## DCPI 459/2005

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 459 OF 2005

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BETWEEN

AU KAR KEUNG, the executor of the

estate of LAI YEE SAU, the deceased Plaintiff

and

TEAM TRADER LIMITED trading as

RAINBOW ELDERY HOME Defendant

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

Coram: Deputy District Judge W.C. Li in Chambers (Open to Public)

Date of Hearing: 25th October 2006

Date of Handing Down Decision: 31st October 2006

**DECISION**

1. The Defendant took out this Summons to set aside the Default Judgment obtained by the Plaintiff on 10th June 2006 in default of the Defendant’s Notice of Intention to Defend. The ground for the Defendant’s application was that the Default Judgment was an irregular judgment based on the fact that the Defendant had not received the Plaintiff Writ of Summons.
2. Two affidavits of Mr. Tam Man Chee (“Mr. Tam”) were filed in support of the Defendant’s application to set aside the Default Judgment. Mr. Tam was a manager of the Defendant and he was one of the four staff of the Defendant working in the Rainbow Elderly Home, the place where Mdm. Lai Yee Sau (“the deceased”) resided prior to the accident on 7th April 2002 which resulted in her death shortly after. Paragraph 3 of Mr. Tam’s 1st affidavit said he managed both elderly homes of the Defendant (On Chi Elderly Home and Rainbow Elderly Home) on a daily basis. In Paragraph 10 of the 1st affidavit, Mr.Tam had this to say, “On 7 April 2002, the next day after Lai (the deceased) was discharged from the NDH**, an accident happened which caused the death of Lai**”. Mr. Tam did not say in either of his affidavits that he worked at or attended the registered office of the Defendant which was the place where the service of the Writ of Summons was effected by ordinary post and that was a different location to the two elderly homes where he worked. The Defendant did not give information as to how the registered office was manned. It was not in issue that the Plaintiff served the Writ of Summons on the registered office of the Defendant. The Defendant was a body corporate. In Paragraph 22 of the 1st affidavit, Mr. Tam said, “From my understanding, I verily believe that the Defendant has never received any Writ of Summons or any documents in relation to the proceedings herein until the receipt of Chou’s letter dated 20 June 2006”. Mr. Tam did not elaborate how he knew and held this belief that the Defendant had not received the Writ served on its registered office.
3. In Paragraph 24 of the 1st affidavit, Mr. Tam went on to say that he had been advised by his solicitor that the affirmation of service of the Plaintiff solicitor was defective in that it did not contain a statement to say that the letter serving the Writ of Summons on the Defendant at its registered office had not been returned undelivered in the post. He believed this was mandatory. This ground appeared to be the main ground of the Defendant in challenging the Default Judgment to be irregular. The service of the Writ was not by registered post and Order 10 Rule 1 of the Rules of the District Court, Cap. 336H, was not applicable. In fact the service of the writ was effected under Sec. 356 of the Companies Ordinance. Cap. .32, the Defendant being a body corporate. The service of the Writ on the Defendant at its registered office by ordinary post was good service. The affirmation of service of the Plaintiff solicitor was not defective at all. The affirmation of service was made by a solicitor, Mr. Wong Kwong Man, and he made the affirmation 3 months after the Writ had been served on the Defendant. If the letter serving the Writ on the Defendant had in the meantime, been returned undelivered, it would surely have come to the attention of Mr. Wong, and he would not have made that affirmation filed with this court.
4. The Plaintiff submits that service of the Writ by ordinary post at the Defendant’s registered office was good whether or not, the writ in question actually come to the notice of the Defendant. (*Ho Kwok Wah v. Group Jewellery Arts Ltd. & Ors* (2000) 3HKC 595; and *Lo Wing Kwong & Lau Heng Wa v. Grand Lord Seafood Restaurant* (unreported) DCCJ 148/2005 (8th June 2006) that followed the Ho Kwok Wah case ). This appeared to be correct in the case of a body corporate.
5. The Defendant had only made a mere assertion through a manager who worked at the 2 Homes for the elderly and not at the registered office that he understood the Defendant not to have received the writ. He did not explain how he knew the Defendant had not received the writ and why it did not receive it when it was sent to its registered office. Counsel for the Defendant intimated to the court that the registered office of the Defendant was regularly maintained, so there was no reason why the writ had not been received. The Default Judgment was not irregular as the Defendant claimed. Neither did the Defendant show any probable reason why it had not received the writ. On the evidence, the writ had been properly served on the Defendant at its registered office and the default Judgment entered in favour of the Plaintiff was regular and as a matter of course when the Defendant failed to give notice of intention to defend. On the evidence, I do find in favour for the Plaintiff that they had effectively served the writ on the Defendant as shown in their affirmation of service.
6. When service of the writ was regular, it is for the Defendant to show that they have a meritorious defence. The court has discretion to allow the Defendant to set aside the judgment if it is shown that the Defence has a real prospect of success in its defence.
7. In this case, the deceased was a 74 year old lady in rather poor health suffering from a number of ailments including diabetes mellitus, post RAI hypothyroidism, wheezy bronchitis, ischemic heart disease and liver cirrhosis. She did not suffer from any brain disease as far as her medical report showed. (re; Dr. Chan Chung Yan’s report dated 13th September 2004). The deceased was medically examined/treated and discharged on 6th April 2002, and that was just one day before the accident. She was also wheelchair bound and could not walk without aid. Her relative provided a wheel chair and also provided a safety belt for the Elderly Home’s use whenever needed to prevent her from falling out of the wheelchair. On 7th April 2002, only one staff, a Mdm. Chung, was on duty, when the deceased who was left alone in her wheelchair outside the back door, fell down and injured her head. Usually 4 staff including Mr. Tam would be at the Rainbow Elderly Home. There were 4 elderly people including the deceased at this home at the time. It was not known how the deceased fell out of her wheelchair but it was known that her safety belt was not used to prevent her from falling. It was also known that Mdm Chung had locked her wheelchair so that it remained stationary. It was also unknown how long the deceased had fallen and lied on the ground before help arrived. She was first found by two police officers on foot patrol and it was after the arrival of the 2 police officers that Mdm. Chung came out to help the deceased. One of the policemen called an ambulance to take the deceased to the hospital. Mdm. Chung in her statement to the police first said that she had only just left the deceased outside and went away to get her safety belt. She later changed her statement and admitted that she was working inside the Home and she did not secure the deceased with a safety belt after locking the wheelchair in a fixed position. She also said she saw 2 police officers outside and then saw that the deceased had fallen down. On admission to the hospital, the deceased was found to suffer from subarachnoid hemorrhage with fractured skull at parietal region. The deceased eventually suffered a cardiac arrest and died on the same day.
8. The Defendant relied on the last paragraph in the Autopsy Report of the deceased where it stated “**the cause of death** (of the deceased) **was due to diffuse subarachnoid haemorrhage. The skull fracture could precede the subarachnoid haemorrhage or happened after the latter. However the autopsy findings did not tell the temporal relationships of the two events.**” The Defendant interpreted this to mean that the cause of death could be due to a sudden deterioration of the deceased’s health and not due to the fall that injured her head. The Defendant denied that the deceased’s death was related to the fall. There was no evidence whatsoever that the deceased had a sudden deterioration of her health that resulted in the diffuse brain haemorrhage from which she developed a heart attack and died. Mdm Chung had helped the deceased in the bath shortly before the accident and she said in her statement that she observed the deceased to be normal and had no complaint of any discomfort.
9. On the evidence, the Defendant had been grossly negligent to have the elderly home undermanned with only Mdm Chung alone looking after 4 elderly persons at the time and to leave the deceased outside, alone and unattended, and having locked her wheelchair to a fixed position, failed to ensure that she was safely secured with a seat belt to prevent her from a fall. The deceased should not be left unattended on her own. The fall was wholly foreseeable as she might want to move around, or get up to go to the washroom on her own for instance. Or she could have fallen asleep and simply fell out of her wheelchair. Old people could suffer tremendous damage from a fall. At one moment, the deceased was well and sitting on her wheelchair and at the next, she was found by 2 policemen lying on the ground suffering from a skull fracture. Common sense dictates that in these circumstances, the skull fracture and the subarachnoid haemorrhage were the natural consequences from the fall. There were no other plausible explanation for her head injuries.
10. In *Lee Kin Kai v. Ocean Tramping Co. Ltd* (1991) 2 HKLR 232 (at page 235I-236B), the principle of causation was stated clearly by His Lordship, Hunter J.A., ***“….First, causation is essentially a matter for the judge, not for the doctors. It is a matter upon which the judge will no doubt be assisted by the medical evidence but he is not dictated to by it. Secondly, it is important to bear in mind that the law and medicine here, it seems to me, apply quite different standards. In law, there is a sufficient causal connection if it is shown on a balance of probabilities that the accident was a substantially contributing cause of the injury. A cause is sufficient; it needs not be shown to be the sole cause….. Thirdly, a judge when considering causation is not only entitled, he is bound, to use his common sense, to approach the question in the same way as would a juror….”*** These principles remained good law and were followed in subsequent cases (e.g. Lo Kwok Fai v. Ngan Cheung Wah (2203) 1 HKLRD 82).
11. The Defendant has therefore failed to show that it has a meritorious defence that has any real prospect of success. For these reasons, the Defendant’s application to set aside the Default Judgment must fail. The Defendant Summons is therefore dismissed with an order for costs against the Defendant. I order that the Defendant do pay the Plaintiff’s costs of and incidental to this Summons, to be taxed if not agreed, with certificate for counsel. This is a cost order nisi to be made absolute in 14 days of the date hereof.

( W. C. Li )

Deputy District Judge

Representation:

Mr. Lawrence L. K. Ngai instructed by Messrs. S. H. Chou & Co. for the Plaintiff

Mr. Wong King instructed by Messrs. Lo, Chan & Leung for the Defendant