## DCPI 58/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 58 OF 2015

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##### BETWEEN

WONG HIN CHUEN Plaintiff

### and

WANG ON MAJORLUCK LIMITED 1st defendant

CHOI WU TONG trading as 2nd defendant

CHUEN YUEN CLEANING & PEST

CONTROL SERVICE COMPANY

GREATEST WEALTH LIMITED 3rd defendant

trading as 萬有放心肉

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Before: Deputy District Judge Eric Tam in Court

Dates of Hearing: 28 and 29 July 2016, 1 and 17 August 2016, and

31 October 2016

Date of Judgment: 5 December 2016

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JUDGMENT

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*Background*

1. The plaintiff claims for damages he sustained in a slip and fall accident (“the accident”) on 16 May 2012 at Po Lam Market, Tseung Kwan O (“the market”). The market was a wet market. The accident happened outside shop 54B (“the stall”) at the market. The plaintiff was shopping at the market. When he passed the stall, he stepped on some slippery substance which caused him to lose his footing and balance. He fell and suffered a fracture of the left femoral neck commonly known as hip fracture. It is the plaintiff’s case that after the fall he found out that he had stepped on some pork residues that were discarded by the staff of the stall. The floor of the passageway was wet at that time. At the time of the accident, Wang On Majorluck Limited (“the 1st defendant”) was the property manager of the market. Choi Wu Tong trading as Chuen Yuen Cleaning & Pest Control Service Company (“the 2nd defendant”) was the cleaning contractor engaged by the 1st defendant to provide cleaning service for the market. Greatest Wealth Limited trading as 萬有放心肉 (“the 3rd defendant”) was a tenant of the 1st defendant at the market and operated the stall selling pork.
2. The plaintiff claims against the 1st and the 2nd defendants for failing to keep the floor of the market clean/dry, free from slippery substance, failing to take steps to prevent shopkeepers at the market from discarding or depositing slippery substance onto the passageway of the market, failing to clean up slippery substance onto the passageway of the market, failing to inspect the market and clean up slippery substance.
3. The plaintiff’s case against the 3rd defendant is that the 3rd defendant’s worker was the primary wrongdoer and the 3rd defendant is vicariously liable for the acts of its staff. The plaintiff’s case is that the 3rd defendant’s worker, in the course of chopping pork, allowed the slippery substance to be deposited onto the passageway outside the stall, allowed the slippery substance to remain on the passageway and failed to clean it up. The slippery substance was pork residues which composed of pig skin, broken bones and minced meat.
4. It is the plaintiff’s case that both the wet floor and the pork residues contributed to his slip and fall.

*Assessment of Credibility of the Witnesses*

*Evidence of the Plaintiff Wong Hin Chuen*

1. The plaintiff adopted his witness statement as evidence. I find that the plaintiff is a credible witness. He had some confusion as to the location of the shops at the market, but such confusion is not relevant to the dispute. Furthermore, there was a discrepancy as to the position of Cheung Chi Choi (“Cheung”), the 3rd defendant’s witness, at the time of the accident. At first, the plaintiff said Cheung was standing at an angle of around 45 degrees, diagonally to the table; but afterwards, he demonstrated that the position was about 85 degrees. The plaintiff was not a person of much education. The difference between 45 degrees and 85 degrees has little bearing in the present case. Henceforth, I would not find that he is a dishonest witness for this discrepancy.

*Evidence of Cheung Chi Choi*

1. I do not accept the evidence of Cheung, the 3rd defendant’s witness. His evidence is not consistent with his previous statements. For example, he said the shop opposite to the stall was open at the time of the accident. But in his statement dated 4 January 2013 (“the first statement”), he said it was vacant.
2. He said he heard nothing at the time of the accident, but in his oral evidence, he said he heard a woman shout someone had fallen. He said in the first statement that when he first saw the plaintiff, he was sitting on the floor. But in his oral evidence, he said that somebody was helping the plaintiff to get up.
3. In the first statement, he said the floor the plaintiff was sitting on was wet. In his statement dated 7 June 2013 (“the second statement”), he said that the floor of the passageway was dry.
4. In his statement dated 3 November 2015 (“the third statement”), he clarified that as the passageway was wide, there was some distance between the two locations. The place he was standing near the stall was dry but the position the plaintiff was sitting was wet.
5. In his oral evidence, he said that the whole floor was wet, the relevant parts of the third statement were wrong, and he had not read the third statement before he signed it. But during examination-in-chief, he confirmed the veracity of the third statement.
6. In the third statement, he said he was the only one working at the stall at the time of the accident. But in his oral evidence, he said there was another worker.
7. In his first statement, he said there was the sign of “Beware of slippery floor” on the floor. In his oral evidence, he said there was none. He said that the policeman only noted down his identity card number at that time. But during cross-examination, he admitted that the policeman also asked for his telephone number and he had given it to them, as stated in the second statement.

*Evidence of Choi Wu Tong*

1. Choi Wu Tong (“Choi”) was the 2nd defendant’s witness. There were some exaggerations in her oral evidence, but on the whole I find her an honest witness. She said that there was always water flowing from the stall onto the passageway. Such evidence is consistent with the evidence of Cheung. Cheung said sometimes he even put some sand bags to prevent water from flowing out of the stall. When there was water flowing out onto the passageway, he would sweep it back to the direction of the stall.
2. Choi’s evidence supported the fact that there was water flowing from the stall onto the passageway. Although there was drainage at the side of the stall, I do not think Cheung had successfully prevented water from flowing onto the passageway. I accept Choi’s evidence that the passageway was made wet by the 3rd defendant’s staff after they washed the floor of the stall.
3. As to whether the court should draw adverse inference against the 2nd defendant for failing to call the cleaners to give evidence. I find that Choi could tell the court the material facts of the present case. I do not find that she is trying to hide anything. The sanitary state of the market was illustrated by Cheung’s evidence. He said that the market was dry in the morning; the cleaning workers cleaned the area several times a day, which is consistent with Choi’s evidence.

*The evidence of Wong Wai Chi Nicole*

1. Wong Wai Chi Nicole (“Wong”) gave evidence for the 1st defendant. She adopted her witness statement as her evidence. She was employed by the 1st defendant in December 2013. The accident happened on 16 May 2012. She had no personal knowledge of the accident. What she could provide was mainly evidence glanced from the contemporary documents. Her evidence was not challenged by any parties and I accept her evidence.

*Issues in dispute relating to the 3rd defendant*

*What caused the plaintiff to fall*

1. The plaintiff’s evidence was that as he was walking past the stall, he stepped on something slippery. He was unable to maintain his balance and fell as a result. Immediately after the fall he saw pig skin and other pork residues on the floor near his feet. The floor was wet and his trousers got wet. He then said to the Cheung, “師傳你今次累死我啦, 我起唔到身”. Cheung’s response was “我都唔想架!” Cheung then got hold of a folding chair from a nearby stall and helped the plaintiff to get up and sit on the chair. Cheung then went and got a broom to sweep away the pig skin and other debris. The plaintiff tried to stop him but Cheung went ahead and said, “你咁自私! 滑倒第二個就慘啦!”
2. In paragraph 8 of the plaintiff’s witness statement, he said that before the accident, he noticed that Cheung would tidy up the pork by cutting off some skins, small bones and meat from the pork and dispose those parts around the floor of the stall.
3. As I accept the evidence of the plaintiff and reject those of Cheung, I find that the plaintiff fell because he stepped on pork residues. Such residues were left there by the 3rd defendant’s staff. Such finding is also supported by the conversations between the plaintiff and Cheung after the fall, and the fact that Cheung hurriedly cleaned up the floor after the accident.
4. As pointed out by Mr Lim, counsel for the plaintiff, Cheung would not be said to have carefully disposed of the pork residues. In one of the photographs produced by the 3rd defendant showing the basket for the collection of the pork residues, the scene that some pork residues sticking to the bottom of the table, instead of being put inside the basket, was captured.
5. It is not in dispute that the floor of the passageway was wet. I find that the wet floor also contributed to the slippery floor and the fall of the plaintiff. But the main reason for the accident was the presence of pork residues on the floor.
6. When Cheung gave evidence, he said that the 3rd defendant dismembered pig carcasses twice a day. After that, the 3rd defendant’s staff would use a hose to wash away the debris and residues. From the photographs taken by the 3rd defendant, it can be seen that the floor was wet. It was the evidence of Cheung that the floor was dry at 8:00 a.m. The worker of the stall would wash the floor at around 10:00 a.m. The accident happened at around 11:00 a.m. As mentioned above, I find that the floor of the passageway was wet because the 3rd defendant’s staff washed the floor of the stall in the morning. The water flew outside the stall and it is also likely that debris and residues were flushed onto the passageway and were deposited there.
7. Mr Chan, counsel for the 3rd defendant, submitted that the plaintiff never pleaded such case. Given my findings above, there is no need to deal with the issue. I accept the plaintiff’s evidence and find that Cheung improperly handled the pork residues and caused the pork residues being left on the passageway. If the issue has to be dealt with, I find that the washing of the floor by the 3rd defendant’s staff may also be the cause of the residues being left on the passageway. Such information was only disclosed by Cheung at the trial and could not be found out by the plaintiff before the trial.
8. The plaintiff had already pleaded that the residues of the pork were discarded by the 3rd defendant’s worker and in the Particulars of Negligence of the 3rd defendant, the plaintiff had pleaded in sub paragraph (a) discarding, disposing of or dropping the pork residues; sub paragraph (c) causing or allowing the pork residue to remain on the floor; and sub paragraph (d) failing to clean up, clear or remove the pork residues. I find that the plaintiff had sufficiently pleaded his case to allow the 3rd defendant to defend his case, and the 3rd defendant would not be said to be taken by surprise. There is also no prejudice to the 3rd defendant as the evidence came from his own witness. As to the reason for the wet floor, again it was the evidence of the 3rd defendant’s witness. I do not see any reason why the court should not make such a finding.

*Liability of the 2nd defendant*

1. The plaintiff claims against the 2nd defendant for failing, inter alia, to keep the floor of the market clean, dry and free from debris, oily and slippery substance. On Choi’s own evidence, she was fully aware that the 3rd defendant’s workers cut up pig carcasses at the back of the stall and then hosed down the floor resulting in water and pork residues flowing onto the corridor.
2. Mr Cheng, counsel for the 2nd defendant, submitted that there was no evidence to show for how long the pork residues had been discarded by the 3rd defendant onto the passageway, before the plaintiff slipped and fell at the time of the accident. There is no basis to fault the 2nd defendant for failing to clean up the pork residues just because the accident happened. It was equally possible that the pork residues were discarded by the 3rd defendant just moments before the accident, leaving the 2nd defendant with no time to detect and clean up properly.
3. Further, Mr Cheng submitted that the 2nd defendant had put in place a reasonable system to minimise the risk of slip and fall accidents inside the market.
   1. It was not challenged that two workers would be on duty during the day inside the market. These two workers would each patrol half of the market to clean up the passageway. There was no complaint that such system of patrol was insufficient for the market’s purpose.
   2. The 2nd defendant was aware that the stall was the only stall that would allow greasy water to overflow to the passageway, and thus she paid special attention to clean the passageway outside the stall. She arranged the cleaning workers to use cleaning powder (黃粉) and bleach (漂水) to remove dirt and oil when the market was less busy. Any water would be mopped off afterwards. This would be repeated at irregular junctures throughout the day, depending on the condition of the passageway outside the stall.
   3. During the evenings when the market closed, the cleaning workers would again use cleaning powder to wash the passageway to remove dirt and oil. After washing with water, the passageway would be left to dry over the night.
   4. The 2nd defendant also stated that she put a yellow warning sign to warn the visitors of the wet floor. (I find that there was a warning sign on the floor at the time of the accident. Cheung, in his witness statement, also confirmed that there was a warning sign.)
   5. The 2nd defendant would inspect the conditions of the market daily, by staying at the market for 1.5 to 2 hours each time. She would ensure that the cleaning workers carried out their work in a proper manner.
4. Mr Cheng submitted that there was no evidence suggesting that slip and fall accidents were prevalent in the market, both before and after the accident. As such, the cleaning system she implemented was more than reasonable. There was no breach of duty by the 2nd defendant.
5. I find that there is no duty to keep the floor of the market dry all the time. The market is a wet market. Given the practice that the 3rd defendant used the hose to clean the stall twice a day, it is impossible to keep the floor of the passageway dry all the time. Such demand is more than reasonable. I agree with Mr Cheng‘s submission that the 2nd defendant’s duty was to keep the market in a reasonable clean state.
6. The main reason for the fall of the plaintiff was the pork residues. There is no evidence that pork residues were there every day, or that slip and fall accidents were prevalent in the market. I accept that the 2nd defendant had established and implemented a cleaning system, employed sufficient staff for the cleaning, and put up warning sign to warn against the risk of wet floor. She was not in breach of her duty.

*Liability of the 1st defendant*

1. Mr Lim submitted that the 1st defendant, as the property manager and occupier of the market, owed a duty to visitors to the market to keep it in a reasonably safe condition. The accident happened in the passageway which was a common area under the control of the 1st defendant.
2. The evidence of Choi was that the floor of the market was washed overnight and it was the 3rd defendant who made the floor of the passageway wet at least twice a day. This scenario was set up by three factors:-
   1. The use of the stall to cut up pig carcasses;
   2. The inclining floor of the stall which resulted in water used to clean the floor flowing out towards the passageway;
   3. The lack of drainage right outside the stall which resulted in water from washing of the floor flowing out onto the passageway.
3. Mr Lim submitted that water and pork residues flowing onto the passageway was a daily occurrence which was a long standing problem before the accident. As an occupier, the 1st defendant was under a duty to keep the passageway safe. On the facts of this case, the 1st defendant’s duty went beyond employing a competent independent contractor to clean the market. Choi’s evidence was that she had made numerous complaints to the 1st defendant but nothing was done about it. The problem was created by its tenant and the 1st defendant had not done anything to stop the problem of the water flowing from the stall onto the passageway. Apart from complaints from the 2nd defendant, the 1st defendant, as the manager of the market ought to know that for pork stall, it was necessary to wash the floor after pig carcasses had been cut up. The 1st defendant could have located the 3rd defendant to a stall that had drainage opening next to the shop front, or if no such stall was available at the time then drainage should be constructed by the front of stall so that dirty water would go into the drain hole and not onto the passageway.
4. Mr Lim submitted that the evidence about the complaints by Choi to the 1st defendant that water flushed from the stall emerged during cross-examination of Choi. After 1 August 2016 (day 3 of the trial) the case was adjourned until 17 August 2016 when Wong gave evidence. It was clear that Wong only joined the 1st defendant after the 3rd defendant had moved away from the stall, and she would have no knowledge of the complaints made by Choi. Having a two week adjournment, the 1st defendant made no effort to call the manager of the market to give evidence on the aspect of whether any complaints had been made by Choi. Mr Lim submitted that this was an appropriate case for the court to draw an adverse inference against the 1st defendant that Choi had made complaints to the 1st defendant against the 3rd defendant on the ground that the 1st defendant failed to call a material witness and no explanation was offered for not calling this witness.
5. Mr Chung, counsel for the 1st defendant, submitted that 1st defendant’s case was that a reasonable system to guard against the risk of slippery floor within the market was implemented with the exercise of reasonable care and diligence:-
6. An independent cleaning contractor, namely the 2nd defendant was engaged;
7. An adequate system of inspection and patrol of the market was implemented;
8. An efficient system of report and remedy coupled with the cooperation/assistance of the 2nd defendant was implemented.
9. Mr Chung submitted that Wong’s evidence was as follows:-
10. The 1st defendant took various measures in selecting the 2nd defendant as the cleaning contractor for the market;
11. The cleaning contract sets out the conditions and standard which the 2nd defendant was required to meet, including:-

(i) Number of cleaners to be engaged;

(ii) Regular cleaning during daytime;

(iii) Ad hoc cleaning;

(iv) Regular cleaning during nighttime;

(v) Regular monthly cleaning in massive scale including removal of stains;

(vi) Regular monthly removal of grease;

(vii) Massive cleaning of the entire market at least half-yearly.

1. A schedule of daily/weekly/monthly cleaning were also set out in a table. In the said table, the 2nd defendant was required to clean the floor three times per day and once per week.
2. Pursuant to clause 7 of the cleaning contract, the 2nd defendant’s staff was required to record their work and attendance. The 1st defendant would check cleaning records submitted by the 2nd defendant.
3. The 1st defendant would also arrange staff on duty to supervise and monitor the 2nd defendant’s cleaning work. Warnings/notices and penalty would be given if the 2nd defendant’s work was found to be unsatisfactory or below the standard.
4. Patrols and inspections were conducted by the 1st defendant’s staff every two hours to ensure the cleaning state of the market.
5. The 1st defendant also held regular reporting meetings with the 2nd defendant to review and monitor the standard of the 2nd defendant’s cleaning service.
6. Wong’s evidence was supported by documents and I accept her evidence. I find that the 1st defendant had established a reasonable system to guard against the risk of slippery floor, and such system was implemented with reasonable care and diligence. There is no evidence that the system was not implemented. The hourly cleaning records filled in by the 2nd defendant’s staff and countersigned by the 1st defendant’s staff were not challenged. The plaintiff’s evidence that he had never seen any cleaning staff or patrol staff could not challenge the existence of such staff in the market. The plaintiff only stayed in the market for a short period of time. Cheung agreed that cleaning and patrol by the 2nd and the 1st defendants’ staff were undertaken.
7. I do not agree with Mr Lim’s submission that the flow of water from the stall onto the passageway after cutting up the pig carcasses imposed an extra duty on the 1st defendant. Although the washing of floor was a daily event, there is no evidence that the presence of pork residues on the passageway was a daily occurrence. The 3rd defendant did wet the floor of the passageway, and the market was a wet market. It should not pose a serious problem. Extra measures had been taken by the 2nd defendant to deal with the wet floor of the passageway outside the stall.
8. Both Cheung and Choi said that there was drainage near the stall, I find there was such drainage. I do not accept that the wetness of the passageway was caused by the lack of drainage or the inclining floor. It was due to the manner of how the floor of the stall was washed.
9. I do not think it is an appropriate case to draw adverse inference against 1st defendant for failing to call new witness. The 2nd defendant had already dealt with the problem.
10. I find the 1st defendant not liable.

*Plaintiff’s contributory negligence*

1. Mr Lim submitted that in this case, the plaintiff was familiar with the market. He knew it was wet, he wore non-slip shoes and he walked slowly. But he did not notice the pork residues as these were of similar colour to the wet shiny floor. As such the pork residues were not readily noticeable and he was entitled to expect the passageway to be free from slippery substance like pork residues. I do not agree.
2. I agree with Mr Chan’s submission that if the plaintiff’s evidence was accepted, as stated in paragraph 8 of the plaintiff’s witness statement, the plaintiff noticed that Cheung would tidy up the pork by cutting off some skins, small bones and meat from the pork and dispose those parts around the floor of the stall. The plaintiff should pay more attention while walking near the stall.
3. Furthermore, after the fall, he noticed that there were residues of the pork in the area, and Cheung used a broom to clean that up. I find that the amount of pork residues should not be too small, as according to his own statement, there were a pile of pig skins, broken bones and minced meat, and Cheung needed to clean them up with a broom. They were not so invisible. I find that the plaintiff should have noticed the pork residues on the floor if he had paid more attention. His extent of liability should be 15 %.

*Quantum*

*The Injury*

1. The plaintiff sustained a fracture of the left neck of femur which necessitated an Austin Moore hemiarthroplasty of the hip. Mr Lim submitted that the plaintiff was left with residual left hip pain. There was muscle wasting of left thigh 3 cm smaller than right side. In his oral evidence the plaintiff said that he started to experience pain in his right hip early this year and he had seven sessions of physiotherapy. As advised by the physiotherapist, the reason he was experiencing pain on the right side was because he was not putting weight on the injured side so the right side was bearing more weight. This was a problem created by the original injury.

*Pain, Suffering and Loss of Amenities (“PSLA”)*

1. Mr Lim submitted that the plaintiff suffered from residual pain and weakness of the left hip. In addition, the plaintiff could not do physical exercise which he used to do prior to the accident. In Dr Tio’s report, it was stated that the plaintiff’s mobility such as walking, standing and squatting could be slightly adversely affected. Dr Tio opined that these implant could last up to 10 years, i.e. 2022 and the plaintiff would need another operation by then, when he would be aged 80. The life expectancy of males in Hong Kong is around 88.42, so in the normal course of events the plaintiff would live beyond the time when a conversion operation is needed. Mr Lim submitted that the pain of this future operation should also be taken into account for the award for PSLA.
2. The plaintiff claims $450,000 for PSLA. Mr Lim submitted that an award of $450,000 for hip fracture would be at the upper end of the range of PSLA award for this kind of injury. Mr Lim submitted that the plaintiff’s claim at this amount was reasonable given the circumstances of his injury and residual symptoms.
3. The defendants submitted that PSLA should be in the range   
   of $200,000 to $250,000.
4. The parties submitted some relevant authorities for the court’s consideration. After considering the authorities, and taking into account that the plaintiff may have to undergo another surgery after 10 years, I find that the amount for PSLA be at $300,000.

*Cost of future operation*

1. Mr Lim submitted that Dr Tio opined that the replacement hip would normally last up to 10 years and after that a replacement would be required. The hemiarthroplasty was done in 2012 and a replacement would be required in 2022. By that time, the plaintiff would be aged 80. Given the life expectancy of male aged 77 in Hong Kong was 11.42, the plaintiff had a life expectancy of 88.42. Given that he would have 8.42 years’ life expectancy at the age of 80, it would be reasonable to allow the cost of a hip replacement surgery, the average cost for the surgery at a private hospital would be around $252,000.

1. Mr Lim submitted that according to the information from the Hospital Authority, the notional waiting time for total hip replacement surgery in the New Territories East Cluster was 57 months. The plaintiff should be entitled to conduct the surgery in a private hospital.
2. Mr Chung submitted that Dr Tio only stated in the expert report that most of these implants could last up to 10 years after which a conversion hip replacement should be considered. Whether the plaintiff would undergo the operation was not certain.
3. Mr Chung further submitted that, as revealed in medical records, the plaintiff was suffering from long term illness, including hypertension and diabetes. It was doubtful whether the surgery would be recommended by then. The plaintiff’s claim for future medical expenses was based on the waiting time for surgery in the public sector. But there was no urgency in this kind of surgery.
4. I agree with Mr Chung’s submission that the medical opinion only stated that most implants could last up to 10 years and another operation had to be considered. Whether the plaintiff will have another operation depends on a lot of variable factors. Life expectancy is only one of them. Furthermore, such operation is not urgent and I cannot see the reason why the public hospital could not provide the service. There is no history that the plaintiff usually engaged private medical services. However, it is anticipated that some follow up medical consultations are needed. I assess the cost at $2,000.

*Loss of housekeeping ability*

1. The plaintiff withdrew this item.

*Special Damages*

1. The revised claim is $10,852 and agreed by all the defendants.

Summary on quantum:-

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| --- | --- | --- | --- |
| (a) | PSLA | | $300,000 |
| (b) | Special Damages | | $10,852 |
| (c) | Future medical expense | | $2,000 |
|  | | Total: | $312,852 |

The liability of the 3rd defendant is $265,924.20 ($312,852 x 85%).

*Conclusion*

1. The 3rd defendant do pay the sum of $265,924.20 to the plaintiff, together with interest at 4% p.a. on the sum of $9,224.20 ($10,852 x 85%) from 16 May 2012 to judgment date, and interest on the sum of $255,000.00 ($300,000 x 85%) at 2% p.a. from 12 January 2015 to judgment date, thereafter interest on the sum of $265,924.2 from judgment date at judgment rate until payment.
2. I also grant order nisi on costs, including reserved costs, that the 3rd defendant do pay costs to the plaintiff, the 1st defendant and the 2nd defendant, with certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. Unless application for variation of the order nisi is taken out within 14 days from the date hereof, the order shall become absolute 14 days thereafter.
3. I thank counsel for their assistance.

( Eric Tam )

Deputy District Judge

Mr Patrick D Lim, instructed by Szwina Pang, Edward Li & Co, for the plaintiff

Mr Gary K H Chung, instructed by Cheng, Yeung & Co, for the 1st defendant

Mr Alfred C P Cheng, instructed by Au Yeung, Cheng, Ho & Tin, for the 2nd defendant

Mr Maurice Chan & Leon Ho, instructed by Au & Associates, for the 3rd defendant