#### DCPI 676/2013

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 676 OF 2013

BETWEEN

WONG TUNG PO（王東寶） Plaintiff

and

LAM LEI YUNG（林麗容） Defendant

##### Before: Deputy District Judge D Ho in Chambers (Open to the public)

Date of Hearing: 7 January 2014

Date of Decision: 7 January 2014

## D E C I S I O N

1. This is an application by the defendant for setting aside a default judgment obtained by the plaintiff.

*Background*

1. The action relates to personal injuries sustained by the plaintiff on 3 August 2012.
2. At the material time, the plaintiff was a tenant of the defendant in a property which was subdivided into four rooms and the plaintiff was occupying Room A of the address (“the first address”).
3. It is alleged that on 3 August 2012 while inside Room A, the plaintiff was hit in the forehead by a concrete fragment falling from the ceiling of Room A. The plaintiff lost consciousness for a while before an ambulance was called to take him to hospital. He was discharged the next day and has allegedly experienced episodes of loss of consciousness since and is said to be still suffering from headache and dizziness and frequent blackout.
4. There are attached to the pleadings three medical reports from public hospitals, which merely refer to the defendant’s symptoms such as recurrent loss of consciousness, without referring to the admission on 3 August 2012.
5. The writ herein was served on 21 May 2013 by inserting into the letterbox of both the first address and another address of the defendant, also in Tsuen Wan.
6. Interlocutory judgment with damages to be assessed was entered on 21 September 2013, the defendant having failed to file a notice to defend. Service of the interlocutory judgment was said to have been effected on 23 September 2013. A week later, a statement of claim, together with other court documents, including a statement of damages as well as a list of documents, were served on the defendant by inserting into the letterbox of the second address.
7. In the plaintiff’s solicitors’ affirmation filed in opposition to the present application, the affirmant deposed to how the defendant came to know about the defendant’s two addresses in Tsuen Wan that I have just mentioned.
8. As said, the first address was the address where the alleged incident took place. The other address was the one used by the defendant in a previous Lands Tribunal action (“second address”). According to the plaintiff’s solicitors, pre-action letters were sent to the second address, which were not returned undelivered.
9. In her affirmation in support of the present application, the defendant admitted that she used the second address in the previous Lands Tribunal action and the property thereat actually belonged to her husband for rental purpose. The writ did not come to her attention until 26 September 2013, when her husband happened to visit the second address to collect rent.
10. According to the defendant, the husband walked by the letterbox and found the door to the letterbox to be left opened and saw inside the letterbox an envelope addressed to the defendant.
11. Upon learning about the present action, the defendant sought legal assistance and a notice to act was filed by her solicitors on 15 October 2013. On 1 November 2013 the defendant filed an affirmation to explain how she came to know about the present proceedings and, three days later (that is, on 4 November 2013), the defendant took out the present summons for setting aside the default judgment.
12. The defendant accepts that service in these proceedings was regular, but otherwise seeks to set aside the default judgment on grounds of merits.

*Principles*

1. The principles on setting aside a regular default judgment are well established. Reference need only be made to paragraphs 13/9/12 to 13/9/14 of the Hong Kong Civil Procedures 2014, Vol 1, which have been aptly summarised in the submission of Miss Yu, Counsel for the defendant, and the principles include, among other things, the following:
2. the power to set aside a regular default judgment is discretionary and unconditional;
3. the major consideration is whether the defendant has shown a defence on the merits to which the court should pay heed;
4. the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication;
5. It is not sufficient to show a merely ‘arguable’ defence. The defendant must show that he has a real prospect of success.
6. The court will also have regard to all relevant circumstances, such as why the default occurred; the defendant’s conduct after he had notice of the proceedings; explanation for any delay in making the application to set aside the judgment; and any prejudice caused to the plaintiff. These factors will be weighed against the dominant factor of the merits to see where the justice of the case lies.
7. I would also refer to the following part of paragraph 13/9/14, that is,

“where the ultimate outcome would depend on whose evidence is believed and no provisional view of the probable outcome of the action can be formed without a trial, the appropriate test to determine whether the defendant has a real prospect of success is whether the defence ‘could well be established’ at trial.”

1. For argument purpose, both parties do have to refer to the terms of the tenancy agreement. However, Miss Yu frankly admitted that the tenancy agreement has yet to be stamped and is, therefore, as yet inadmissible. For the present purpose, however, both counsel agreed that I could look at the tenancy agreement de bene esse.
2. In her written submission, Miss Yu submits that there was no factual evidence to support the plaintiff’s allegations such as photographs or discharge slip or medical reports arising from his admission to hospital on the date of the alleged incident, while the medical reports disclosed so far did not assist the plaintiff’s case that the alleged incident caused injury to the plaintiff.
3. As to liability, Miss Yu submitted that the defendant, as the landlord, was not liable under Section 5 of the Occupiers Liability Ordinance, Cap.314, absent a clause in the relevant tenancy agreement imposing an obligation on the defendant to repair. She referred to Clause 10, which only imposed a duty to repair on the tenant’s part in respect of windows DCCJ 5148/2004 unreported, 27 April 2006 and fittings in the kitchen and bathroom.
4. She relied on *Lai Kin On Jacky & Another v Sajjad-Haider*, regarding the absence of an implied obligation to repair on the landlord’s part. Miss Yu further referred to the absence of prior reports of problems by the plaintiff to the defendant and the fact that the plaintiff did not inform the defendant of the alleged incident immediately afterwards.
5. On the question of delay, Miss Yu submitted that there was no delay on the defendant’s part in taking out the present application and any delay to these proceedings would not be significant. She also referred to the absence of any reference in the plaintiff’s affirmation to any prejudice caused to him or reference to any lack of merits in the defence case.
6. From the plaintiff’s belated affirmation, it is now clear that the plaintiff’s solicitors in fact served a list of documents along with the pleadings on 27 September 2013, which includes, inter alia, what appears to be a note of ambulance men dated 3 August 2013 recording the plaintiff’s head injury caused by cement falling from the ceiling while at home, as well as a discharge summary of 4 August 2012.
7. In his submission in reply, Mr Jackson Poon, counsel for the plaintiff, submitted, first, in his written submission that it was incredible for the defendant not to have cleared the letterbox of the second address between the date of the first pre-action letter (that is, 23 August 2012) and the day when the defendant’s husband opened the letterbox of the same address on 26 September 2013.
8. He further submitted that there is no defence on liability on the part of the defendant. Reference was made to Section 3 of Occupiers Liability Ordinance, Cap.314, which imposes a general duty of care on occupiers. He relied on *Chung Man Yau & Anor v Sihon Co Ltd* (HCPI117/1995) unreported,9 August 1996. In this regard, Mr Poon submitted that the tenancy agreement contained a right on the defendant’s part to inspect the property in question so that she should be regarded as an occupier, hence a duty to make sure the place would be safe to visitors, of whom the plaintiff was one. Mr Poon submitted that the defendant should regularly enter the room to inspect the state of repair and it was her failure so to do that resulted in the incident.
9. He referred to clause 12 of the tenancy agreement, which requires the plaintiff not to disallow the defendant’s personnel to enter the room to inspect or carry out any repair works. Clause 12, he submitted, implies a duty to repair on the defendant’s part. He also refers to Halsbury Laws of Hong Kong, Vol 17(1), 2007 Reissue, paragraph 235.289, which refers to the general rule, that is, in the absence of express stipulation or of an obligation imposed by statute, the landlord is generally under no liability towards the tenant to put the demised premises into repair at the commencement of the tenancy or to do repairs during the continuance of the tenancy. The paragraph continues to set out exceptions to the general rule, the first being this:

“Where the landlord retains in his possession some part of the building, the maintenance of which in proper repair is necessary for the protection of the demised premises or the safe enjoyment of them by the tenant, he is under an obligation to take reasonable care that the premises retained are not in such a condition as to cause damage to the tenant or the demised premises and this obligation is properly to be regarded as an implied term rather than an independent tortious duty”

1. In reply, Miss Yu referred to paragraph 4 of *Lai Kin On*, supra, where Deputy District Judge Mimmie Chan (as she then was) considered the contents of a tenancy agreement which bears much similarity to the tenancy agreement in this action. At paragraph 7, the learned judge refers to the fact that the tenancy agreement did not contain any express covenant on the part of the landlord to maintain or repair the ceiling or any part of the premises and continues:

“In law, there is no implied covenant by the landlord of an unfurnished flat that it is or shall be reasonably fit for habitation, occupation, or for any other purpose for which it is let. No covenant is implied that the landlord will do any repairs whatsoever. Nor is there an implied obligation that the flat will endure the term of the tenancy and a landlord is not liable to his tenants for defects in the premises rendering them dangerous or unfit for occupation, even though the landlord is aware of their existence …… The law is therefore clear that landlords are not under any implied obligation to repair, and the Courts have no power to introduce such an implied term even if or merely because the Court considers such term to be reasonable.”

1. So far, there is no evidence that the subdivided room was a furnished domestic unit when it was rented out to the defendant and, as I understand it, even if it was a furnished flat, any implied obligation would not extend to the whole currency of the tenancy agreement.
2. Miss Yu further referred to the Privy Council case of *Cavalier v Pope* [1906] AC 428, a very old case. At page 431, Lord James of Hereford has this to say,

“It was ably argued at the Bar that, as the premises belonged to the defendant, he must be taken to be in possession of them, and that, therefore, a duty arose to maintain them in a condition that would not cause injury to anyone who came upon them. But there seems to be a fallacy in this argument. The defendant was not in actual possession of the house in question, and did not occupy it. The plaintiffs were the occupiers, and the statement of claim so alleges. No duty is cast upon a landlord to effect internal repairs unless he contracts so to do.

Then all that remains on which to found liability is the contract, and it was urged that contract to repair placed the premises constructively in the possession of the defendant and under his control. But the actual possession by the plaintiffs seems to negative this constructive control.”

1. At page 433, the court continues,

“But the power necessary to raise the duty for a breach of which damages were recovered in the several cases to which we have been referred implies something more than the right or a liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them, but this power and this right belonged to the tenant, not the landlord, and the latter’s contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control.”

*Discussion*

1. As Miss Yu rightly observed, in the plaintiff’s affirmation in opposition, reference was merely made to the effecting of service and the regularity of the default judgment. There is not a word on any prejudice caused to the plaintiff in setting aside the default judgment.
2. As to merits, in arguing that the defendant has no defence on liability, Mr Poon referred to Section 3 of Cap.314. However, as between a landlord and his tenant, the relevant section should be section 5, which imposes a similar duty of care on a landlord who is obliged under a tenancy agreement for maintenance or repair of the premises. As rightly submitted by Miss Yu, at common law, there is no implied duty to repair on the part of the landlord.
3. I agree with Miss Yu that *Lai Kin On*, supra,and *Cavalier v Pope*, supra, clearly provide an answer to Mr Poon’s submission on an implied duty on the defendant’s part to repair in reliance on the relevant clause in the tenancy agreement here. Nor does Mr Poon’s reference to Halsbury Laws of Hong Kong assist him, as there is simply no evidence as yet to indicate if the defendant could be said to have retained any control of the relevant property so as to impose an implied duty on her part to repair Room A. Neither is *Chung Man Yau*’s case, cited by Mr Poon, relevant, as it is not about liability as between a landlord and a tenant.
4. The question here is, therefore, whether the tenancy agreement in question imposes a duty to repair on the defendant. It is the defendant’s case that the tenancy agreement does not impose on her a duty to repair. Clause 10 merely imposes a duty to repair on the tenant’s part while clause 12, as submitted by Miss Yu, would not imply a duty to repair on the landlord’s part. As to the plaintiff’s case, all the plaintiff can point to so far is the alleged knowledge on the defendant’s part of the state of repair of Room A before the incident took place. That in itself is insufficient when it comes to liability for repair as between a landlord and a tenant. In the circumstances, the defendant does seem to enjoy a real prospect of success in defending liability on this ground.
5. As to the happening of the alleged incident, while it may be premature for Miss Yu to say there is a lack of evidence and whether or not the plaintiff can ultimately prove the happening of the incident cannot be determined without a trial, it is in my view understandable for Miss Yu to have observed that there is a lack of evidence in the light of the current state of pleadings and the lack of reference to the alleged incident in the medical reports attached to the pleadings. In particular, the plaintiff’s failure to report the incident to the defendant immediately afterwards is difficult to understand when the plaintiff was not in a state of coma after the accident.
6. As to the lack of reference in the medical reports attached to the pleadings, this suggests room for improvement on the plaintiff’s part in deciding what to attach to the pleadings. What was chosen were reports that do not make any reference to the alleged incident or the plaintiff’s admission to the hospital. It was only when the plaintiff filed his belated affirmation, exhibiting the records of the ambulance men and the discharge summary mentioned above did the picture become clearer.
7. The defendant cannot be criticised in the circumstances for not having realised that the medical records pertaining to the alleged incident have actually been covered by the plaintiff’s list of documents served along with the pleadings and not having requested copies of the listed documents when the defendant has yet to obtain leave to defend.
8. In a case where personal injury is alleged to have been occasioned to a person without any eyewitness, the ultimate outcome would depend on what evidence is to be believed and there can be no provisional view of the probable outcome of the action without a trial. In such a case, the appropriate test to determine whether the defendant has a real prospect of success is therefore whether the defence could well be established at trial. Applying the test to the present case, I am inclined to take the view that the defendant should be allowed the opportunity of putting the plaintiff to strict proof as to what happened inside Room A as well as challenging the plaintiff’s evidence on how the alleged injury was occasioned. That can only be done in a trial.
9. It is true that the defendant has not said anything about the pre-action letters sent to the second address and it is hard to understand why such letters would not have come to her attention if they did reach the second address. For the present purpose, however, the focus is on what happened after service of writ. While it is also hard to understand why the defendant’s tenant would leave the letterbox unlocked and let mails addressed to the defendant stay inside it without either retrieving the same or notifying the defendant or the husband to collect such mails. There is, however, no evidence to contradict the defendant’s evidence that she did not come to receive the court documents until 26 September 2013.
10. I accept that the defendant has acted promptly in coming to the court to seek indulgence and there are no other special factors militating against the defendant’s application here, such as delay in taking out application. I am, therefore satisfied that it is a suitable case for setting aside the default judgment and allow the defendant to defend the plaintiff’s case.

*Costs*

(Discussion)

1. This is my ruling on costs.
2. Miss Yu relied on *Welson International Limited v Jebson Investment Limited* (HCA 2620/2008) unreported 29 June 2010, where Chung J referred to the usual practice in relation to costs where a default judgment is set aside on grounds of a meritorious defence. In paragraph 14, the learned judge cited paragraph 13/9/16, Hong Kong Civil Procedure 2010, Vol. 1:

“Where the defendant has been at fault, the usual practice is for the plaintiff to be awarded his costs in any event; such practice is not appropriate, however, on setting aside a regular judgment where neither party has been at fault *(Cox (Peter) v. Thirwell* (1981) 125 S.J. 481)”.

1. There the learned judge agreed with the defendant and adopted an approach similar to the court’s usual approach in contested applications for leave to amend pleadings, that is, to allow costs to follow the event. The learned judge also explained why he did not follow the case of *Cox (Peter) v Thirwell*.
2. In the same judgment, the learned judge referred to the plaintiff’s submission that “as long as an opposing party is made to attend a setting-aside application”, that is, the plaintiff, “that party should be entitled to all the costs”. In response to that submission, the learned judge said he disagreed, because “[t]o do so would encourage setting-aside applications to be contested irrespective of whether there is substance in the opposition”. The learned judge, therefore awarded costs to the defendant, who was, of course, seeking indulgence from the court by way of an application for setting aside a default judgment.
3. When it comes to costs, it is always a matter of discretion of the court and, of course, the discretion has to be exercised judicially, depending on the circumstances of each case. An application for setting aside a regular judgment is clearly an application for indulgence of the court.
4. In the present case, I share with Mr Poon’s observation that the circumstances in which the writ and pleadings came to escape the defendant’s attention by reason of the defendant’s use of an address which was clearly not her own address or at least was not an address convenient for the purpose of receiving correspondence. That she had chosen to use such an address would oblige her to regularly check mails sent to that address in order to avoid problems like the one she is now facing, that is, service of court documents escaping her attention. The court is entitled to take this into account in considering an appropriate costs order.
5. In *Ko Sin Yun v Chan Chuen* [2007] 1 HKLRD 324, the Court of Appeal referred first to the general rule for costs to be awarded to the plaintiff in such circumstances and the alternative option of ordering costs of the application to be in the cause. Of course, the Court of Appeal did not elaborate on the circumstances where an order for costs to be in the cause would be appropriate. So, the position is at large and I think I am entitled to take into account also the fact that the plaintiff has opposed the application when the defendant clearly has a meritorious defence on liability in law as well as on the factual allegations of an injury having been caused to the plaintiff when he was all alone in his room. In my view, the plaintiff should have agreed to the defendant’s proposal to deal with the application by consent to save costs.
6. In the circumstances and balancing the above against the default on the defendant’s part, I take the view that a proper costs order in the circumstances would be for the costs of the application to be in the cause.

(Further discussion)

1. So, my order would be:
2. the default judgment of 21 September 2013 be set aside;
3. the defendant do have leave to file and serve a defence and counterclaim, if any, on or before 21 January 2014;
4. the plaintiff do have leave to file and serve a reply and defence to counterclaim, if any, on or before 18 February 2014;
5. the parties do write to the PI master to apply for a fresh checklist review hearing date for further directions on this matter;
6. costs of this application be in the cause, with a certificate for counsel.

( D Ho )

# Deputy District Judge

Mr Jackson Poon, instructed by K Y Lo & Co, Solicitors, for the plaintiff

Miss Emily Yu, instructed by Ho Tse Wai, Philip Li & Partners, Solicitors, for the defendant