#### DCPI1039/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1039 OF 2009

BETWEEN

LI LAI SIK FAI, MARY Plaintiff

and

HONG KONG HOUSING AUTHORITY Defendant

##### Before: Deputy District Judge Kent Yee in Chambers (Open to Public)

Date of Hearing: 18 March 2010

Date of Decision: 18 March 2010

## D E C I S I O N

1. This is an application of the plaintiff for specific discovery and inspection of property by her summons dated 15 March 2010 under Order 24 rule 7 and Order 29 rule 2.
2. At the hearing today, Ms Soo appearing for the defendant confirms that the defendant has no objection to inspection of the driveway by the plaintiff and her legal representatives.
3. By way of background, the plaintiff’s action is for damages for her injuries sustained as a result of a slip at the driveway within the defendant’s premises, i.e. the Headquarters of Hong Kong Housing Authority located at Fat Kwong Street, Ho Man Tin, Kowloon. The pleaded case of the plaintiff is that there was an oily and greasy patch on the driveway and, hence, it caused her to fall.
4. The trial of this action is to commence on 13 April 2010. I note that in a questionnaire of the plaintiff dated 11 November 2009, the plaintiff confirmed that she did not intend to take out any interlocutory applications other than her then outstanding Further and Better Particulars application. There is no explanation for this very late change of position. Be that as it may, I proceed to examine the merit of this application.
5. The plaintiff has filed the First Affidavit of Maria Fatima Cesar Da Luz in support. The plaintiff is seeking to discover five different classes of documents and I shall deal with them in turn.
6. Class No. 1 documents are set out in paragraph 1(a) of the summons, which reads:

“All Form 2 notice by employer of the death of an employee or of an accident to an employee resulting in death or incapacity under the EEC - ECO filed by the Housing Authority/Housing Department relating to slipping accident suffered by any employees at the driveway at the main entrance of Housing Authority Headquarters Building at Fat Kwong Street, Ho Man Tin, Kowloon for the period of between 6 December 2003 and 6 December 2009, i.e. three years before and after the plaintiff’s evidence in suit on 6 December 2006.”

1. I am not persuaded that there is prima facie evidence of the existence of such documents as disclosed by the affidavit filed on behalf of the plaintiff in support of this application.
2. The plaintiff relies on the fact that the confirmation of one, Miss Li Kam-lin, one of the defendant’s witnesses, in her witness statement dated 1 September 2009 that she had not heard of any accident identical to the plaintiff’s alleged accident during the 12-year period she had worked for the defendant at the Headquarters building.
3. Mr Li appearing for the plaintiff complains that this assertion is imprecise. Be that as it may, it is a matter for cross-examination. It does not give rise to any prima facie evidence that in fact there were similar accidents and hence such documents sought to be discovered. Mr Li further says that it is very easy for the defendant to say on oath that there is no such document. That is very true, but the central question is whether there is evidence of the existence of such documents. The list of documents previously filed by the plaintiff is prima facie conclusive evidence of all those documents which are in the possession, custody and power of the defendant, relevant to these proceedings. It is for the applicant to show that the original list is not sufficient. It is for them to adduce contrary evidence that there may be other documents which are germane to these proceedings not having been disclosed. But on the evidence before me I am not satisfied that the threshold is met.
4. Mr Li also says that this evidence is necessary for the purpose of being adduced as similar facts evidence. Given my finding that there is no prima facie evidence of its existence, I do not really have to deal with this. But suffice it to say that I agree with Ms Soo that the probative value of such documents, if ever exists, is little, and hence, I exercise my discretion against the grant of specific discovery of this class of documents.
5. Then I come to Class (b), (c) and (d) documents. They are set out in paragraph 1(b) of the summons which reads:

“Any documents setting out the gradient of the slope at the driveway; and Class (c) documents, any documents setting out the road surface material used for the driveway and its related coefficient of friction at the material time of the plaintiff’s accident in suit on 6 December 2006; and (d) if the driveway has been resurfaced at any point in time after the date of the plaintiff’s accident, any documents indicating when the resurfacing work has been carried out and whether new kind of road surface material has been used and its related coefficient of friction.”

1. Again, I am not convinced that there is prima facie evidence of the existence of these documents as disclosed by the supporting affidavits. Even if they may exist, I am persuaded by Ms Soo that they are irrelevant for the purpose of these proceedings given the present state of pleadings. Ms Soo helpfully has taken me through the pleaded case of the plaintiff and the relevant complaint as disclosed in her witness statement. The true culprit or the major cause of the accident is the alleged oily and greasy patch on the driveway and the plaintiff has never complained about the physical makeup of the driveway, including its steepness or gradient.
2. I note that there is no expert evidence to be adduced by the plaintiff to establish liability. I cannot see how the information that may be disclosed by documents sought to be discovered can help the court find liability on the plaintiff’s pleaded case. An oily and greasy patch on the driveway would cause a person to fall, whether it was on a flat surface or a slope. I cannot really see the relevance of those information and I do not think that they are of sufficient probative value to prompt me to exercise my discretion for the grant of specific discovery at such a late stage of these proceedings.
3. To allow the plaintiff to adduce evidence on the physical makeup of the driveway is to allow the plaintiff to move the goalposts, that is to say, to allow the plaintiff to make a new allegation of the cause of her fall. I cannot allow such a course to be taken.
4. In the premises, apart from the demand for inspection which is agreed by the defendant, for the plaintiff’s summons, I decline to make any order for specific discovery. In the result, I will make an order in terms of paragraph 2 of the summons and that is it.

(Discussion re costs)

1. It is very tempting for me to make no order as to costs, as suggested by Mr. Li. But looking at the matter in the round, the plaintiff could have asked for such an inspection long time ago. The request was made at such a late stage and only three days were given to the other side to reply. I do not think that was very reasonable. But on the other hand the defendant is not entirely free from blame, they could have been more responsive and should have done more in the spirit of the CJR. But be that as it may, as the time spent on the inspection issue was negligible and the evidence in support of the inspection request was minimal, and given the fact that the plaintiff had to come to court to argue for specific discovery in any event, I believe the fairest costs order is that costs be to the defendant.

(Discussion re taxation)

1. I decide to make this order. Costs be to the defendant to be summarily assessed by me on the first day of the trial hearing, that is 13 April.

# (Kent Yee)

# Deputy District Judge

Mr Joseph Li of Messrs. Joseph Li & Co., for the Plaintiff

Ms Betty Soo of Messrs Li, Kwok & Law, for the Defendant