DCPI504/2006

# IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 504 OF 2006

BETWEEN

AU SHUI LIN Plaintiff

and

STAR CRUISES (HK) Defendant

LIMITED

Coram: Her Honour Judge H C Wong in Chambers (Open to public)

Date of Hearing: 15 September 2006

Date of Decision: 15 September 2006

D E C I S I O N

1. The defendant applies to set aside a judgment entered in default on 30 May 2006 by summons taken out on 27 June 2006. The application is opposed by the plaintiff.
2. The defendant’s solicitor filed an affirmation in support explaining the reasons for the failure to file defence in spite of the acknowledgement of service indicating the defendant’s intention to defend. The reasons given were that due to the negligence of the defendant’s solicitor’s firm’s staff to have filed the Notice of Intention to Enter Judgment, served on the defendant’s solicitor on 2 May 2006, into a wrong file. By 15 June 2006, the defendant’s solicitor sent to the plaintiff’s solicitors a letter informing them that the defendant wished to set aside the default judgment, setting out the grounds of defence.
3. It is therefore a case that the defendant did not delay extensively before making an application to set aside the judgment. However, it is a clear and obvious that the defendant’s solicitors had been negligent in, firstly, failing to file a defence within time in accordance with the Rules and Regulations of the District Court; secondly, in spite of the notice by letter from the plaintiff’s solicitor, giving notice of intention to enter judgment, the defendant’s solicitors failed to heed the notice and file a defence immediately upon receipt of the notice of intention to enter judgment.
4. There were references to the defendant’s solicitor having to take instructions from Malaysia. However, as Miss Chan, representing the plaintiff, pointed out, the defendant is a Hong Kong registered company. There were no reasons given as to why instructions have to come from Malaysia and why instructions were not available in Hong Kong, and certainly no reason why if the writ was served in March, by 30 May it still had not prepared any grounds of defence. In any event, wherever instructions have to come from, the defendant’s solicitors, being officers of this court, should be aware of the time allowed under the Rules of the District Court.
5. The judgment being a regular one, the defendant would have to discharge the burden, not only that it has a good defence, it has to satisfy the court, under Order 19 rule 9 and Order 13 rule 9, that its case and the evidence it has adduced in support of it, carried some degree of conviction, as observed by Godfrey JA in the case of *Premier Fashion Wears Ltd v Chow Cheuk Man and Another* CACV177/1993, 1 March 1999. Godfrey JA went on to say, on page 12 of that judgment:

“It seems to me that unless potentially credible affidavit evidence from the defendant has demonstrated a real likelihood that he will succeed on fact, he cannot have shown that he has a real prospect of success.”

1. The same principles apply in the present case; the court will look at the merits of the defendant’s defence to consider whether the evidence adduced in support carried some degree of conviction. It does not mean repeating the same issues in the draft defence to the court and saying it with conviction, what it means is adducing supporting evidence on affidavit to show the defence carried some conviction; that the evidence adduced demonstrated a real likelihood that the defendant would succeed in the trial.
2. In the present case the defendant has shown in the affidavit in support, that it had taken sufficient precaution by installing railings along the deck of the cruise ship and it had further put up warning signs over the doors to the deck informing its customers on board the cruise ship to beware of the wet and slippery deck floor. It claimed further the deck was always wet anyway but denied any spillages. On the other hand, the plaintiff claimed she had put on track shoes on that occasion and she had her hands free of articles, so that she would be able to hold on to the railings. Unfortunately, she did slip, fall and injure herself. Upon inquiry from me, Mr Mallard, the defendant’s solicitor, informed me that the draft defence will be amended to include an alternative defence of contributory negligence, although the defendant maintains a defence of no liability.
3. Under Order 18 rule 8(6) in the Practice Notes of the Hong Kong Civil Procedure, contributory negligence must be specifically pleaded in a defence in cases of this kind. On the assurance by Mr Mallard that the defendant’s defence will include the plea of contributory negligence, I am prepared to set aside the judgment entered in default.
4. In my consideration of the evidence adduced on affidavit in support of the application, and the affidavit in opposition, I accept the defendant may have a good defence, with real prospect of success on the specific defence of contributory negligence.
5. The judgment debt is aside on the defendant’s defence, including a plea of contributory negligence.

(Submissions on costs)

Costs

1. Costs to be borne by the defendant on an indemnity basis, it means all costs thrown away. The defendant’s solicitor to show cause as to why it should not personally bear costs because the reason for failure to file a defence was entirely the solicitor’s fault. I will give you a chance to show cause as to why your firm should not personally bear costs.
2. As to the reason that the defendant should bear all the costs, in spite of the letter of 15 June, I have given reasons in my decision that the plaintiff’s solicitor did its part by serving a Notice of Intention to enter judgment. This was not heeded. The defendant’s solicitors, if they have done their duty, should have filed a defence within time. Putting the letter of 2 May into a wrong office file is not a good enough reason why the defence was not filed; it is only a reason explaining why they failed to heed that warning, a 48-hour warning. Why did it not file defence before then? No explanation other than taking instructions from Malaysia was given.
3. Further, if I had not made inquiries as to whether the defendant would be amending its defence to include contributory negligence, the defendant would not have successfully set aside the judgment at all; these reasons I have given fully above. They were not the reasons set out in the 15 June letter to the plaintiff’s solicitor.
4. I echo the defendant’s cited authority, in Deputy Judge Woolley’s case, “getting the setting-aside by the skin of its teeth”, I do not see the defendant here to be in any but a similar situation, by the skin of its teeth. The offer under the letter of 15 June 2006 is simply not sufficient.

(H C Wong)

District Court Judge

Miss Chan Siu-kuen of Messrs Huen & Partners, for the Plaintiff

Mr Nicholas Mallard of Messrs Dibb Lupton Alsop, for the Defendant