公眾關注的法援案件

Cases of Public Interest or Concern

第三章 公眾關注的法援案件
Chapter 3 Cases of Public Interest or Concern

重複的問題：是分判商還是僱員?

終審法院在二〇〇七年三月作出一項判決，該判決再次確認樞密院在*Lee Ting Sang v Chung Chi Keung [1990] 2 AC 374*一案中，為確定僱主與僱員關係是否存在所採用的基本驗證方法。要確定某人是僱員還是獨立承判商，基本的驗證方法是，該人履行服務時，是否為自己經營的業務提供有關服務。這是一個關乎事實的問題，須由主審法官在研究及衡量該人工作時的實際情況後作出裁決。

法院又裁定，一九九八年實施的《強制性公積金計劃條例》（第485章）不影響上述基本原則。

本案的上訴人Y先生為冷氣工人，以散工形式受僱於答辯人。在工作期間，一條焊枝突然截斷，擊中Y先生的左眼，令其眼部嚴重受傷。事前，Y先生與答辯人曾達成協議，由Y先生以自僱人士身分自行安排強制性公積金事宜。

區域法院及上訴法庭均裁定Y先生是分判商而非答辯人的僱員，原因之一是Y先生以自僱人士身分自行支付強制性公積金供款。其後，Y先生獲批法律援助，就其申索向終審法院提出上訴。

A Sub-contractor or an Employee? A Question Revisited

In a judgment handed down in March 2007, the Court of Final Appeal ("CFA") re-affirmed the fundamental test for determining whether an employer and employee relationship existed as laid down in the Privy Council's decision in *Lee Ting Sang v Chung Chi Keung [1990] 2 AC 374*. The fundamental test in determining whether a person was an employee or an independent contractor is whether or not that person was performing services as a person in business on his own account. It is a question of fact for the trial judge to decide following an investigation and evaluation of the factual circumstances in which that person performed his work.

It was also held that the introduction of the Mandatory Provident Fund Schemes Ordinance, Cap. 485 ("MPFSO") in 1998 does not affect these fundamental principles.

In this case Mr Y was working as a casual air-conditioning worker for the Respondent when a welding rod suddenly shattered and struck his left eye, causing severe eye injury. Mr Y had previously agreed with the Respondent that he would make his own Mandatory Provident Fund arrangements as a self-employed person.

Mr Y was granted legal aid to take his claim to the CFA after both the District Court and the Court of Appeal found him to be a sub-contractor and not an employee of the Respondent on the grounds that, inter alia, he had made his own Mandatory Provident Fund contributions as a self-employed person.

結果，終審法院法官一致裁定Y先生上訴得直。終審法院指出，要確定僱傭關係是否存在，必須先研究和衡量所有實際情況，然後作出一個整體的評估。在本案中，法院得悉，分配甚麼工作給Y先生，以及以日薪方式向Y先生支付薪酬並發放超時工作津貼(如有者)，都是由答辯人決定。經營冷氣業務賺取的利潤全歸答辯人所有，如業務有虧損，亦由答辯人承擔。Y先生不用承擔任何財政風險，除了收取按日計算的工資外，再無任何金錢報酬。法院亦得悉，管理業務及聘用工人（其中一些工人與Y先生一起工作）的事宜均由答辯人負責。Y先生接到分配給他的工作後，獨力完成工作，並無僱用他人協助。使用的工具部分屬Y先生，部分屬答辯人。Y先生為工作需要購買的物品，所花費用均由答辯人付還。由於Y先生是一名熟練的冷氣工人，他無須在督導或監管的情況下工作。法院對案中事實進行的整體評估，顯示答辯人和Y先生屬僱主與僱員關係。

In a unanimous decision allowing the appeal, the CFA held that in order to determine whether an employment relationship existed, all the factual circumstances must be investigated and evaluated to give an overall assessment. In this case, the Court found that it was the Respondent who decided which jobs would be assigned to Mr Y and that Mr Y would be paid at a daily rate plus overtime, if any. All the profits and losses of the air-conditioning business were for the Respondent's account and Mr Y bore no financial risks and reaped no financial rewards beyond his daily rated remuneration. The Court found that it was the Respondent who managed the business and hired workers, some of whom worked alongside Mr Y. Mr Y personally did the work assigned to him and did not hire anyone to help him. Some equipment was owned by Mr Y and some by the Respondent. Whenever items had to be purchased by Mr Y for work purposes, he was reimbursed by the Respondent. Mr Y was a skilled air-conditioning worker and as such did not require supervision or control over the manner in which he carried out his work. The overall assessment of the facts was that they pointed to an employer-employee relationship.

因此，法庭裁定，鑑於案中有充分事實支持答辯人和Y先生屬僱主與僱員關係的結論，即使雙方曾達成協議，由Y先生自行支付強制性公積金供款，但Y先生在其受僱期間因工遭遇意外以致受傷，答辯人仍有責任根據《僱員補償條例》（第282章）向Y先生作出補償。

The Court therefore held that as the facts of the case strongly supported the conclusion that there was an employer-employee relationship, the Respondent would still be liable to compensate Mr Y for injuries sustained in an accident in the course of his employment under the Employees' Compensation Ordinance, Cap. 282 ("ECO") notwithstanding an agreement that Mr Y made his own Mandatory Provident Fund contributions.

不過，法院亦明確指出，此決定只適用於根據《僱員補償條例》提出的申索，不應對《強制性公積金計劃條例》所指的臨時僱員造成影響。

The Court made it clear however that this decision is only applicable in respect of a claim under the ECO and is not intended to affect the position of casual employees under the MPFSO.

刑事案件的法律援助範圍

X先生被控盜竊，受審後獲裁定罪名不成立。他獲判無罪後，向法庭提出申請，要求控方支付訟費，但申請被原審裁判官拒絕。他只就訟費問題向原訟法庭提出上訴，但遭法庭駁回。X先生繼而申請法律援助，向終審法院提出上訴。

法律援助署署長（“法援署署長”）就刑事案件給予法律援助的權力受《刑事案件法律援助規則》（第221章）所規限。該規則為擬向終審法院上訴的人士提供法律援助作出規定，條文如下：*“就任何罪行被定罪的人，可根據本規則就向終審法院提出的上訴或為向終審法院上訴的許可申請，並在相關的任何初步或附帶法律程序中，獲給予法律援助。”*

從該規則的含意來看，由於X先生並非該規則所指‘被定罪’的人，法援署署長認為其申請不在刑事案件的法律援助範圍內，因而拒絕其申請。

X先生根據《法律援助條例》（第91章）第26A條的規定，取得由資深大律師發出的大律師證明書，就法援署署長的決定申請覆核。有關資深大律師認為，覆核委員會可能會指示署長根據《法律援助條例》第10條，向X先生提供法律援助。

覆核委員會在駁回有關申請時指出：

The Scope of Legal Aid in Criminal Cases

Mr X was charged with theft and was acquitted after trial. He applied for costs against the prosecution following his acquittal but his application was refused by the trial magistrate. He appealed to the Court of First Instance solely on the issue of costs and his appeal was dismissed. Mr X then applied for legal aid to appeal to the Court of Final Appeal.

The Director of Legal Aid's ("DLA") power to grant legal aid in criminal cases is governed by the Legal Aid in Criminal Cases Rules, Cap. 221 (LACCR). The rule which applies to the grant of legal aid to appeal to the Court of Final Appeal provides that *"a person convicted of any offence may be granted legal aid under these rules for any appeal to, or an application for leave to appeal to, the Court of Final Appeal and any proceedings preliminary or incidental thereto".*

As Mr X is not a person 'convicted' of any offence within the meaning of the rule, DLA took the view that his application was outside the scope of criminal legal aid and refused his application on this basis.

Mr X applied for a review of the DLA's decision under Section 26A of the Legal Aid Ordinance, Cap. 91 ("the Ordinance") having obtained a certificate by counsel from a senior counsel who was of the opinion that the Review Committee might direct the Director to grant legal aid to Mr X under Section 10 of the Ordinance.

In dismissing the Applicant's application, the Review Committee considered that :

(a) 《刑事案件法律援助規則》由規則委員會制定，並經立法會通過。該規則第II部清楚說明刑事案件可獲給予法律援助的種種情況，並就該等情況加以界定和規限。所有適用的情況已詳盡無遺地在該規則列明，而非純屬指示性質。

(a) The LACCR were made by the Rules Committee and approved by the Legislative Council. Part II of the LACCR provides a definitive list of the circumstances under which legal aid may be granted in criminal cases. The circumstances are defined and circumscribed. They are exhaustive and not merely indicative.

(b) 《刑事案件法律援助規則》內沒有任何條文，適用於X先生的情況。在現行《刑事案件法律援助規則》之下，法援署署長無權向其提供法律援助。

(b) There are no rules in the LACCR which cover Mr X's situation and no jurisdiction under the existing LACCR to provide legal aid to the Applicant.

(c) 《法律援助條例》就民事案件，而非刑事案件作出規定。

(c) The Ordinance provides for legal aid in civil and not in criminal cases.

法援署署長拒絕X先生的法援申請是正確的。

The DLA acted correctly in refusing Mr X's application for legal aid.

六月八日
助理首席法律援助律師(法律及管理支援) (署理)王耀輝先生向一批本地的法律系學生介紹法律援助署的工作。
8 June
Assistant Principal Legal Aid Counsel(Legal and Management Support) (Acting), Mr Steve Wong, gave a briefing on the work of the Legal Aid Department to a group of local law students.

大廈業主立案法團對疏忽和公眾滋擾所負的法律責任

一九九九年夏天，L女士(死者)在通菜街一個固定攤檔擺賣。突然，一塊重約15磅的石屎從毗鄰大廈11樓一單位（“該單位”）墮下擊中她。該單位露台有一幅伸出的石屎簷篷，而墮下擊中她的石屎是剝落簷篷的一部分。L女士最終因傷不治。

已故L女士的受養人及遺產管理人（“原告人”）獲批法援，向該單位的註冊業主及租客，以及該大廈的業主立案法團（“立案法團”），就疏忽和公眾滋擾追討賠償。

向立案法團提出的索償理據是，該僭建簷篷結構上有危險，危害公眾安全，而立案法團已知悉或理應知悉有關危險。由於立案法團沒有採取任何行動拆除該簷篷或消除有關危險，他們須承擔賠償責任。

Liability of Incorporated Owners of Buildings for Negligence and Public Nuisance

In the summer of 1999, the late Madam L was plying her trade as a hawker at a fixed pitch in Tung Choi Street when she was struck by a piece of concrete weighing some 15 pounds which had fallen from the balcony of a flat on the 11th floor (“the flat”) of an adjacent building. The piece of concrete which struck her was part of a concrete canopy projecting over the balcony of the flat. Madam L (“the deceased”) died as a result of injuries sustained.

Legal Aid was granted to the dependants and the administrators of the estate of the late Madam L (“the Plaintiffs”) to claim for damages against the registered owners of the flat, the tenant of the flat and the Incorporated Owners of the Building (“Incorporated Owners”) for negligence and public nuisance.

The claim against the Incorporated Owners was that the extended canopy was in a dangerous condition and amounted to a hazard and that they knew or ought to have known of that hazard. As the Incorporated Owners failed to take any steps towards removing the canopy or otherwise neutralising the hazard, they should be liable for damages.

該單位的業主在審訊時承認了責任。法官亦裁定租客須承擔責任，但撤銷原告人對立案法團提出的訴訟兼判原告人須向立案法團支付訟費。他在總結時指出，該僭建簷篷剝落的原因“不外乎可適當地描述為日久失修所致”。立案法團修葺外牆的責任不應擴及至在大廈外牆搭建的違例僭建物，因為立案法團無權管有、佔用或控制該等違例僭建物。因此，法官裁定立案法團毋須就L女士因傷致死一事承擔責任。

At the trial, the owners of the flat admitted liability. The judge also found the tenant liable but dismissed the action against the Incorporated Owners with costs. He concluded that the cause of the collapse of the extended canopy “could not have been anything other than what could properly be described as want of repair.” The duty of the Incorporated Owners to maintain the external walls can not be extended to cover an illegal structure attached to the building to which the Incorporated Owners had no right of possession, occupation or control. Hence the judge concluded that the Incorporated Owners could not be held liable for the fatal injuries sustained by Madam L.

原告人不滿原審法官對立案法團的法律責任所作的裁決。他申請法援向上訴法庭提出上訴，獲得批准。上訴法庭駁回原告人的上訴，所作的裁決與原審法官的相同。

The Plaintiffs, who were aggrieved by the finding of the trial judge in respect of the liability of the Incorporated Owners, applied for and were granted legal aid to lodge an appeal to the Court of Appeal. The Court of Appeal dismissed the Plaintiff’s appeal and drew the same conclusions as that of the trial judge.

由於案件涉及的問題具有重大廣泛的或關乎公眾的重要性，原告人於二〇〇七年獲批法援，申請向終審法院提出上訴的許可。終審法院需考慮大廈的業主立案法團，是否有責任清除已知悉或推定已知悉在大廈的危險僭建物或因此而產生的危險，以免該危險僭建物危害公眾安全。

As it was considered that the case involved a question of great general or public importance, legal aid was granted to the Plaintiffs to apply for leave to appeal to the Court of Final Appeal (“CFA”) in 2007. The CFA was invited to consider whether Incorporated Owners of buildings have a duty to remove any hazard on or arising from their property of which they are aware of or are presumed to be aware of so as to prevent such hazard from endangering members of the public.

在上訴時，代表原告人的首席大律師指出，根據《建築物管理條例》及大廈公契對業主立案法團的性質、職責及權力所作的規定，立案法團實際上是一個由眾多業主組成的團體，共同管有及控制大廈的公用部分；從實際角度考慮，立案法團應被視為公用部分的業主及佔用人，因此，對公用部分（包括大廈外牆）有妥善維修的責任，以及在進行適當檢查後，把在公用部分所搭建的危險僭建物拆除。

At the appeal, leading counsel for the Plaintiffs argued that the nature of an owners' incorporation and its duties and powers arising under the Building Management Ordinance and under the deed of mutual covenant showed that the Incorporated Owners were in effect the corporate embodiment of the owners, collectively possessing and exercising such control over the common parts of the building that they should, for all practical purposes, be treated as if they were owners and occupiers of the common parts and were therefore under a duty to maintain those common parts including the external walls in good repair and to remove, after due inspection, any dangerous unauthorised structures attached to those common parts.

代表立案法團的首席大律師在反駁上訴時指出，儘管立案法團有責任維修外牆，但這並不表示該責任擴及至在大廈外牆搭建的違例僭建物。他亦指出，只有出現“佔用控制”的情況，即“與在處所內出現及使用該處所或與該處所內的活動有聯繫及因上述情況而產生的控制”，才能構成一項可就其不作為而提起訴訟的責任，但在本案中顯然沒有這樣的“佔用控制”情況。

In opposing the appeal, leading counsel for the Incorporated Owners argued that his client's duty to maintain the external walls did not mean that such duty extended to cover external parts of illegal structures attached to the building. He further argued that only "occupational control" as meaning "control associated with and arising from presence in and use or activity in the premises" suffices to create a duty giving rise to an actionable omission, and that such control was plainly absent in the present case.

終審法院認為，鑑於立案法團在法律上的性質、職責及權力，立案法團與業主及佔用人的角色非常類似，而後兩者一般均有責任消除他們知悉或推定已知悉在其土地或因其土地構成的妨擾危險；至少須防止有關的危險危及公眾安全，以免他人受傷。如他們沒有履行這項責任以致有人受傷，便須因不作為而負上對公眾構成滋擾的法律責任。

The CFA was of the view that the legal attributes, duties and powers of the incorporated owners placed them in a category closely analogous with that of owners and occupiers who generally come under a duty to remove any nuisance hazard on or arising from the land of which they have knowledge or presumed knowledge, at least to prevent such hazard from injuring members of the public. If they fail to do so and injury results, they are liable in public nuisance for such omission.

終審法院認為，鑑於立案法團是大廈業主共同組成的團體，立案法團可有效控制大廈的公用部分（包括外牆部分），而事實上立案法團早已知悉或理應知悉該妨擾危險僭建物的存在，因此，立案法團有責任拆除該危險僭建物或防止該僭建物對街上的行人構成危險。在審訊時所援引的證據顯示，立案法團可採取種種方法解決問題，但他們坐視不理。如僭建的簷篷經過適當檢查，立案法團理應發現該簷篷的結構有危險，並予以修葺。由於立案法團沒有安排適當檢查及修葺，導致慘劇發生。

The CFA held that by virtue of the Incorporated Owners' collective status as the embodiment of the owners of the building, of its effective control over the common parts including the external parts of the building; and of the fact that it knew or ought to have known of the nuisance hazard, it was therefore under a duty to remove that hazard or prevent it from causing harm to the public in the street below. Evidence adduced at the trial demonstrated that they plainly had the means to achieve this but took no action. Had the extended canopy been subjected to a proper inspection, its dangerous condition would have been discovered and rectified. The omission was therefore causative of the tragic accident.

終審法院裁定原告人上訴得直，頒令立案法團對原告人作出賠償。

The CFA allowed the appeal and ordered that there be judgment for damages in favour of the Plaintiffs as against the Incorporated Owners.

終審法院的判決對香港的大廈業主立案法團的法律責任有重大影響。

The finding of the CFA has significant impact on liability of incorporated owners of buildings in Hong Kong.

七月十七日
助理首席法律援助律師(刑事)陳琼華女士(右二)向到訪的中華全國律師協會未成年人保護專業委員會的代表講解香港的法援服務。右一為高級法律援助律師盧浩輝先生。
17 July
Assistant Principal Legal Aid Counsel (Crime), Miss Betty Chan (second from right), was explaining the legal aid services in Hong Kong to a group of Mainland lawyers from the Committee for Children Protection of All China Lawyers Association. On far right is Senior Legal Aid Counsel, Mr Joseph Lo.