### DCPI247/2002

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 247 OF 2002

\_\_\_\_\_\_\_\_\_\_

BETWEEN

WONG FUNG YING Plaintiff and

RIGHTOP INVESTMENT LIMITED 1st Defendant

KOLOT PROPERTY SERVICES LIMITED 2nd Defendant

THE INCORPORATED OWNERS OF

SHAUKEIWAN PLAZA 3rd Defendant

OCEAN SENSE DEVELOPMENT LIMITED 4th Defendant

\_\_\_\_\_\_\_\_\_\_

Coram : H.H. Judge Muttrie in Chambers

Date of Hearing : 6th January 2003

Date of Decision : 6th January 2003

# Reasons for Decision

1. The plaintiff claims against the defendants for damages for personal injury suffered in an accident at Shaukeiwan Plaza on 2 February 2000. The Writ and Statement of Claim were filed in the High Court on 25 March 2002. No Notice of Intention to defend having been filed by the 1st defendant, judgment was entered against it on 6 May 2002 for damages to be assessed. The action was transferred to the District Court by order of a Master, dated 23 July 2002. The 1st defendant by summons filed on 11 December 2002 applied to set aside the judgment. On 6 January 2003 I refused the application and now give my reasons for so doing.

2. Shaukeiwan Plaza is a commercial and residential development. The commercial part of it is known as Smiling Shaukeiwan Plaza. The 2nd defendant was the Estate Manager of the Shaukeiwan Plaza and had delegated management and control of the common areas of the Smiling Shaukeiwan Plaza to the Manager thereof, namely the 1st defendant. The 3rd defendant was the owners’ incorporation. The 4th defendant operated a restaurant within the Smiling Shaukeiwan Plaza; one of the cubicles in the toilet on the 2nd floor thereof was designated for the use of its customers and it undertook the cleaning of that cubicle. The plaintiff says that she was dining in the 4th defendant’s restaurant and went to the toilet where she slipped and fell and suffered injuries. She sues all the defendants as occupiers.

3. There is no dispute that the judgment against the 1st defendant was obtained regularly. The Writ and Statement of Claim were duly served but apparently there was then some confusion between its solicitor and its insurer, as a result of which no Notice of Intention to Defend was filed. The judgment being regular, the court’s power to set it aside is discretionary; but for the discretion to be exercised in its favour the 1st defendant must therefore show a real prospect of success; see **Alpine Bulk Transport Co Inc. v. Saudi Eagle Shipping Co. Inc.** [1986] 2 Lloyd’s Rep. 221, CA.

4. The 1st defendant had by a Letter of Appointment dated 1 January 1999 appointed Rightop Property Services Ltd. (“Rightop Property”) to be its management agent in the following terms:

“Pursuant to Clause 12(a) (1) of the Sub-Deed of Mutual Covenant registered in the Land Registry by Memorial No. 5337014, we Rightop Investment Ltd. hereby appoint Rightop Property Services Ltd. to be our management agent with immediate effect to undertake the management and maintenance of the Commercial Development (as defined as abovementioned) of Smiling Plaza for such period (unless previously determined by us in writing) as we shall remain the Manager of the said Commercial Development under the terms of the said Sub-Deed of Mutual Covenant (except the right of appointment conferred by Clause 12(a) (1) thereof) and subject to the obligation of the said Rightop Property Services to perform all our duties as imposed by the said Sub-Deed of Mutual Covenant.

Rightop Property Services Ltd. shall during the subsistence of its appointment as our management agent hereunder be entitled to charge remuneration in accordance with the terms of the said Sub-Deed of Mutual Covenant as if it were itself the Manager thereunder in place of us.”

5. The 1st defendant argues that the effect of this appointment is to exclude it from liability as occupier. In effect the plaintiff should be claiming against Rightop Property in place of the 1st defendant.

6. The question here is whether or not the 1st defendant ceased to be an occupier. “Occupier” is not defined in the Ordinance. A useful explanation of its meaning was given by Lord Denning in **Wheat v Lacon** 1966 AC 552 at 577 and 558:

“In the Occupier’s Liability Act, 1957, the word “occupier” is used in the same sense as it was used in the common law cases on occupiers; liability for dangerous premises. It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises……..

*Translating this general principle into its particular application to dangerous premises, it becomes simply this: wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor"; and the "occupier" is under a duty to his "visitor" to use reasonable care. In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers". And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.*

*In SALMOND on TORTS (14th Edn., 1965) p. 372, it is said that an "occupier" is "he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons". This definition was adopted by Roxburgh, J., in* ***Hartwell v. Grayson Rollo and Clover Docks, Ltd****.), and by Diplock, L.J., in the present case. There is no doubt that a person who fulfils that test is an "occupier". He is the person who says "come in"; but I think that that test is too narrow by far. There are other people who are "occupiers", even though they do not say "come in". If a person has any degree of control over the state of the premises it is enough.”*

7. Lord Denning went on to consider various situations including that of the independent contractor. At page 595 he went on:

“Fourthly, where an owner employed an independent contractor to do work on premises or a structure, the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there.”

8. I think the situation is the same here. The 1st defendant was not the owner; it was the Manager under the Sub-Deed of Mutual Covenant; but the position is the same. Although the 1st defendant delegated its duties of management and maintenance to Rightop Property and obliged the latter to perform all the duties imposed on the Manager, the 1st defendant never ceased to be the Manager under the Sub-Deed. It could withdraw the delegation at any time; the appointment specifically provided for that. Rightop Property was never put in the position of the 1st defendant; it was always the agent. Any third party would naturally look to the Manager named in the Sub-Deed in the case of a claim rather than to the Manager’s agent. So long as the 1st defendant remained the Manager it seems to me that it retained sufficient control of the premises to be under a duty towards all those who might lawfully come there. It was an occupier and owed the occupier’s common duty of care.

9. The 1st defendant further relies on section 3(4)(b) of the Occupier’s Liability Ordinance, Cap 314 which provides:

“where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done”.

10. The 1st defendant’s general manager affirms that the maintenance and repair of the common areas or common facilities or common parts of the Commercial Development was contracted out to Rightop Property and that during the period of the latter’s appointment there were no complaints or negative opinions about its service and work. Therefore, the 1st defendant had acted reasonably in entrusting the work to Rightop Property and had taken such steps as it reasonably ought in order to satisfy itself that the contractor was competent and that the work had been properly done.

11. I think that this argument can be disposed of quite simply. There is only evidence that there were no complaints. To avail itself of the protection of section 3(4)(b) the 1st defendant would have to show that it had taken steps to satisfy itself that the contractor was competent and that the work had been properly done. It would have to take positive steps and not simply rely on the fact that no one had complained. There is no evidence that any positive steps were taken. Therefore, it could not avail itself of the protection of section 3(4)(b).

12. This being so, I could not see that the 1st defendant had shown a real prospect of success, and accordingly made the order which I did.

( G.P. Muttrie )

District Judge

Mr. G. Lipkin of Messrs. T.C. Lau & Co. assigned by Director of Legal Aid for the Plaintiff.

Ms. Huen of Messrs. Richard Tai & Co. for the 1st Defendant.