#### DCPI 283/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 283 OF 2008

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| BETWEEN | LEUNG TSUI CHUN | Plaintiff |
|  | and |  |
|  | YICK TAT PROPERTY MANAGEMENT COMPANY LIMITED | 1st Defendant |
|  | LI HING CLEANING SERVICES CO LIMITED | 2nd Defendant |

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##### Coram: His Honour Judge Thomas Au in Chambers

##### (open to public)

Date of Hearing: 31 March 2009

Date of Delivering Decision: 31 March 2009

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### DECISION

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A. Introduction

1. At around 5 am on 12 March 2005, Madam Leung (the Plaintiff) slipped and fell at the staircase of the lobby of Ho Shun Lee Building (“the Building”) where she had been living. As a result of the accident, she suffered personal injuries.
2. On 4 February 2008, she issued the present action against the property management company (“the Manager”) of the Building (the 1st Defendant) and Li Hing Cleaning Services Co Ltd (the 2nd Defendant). At the time of the accident, Li Hing was under a cleaning service contract with the Incorporated Owners of the Building (“the IO”).
3. On 13 March 2008, upon Li Hing’s default to file an acknowledgment of service in the present claim, Madam Leung obtained an interlocutory judgment (“the Default Judgment”) with damages to be assessed against Li Hing.
4. On 18 December 2008, Li Hing took out the present application by way of Summons seeking to set aside the Default Judgment.
5. Accepting that the Default Judgment was obtained regularly, Li Hing’s only ground to support the application to set aside is that it has a meritorious defence to the present claim.

B. Applicable principles

1. There is no dispute between the parties that on an application to set aside a regular default judgment, the following well established principles apply:
2. The Court is to exercise a discretion to decide whether to set aside a regular default judgment on merits. The Court could also set aside a default judgment on merits with conditions.
3. The major consideration in the exercise of the discretion is whether the defendant has shown a defence with merits. The defendant would be regarded to have shown a meritorious defence on this basis if he can demonstrate that the purported defence has a real prospect of success, or that the defence would well be established at trial. In assessing the defence, the Court has to form a provisional view of its merits without going into a mini-trial on affidavits.
4. If no meritorious defence is shown, it is usually the end of the matter and the default judgment would not be set aside.
5. However, where a meritorious defence is shown, the Court could and should also take into account of other factors to weigh against the dominant factor of merits in its exercise of discretion. These factors include matters such as any explanation as to why the default occurred, whether there is an explanation for any delay in taking out the setting aside application, and whether there is any prejudice that would be caused to the plaintiff it the judgment is set aside.

See: Hong Kong Civil Procedure 2009, paras 13/9/13-14.

C. The present application

C1 Whether there is a meritorious defence

C1.1 The defence raised

1. The principal defence raised by Lee Hing is that, at the material time of the accident, it was not part of its duty to provide any cleaning services to the lobby of the Building regarding any slipperiness or remaining water substance on the floor or the staircase. As such, even if Madam Leung slipped and fell there by reason of any wetness on the floor, it had nothing to do with Lee Hing’s duty owed to Madam Leung as a user of the place.
2. Lee Hing’s defence relies on the service contract it had entered into with the IO to provide the cleaning services.
3. The provisions relevant to this application are as follows:

“2. 合約範圍：

本合約之潔淨工作範圍包括物業內之所有公眾地方，包括大堂、前後樓梯、走廊、管理處、洗手間、商場及升降機等。

4. 潔淨工人：

乙：

承辦商須僱用兩名清潔員工，在該大廈範圍內執行潔淨工作，並須於工作時間內於範圍作不定時巡視清潔情況。

8. 人手安排：

|  |  |  |
| --- | --- | --- |
| 員工崗位 | 每日工作時間 | 人數 |
| 駐廈清潔服務員 | 0700—1600 | 1名 |
| 垃圾收集員 | 0100—0600 | 1名 |

* 日班駐廈清潔服務員將負責0700--1600時段內清倒垃圾工作及不得離開本大廈清潔範圍作任何其他之清潔工作，如有發現將扣除每日的清潔服務月費，而合約工作細則之內容則維持不變。
* 垃圾收集員將負責晚間清倒垃圾工作，時間由0100內完成，而合約工作細則之內容則維持不變。

若於合約期內任何時段增派清潔服務員於服務範圍內當值/ 執行職務，如承辦商提供每次2名清潔服務員，4小時收費為港幣$400.00，則其後每小時每名清潔服務員為港幣$50.00。(如特別情況下，承辦商將另行報價)

…

好順利大廈工作細項

每日清潔工作

1. 每日清倒一、二座各層住戶、地舖及商場垃圾早晚各一次
2. 打掃及拖抹地下大堂及公眾地方
3. 打掃大堂、管理處及洗抹大堂報告箱一次
4. 掃各層走廊及前後樓梯一次
5. 每日拖抹每座五層公眾走廊及氣窗位置(如有需要大廈管業經理或好順利大廈業主立案法團可要求承辦商隨時增加拖抹及清洗)
6. 每日清潔商場洗手間及拖抹商場地面
7. 每日需往管理處簽到

…”

1. Mr Wong (counsel for Li Hing) submits that on a proper construction of the above clauses, Li Hing was only contractually required to provide on a daily basis (a) floor and other cleaning services to the Building (which included the lobby area and its staircase) between 7am to 4 pm to keep the Building common areas clean, and (b) garbage collection services between 1 am to 6 am.
2. Therefore, (Mr Wong further submits) at the time of the accident, that is about 5 am on 12 March 2005, it was not within Li Hing’s duty to provide any floor cleaning services (which included keeping the floor and staircase dry) for the Building. As a result, any wetness on the staircase of the lobby which allegedly led to Madam Leung’s slipping accident could not have been due to any default on Li Hing’s duty in (a) leaving the floor wet after any floor cleaning acts or (b) failing to keep the floor clean by drying up any wetness (whatever its cause was) on it. In other words, there was no negligence on the part of Li Hing.
3. It is Mr Wong’s submissions that given (a) the clear wording of the contract, (b) the now common ground that, at the time of the accident, Madam Leung did not see any of Li Hing’s workers cleaning the floor and leaving any water on the floor, and (c) the clear affirmation evidence from Li Hing to show that at the material time, Li Hing only deployed one worker (a Madam Poon, who has provided an affirmation to confirm the same) to collect garbage at the Building with no other cleaning workers, Li Hing’s defence is meritorious and bears a real prospect of success at trial.
4. As an alternative, Li Hing also submits that if it were under a general duty to provide cleaning services at the relevant time, on a proper construction of the word “cleaning”, it was only required to clean up any dirty material left on say the lobby floor or staircase. Since in the present case it is at least seriously debatable that the cause of the wetness on the lobby staircase or floor was due to high humidity, this did not amount to any dirty materials where Li Hing was under a duty to clean. As such, it is submitted that Li Hing was not in breach of any duty even if it had failed to clean up such wetness within a reasonable time.

C1.2 Madam Leung’s reply

1. Ms To (counsel for Madam Leung) however submits that on a proper construction of the above clauses in the contract, Li Hing was required *regularly* to provide all round cleaning services to the Building. Ms To further submits that the time and work specifications provided at clause 8 of the contract, when read with the other quote clauses, do not mean that each worker provided by Li Hing at the relevant time should only carry out the work as the title provided to the worker suggests. Counsel in particular relies on the reference back by clause 8 to the overriding duty to provide cleaning services under item 2 of the itemized schedule. Item 2 provides “打掃及拖抹地下大堂及公眾地方”, which means (submitted by Ms To) that even the garbage collector had to carry out general sweeping and mopping services regularly to the lobby floor and common areas of the Building.
2. As to the alternative defence, Ms To contends that the ordinary meaning of the word “cleaning” must include rendering the place tidy. This should include mopping up the floor or the common areas any wetness no matter what the cause of it was. Ms To further relies on item 2 of the schedule to support her submission.
3. In the premises, Ms To further says Li Hing clearly has no defence to the present claim, since it was duty-bound to provide cleaning services to the Building, which included the mopping up of any wetness on the lobby of the Building at the time of the accident.

C1.3 Discussion

1. I am of the view that Li Hing has shown a meritorious defence which could well be established at trial.
2. In the premises, as the matter may have to proceed to trial subject to my further considerations below of the other factors, I would not discuss in this decision in detail the merits of the defence other than to explain briefly why I have come to this view at this stage.
3. With respect to Ms To, her construction of the contract would have made the specific categorization of work and time of work provided in clause 8 redundant or superfluous. If her construction were correct, there was no need to expressly provide in clause 8 the specific title to the worker to be deployed by Li Hing at the relevant time. This is particularly so as it is not suggested by Ms To that Li Hing was contracted to provide a 24-hour service to the Building.
4. The reference in clause 8 to the itemized schedule does not in my view assist Ms To. In order to make reasonable sense of the itemized schedule, on a proper construction, the specific items set out therein are more consistent with an interpretation that each of them is respectively referable to the main duty of each of the specified worker as provided in Clause 8. That is, not all the items provided in the schedule are applicable at the same time to the worker specifically assigned and provided by the contract to carry out the specific roles prescribed by clause 8.
5. Thus, in my view, on a proper and objective reading of the service contract, there is a real prospect of success in Li Hing’s contention that it was only required to provide cleaning services (including mopping up any wet floor) of the Building between 7am to 4 pm each day. In other words, there is a real prospect of success in the defence that at the time of the accident, it was not Li Hing’s duty to provide any such cleaning service to the Building, and thus there was no default on its duty which led to Madam Leung’s slipping accident.
6. As to the alternative defence, I however accept Ms To’s submissions and do not think Li Hing has demonstrated to me that this defence has a real prospect of success. In my view, the duty, if there was one, to provide general cleaning services, including mopping up the floor (as provided in item 2 of the schedule) at the material time is ordinarily consistent with an interpretation to mop up water remaining on the floor whatever its cause was.
7. Given the above conclusions, I now have to consider whether there are other factors that would have transcend the dominant factor that Li Hing has shown a meritorious defence to refuse setting aside the Default Judgment.

C2. Why the default occurred?

1. In its affirmation in support of the present application, Li Hing explained that the default occurred as a result of the failure of its handling staff, one Ms Kaka Cheung, to keep a continuous and close attention of the development of Madam Leung’s bringing of the action herein against Li Hing. It is said that Ms Kaka Cheung had been handling all public liability claims against Li Hing and liaising with the insurer.
2. However, after Li Hing’s insurer disclaimed liability in late March 2008 on the basis that Li Hing had delayed in passing on the claim to the insurer, Ms Cheung had somehow failed to follow up the action. She had also failed to inform Li Hing to instruct lawyers to act on its behalf in the present case.
3. Ms Cheung further failed to inform her successor colleague that the insurer had disclaimed liability in this action when she passed on all public liability claim files to another quality assurance officer of Li Hing. The successor was then under the mistaken belief that the action had been handled by the insurer and left it unattended.
4. Ms Cheung left Li Hing’s employment in November 2008.
5. It is said that the Default Judgment was entered without in the knowledge of Li Hing under the above circumstances.
6. There is nothing before me to challenge the explanation. I accept the explanation. Although it does not make the default excusable, it shows that it is more due to the carelessness on the part of Li Hing’s staff. It further shows that the default was not intentional or contumelious on the part of Li Hing.
7. In light of the way as to how the default occurred, I am not satisfied that it is a factor that could outweigh the conclusion that Li Hing has shown a meritorious defence to set aside the Default Judgment.

C3. Delay in making the present application

1. The Default Judgment was apparently served on Li Hing on 14 March 2008.
2. However, Li Hing evidence says it was only until late October 2008 when the insurance agent informed the executive director of Li Hing that there would be a court hearing in November 2008, that Li Hing became aware of the Default Judgment.
3. I am prepared to accept that it was due to the oversight of Ms Cheung (as explained above) that Li Hing had no knowledge of the notice of the Default Judgment after being served with it.
4. Thus, from the time of the service of the Default Judgment till late October when Li Hing was informed of the same, there was a 7-months delay which is explained and not intentional.
5. However there is a 2-month unexplained delay which came after Li Hing becoming aware of the Default Judgment in late October 2008 until it took out the present application on 18 December 2008. Mr Wong for Li Hing fairly accepts that.
6. Nevertheless, I am not convinced that these 2 months’ unexplained delay would tip my exercise of discretion against the meritorious defence to refuse to set aside the Default Judgment. Ms To fairly has also not sought to contend otherwise.

C4. Prejudice

1. Ms To submits that it has been 4 years since the accident happened in March 2005. It is further submitted that the last checklist hearing was conducted on 4 November 2008, and but for Li Hing’s present application, the case (against the Manager) would have been ordered to be set down for trial. In the circumstances, Ms To urges the Court that to let the case drag on is unfair and prejudicial to Madam Leung.
2. I am not persuaded that Madam Leung would suffer any serious prejudice if the Default Judgment is set aside because:
3. It must be noted that Madam Leung only issued the present action in February 2008, that is about 3 years after the accident. This period of time has nothing to do with Li Hing’s present application.
4. Given the nature of Li Hing’s defence and the evidence in relation to it that has been revealed in this application, I am satisfied that Li Hing should be able to proceed with its defence and filing of evidence in a relatively short period of time. Coupled with a tight timetable to be given by the Court and the implementation of the new rules under the Civil Justice Reform on 2 April 2009 (in two days’ time), any further delay to these proceedings is likely to be minimal.

D. Conclusion

1. For the above reasons, I am satisfied that in the exercise of my discretion, the Default Judgment should be set aside since:
2. Li Hing has shown that it has a meritorious defence with a real prospect of success.
3. There are no other factors (whether considered independently or together) that would have been sufficient to outweigh the factor that Li Hing has a meritorious defence.
4. I therefore order that the Default Judgment be set aside.
5. Although Li Hing is successful in its application, given that the default was caused by its own carelessness, and there was a further unexplained delay in taking out the present application, I think it is just and fair in all the circumstances to order that the costs of this application be paid by Li Hing to Madam Leung, to be taxed if not agreed with certificate for counsel. I further order that Madam Leung’s own costs be taxed in accordance with legal aid regulations. Cf: Hong Kong Civil Procedure 2009, para 13/9/16
6. I will now deal with the directions to be given in the future conduct of this case.

# (Thomas Au)

District Court Judge

Ms Doris TO, instructed by Messrs Cheung Wong & Associates for Plaintiff

Mr Jonathan WONG, instructed by Messrs Sit, Fung, Kwong & Shum for 2nd Defendant