notice of intention to defend, so that on 4 July 2008 Chan entered interlocutory judgment against Tang and Kwok. Tang and Kwok are liable to pay damages to Chan. The quantum was to be assessed by the Court.

6. On the other hand, Kin Wo filed a defence, in which it denied that Chan was a visitor to the 2nd construction site and denied that it was negligent in any way. Kin Wo averred that although the excavator was hired out to Kwok together with the operator to be used in the 2nd construction site, the working schedule on the day of the accident did not require the use of the excavator in the construction site. At the material time, Kwok used and operated Kin Wo’s excavator without ever obtaining any authorization or consent from Kin Wo, and it was only after the accident that Kin Wo learned that the excavator had been used by Kwok.

7. The issues of this case are:

(1) As far as liability is concerned, whether Kin Wo was negligent or in breach of its statutory duty, and whether it should be liable for any negligence on the part of Kwok;

(2) The amount of damages payable by Tang, Kwok or Kin Wo on account of their negligence or breach of duty.

Matters involved in issue (1) are set out in paragraph 11 below.

As far as liability is concerned, whether Kin Wo was guilty of negligent in any way or was in breach of any statutory duty, and whether it should be liable for any negligence on the part of Kwok

8. According to the Statement of Claim filed by Chan, at the time of the accident:

(1) Chan was squatting on the ground in the 1st construction site and was working;

(2) Kwok was operating an excavator owned by Kin Wo;

(3) Kwok was in the course of pulling up a metal pole which was planted in the ground of the open space between the 1st construction site and the 2nd construction site (“government land”);

(4) When the metal pole fell down, it first hit a low wall and then hit Chan’s back.

9. Chan did not state clearly whether the excavator Kwok operated at the time of the accident was situated in the 2nd construction site or the open space between the 1st construction site and the 2nd construction site. According to the investigation report prepared by the Labour Department, the open space between the 1st construction site and the 2nd construction site was government land, and that at the material time Kwok was in the 2nd construction site operating the excavator to remove the metal pole located on the government land. The Labour Department report stated that when the metal pole fell down, it first hit a wall and then hit Chan, who was working in the 1st construction site near the roadside.

10. Chan relied on the written declarations made to the Labour Department by Tang, Kwok and the employees of Kin Wo to prove what happened during the accident. Neither Tang nor Kwok appeared to give evidence in this action. Therefore most of the evidence relied on by Chan is hearsay evidence.

11. As far as Kin Wo’s liability is concerned, in the Statement of Claim Chan relied on the following 5 points to prove that Kin Wo was in breach of its duties under the law:

(1) Kin Wo should be vicariously liable for the negligence of Kwok, who was Kin Wo’s employee or agent;

(2) Kin Wo, the occupier of the 2nd construction site, bore in relation to Chan, its visitor, occupier’s liability;

(3) Kin Wo was in breach of regulation 38A of the Construction Sites (Safety) Regulations (“the Regulations”) in that it failed to provide safe access and egress on the 2nd construction site, and failed to maintain such access and egress;

(4) Kin Wo was in breach of regulation 45 in that it failed to ensure that the excavator was not operated except by a workman who was trained and competent to operate it;

(5) Kin Wo was in breach of section 7 of the Occupational Safety and Health Ordinance (“the Ordinance”) in that it failed to ensure that the 2nd construction site, the government land and the means of access to and egress from the 2nd construction site and the government land were safe.

12. The party who institutes proceedings against another party has the duty to raise grounds and adduce evidence to prove the case against the other party and to prove and establish the case by clear and the best evidence. The burden of proof in this case is on Chan. The standard of proof in a civil action is proof on a balance of probabilities. If the party who bears the burden of proof fails to persuade the Court to accept, on a balance of probabilities, his contentions and claim, then he fails in the action.

Issue concerning vicarious liability

13. Judging from the evidence available in this case, including the evidence given by Kin Wo’s witness Siu Kai Ming（蕭啟明）and the contractual documents submitted by Kwok, I accept that Kin Wo contracted with the principal contractor for carrying out site formation works in the 2nd construction site, and then it subcontracted the works to Kam Hing, which was run by Kwok. Kam Hing contracted to undertake the site formation works and rented an excavator belonged to Kin Wo at a daily rent of $1,200, including the operator of the machine, for the carrying out of the works. According to the evidence of Siu Kai Ming and Siu Ming (蕭明), both from Kin Wo, on the day of the accident the original working schedule of Kam Hing was such that it was unnecessary to use the excavator, Kin Wo therefore did not arrange for the operator to go to the 2nd construction site. The accident happened on that day only because Kwok operated the excavator without the authorization or consent of Kin Wo. Kin Wo further stated that the work of removing the metal pole which Kwok was doing with the use of the excavator at that time was not within the scope of the site formation works which he had contracted to undertake, and that the site formation works in the 2nd construction site did not require the removal of the metal pole planted in the ground outside the 2nd construction site and located on the government land.

14. In the written declaration (“declaration”) which Kwok made on 31 July 2004 to the Labour Department, Kwok claimed that on the day of the accident 2 workers, namely Tang and Chan, who were working in the 1st construction site, asked Kwok to use the excavator to remove and break the metal pole for them, so that it would not hinder them in their work in the 1st construction site. Kwok also claimed that before he used the excavator, he had telephoned “Dai Siu”（大蕭）of Kin Wo and had obtained consent from that Dai Siu to use Kin Wo’s excavator to break the metal pole.

15. Siu Ming (“Dai Siu”) was Kin Wo’s excavator operator. He confirmed that his work was to operate the excavator which Kin Wo rented to Kam Hing for use in the 2nd construction site. However, on 23 July 2004 he did not go to work in the 2nd construction site, because according to the working schedule the excavator was not required on that day. He denied that he had received Kwok’s telephone call on that day and said that he had never given any authorization or consent to Kwok for using Kin Wo’s excavator, nor had he lent the key to Kwok for him to use the excavator.

16. Chan himself also denied that he had asked Kwok to remove the metal pole. Chan said that he had never heard that Tang had made such a request. I accept that since the metal pole was planted in the ground on the government land and not in the 1st construction site, it would not hinder Tang and Chan’s work in any way. Kwok’s account that Tang and Chan asked him to remove the metal pole is therefore not credible.

17. Kwok did not come to Court to give evidence or to be cross-examined in respect of his declaration. Having taken into account the factors set out in section 49 of the Evidence Ordinance, including the fact that Kwok had the motive to avoid incurring liability and to conceal his improper use of Kin Wo’s excavator, that Kwok’s evidence involves multiple hearsay and that Kwok’s declaration was made 8 days after the accident, I find that the statement in Kwok’s declaration that he had obtained Kin Wo’s consent before using and operating the excavator is not reliable.

18. The evidence shows that Kwok was not an employee of Kin Wo and that when he was doing the work of removing the metal pole, he was not in the course of carrying out the site formation works contracted out by Kin Wo to Kam Hing. Therefore Kwok cannot be regarded as an agent of Kin Wo. Under the law, Kin Wo is not vicariously liable for Kwok’s conduct. Furthermore, there is no evidence that the site formation works which Kin Wo contracted out to Kam Hing were dangerous operations or that they involved extra hazards so that Kin Wo should be vicariously liable for any negligence committed by its independent contractor. (see the Court of Appeal’s judgment in *Wong Wai Hing v. Hui Wei Lee* (CACV 136/2000, 16 March 2001)).

Issue concerning occupiers’ liability

19. All the evidence points to the fact that at the time of the accident Chan was all along working in the 1st construction site and had never worked outside the 1st construction site or worked in the 2nd construction site or on the government land. Kin Wo was not an occupier of the 1st construction site and thus under the law it did not bear in relation to Chan any occupier’s liability. Chan was not a visitor to the 2nd construction site, so he cannot take any action against the occupier of the 2nd construction site for matters concerning occupiers’ liability.

Issue concerning regulation 38A of the Construction Sites (Safety) Regulations

20. Regulation 38A(2) provides that “the contractor responsible for any construction site” shall ensure that, so far as is reasonably practicable, suitable and adequate safe access to and egress from every place of work on the site is provided and properly maintained.

21. At the time of the accident, Chan’s place of work was in the 1st construction site. According to Chan’s Statement of Claim and the Labour Department report, the metal pole was located on the government land. The account given in the Labour Department report is that at the time Kwok was operating the excavator in the 2nd construction site. The 1st construction site adjoined the government land and the government land adjoined the 2nd construction site. From the photographs produced as exhibits, it can be seen that in between the construction sites and the government land there was no high wall, cover or other obstacle, so that Kwok, whilst he was in the 2nd construction site, could use the excavator and a length of wire to pull up the metal pole, which was on the government land. When the metal pole slipped off from the wire, it fell down on the government land and hit a wall and then hit Chan, who was in the 1st construction site.

22. What regulation 38A aims at is to ensure that safe access and egress is provided in a construction site in respect of every place of work or every place where the workers can enter while they are at work therein. Even if Chan can prove that workers who worked in the 2nd construction site could, in the course of their work, enter the government land and therefore the ambit of regulation 38A can be extended to require Kin Wo to provide safe and proper access to and egress from the government land, Chan has failed to prove from the available evidence that the place where the accident happened was the 2nd construction site or the access to and egress from the government land; that is because Chan admitted that at the material time he was working in the 1st construction site.

23. The important thing is that the person on whom regulation 38A imposed the duty is “the contractor responsible for any construction site”. Chan can produce no evidence to prove that Kin Wo was the contractor responsible for the 2nd construction site. The available evidence shows that Kin Wo was not the principal contractor of the 2nd construction site, and certainly Kin Wo had no power to take charge of or control the work being carried out in the 1st construction site either. The evidence adduced by Chan does not show that the accident was caused by any unsafe or improper condition in existence at the 2nd construction site or the access to and egress from the government land.

24. I do not find that Kin Wo was the contractor responsible for either the 2nd construction site or the 1st construction site. Therefore Kin Wo was not in breach of regulation 38A.

Issue concerning regulation 45 of the Construction Sites (Safety) Regulations

25. Regulation 45 provides that the “contractor responsible for any mechanical equipment” and the “contractor who has direct control over any construction work which involves the use of the equipment” “shall ensure” that when the mechanical equipment is used on a construction site, it is not operated except by a workman who is trained and competent to operate it.

26. The difference between regulation 45 and regulation 38A is that in the former there is no expression such as “so far as is reasonably practicable” which can serve to qualify the duty to “ensure”. The wording of regulation 45 can be compared with that of regulation 38(2) (“take all reasonable steps as will ensure”), regulation 38A(1) (“ensure… so far as is reasonably practicable”) and regulation 38A(3) (“ensure that, so far as is reasonably practicable”). This shows amply that the statutory duty imposed by regulation 45 is one which involves absolute or strict liability.

27. Kin Wo contracted with the principal contractor to undertake the site formation works. The excavator was to be used in the works. Even though Kin Wo subcontracted the works to Kam Hing, the statutory duty laid down in regulation 45 was non-delegable.

28. Although on the basis of the analysis done in paragraphs 14-17 above I do not accept that Kin Wo had given its authorization or consent for Kwok to use the excavator, Kwok was in fact operating the excavator at the time of the accident. The duty imposed by regulation 45 was one which entailed strict liability and in this case there is no evidence that Kwok was trained or competent to operate the excavator.

29. I do not agree that Kin Wo was not in breach of regulation 45, but it was held in the authorities that even if a defendant was in breach of a statutory duty, he would still have a defence if the damage suffered by the claimant was caused by the conduct of an independent 3rd party (*Charlesworth & Percy on Negligence* (2006 edition), paragraphs 11-72 to 11-73; *Northwestern Utilities Ltd. v. London Guarantee and Accident Co.* [1936] A.C. 108).

30. I accept that Kwok used the excavator without obtaining authorization or consent from Kin Wo, that he used the excavator to carry out work which was not covered by the contract between Kin Wo and Kam Hing (to remove the metal pole located on the government land) and that Chan was injured all because Kwok carried out such work improperly and negligently.

31. Although I accept that the accident was caused by the independent act of Kwok, yet according to the authorities, if the independent act of Kwok was something which Kin Wo could have foreseen or which Kin Wo could reasonably have guarded against, then Kin Wo should still be liable for Kwok’s act (*Northwestern Utilities Ltd. v. London Guarantee and Accident Co.* [1936] A.C. 108).

32. According to the evidence of Dai Siu and Siu Kai Ming, Dai Siu was the operator sent by Kin Wo to the 2nd construction site to operate the excavator rented to Kwok/Kam Hing. Dai Siu had a certificate for operating excavators issued by the Construction Industry Training Authority. He was trained and competent to operate the excavator.

33. Siu Kai Ming stated that a key was required for activating Kin Wo’s excavator. Whenever Kam Hing needed to use the excavator in the 2nd construction site, Dai Siu had to go to Kin Wo’s office situated in Mongkok, Kowloon to fetch the excavator key first, before going to the 2nd construction site to work. Everyday after work, Dai Siu was required to return the key to Kin Wo’s office; only after that could he receive his wage for that day. $200 would be withheld from any operator who did not return the excavator key on the same day. Dai Siu’s evidence was that everyday when he finished his work, he would lock up the excavator and then return the key to Kin Wo. On the day of the accident, Dai Siu did not go to the 2nd construction site at all, and certainly did not bring the excavator key to the 2nd construction site either. This was because the working schedule of that day was such that it was not necessary to use the excavator.

34. Kin Wo did not know how Kwok came to be able to activate the excavator on that day. Siu Kai Ming guessed that Kwok activated Kin Wo’s excavator by using a key for activating excavators which belonged to Kam Hing. This is purely a conjecture made by Siu Kai Ming.

35. On the basis of the evidence in this case, I accept that Kin Wo had taken necessary and reasonable measures to ensure that its excavator was not operated except by a workman who was trained and competent to operate it. It had also taken every reasonable and practicable step to prevent any third party from using its excavator, which was locked up, without authorization. Kwok’s using the excavator without authorization and his being able to activate the excavator without the key being provided to him by Dai Siu was not something which Kin Wo could have reasonably foreseen and guarded against. I find that Kin Wo is not liable for the accident caused by Kwok.

Duty under the Occupational Safety and Health Ordinance

36. Section 7 of the Ordinance provides that the occupier of an employee’s workplace must ensure that the premises and the means of access to and egress from the premises are, so far as reasonably practicable, safe.

37. At the time of the accident, Chan was in the 1st construction site. He was not a visitor to the 2nd construction site or the government land, nor was he working at those places; and Kin Wo was not the occupier of the 1st construction site. Chan therefore has failed to prove that the accident resulted from Kin Wo’s violation of any duty pertaining to the occupation of Chan’s workplace or from its violation of any duty owed to a visitor. Chan has also failed to prove that at the time of the accident he was present at the means of access to and egress from the 2nd construction site.

38. Section 7 of the Ordinance is not applicable.

Damages payable by Tang and Kwok

39. According to the report made by Tseung Kwan O Hospital, Chan received treatment at the Accident and Emergency Department of the Caritas Medical Centre at about 10 a.m. on 23 July 2004. At that time his condition was good. He felt pain in his back on which there was a small abrasion. X ray check of his spine and his chest showed that these parts were normal. The doctor diagnosed that he had back contusion. Having received an injection of analgesic, he was discharged in the afternoon of that very day. He was granted 5 days’ sick leave.

40. On 26 July and 4 August 2004 Chan went to hospital again for treatment due to pain in his back. He was given analgesic and a total of 12 days’ sick leave. Later, on 2 August, 9 August, 23 August and 1 September Chan went to hospital for treatment of his back pain.

41. According to the report made by Caritas Medical Centre, Chan began to receive physiotherapy on 16 August 2004. At the initial stage of the physiotherapy, he felt pain after walking or sitting for 10 minutes, and his back movement was limited. In September 2004, he could walk for 30 minutes and the range of motion of his back increased to half of the normal range.

42. On 17 May 2005, Chan was examined by his expert Doctor Lee. According to Doctor Lee’s report, Chan had episodic lower back pain of a piercing character. Standing or sitting on something without a backrest for more than 10 minutes would particularly cause him pain. At that time he had difficulty even in squatting. The June 2005 report of Doctor Lee recorded that there was a healed scar on Chan’s back and that there were limitations in his spinal movement. Doctor Lee did not notice any chest or bone injury. He opined that the back injury inflicted on Chan would not be deep or penetrating as the treatment he received at the Accident and Emergency Department of Tseung Kwan O Hospital was only sterilization of the injured area and administration of analgesics. Doctor Lee considered that back injury of the type suffered by Chan usually would leave only minor impairment in the patient’s movements.

43. On 20 June 2008, Chan was further examined by Doctor C. K. Lam. At the time it was 4 years after the accident. Chan told Doctor Lam that he still occasionally felt pain in the lumbar region. Each week he felt pain which lasted several minutes. He needed analgesics twice a month. Although Chan complained that he could not sit still for 10 minutes, Doctor Lam observed that he showed no sign of discomfort during the entire consultation.

44. According to Doctor Lam’s examination report, there was no abnormal swelling or scarring or scar tenderness in the muscles around the injured area on Chan’s back. Neither was there any hypertrophy. Dr Lam pointed out that suturing was not required when Chan was at the Accident and Emergency Department. Dr Lam therefore considered that the initial contusion and abrasion were only minor injuries. Dr Lam concluded that Chan would not suffer significant impairment or disability.

45. Having considered all the medical reports, I find that Chan suffered contusion and superficial abrasion in the accident. The pain in his back in 2004 might be more serious than that in 2008, but from Doctor Lam’s report it can be seen that in 2008 Chan’s injuries had almost completely healed.

*Damages for pain, suffering and loss of amenities*

46. In view of the fact that Chan’s injuries were not serious and that they were healed, I find that reasonable damages payable to him in respect of his pain, suffering and loss of conveniences or amenities shall be **$80,000**.

*Damages for pre-trial loss of earnings*

47. Chan’s evidence was that before the accident his daily wage was $500 and that on average he worked for 22 days per month. He was granted sick leave from 23 July 2004 to 4 September 2004, from 8 September 2004 to 30 November 2004 and from 11 January 2005 to 24 May 2005. In the pre-trial period, he obtained a construction site job and worked for 15 days. He quitted the job because his physical condition did not allow him to continue. He earned $7,500 in these 15 days.

48. In June 2007, he obtained an internal renovation job. The daily wage was $800 and he could work 20 days per month. From June 2007 to December 2007, he suffered no loss of earnings, as the wages he earned in the internal renovation job were even higher than those he earned before the accident. However, starting from 2008, because of the downturn in the economy, his daily wage for the renovation job dropped to $650 and his working days per month were reduced to 15 days. Therefore his monthly earnings were less than those he earned before the accident. It can be seen from Chan’s evidence that the loss of earnings he suffered from 2008 onwards is not the result of the injuries inflicted in the accident and it had nothing to do with his physical condition either.

49. None of Tang, Kwok or Kin Wo has adduced any evidence or made any submission to challenge the earnings and losses alleged by Chan.

50. Having considered Doctor Lee’s report, Doctor Lam’s report and Chan’s injuries, I am of the view that the sick leave granted to Chan was sufficient to allow him to recover to such a condition that he was able to work again. When he was examined by Dr Lee in May 2005, Dr Lee pointed out that the type of injury suffered by Chan would usually leave only minor impairment in his movements. I will only give Chan one more month for him to look for a job. His loss of earnings from the accident to 23 June 2005 was: ($500 x 22 days x 11 months) = **$121,000**.

*Future loss of earnings*

51. As mentioned before, Chan obtained an internal renovation job in 2007, the daily wages of which were even higher than the wages he earned when he worked in construction sites before the accident. Although Chan claimed that from 2008 onwards he worked only 15 days per month, his explanation was that this was a result of economic downturn and was not related to his injuries. From this it can be seen that any post-trial loss of earnings suffered by Chan has to do with the economy and has nothing to do with any permanent injury which remains after the accident. I therefore do not award to Chan any damages for future loss of earnings.

Damages for loss of earning capacity

52. Doctor Lam considered that the result of the objective physical examination was normal. In Dr Lam’s judgment, the injuries suffered by Chan were mild and Chan should be able to return to his pre-accident job with no limitation. Doctor Lee was only able to remark that “theoretically” Chan’s working ability might be limited due to his inability to lift heavy objects. However, the evidence shows that Chan successfully obtained the internal renovation work in 2007. He claimed that his working days in 2008 were less than those in 2007, but that was a result of the economic situation and had no connection with his working ability.

53. It was held in *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 W.L.R 132 that if the plaintiff can prove that there is a *substantial or real risk* that he will lose his present employment, he can be awarded damages for loss of earning capacity. Only if there is evidence which shows that there is such a risk will the Court assess the damages payable to the plaintiff, and the assessment will depend on the plaintiff’s chances of obtaining other employment and his competitive power in the market.

54. In this case, Chan did not adduce any evidence which shows that there is a substantial or real risk that he will lose his present job because of his minor back injury. Chan’s evidence shows that after the accident he, starting from 2007, was able to be engaged in internal renovation job and he earned, for some time, more than what he earned before the accident. I therefore do not agree that Chan’s competitive power in the market was weakened because of the injuries he suffered in the accident; nor do I think that he has suffered any loss of earning capacity.

Other special damages

55. I award to Chan the medical expenses and traffic expense he claims for; the total amount is $4,642. As for the $30,000 for tonic food, I award to him only $800, being the reasonable amount for tonic food.

Total amount of damages

56. I summarise the amount of damages I award to Chan:

Pain, suffering and loss of amenities $  80,000.00

Pre-trial loss of earnings $121,000.00

Special damages $　5,442.00

Total　: $206,442.00

57. Interest is payable on the damages for pain, suffering and loss of amenities from the commencement of this action to the day of judgment at 2% per annum. Interest is payable on the damages for other losses from the day of the accident to the day of judgment at half the interest rate set by the Court.

Conclusion

58. Chan is entitled to damages in the sum of $206,442 payable by Tang and Kwok. Tang and Kwok shall pay to Chan the costs of the action in which Chan claims against Tang and Kwok, to be taxed if not agreed.

59. I dismiss the claim made by Chan against Kin Wo. Chan shall pay to Kin Wo the costs of this action, including counsel’s fees. Since Chan’s claim against Kin Wo is dismissed, I do not need to make any order as to Kin Wo’s Third Party Notice.

60. When Chan’s legal representative filed the Statement of Claim of this case for him on 22 April 2008, his legal representative should have the Labour Department report dated 29 October 2004 in hand. In the Statement of Claim it is stated clearly that at the time of the accident Chan was working in the 1st construction site and that Kin Wo was the occupier of the 2nd construction site. It is also stated clearly that the metal pole was located on the government land. At no time did Chan show any evidence that he had ever entered the 2nd construction site or had been present at the access to and egress from the 2nd construction site. I do not see there was any factual basis for Chan’s legal representatives, when they were preparing the Statement of Claim, to make the allegation that Kin Wo was in breach of the above-mentioned section 7 or regulation 38A, or had incurred any occupiers’ liability under the common law. Even if his legal representatives were not sure whether the provisions were applicable when they were preparing the Statement of Claim, later when his legal representatives, from the available evidence, realized that the allegations in the Statement of Claim prepared earlier could not be substantiated and therefore needed to be amended, his legal representatives should have made necessary amendments in order that the Court would not be misled. At the trial Chan was unrepresented and he himself certainly did not know that the Statement of Claim prepared by his legal representatives for him should be amended. For this reason, Kin Wo and the Court have spent considerable time in dealing with legal points which actually are not applicable. This is a very unsatisfactory situation indeed. Being Chan’s legal representatives and officers of the Court, Chan’s solicitor and counsel were very irresponsible to have acted in this way. In particular, after the Civil Justice Reform has been implemented, such conduct is even more improper; this is because such conduct is not conducive to increasing the cost-effectiveness of conducting litigation before the Court, does not ensure that a case is dealt with expeditiously and does not ensure that the resources of the Court are distributed fairly.

61. I make an order *nisi* that Chan shall pay to Kin Wo the costs of this action, including counsel’s fees, to be taxed if not agreed. If Kin Wo or Chan intends to apply for varying this order *nisi*, application can be made within 14 days after the handing down of this judgment. The Court will consider making an order requiring Chan’s former solicitor and counsel to appear in the hearing concerning the variation of the costs order *nisi* and may, after hearing submissions from all parties, make an order about wasted costs provided for in section 53 of the District Court Ordinance and Order 62 rule 8 of The Rules of the District Court. Under Order 62 rule 8, a wasted costs order may (1) disallow the costs as between the legal representative and his client (e.g. Chan); and (2) direct the legal representative to repay to his client (e.g. Chan) costs which the client has been ordered to pay to another party to the proceedings.

62. If there is no application for varying the costs order, the order *nisi* shall become absolute.

(Mimmie Chan)

District Judge

The Plaintiff, acting in person, present

The 1st Defendant, acting in person, absent

The 2nd Defendant (also the Third Party), acting in person, absent

Mr. Kwan Tong-Lee, instructed by K.B. Chau & Co, for the 3rd Defendant

Translated by the Judgment Translation Unit of the Judiciary and approved by Mr. P. Y. Lo, Barrister-at-law.