DCPI 70/2012

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 70 OF 2012

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BETWEEN

WONG WAI MAN Plaintiff

and

KUN TIN ALUMINIUM CO. LIMITED 1st Defendant

AE INTERIOR DESIGN LIMITED 2nd Defendant

NG WAI CHIM 3rd Defendant

TO YIN MEI 4th Defendant

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Before: Deputy District Judge Victor Dawes in Court

Date of Hearing: 5 November 2012

Date of Handing down decision: 19 December 2012

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D E C I S I O N

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1. *Introduction*
2. The plaintiff commenced proceedings on 11 January 2012 with a general indorsement of claim. No notice of intention to defend was given by the 1st to 4th defendants and an interlocutory judgment was entered against them on 26 April 2012 (“Default Judgment”).
3. By a summons dated 19 June 2012, the 3rd and 4th defendants applied to set aside the Default Judgment.
4. *Background*
5. By way of background, the following matters are not in dispute:
6. The 3rd and 4th defendants are husband and wife. They retained the 2nd defendant to carry out refurbishment works to their property at House No 85, Margaux Avenue, The Vineyard, Yuen Long, New Territories (the “Property”). The refurbishment works included the installation of an L-shaped glass canopy (the “Glass Canopy”) at the rear garden of the Property. The height of the Glass Canopy was about 3.8 metres.
7. The 2nd defendant sub-contracted the installation of the Glass Canopy to the 1st defendant who employed the plaintiff to carry out the installation. The installation was scheduled to start in early January 2009 and was to be completed in late March of the same year.
8. At around 9:45am on 3 March 2009, when the plaintiff was working on the top of the Glass Canopy, he fell and was injured.
9. The 3rd and 4th defendants were sued as occupiers of the Property.
10. The 1st and 2nd defendants were subsequently prosecuted by the Labour Department for breaches of various safety regulations in respect of the accident and were convicted and fined on 3 November 2009.
11. *APPLICATION TO SET ASIDE THE DEFAULT JUDGMENT*
12. The application was taken out by the 3rd and 4th defendants on 19 June 2012. It is common ground that the Default Judgment was a regular judgment. In exercising the power to set aside, the court has to consider all the relevant circumstances including the reason for default, the period of delay in applying to set aside and the prejudice caused to the plaintiff or third parties. Further, it is also common ground that the most important consideration is whether the defendants are able to show that they have a meritorious defence. It is not sufficient to show a merely arguable defence. The defendant must show that he has a real prospect of success. See §§13/9/12-13/9/14, *Hong Kong Civil Procedure 2012,* Vol I.
13. Mr Siu (for the 3rd and 4th defendants) initially argued that there is a meritorious defence on the following basis:
14. The 3rd and 4th defendants were not “occupiers” within the meaning of the Occupiers Liability Ordinance (Cap 314) (“OLO”).
15. Alternatively, they have fully discharged their duties as occupiers.
16. Further or in the alternative, contributory negligence.
17. At the hearing before me, Mr Siu accepted that for the purpose of this application, he no longer contends that the 3rd and 4th defendants were not occupiers of the Property and asked me to focus on the other arguments set out in paragraph 5(2) and (3) above.

*C1. Have the 3rd and 4th defendants discharged their duties?*

*Common law duty under s 3 of the OLO*

1. The common law duty of care owed by the 3rd and 4th defendants which is set out in s 3 of OLO is a duty to take such care as in all the circumstances of the case reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there. It is well established that an occupier does not per se avoid liability simply by engaging an independent contractor. See: *Ting Kam Yuen the administrator of the estate of Ho Lam Deceased v The Hong Kong Buddhist Association & Anor* (HCPI 1203/96, unreported, 10 April 1999)at pp 20 and 22 per Sakhrani J*.* The parties agreed that in a case where the owners have sub-contracted the relevant works to an independent contractor, the following questions are relevant:

Has the occupier:-

1. acted reasonably in entrusting work to an independent contractor?
2. used reasonable care in selecting the contractor?
3. taken reasonable steps (if any are possible) to supervise the carrying out of the work?
4. used reasonable care to check (if possible) that the work has been properly done?

See: *Yeung Kam Fuk v Len Shing Construction Co Ltd & Ors* [1986] HKC 160 at 167I to 168C per Hunter J (as he then was) and *Hsu Li Yun v Incorporated Owners of Yuen Fat Building* [2000] 2 HKC 365 at 371 per Keith JA

1. In support of the suggestion that they have discharged their duties, the 3rd and 4th defendants relied on the following matters:
2. They have known a Mr Andy Yip Kwan Leung (“Andy”) who is a director and shareholder of the 2nd defendant since about 2002. Insofar as they were aware, the 2nd defendant specialised in the provision of services in interior designs. Further, Andy has been in the industry since 1993 and was a graduate of a college known as Design First. Eric Yan Fai Wan (“Eric”) is the other director of the 2nd defendant and he has a bachelor degree from the University of North London.
3. They have previously engaged Andy in other refurbishment works in 3 properties in Hong Kong and Shenzhen between 2005 and 2011.
4. By reason of the experience of Andy and their previous dealings with him, the 3rd and 4th defendants hired Andy and Eric to carry out the refurbishment works in question.
5. The scope of the refurbishment works were ordinary and did not involve any extra-hazardous works.
6. When the refurbishment works were being carried out, they were in regular liaison with Andy who would report the progress to them. They have also briefly visited the Property a few times to see how the works were going. However, they have never given any instructions to the 1st defendant or any of its employees/subcontractors, including the plaintiff.
7. On the basis of the evidence before the court, I am not satisfied that the 3rd and 4th defendants have discharged their duties. In this regard:
8. Considering the 4 questions summarised in paragraph 7 above, the 3rd and 4th defendants cannot be criticised for entrusting the refurbishment works to the 2nd defendant.
9. What I am not satisfied with are that they have used reasonable skill and care in supervising and/or checking that the work has been carried out properly. On this point:
10. Mr Siu emphasised the fact that the works in question is only a refurbishment project. Item Q5 of the contract between the 2nd, the 3rd and 4th defendants specifically provided for third party insurance. Most importantly, the installation of the Glass Canopy did not involve any extra-hazardous work. Mr Siu suggested that it would be unduly onerous and unreasonable, if not impossible, to impose upon the 3rd and 4th defendants a duty to ensure that all requisite safety measures had been taken as they are laymen and not professionals.
11. The scope of the refurbishment works in question must be a relevant consideration. I have considered the photographs of the Glass Canopy that was under construction. The installation was not a straightforward or simple task and required works that were carried out at a considerable height (over 3.8 metres). Mr Lin referred me to the Accident Report prepared by the Labour Department where it was concluded at paragraph 6.11 that “[n]o suitable steps, such as a safe working platform, guard-rails, barriers, toeboards, fence and etc was provided by the principal contractor and the sub-contractor at the workplace while [injured person] was doing the installation work on the top of the glass canopy at the time of the accident.”
12. On the evidence before the court, it does not appear that the 3rd and 4th defendants have taken any steps to check that the works in respect of the installation of the Glass Canopy were conducted safely. Despite the suggestion that they visited the property briefly “to see how the works were going”, there is no suggestion that any questions were asked or that they have even applied their minds to the issue of safety at all. All they did was to leave the issue of safety completely in the hands of their contractors. Given the nature of the work in question, it would not be unreasonable to expect them to check and enquire with their contractors as to whether there were any safety measures for the installation of the Glass Canopy and they have clearly failed to do so.

1. Given that this is an application to set aside the Default Judgment, the 3rd and 4th defendants have a high threshold to meet. On the evidence available, I am not satisfied that what they did was adequate. When visiting the Property, they should have noticed that there was simply no or no adequate safety measures to prevent the accident in question. In order to discharge their duties, the 3rd and 4th defendants should at the very least raise the issue with the 2nd defendant.

*Statutory duty under s 7 of the Occupational Safety and Health Ordinance (Cap 509)(“OSHO”)*

1. In addition to the common law duty, the plaintiff also relied on s 7 of the OSHO which imposes a duty on the occupier of the premises to ensure that the premises are “so far as reasonably practicable, safe and without risks to health.” The section is applicable if an employee’s workplace is located on premises that “are not under the control of the employee’s employer”. An “occupier” under the OSHO is defined under s 3 as “a person who has any degree of control over the premises or workplace and, in particular, includes a person to whom subsection (5) or (6) applies.” Subsections (5) to (7) provides as follows:

“(5) A person who, under a lease or contract, has an obligation for-

1. The maintenance or repair of premises; or
2. The safety of, or absence of risks to health arising from the condition or use of, any plant or substance located on premises, is taken to be an occupier of the premises for the purposes of the Ordinance.
3. A person who, under a lease or contract, has an obligation to provide, maintain or repair a means of access to, or egress from, premises is taken to be an occupier of the premises for the purposes of this Ordinance.
4. Subsections (5) and (6) do not apply to persons in their capacity as occupiers of domestic premises.”
5. Mr Lin (for the plaintiff) argued that the test under s 7 of the OHSO is whether the working place was safe. If in fact it was not safe and as a result of that unsafety the worker sustained an injury, the worker will succeed. The burden then rests on the occupier to establish its compliance with the proviso “so far as is reasonably practicable”. He went on to argue that the 3rd and 4th defendants have failed to comply with the proviso and discharge the burden. There was nothing unreasonable or impracticable in requiring them to make sure that the 1st and 2nd defendants would take adequate precaution and comply with their statutory and common law duty in carrying out the renovation work. They simply turned a blind eye to the safety issue and cannot escape liability under s 7.
6. Mr Siu complained that the OSHO was not specially pleaded and that it was unfair to raise this only in the plaintiff’s skeleton. Further, s 7 has no application to this case because:
7. The 1st defendant was the person who was in control of the Property at the time (especially the Glass Canopy). The plaintiff had repeatedly suggested that the 1st defendant should have but failed to provide a safe working platform and it is not understood how the 1st defendant could make such provision if it did not have control over the part of the Property in question.
8. Further, he also referred to s 3(5) to 3(7) of the OSHO and argued that the 2nd defendant was the occupier instead and as it was the main contractor. Section 7 was only applicable to the 2nd defendant and not the 3rd and 4th defendants.
9. I am of the view that the answer can be found in the wording of s 7 itself. The section is only applicable if “an employee’s workplace is located on premises that are not under the control of the employee’s employer”. In the present case, the “employee’s employer” is the 1st defendant who was a sub-contractor of the works in question. I am satisfied that the 1st defendant must have a certain degree of control over the area in the Property where the Glass Canopy was located. This is to be contrasted with, for example, a postman who delivers a parcel to an office building where his employer has no control whatsoever. In the premises, I am satisfied that s 7 has no application to the present case.

*C2. Contributory negligence*

1. The 3rd and 4th defendant also contended that the defence of contributory negligence is available to them by reason of the following matters:
2. The 1st defendant has been convicted of violating s 6BA(5)(a) and 6BA(12) of the Factories and Industrial Undertakings Ordinance (Cap 59) for employing a relevant person without a relevant certificate.
3. It is believed that it was the plaintiff who was the relevant person without the certificate. There is no suggestion otherwise.
4. The implication is therefore that it was the plaintiff who did not attend the requisite safety training courses before carrying out the works in relation to the Glass Canopy. By reason of the plaintiff’s failure to take precautions that a reasonable person in his position would have taken to ensure his own safety, the defence of contributory negligence is available to the 3rd and 4th defendants.
5. I am unable to agree with the aforesaid arguments. The burden is on the 3rd and 4th defendants to prove contributory negligence on the part of the plaintiff. The statutory obligation was on an employer to ensure that his employees had the requisite training. The obligation was not on the employee. In the premises, even if one is to assume that the plaintiff was the person without the relevant safety training certificate, there was only a breach on the part of the 1st defendant. It does not follow that the plaintiff was negligent.
6. *Conclusion*
7. In the premises, I am not satisfied that the 3rd and 4th defendants have a real prospect of success. The application is dismissed. I also make a costs order nisi that the costs of the application be to the plaintiff to be taxed if not agreed. I further order that there be legal aid taxation of the plaintiff’s own costs. I also give certificate for counsel.

( Victor Dawes )

Deputy District Judge

Mr Kenny C P Lin instructed by B Mak & Co, assigned by Director of Legal Aid for the plaintiff

Mr Patrick Siu instructed by Bobby Tse & Co, for the 3rd and 4th defendants