

HONG KONG / JUDGMENT

WAN CHEE LEUNG v. LAM KI MAU AND ANOTHER

COURT

Court of Appeal

DECIDED

20 December 2007

CASE / FILE NUMBER

CACV40/2007

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bjbj CACV 40/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CIVIL APPEAL NO. 40 OF 2007 (ON APPEAL FROM DCEC nO. 415 OF
2004)

BETWEEN wan chee leung a mentally incapacitated person by his next friend WEN ZEFEN
Applicant and lam ki mau and CHAN CHIU YEE trading as TOMSON CONSTRUCTION
ENGINEERING CO Respondent

Before: Hon Cheung JA, Yeung JA and Lam J in Court Date of Hearing: 4 December 2007 Date of
Judgment: 20 December 2007 J U D G M E N T Hon Yeung JA (giving the Judgment of the Court):

Introduction

On 18 June 2003, the applicant, Wan Chee Leung was found lying in a small-houses construction site at Lot No 596 SC and 579 SB in DD 244, Ho Chung, Sai Kung, New Territories (the site), seriously injured with his head bleeding. Other than a white helmet by his side, there did not appear to be any machinery, appliance, tool or equipment to show that the applicant was performing any particular duty. The respondent, Lam Ki Mau and Chan Chiu Yee (Madam Chan) trading as Tomson Construction Engineering Co, the contractor of the site, filed an accident report (Form 2) dated 30 June 2003 in accordance with s 15 of the Employees Compensation Ordinance, Cap 282 (the Ordinance). The applicant s job nature was described in Form 2 as vBf, 2. A police investigation report dated 18 June 2003, compiled on the information supplied by the applicant, his wife- Madam Wan Chak Fan, and three employees of the respondent working at the site (Mr Wong Kam Wai, Mr Wong Choi Ming and Mr Wong Hin Chung), described the accident as follows: The injur(ed) person was working at the 2/F of ..for some clearance work. Nobody witnessed how the injured person fell down. There was scaffolding erected at the scene. Witness 3 reported that although he was at the same floor where injured person working, he didn t see

how injury person fell down but just heard he shouted.. The respondent appeared then to have accepted that the applicant was its employee. Apart from filing Form 2, the respondent also paid the applicant his medical expenses and sick leave pay for six months until the end of 2003. The investigation report by the Labour Department dated 11 December 2003 (the Investigation Report) indicated that the applicant returned to the site at 8 a.m. and, after lunch, was instructed to use the welding equipment to cut off steel bars on the 2/F. The report further stated that just before the accident occurred, the applicant was standing on a wooden plank, using a welding equipment to cut a steel bar that was protruding from the building facade on the 2/F when there was some sparks spreading on his right foot. The applicant tried to avoid the sparks, but lost his balance and fell from a height of around seven meters from the 2/F onto the G/F with the wooden plank, and sustained injuries. The applicant's injuries were so serious that he became a mental patient and had to be admitted into the mental ward of the Kowloon Hospital. He was still hospitalised in September 2006. According to the Certificate of Assessment issued by the Employees Compensation (Ordinary Assessment) Board (The Assessment Board) appointed under s 16D of the Ordinance, the applicant suffered multiple injuries resulting in (i) Post-concussional syndrome, (ii) back pain and stiffness, and (iii) Psychiatric impairment. However, the applicant appeared to be able to describe to the Labour Department the cause of the accident in a declaration dated 28 November 2003, which was recorded by a Labour Department officer, Mr Leung Lok Chuen (the Declaration) as follows: On the day in question, arrived at the site for work around 8 in the morning. Wong Choi Ming first asked me to install windows until taking meal at noon. Returned to site around 1 pm, Wong Choi Ming told me to go to 3/F to off the metal bar(s) protruding from the outer wall with welding machine. At that time, I stood on a 24 stripe [that is, a wooden stripe of 2 x 4]. One end of the wooden stripe was placed on the concrete window ledge and the other end was placed on the single-layer bamboo scaffold (as shown in diagrams 1 and 2). The gap between the window ledge and the scaffold was about 18 inches. There was no fencing around the four sides of the wooden stripe. After I had worked for about 15 minutes, the welding sparks splashed on my left thigh. At that time I moved my body sideways trying to avoid the sparks but lost my balance suddenly. I fell from the 3/F to the ground surface together with the wooden stripe on which I had been standing. When examined by Dr Singer and Dr Au Ka Kau in October 2004, it was recorded by Dr Singer and Dr Au respectively that the applicant, was at work when he fell from the 2nd floor and lost consciousness , and recalled that on 13 June 2003, he fell from a height of thirty feet . When examined by Dr Law Wun Tong on 24 January 2005, it was recorded that (the applicant) was unable to tell any details of the accident. He claimed that he was able to recall an accident during which he had injured his head, mouth, teeth and his limbs. He could not tell when it happened or what the doctor had told him afterwards. He said that he was injured at work. The Assessment Board assessed the applicant's permanent loss of earning capacity at 74%. The Applicant's Claim The applicant commenced the present proceeding against the respondent, for compensation under ss 7, 8, 9, 10 and 10A of the Ordinance. Initially, in his application, the applicant claimed to be doing cleaning work at the time of the accident. The application was amended and it then suggested that the applicant was doing the welding work in order to cut off metal bars from the outer wall of the building. The applicant also sought to appeal against the 74% permanent loss of earning capacity assessed by

the Assessment Board and claimed that his permanent loss of earning capacity should be 100%.

The Respondent's Case It was the respondent's contention that the applicant had resigned from its employment on 14 June 2003. Therefore at the time of the accident, the applicant was not in its employment and the accident did not arise out of and in the course of his employment. The respondent suggested that it had not assigned any work to the applicant on 18 June 2003. The Evidence for the Applicant Because of his mental condition, the applicant was unable to give evidence. However, by way of hearsay notice, the applicant adduced the Investigation Report, the Declaration and other documents as evidence. He also produced his witness statement and the transcript of his evidence given at the magistracy in connection with the summons issued by the Labour Department against the respondent arising out of the accident in question. The applicant's case was that he was cutting steel bars with the welding machine at the time of the accident. The applicant's wife, Madam Wan Chak Fan gave evidence to the effect that Wong Kam Wai, one of the respondent's employees had told her on 22 June 2003 that the applicant fell during his work. Madam Wan also said the supervisor of the site, Mr Wong Choi Ping told her on 23 June 2003 that the applicant suffered injury whilst at work. She said none of the respondent's employees ever told her that the applicant had resigned. Wage receipts issued by the respondent were adduced as evidence. The last of those wage receipts (the last receipt), dated 16 June 2003, indicated that the applicant worked on 3, 5, 6, 7 (half day) and 14 (half day) in June 2003, a total of 4 days at \$280 a day for a total wage of \$1,120. There were the following writings on the last receipt, 14/6 resigned. 17/6 resumed. The writings on the last receipt were made by Mr Joseph Chan, a solicitor engaged by the respondent. The Evidence for the Respondent The respondent called a number of witnesses with a view to show that the applicant had resigned from its employment and that he could not have been cutting off any metal bar protruding from the building facade at the time of the accident. Mr Poon Wood Keung, the registered structural engineer and Mr Shum Chi Kwong, the steel-bending contractor both said there was no steel bar protruding from the outer wall. Mr Lai Ming Wah, the welding contractor, said if any welding work needed to be done, he would transport the welding machine to the site. However, on 18 June 2003, he did not transport any welding machine to the site and none was stored there. Mr Shing Kam Fung, the water and electricity contractor, said on 18 June 2003, there was still no formal water and electricity supplies to the site and in order to do any welding work, a temporary electricity box would have to be installed. Mr Shing said he could not see any electricity box at the site on the photographs taken after the accident. Mr Wong Hin Chung, an electricity worker, said on the day of the accident, he went up to the building to install electricity switch box in the kitchen. Mr Wong said he saw the applicant, but did not pay any attention to what he was doing. Suddenly, he heard someone shouted and he saw the applicant lying on the ground. Mr Wong also said he only told the police that he saw the applicant, but did not tell the police that the applicant was working at the site. Mr Joseph Chan, a partner of the solicitors firm engaged by the respondent, confirmed that the writings at the bottom of the last receipt were his. He said he put down the writings on the instruction of Mr Wong Choi Ping, the site supervisor in May 2004. Mr Chan further said Mr Wong subsequently told him that the applicant could not have been doing any welding work at the time of the accident and on further checking, Mr Wong said the applicant had in fact resigned on 14 June 2003, but as the applicant had resigned and resumed

work a few times, he had mixed up the events and told Mr Chan that the applicant had resumed on 17 of June 2003. Mr Wong Kam Wai, one of the respondent's employees said Mr Wong Choi Ping had instructed him, on 16 of June 2003, to get back the mobile phone and the temporary accommodation from the applicant as he had been dismissed. Mr Wong said the applicant indeed handed over the mobile phone and the keys before leaving the site on 16 June 2003 with his personal belongings. Mr Wong Choi Ming, the construction supervisor of the site said he never taught the applicant to install windows or door and he never instructed him to any welding work as he himself did not know how to do them. He said those works were all contracted out to contractors. Mr Wong Choi Ping expressly denied that he had instructed the applicant to install windows or doors or to do any welding work on 18 of June 2003. Mr Wong Choi Ming also confirmed that the applicant had resigned in the morning of 14 June 2003, saying that he wanted to go back to work in a restaurant, and the applicant did not return to the site to work in the afternoon. Mr Wong Choi Ming said on the day of the accident, having been informed of it, he arrived at the scene and saw the applicant, half naked and wearing shorts, lying on the floor bleeding. However, there was no welding machine or cables. He subsequently found the applicant's clothes and sleeping mattress on the 3rd floor of the building. Mr Wong Choi Ping, the site supervisor, said all construction, water and electricity works at the site were sub-contracted to contractors and that the applicant was only employed to take care of completed houses with the duties of cleaning, watering and opening gates for potential purchasers. Mr Wong Choi Ping said there was no cleaning work to be done as the building was still under construction and that the applicant could not be doing windows and doors installation or any welding works as those works were contracted out. Mr Wong Choi Ping also said there was no metal bar protruding from the outer wall and even if there were such protruding metal bars, it would be remedied by Mr Shum Chi Kwong, the steel-bending contractor. Mr Wong Choi Ping confirmed that there was no welding machine or electricity supply at the site for the applicant to use and no welding machine could be found after the accident. Mr Wong Choi Ping emphasized that the respondent was insured and there was no reason for him not to tell the truth. He further said the respondent paid the applicant his medical expenses and his sick leave pay upon the advice of the Labour Department in order to avoid any possible breach of the legislation. Mr Wong Choi Ping also confirmed that on 15 June 2003, having confirmed over the telephone that the applicant would not be working for the respondent, he instructed Mr Wong Kam Wai to get back from the applicant the mobile telephone and the temporary accommodation provided to the applicant by the respondent. Mr Wong Choi Ping suspected that the applicant remained at the site on 16 June 2003 because he had no place to live. Mr Wong Choi Ping denied telling Madam Wan that the applicant was injured whilst at work. He said he only told her that the applicant had fallen from height. The Judge's Findings Judge S Chow in the District Court, in a relative short judgment, commented that the content of the Declaration was unlikely to have come from a mental patient, but he referred to the evidence of Dr Nguyen that there were times when the applicant's condition stabilized and that his condition gradually stabilized by July 2003. The judge appeared to have concluded that the Declaration did come from the applicant and its contents were true. The judge, pointing out that Mr Leung Lok Chuen had recorded the Declaration, commented that the respondent should have called Mr Leung to testify if it had doubts about it, but it did not. The

judge emphasized the respondent's initial position on 18 June 2003 that the applicant was its employee, and its position only changed on 22 July 2004. The judge referred to the evidence of the respondent's witnesses. He rejected the suggestion that the applicant had not returned to work on 14 June 2003 as he had found a job in a restaurant. The judge also rejected Mr Poon Wood Keung's suggestion that there wasn't any steel bar protruding from the external wall, as he did not make any written record of his inspection work. The judge rejected Mr Wong Choi Ping's evidence that the applicant had resigned on 14 June 2003, pointing out that Madam Chan still submitted Form 2 to the Labour Department on 18 June 2003 to confirm that the applicant was a site odd-job worker. The judge referred to the wage receipts, the Police Report, the Accident Report, the Declaration, the medical reports on the applicant and the evidence of the various witnesses called by the respondent. The judge emphasized that the contents of the police report were based on information obtained from Wong Kam Fai, Wong Choi Ming and Wong Hin Chung shortly after the accident occurred and opined that those witnesses had no motive to provide any false information. The judge pointed to the report, which suggested that the applicant was working at the site when the accident occurred. The judge further referred to Form 2 and commented that Madam Chan, who had signed it, did not give evidence to say that its content was false. The judge concluded that the applicant was injured in the course of his employment with the respondent. The judge made no express findings on the circumstances in which the writings on the last receipt, 14/6 resigned. 17/6 resumed were made, or on Mr Wong Choi Ping's evidence relating to the applicant's resignation, or the circumstances in which the respondent paid the applicant his medical expenses and sick leave pay. The judge concluded his reasoning by the following remarks: Base on the above reasons, I find that the applicant was an employee of the respondent on 18 June 2003 and as he was injured in the course of work, the respondent had to make compensation to the applicant in accordance with the relevant provisions of the Ordinance. The judge found that the applicant's permanent loss of earning capacity was 100%. The judge allowed the applicant's appeal against the assessment of the Assessment Board and made his awards in favour of the applicant under s 9 of the Ordinance in the sum of \$403,200. The judge found the applicant was in need of further psychiatric treatment and constant attention. He therefore awarded him \$412,000 compensation under s 8(1)(a) of the Ordinance. The judge further extended the sick leave period from two years to three years under s 10(5) of the Ordinance and made an award under s 10 in the sum of \$161,280. The judge made a total award of \$976,480 [\$403,200 + \$412,000 + \$161,280] in favour of the applicant. Grounds of Appeal Mr Tim Kwok, on behalf of the respondent, suggests that the judge had not made adequate and proper findings of fact to justify his decision. In so far as the judge might have found liability on the part of the respondent by relying on Form 2 in that the applicant was injured when he was clearing the work site, Mr Kwok submits that such a finding was wrong in law. Mr Kwok emphasizes that the applicant's case, as eventually pleaded, was that he was injured whilst cutting off steel bars that were protruding from the external wall of a building, it was therefore not open to the judge to find that the applicant was injured whilst doing clearing work. Mr Kwok suggests that when the parties proceeded with the case on the basis of the applicant's pleaded case, it was unfair for the judge to find liability on another basis. Mr Kwok argues that the major dispute between the applicant and the respondent was whether the applicant had resigned from the respondent's

employment on the 14 June 2003, it was therefore incumbent upon the judge to make a finding on the dispute, and not just relying on Form 2 when its contents were contradicted by so many witnesses called by the respondent. Mr Kwok further argues that the contradictions between the various reports and the statements relied on by the applicant, viewed against the evidence of the respondent's witnesses, was such that the judge was obliged to make clear and proper evaluation before coming to his conclusion on the circumstances in which the accident occurred. Mr Kwok suggests that the judge had failed to deal with issues adequately and properly. Mr Kwok further suggests that the judge should not have allowed the applicant's appeal against the 74% permanent loss of earning capacity by pointing out that such finding was not consistent with some of the medical evidence presented to the judge. Mr Kwok points out the evidence of Drs Law and Wu, who suggested that the applicant was malingering, and that his permanent loss of earning capacity was less than 74%. Mr Kwok, however, is contented with the assessment of 74% by the Assessment Board. Mr Kwok also suggests that the judge should not have extended the period of sick leave from 2 years to 3 years. The Applicant's Position Mr Daniel Chan, counsel for the applicant, emphasizes that as the judge had heard the witnesses and had evaluated the evidence before making his findings on fact, an appellate court should be slow to interfere with his findings. Mr Chan submits that the judge was entitled to rely on Form 2 and to find that the applicant was injured whilst doing clearance work at the site in the course of his employment. Mr Chan submits that there was no inconsistency between the case as pleaded by the applicant and the judge's finding. Mr Chan's simple suggestion is that the applicant's medical expenses and sick leave pay after the accident, and that the certificate of the applicant's monthly income dated 2 March 2004, submitted by the respondent, stated that the applicant had an accident in the course of work in June 2003. Mr Chan emphasizes that Dr Law had only examined the applicant on one occasion and he appeared to have failed to diagnose the frontal lobe syndrome suffered by the applicant. Mr Chan points out that the applicant's conditions deteriorated after the assessment by the Assessment Board and that at the time of the hearing, the applicant was still being hospitalised. In the circumstances, Mr Chan submits that the judge was right to assess the applicant's permanent loss of earning capacity at 100%, and to extend his sick leave period to 3 years. Discussion The main issue, as properly identified by the judge, is whether the applicant was injured in an accident arising out of and in the course of his employment with the respondent. Despite what was originally pleaded in the application, when the applicant described the accident, he always said he was using a welding machine to cut off steel bars at the site when the accident occurred. The Investigation Report supported his case and what he said in the Declaration was also consistent with his case. Mr Kwok refers to the police investigation report and Form 2, and suggests that there were inconsistencies with the applicant's case. Mr Kwok points out that the applicant's work at the time of the accident was described therein as clearing the site and not cutting off steel bars with a welding machine, as pleaded by the applicant. Mr Kwok suggests that a finding by the judge that the applicant was clearing the site, contrary to his pleaded case, rendered the trial and the judgment unfair. Mr Kwok's reasoning is premised on the incorrect assumption that clearing the site does not include cutting off protruding steel bars with a welding machine. Only with this incorrect assumption would it appear that there were inconsistencies in the applicant's case and the judge's finding or that his finding was erroneous.

As early as 6 December 2005, the applicant had served hearsay notice on the respondent to cover, inter alia, the Investigation Report, the Declaration, the applicant's statement and Form 2. It was clearly the applicant's contention that there was no inconsistency in those documents or he would not have served all those documents in support of his case. The judge, in the course of counsel's submission, made it clear that clearing the site, though not the same as cutting off protruding steel bars, could include the latter. We are persuaded that the judge was right. Mr Kwok submits that the judge did not find, and in effect rejected, welding work as being the basis of liability. We are not persuaded that Mr Kwok is right. The judge had, in our view, clearly found that there was no inconsistency between the suggestion that the applicant, at the time of the accident, was clearing the site and was cutting off protruding steel bars. The judge, true to what he suggested to counsel in the course of their argument, did find that clearing the site included cutting off protruding steel bars. The judge commented that the applicant's condition gradually stabilized in July 2003 and that a mentally disordered person could not have made such a detailed declaration. The judge further commented that if the respondent had any doubt about the Declaration, it should call Mr Leung Lok Chuen to testify, but it did not. Such comments clearly indicated that the judge accepted the veracity of the Declaration, showing that the accident occurred when the applicant was cutting protruding steel bars with a welding machine. The judge also commented that the respondent supplied the information in Form 2 and prior to that, Madam Chan must have made inquiries into the course of the accident and the identity of the injured person, but she did not testify that the information was false. The judge expressly found that the information contained in the Form 2 was correct and accurate. The fact that the judge found the contents of both the Declaration and Form 2 to be correct and accurate must necessarily mean that the judge did not find any inconsistency between them, and it must be his finding that clearing the site included cutting off protruding steel bars. With respect, the judge was entitled to reach such a conclusion. The judge did not make any finding of fact contrary to the applicant's pleaded case as suggested by Mr Kwok. There is no broad term, tidying up the site or getting rid of what is unwanted from the site. The term is certainly wide enough to cover cutting off protruding steel bars that were unwanted. The judge might not have expressly dealt with every issue raised by the parties, but there was no need for him to do so. The judge had clearly rejected the suggestion that the applicant had resigned on 14 June 2003. Despite the evidence from the respondent of the absence of welding equipment or electricity supply, and the suggestion that the applicant would not be instructed to cut off metal bars, the judge must have concluded that the applicant was actually doing that at the time of the accident. The judge, on the evidence, was entitled to reject the respondent's case that the applicant had resigned, despite the large number of witnesses that the respondent had called to support its case. We wish to echo what Godfrey JA said in *Tang Kwok Ming v Daxprofit Scaffolding Ltd* [1999] 1 HKC 658, also an employee's compensation case: It is important for counsel and solicitors (and for the legal aid authorities) to remember the very limited extent to which this court will interfere in a case in which the appellant seeks to dispute the judge's findings of fact. If it is necessary to disturb an adverse finding of primary fact, the appellant has to demonstrate either (1) that there is no evidence to support it; or (2) that it is contrary to documentary or other incontrovertible evidence which the judge overlooked. It is not enough to show there is little evidence to support the judge's finding,

or that it was contrary to the weight of the evidence . The weight of evidence is a matter for the trial judge. It does not matter how many witnesses say one thing, or how few said the contrary. The judge is perfectly entitled to prefer the evidence of the few to that of the many. The respondent employed the applicant at the site and the applicant fell from a building at the site during working hours. When the applicant was found lying on the ground, there was a helmet by his side. The respondent admitted in Form 2 that the applicant was its employee and that he was injured in an accident arising out of and in the course of the employment. The respondent paid the applicant his medical expenses and sick leave pay. The applicant and some of his co-workers gave statements supporting the applicant's case that he was injured at work. The judge was perfectly entitled to make the findings that the applicant was injured in the course of his employment with the respondent and was therefore entitled to be paid compensation in accordance with the Ordinance. Quantum On 3 August 2005, the Assessment Board issued a certificate assessing the applicant's permanent loss of earning capacity at 74%. There was evidence that the applicant's condition further deteriorated thereafter. Dr Law, the respondent's expert on psychiatry, assessed the applicant's permanent impairment of the whole person at 15% based purely on the applicant's post-concussional syndrome without reference to his frontal lobe syndrome. Dr Law, having only examined the applicant once on 24 January 2005, admitted that he would have agreed with the other doctors diagnosis of the applicant's further disability if he had further opportunity to observe him. The judge noted that the applicant suffered from cerebral trauma, rendering him a mental patient; that he had been required to be admitted into the psychiatric ward of Kowloon Hospital on and off since October 2004; and that he was still hospitalized at the time of his judgment. The judge, having considered the various medical opinions, concluded that Dr Singer's assessment of the applicant's permanent loss of earning capacity at 100% was a correct one. The judge also concluded that the applicant was in need of further psychiatric treatment and constant attention and that it was reasonable to extend the period of sick leave from 2 years to 3 years. There was clear evidence to support the judge's conclusion. The Court of Appeal would only interfere with the assessment of damages if the trial judge was found to be in serious error or acting upon a wrong principle of law or that the amount awarded was so high or so small as to make it, in the judgment of the appellate court, an entirely erroneous estimate. We are not persuaded that the judge was in any of those errors. We do not find any valid basis to interfere with the judge's awards. We would dismiss the respondent's appeals with a costs order nisi that the respondent to bear the applicant's costs of the appeal to be taxed if not agreed. We also order the applicant's own costs to be taxed in accordance with the Legal Aid Regulations. (Peter Cheung) (W Yeung) (M H Lam) Justice of Appeal Justice of Appeal Judge of the Court of First Instance Mr Daniel K.K. Chan instructed by Messrs T.S. Tong & Co. for the Applicant. Mr Tim Kwok and Mr Simon Wong instructed by Messrs Day & Chan for the Respondent. PAGE - A B C D E F G H I J K L M 1udk 1udk t160 1Vt^ H; < t160 & 6" ABC final.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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