CACV 208/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 208 OF 2016
(ON APPEAL FROM HCA NO 529 of 2013)

BETWEEN

AVC PROPERTY DEVELOPMENT COMPANY LIMITED	Plaintiff
and	
JOYFUL GRACE TRADING LIMITED	1st Defendant
LION LEGEND HOLDINGS LIMITED	2nd Defendant

Before: Hon Lam VP, Cheung and Kwan JJA in Court

Date of Hearing: 27 April 2017

Date of Judgment: 16 June 2017

J U D G M E N T

Hon Lam VP (giving the Judgment of the Court):

1. In this appeal, the Plaintiff asks this Court to overturn the judgment of Deputy High Court Judge Kenneth Kwok SC on 30 September 2016. By that judgment, the learned judge dismissed the

Plaintiff's claim against the 2nd Defendant and ordered the Plaintiff to pay costs to the 2nd Defendant.

2. The Plaintiff was the landlord of shop premises at Shops A-D, Ground Floor, Paul Yee Mansion in Wanchai ["the Shop"]. By a tenancy agreement of 12 September 2012, the Plaintiff leased the Shop to the 1st Defendant. By a Guarantee dated 20 August 2012, the 2nd Defendant guaranteed the due performance of the obligations of the 1st Defendant under the tenancy agreement including the due payment of rent. The Guarantee was executed by one Surasak Lelalertsuphakun ["Lela"], who was the sole director and shareholder of the 2nd Defendant.

3. Though it was originally envisaged that the tenancy could commence on 20 August 2012, there was some delay due to repair works at the Shop not being completed. The tenancy eventually commenced on 11 September 2012. The 1st Defendant defaulted in the payment of rent in November 2012. Upon demand by solicitors for the Plaintiff, such rent was paid on 9 January 2013. In February 2013, the 1st Defendant again failed to pay rent and management fees. No payment was made despite demand by the solicitors.

4. The Plaintiff issued the writ on 2 April 2013, seeking to forfeit the tenancy and the recovery of possession. The Plaintiff also sought payment of outstanding rent and management fees with overdue interests as well as mense profits until possession.

5. Based on the Guarantee, the Plaintiff also sued the 2nd Defendant in the action.

6. After the issue of the writ, the 1st Defendant handed the keys of the Shop back to the Plaintiff on 29 May 2013. The Plaintiff obtained summary judgment against the 1st Defendant on 3 September 2013. The 1st Defendant's appeal against the summary judgment was dismissed on 21 February 2014.

7. In the 2nd Defendant's Amended Defence of 30 April 2015, it disputed liabilities on the following basis:

(a) There was a signed Guarantee which was only a draft which had never come into effect. The Guarantee relied upon by the Plaintiff is a forged document;

(b) The amendment in terms of adding a Clause 7 to Part II of the 5th Schedule to the tenancy agreement was a material variation and the guarantee was discharged accordingly.

8. Clause 7 provided:

> " The Tenant is fully aware that the Landlord is presently carrying out repair works in the Premises. If for whatever reason the Landlord fails to deliver up vacant possession of the Premises on or before 1st September 2012 ('the Lease Commencement Date'), the Landlord shall be entitled to postpone the delivery of possession to a later date to be designated by the Landlord in a 7 days' prior written notice to the Tenant provided that such later date shall not be later than 30th September 2012. Upon such postponement, the Lease Commencement Date and all relevant dates of the Term shall automatically be postponed accordingly."

9. In respect of the duration of the tenancy, the Third Schedule of the tenancy agreement provided:

> " Term: For the term of TWO (2) YEARS fixed lease commencing on the 1st day of September 2012 and terminating on the 31st day of August 2014 (both days inclusive).
>
> Rent: …

> Rent Free Period: The Tenant will be granted a rent-free of One (1) month starting from 1st September 2012 to 30th September 2012 (both days inclusive).
>
> During the rent free period, the Tenant shall nevertheless be responsible for payment of Management Fee, Government Rates and other outgoing utilities payable in advance on the 1st day of each calendar month."

10. In the Reply, the Plaintiff pleaded the following in respect of the amendment of the tenancy agreement:

(a) The 2nd Defendant consented to the amendment;

(b) The amendment was in any event manifestly immaterial and incapable of prejudicing the 2nd Defendant as guarantor.

11. The 2nd Defendant was legally represented until its former solicitors ceased to act for it on 8 September 2016, shortly before the trial. The 2nd Defendant did not appear at the trial, which took place before the judge from 12 to 14 September 2016. The Plaintiff called its witnesses at the trial. After hearing the evidence and submissions, the judge handed down the judgment of 30 September 2016 dismissing the claim against the 2nd Defendant.

12. In the judgment, the judge held that the amendment was material alteration and rejected the Plaintiff's case that the 2nd Defendant had consented to the same. The judge also made some adverse comments on the quantum of the claim.

Service of the Notice of Appeal and the summons of 20 April 2017

13. The Plaintiff appealed against the judgment. Since the former solicitors for the 2nd Defendant have gone off the record, the

Plaintiff served the Notice of Appeal on the 2nd Defendant by leaving the same at two addresses of the 2nd Defendant on 27 October 2016: 19th Floor Two IFC, Central and Unit 2205A, 22nd Floor, 9 Queen's Road Central.

14. Service of a notice of appeal is important because Order 59 Rules 3(5) and 4 prescribe the service as the commencement of the appeal process. For the purpose of reckoning if an appeal is brought within time, such time only stop to run upon service of the notice of appeal. In this connection, Fok JA (as he then was) said in *Law Bing Kee v Persons in occupation of RP* HCMP 672 of 2013, 9 May 2013 at [11]:

> " The proper way to commence an appeal is therefore by service of the notice of appeal on the intended respondent. There is no need for issue or prior authentication of the notice of appeal by the Appeals Registry."

15. Thus, apart from *ex parte* appeals, until a notice of appeal has been validly served (or, perhaps, the court granting an order for service to be dispensed with in cases of an intended respondent evading service, a subject which has not been argued before us) the Court cannot entertain an appeal.

16. In the present case, the 2nd Defendant is a Cayman Island company. It has been registered in Hong Kong as a non-Hong Kong company. On 19 July 2012, its secretary gave notice to the Companies Registry that the new address of its principal place of business was Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong. That was one of the addresses at which the Notice of Appeal was served by the Plaintiff.

17. There is no further up-dating in the records of the Companies Registry regarding the address of the principal place of business of the 2nd Defendant. There is also no notification of the 2nd Defendant's

cessation of having a place of business in Hong Kong (as prescribed by Section 794 of the Companies Ordinance Cap 622).

18. Under Section 791 of the Companies Ordinance Cap 622, when there is a change of the address of the company's principal place of business in Hong Kong, a registered non-Hong Kong company must deliver to the Registrar of Companies within one month after the date of the change.

19. Apparently, those responsible for the operation of the 2nd Defendant had failed to comply with these statutory requirements. When a para-legal of the solicitors for the Plaintiff attended Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong (which is the address of a firm of Hong Kong solicitors) for service of documents in relation to this appeal on 13 March 2017, he was told by the reception staff that the 2nd Defendant was not located there. Documents sent there by registered post were returned.

20. The other address at which the notice of appeal was served at 19th Floor Two IFC, Central was an address obtained by solicitors for the Plaintiff from the website of The Hong Kong Trade Development Council. There is no further information as to how that address came to be posted on that website. When the para-legal went there, it was found out that it is the office of a company which provides serviced and 'virtual' office facilities or services and the 2nd Defendant was not located there. Again documents sent there were returned.

21. Section 803 of the Companies Ordinance Cap 622 governs the service of process or notice on a registered non-Hong Kong company. For present purposes, Sections 803(1) to (3) are relevant. They read:

> " 803. Service of process or notice
>
> (1) Subject to subsections (3) and (4), any process or notice required to be served on a registered non-Hong Kong company is sufficiently served if—
>
> (a) it is addressed to an authorized representative of the company whose required details are shown in the Companies Register; and
>
> (b) it is left at, or sent by post to, the representative's last known address.
>
> (2) Subsections (3) and (4) apply if—
>
> (a) no required details of authorized representatives of a registered non-Hong Kong company are shown in the Companies Register; or
>
> (b) every one of the company's authorized representatives refuses to accept service on behalf of the company or the process or notice cannot be served on any of them.
>
> (3) Any process or notice required to be served on the registered non-Hong Kong company is sufficiently served if it is left at, or sent by post to, any place of business established by the company in Hong Kong."

22. The 2nd Defendant had appointed an authorized representative in the past. That authorized representative, Wong Ying, had been its director from April 2003 to September 2004. She resigned as a director on 13 September 2004 and another person was appointed in her place. That person later resigned in 2007 when Lela became the sole director. There has not been any notification of change of authorized representative. Those acting for the Plaintiff had attempted to serve papers in this appeal on Wong Ying but without success. Apparently she had moved out of the address stated in the return naming her as authorized representative.

23. In our judgment, on the evidence before us, this is a clear case coming within Section 803(2)(b) and therefore the Plaintiff should be permitted to rely on the provision for service under Section 803(3). The

only obstacle to that is solicitors for Plaintiff had not attempted to serve the Notice of Appeal on the 2nd Defendant through Wong Ying before resorting to service at Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong.

24. Mr Lo, counsel for the Plaintiff, tried to make good his case on service by two alternative arguments:

(a) Section 803 is not the exclusive provision governing service and the Plaintiff can still rely on Order 65 Rule 5 of the Rules of the High Court;

(b) Alternatively, the court should grant relief under Order 2 Rule 1(2) to cure the irregularity in respect of the omission to serve through Wong Ying pursuant to Section 803(1) before resorting to service pursuant to Section 803(3). For that purpose, the Plaintiff issued a summons of 20 April 2017 asking for such relief.

25. In respect of the submission that Section 803 is not the exclusive code, Mr Lo relied on the dicta of Saunders J in *Stevenson, Wong & Co v Goldsense Technology Ltd* [2007] 1 HKLRD 217 at [8]. That was not a case on service on registered non-Hong Kong company. Rather, it was a case on service on Hong Kong company and the judge in that case held that a plaintiff can rely on Order 10 Rule 1 to effect service apart from the provision in section 356 of the old Companies Ordinance Cap 32. There was however not much discussion on that issue in the judgment save a reference to a paragraph in the *Hong Kong Civil Procedure 2006*.

26. There are indeed other cases on the same topic (in respect of service on a Hong Kong company) and they did not speak with one voice:

Treasure Land Property Consultants v United Smart Development Ltd [1995] 3 HKC 30; *Guangdong International Trust & Investment Corp v Yuet Wah (HK) Wah Fat Ltd* [1997] 1 HKLRD 489. *Treasure Land* is an authority of the Court of Appeal whilst the latter, like the decision of Saunders J, is a first instance decision. Mr Lo have not addressed us on the same.

27. In respect of registered non-Hong Kong company, there are English Court of Appeal authorities on similar legislation as Section 803 which held that the section was the complete code for effecting service on such company: *Boocock v Hilton International Co* [1993] 4 All ER 19; applied in *Saab v Saudi American Bank* [1999] 2 BCLC 462. Mr Lo attempted to distinguish *Boocock* by submitting that it was dealing with the service of originating process, for which personal service is required and Order 10 Rule 1(7) explicitly provides for the rules to be applied subject to any other enactment.

28. Though there was reference to Order 10 Rule 1(7) in the judgment of Neill LJ in *Boocock*, we do not think His Lordship solely rested his decision on the provision in that rule. Further, Section 803 itself does not draw any distinction between service of originating process and service of other documents.

29. We prefer to rest our decision on the alternative route. Assuming (without deciding) that Section 803 is a complete code, on the facts of the present case there is sufficient ground for this Court to grant the relief under Order 2 Rule 1 to cure the irregularity. Such discretion to cure irregularity in service is well established: see *Boocock*, p.29; *LG Electronics v Bank of Taiwan* [2001] 4 HKC 421; *Deutsche Bank v Zhang*

Hong Li HCCL 19 of 2014, 27 November 2015, upheld on appeal [2016] 3 HKLRD 303.

30. The irregularity in question is the omission to serve through Wong Ying before resorting to Section 803(3). The evidence clearly shows that any attempt to serve the 2nd Defendant through Wong Ying would be a futile exercise. Though remaining on record as the authorized representative of the 2nd Defendant, she had probably ceased to have any connection with the 2nd Defendant a long time ago. Further, she herself cannot be located and she had moved out of the address recorded in the return filed with the Companies Registry. As Neill LJ held in *Boocock* at p.29j, "the surest guideline for the exercise of any general discretion is to consider what the justice of the case demands". In the present circumstances, we have no hesitation in holding that justice demands that relief be granted to the Plaintiff to cure the immaterial irregularity.

31. We are satisfied that the address at Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong can be regarded as the place of business established by the 2nd Defendant. Service at that address is valid notwithstanding that the 2nd Defendant had moved out at the time of service since the 2nd Defendant did not notify the Companies Registry as regard the change of its address in accordance with the law, see *Ho Kwok Wah v Group Jewellery Arts Ltd* [2000] 3 HKC 595 at 598I to 599B and *Best Joint Investments Ltd v Kagani Ltd* CACV 417 of 2007, 23 August 2011, at [49].

32. Thus, the notice of appeal had been validly served on the 2nd Defendant. Likewise, we are satisfied that the Amended Notice of Appeal, notice of hearing and other documents deployed in this appeal have been validly served on the 2nd Defendant.

Liability of the 2nd Defendant

33. Mr Lo relied on three grounds to support his argument that the judge erred in holding that the 2nd Defendant was not liable:

(a) Consent of the 2nd Defendant to the amendment of the tenancy agreement;

(b) The amendment was manifestly immaterial and incapable of prejudicing the 2nd Defendant;

(c) Estoppel.

34. Estoppel was not pleaded nor run before the judge and we are not persuaded that we should entertain this fresh point in this appeal. The judge's conclusion on consent is a finding of fact. In our view, Mr Lo is on firmer ground in terms of the submission on the amendment being manifestly immaterial and incapable of occasioning any prejudice to the 2nd Defendant.

35. The law can be taken from *Holme v Brunskill* (1878) LR 3 QBD 495. At p.505-6, Cotton LJ said:

> " The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is insubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge

> whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

36. In Courtney & Phillips, *The Modern Contract of Guarantee* 3rd Edn, paragraph 7-002, the learned editors opined:

> " The principle is an equitable one and is applied strictly. If the variation of the principal contract could prejudice the guarantor, the guarantor will be absolutely discharged whether or not the variation has in fact resulted in prejudice and whether or not it is likely to do so. The guarantor will remain liable only where the alteration to the principal contract is obviously "unsubstantial", with no possible prejudice to the guarantor resulting, or whether the alteration is inevitably for the benefit of the guarantor."

37. The threshold is very high. The guarantee is discharged when the amendment can potentially cause prejudice or increase the risk borne by the guarantor.

38. In the present case, the judge found that the amendment caused prejudice to the 2nd Defendant because the rent free period had been reduced. That was based on the judge's construction of Clause 7, see [26] to [28] of the judgment.

39. It all turns on a very narrow point. The relevant part is the last sentence in Clause 7:

> " Upon such postponement, the Lease Commencement Date and all relevant dates of the Term shall automatically be postponed accordingly."

40. The judge construed "all relevant dates of the Term" as only referring to the commencement and end dates of the tenancy, but not the rent free period. The construction advocated on behalf of the Plaintiff is that "all relevant dates of the Term" include the dates of the rent free period.

41. The judge referred to the *contra proferentem* rule in coming to his conclusion. With respect, the judge apparently overlooked that the tenancy agreement was made between the Plaintiff and the 1st Defendant. If one were to apply the *contra proferentem* rule (assuming that rule has any place for present purposes), one should adopt a construction more favourable to the 1st Defendant. Adopting a construction of this phrase to encompass a corresponding postponement of the rent free period would be more favourable to the 1st Defendant.

42. In any event, one must have regard to the context and the factual matrix in construing a clause. The postponement of the commencement date was to accommodate the landlord in not having the Shop ready for possession to be delivered, it is highly unlikely that the tenant would accept that it should suffer in terms of the reduction of the rent free period as a result of the postponement. We accept that it would be clearer if the expression is "all relevant dates <u>in</u> the Term". However, if one pays proper regard to the context, the meaning is tolerably clear.

43. We hold that on proper construction, Clause 7 provides for the corresponding postponement of the rent free period as well. On that construction, the 2nd Defendant could not possibly suffer any prejudice arising from the amendment.

44. Though the threshold is high, we are satisfied that this is a case where self-evidently the amendment could not possibly cause any prejudice to the 2nd Defendant. Hence, the 2nd Defendant could not rely on the amendment as discharging it from the obligation under the Guarantee.

45. Without any evidence to support its case of forgery and the Guarantee not intended to take effect, there is no other defence available to the 2nd Defendant.

46. We therefore reverse the judge's conclusion on liability.

Quantum

47. In his submissions, Mr Lo particularized the Plaintiff's claim as follows:

> " For **1.2.13 to 28.2.13**, unpaid rent and management fees of **HK$152,860**, plus contractual interest at 3% per month from 14.2.13 to judgment and thereafter at judgment rate;
>
> For **1.3.13 to 31.3.13**, unpaid rent and management fees of **HK$152,860**, plus contractual interest at 3% per month thereon per month from 14.3.13 to judgment and thereafter at judgment rate;
>
> For **1.4.13 to 2.4.13**, unpaid rent and management fees of **HK$10,190**, plus contractual interest at 3% per month thereon from 14.4.13 to judgment and thereafter at judgment rate; and
>
> For **3.4.13 to 29.5.13**, mesne profits in the sum of **HK$280,322**, plus interest thereon at prime+1% p.a. from 1.5.13 (the middle of the hold-over period) to judgment and thereafter at judgment rate. Mesne profits are recoverable under Clause (2) of the Guarantee."

48. Counsel also prepared a schedule setting out the quantum of interests in the Plaintiff's claims. They are as follows:

"

Item	**Calculation**
Unpaid rent and management fees of HK$152,860 for 1.2.13 to 28.2.13	Daily Interest = HK$152,860 x 3% per month / 30 days =HK$152.86 Interest from 14.2.13 up to date of hearing = HK$152.86 x 1,534 days = HK$234,487.24

Unpaid rent and management fees of HK$152,860 for 1.3.13 to 31.3.13	Daily Interest = HK$152,860 x 3% per month / 30 days = HK$152.86 Interest from 14.3.13 up to date of hearing = HK$152.86 x 1,506 days = HK$230,207.16
Unpaid rent and management fees of HK$10,190 for 1.4.13 to 2.4.13	Daily Interest = HK$10,190 x 3% per month / 30 days = HK$10.19 Interest from 14.4.13 up to date of hearing = HK$10.19 x 1,475 days = HK$15,030.25
Mense profits of HK$280,322 for 3.4.13 to 29.5.13	Daily Interest = HK$280,322 x 6% per annum / 365 days = HK$46.08 Interest from 1.5.13 up to date of hearing = HK$46.08 x 1,458 days = HK$67,184.64 ”

49. The judge raised several points on quantum:

(a) The claim for default interest is a penalty;

(b) There is no basis for the claims for mesne profit, management fees from 1 May 2013;

(c) The claim for damages for breach of tenancy agreement is triple counting.

50. The judge also had some observations on the pleadings.

51. We are satisfied that there is no problem with the principal sums claimed by the Plaintiff as particularized by Mr Lo. The position regarding interest is more complicated.

52. The claim for default interest is based on Clause 2 in Section VIII of the tenancy agreement:

> " Notwithstanding anything herein contained in the event of default in payment of Rent or rates or management fees or any monies payable by the Tenant for a period of 14 days from the date when payment is due (whether formally demanded or not) the Tenant shall pay to the Landlord on demand daily interest on all such sums outstanding at the monthly rate of $3% calculated from the date on which the same shall be due for payment (in accordance with the provisions contained in that behalf herein) until the date of payment as liquidated damages and not as penalty provided that the demand and/or receipt by the Landlord of interest pursuant to this Clause shall be without prejudice to and shall not affect the right of the Landlord to exercise any other right or remedy hereof (including but without prejudice to the generality of the foregoing the right of re-entry) exercisable under the terms of this Agreement ."

53. In light of that provision, subject to arguments on its validity and applicability, the court should enforce this contractual obligation to pay interest, see *Chitty on Contracts* 32nd Edn, Vol 1 paragraph 26-239.

54. The judge questioned the validity of the clause and held that it was a penalty. However, as Mr Lo submitted, there was no allegation in the pleadings that the provision is a penalty. The Plaintiff pleaded the provision for default interest in paragraph 6 of the Amended Statement of Claim. In the Amended Defence of the 2nd Defendant, it was admitted, see paragraph 5 of it. There was no further averment that the provision was invalid as it constituted a penalty. There was also no suggestion in the witness statements filed on behalf of the 2nd Defendant to such effect.

55. As held in *Ip Ming Kin v Wong Siu Lan* CACV 201 of 2012, 28 May 2013, at [38], the onus rested on the party being sued upon to show that the provision is a penalty. Hence, it is the duty of the 2nd Defendant to raise the issue by pleadings if it wished to rely on such attack on the default interest provision.

56. In such circumstances, with respect to the judge, it would not be right for the court to raise the issue on penalty on its own motion. Had the issue been raised on the pleadings, the Plaintiff would have to consider adducing evidence on the course of negotiations and other evidence to support its case that it was a genuine pre-estimate of the loss suffered by the Plaintiff on account of its being kept out of the money. At the trial, the judge only raised the issue after the Plaintiff had closed its evidence.

57. For these reasons, we cannot uphold the judge's conclusion that the clause constituted a penalty.

58. The judge was also not satisfied that the Plaintiff had shown that the conditions for imposing default interest had been fulfilled. At [36] to [38] of the judgment, he said:

> " 36. To claim interest under Clause 2 in section VIII:
>
> (1) the tenant has to be in default in payment for a period of 14 days; and
>
> (2) demand (for interest) is necessary.
>
> 37. The plaintiff forfeited the Tenancy Agreement by the issue of the Writ on 2 April 2013, see §16 of the Amended Statement of Claim.
>
> 38. There is an unparticularised allegation of demand in §15 of the Amended Statement of Claim. Mr Patrick Chong accepted that the latest demand was made on 14 March 2013. As rent was due on the first day of each month, rent for March 2013 had not been in default for 14 days at the time of demand by letter dated 14 March 2013. Only the rent for February 2013 had been in default for 14 days or more at the time of demand."

59. We agree with the judge as to his analysis of the pre-conditions for triggering default interest. Unlike a challenge on its validity (for which the burden is on the defence), the Plaintiff bears the burden of showing that these pre-conditions had been fulfilled. The judge was also correct in highlighting the lack of pleadings in the Amended Statement of Claim to aver that these pre-conditions had been fulfilled before the issue of the writ.

60. The only evidence of demand is the letter of 14 March 2013 from the then solicitors for the Plaintiff to the 2nd Defendant. As the judge quite rightly observed, that could only serve as a valid demand for the default interest regarding the arrears for February 2013.

61. Mr Lo did not advance any submissions in these respects.

62. In the circumstances, we are only prepared to award contractual interest in respect of the arrears for February 2013. In respect of the arrears accruing after February 2013 (including mesne profit), we would award usual pre-judgment interest at 1% above prime, see *Waddington Ltd v Chan Chun Hoo Thomas* CACV 10 of 2014, 20 May 2016, at [185].

Disposition

63. For the above reasons, we allow the appeal and give judgment to the Plaintiff against the 2nd Defendant in the sums as indicated above. Solicitors for the Plaintiff should produce a set of revised figures in accordance with this judgment for the approval of the court within 14 days.

64. We also set aside the judge's order as to costs. Instead we order the 2nd Defendant to pay the costs of the Plaintiff here and below, such costs are to be taxed if not agreed.

(M H Lam)	(Peter Cheung)	(Susan Kwan)
Vice President	Justice of Appeal	Justice of Appeal

Mr Benny Lo, instructed by FitzGerald Lawyers, for the plaintiff

2nd defendant, absent