## DCPI 1675/2012

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1675 OF 2012

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BETWEEN

CHAN NGA YIN formerly known as

CHAN MEI YI SICELY Plaintiff

and

MTR CORPORATION LIMITED Defendant

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Before : His Honour Judge Tam in Chambers (Open to Public)

Date of Hearing : 17 October 2014

Date of Decision: 16 December 2014

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DECISION

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*Introduction*

1. This is an application, by way of summons issued on 22 July 2014, for leave to appeal against my judgment dated 25 June 2014 against the defendant applicant for liability under the law of negligence and for breach of common duty of care stipulated in the Occupier’s Liability Ordinance, Cap 314.
2. The substance of the claim at first instance was that the plaintiff suffered an injury as a result of a slip and fall in a shopping mall managed and operated by the defendant. The cause of the fall was that a cleaner employed by an independent contractor engaged by the defendant had left a wet surface on the floor through mopping without having placed a warning sign in the vicinity. I held for the plaintiff and ordered the defendant to pay damages in the sum of HK$203,450 plus interest and costs to the plaintiff.

*The applicable test*

1. Under section 63A(2) of the District Court Ordinance, Cap 336, leave to appeal shall not be granted unless the judge hearing the application for leave is satisfied that:-
2. The appeal has a reasonable prospect of success; or
3. there is some other reason in the interests of justice why the appeal should be heard.
4. It is well established that a reasonable prospect of success means an appeal with prospects that are more than fanciful but do not need to be shown to be probable : *Yau Kam Ching v Cheung Shun Kau*, HCMP  1339/2014.

*Intended grounds of appeal*

1. The intended grounds of appeal are said to be as follows:-
2. *The learned judge correctly held that a person is not, generally speaking, vicariously liable for the negligence of an independent contractor; and, in this case, as the occupier of the shopping mall in question, the defendant was not liable for the negligence of the cleaner employed by Winson Cleaning Service Co Ltd (“Winson”) if the requirements in s 3(4)(b) of the Occupiers Liability Ordinance, (“the OLO”) were satisfied (judgment, paras 93-95, 124-125).*
3. *There was no evidence and no finding that it was unreasonable for the defendant to select and entrust the cleaning work of the shopping mall to Winson back in February 2010 in the first place.*
4. *The learned judge was correct to consider the content of the contract between the defendant and Winson but he erred in his conclusions in this respect for the following reasons:-*
5. *The purpose of examining the contract was to discern whether the defendant had imposed any contractual obligation on Winson to take steps which would impact on and enhance the safety of the visitors of the shopping mall.*
6. *The learned judge was wrong in holding that the contractual documents only contained terms relating to employees’ safety and did not cover the safety of the visitors to the shopping mall at all (judgment, paras 103-120).*
7. *He has correctly identified clause 27.1 in the Conditions for Supply of Service; however, he erred in holding that there were two problems with it and hence, gave no weight to it (judgment, paras 117-118):-*
8. *It is irrelevant that it was a general boiler-plate clause without any particular reference to Winson in its capacity as a cleaning services provider. The Conditions for Supply of Service, which contained this clause, had been incorporated as part of the contract between the defendant and Winson as confirmed by the defendant’s letter of agreement dated 17 February 2010 (and signed by Winson on 19 February 2010).*
9. *It is also irrelevant that there was no evidence to associate the “warning signs” referred to in that clause with the yellow warning signs involved in the accident. Under that clause, Winson was required to provide and maintain “all warning signs … when and where necessary … for the safety and convenience of the public or others”.*
10. *In considering the Particular Specifications (judgment, paras 103-115):-*
11. *The learned judge overlooked various provisions which were relevant to, and would impact on and enhance the safety of the visitors to the shopping mall even though they did not refer to it expressly.*
12. *In particular, there were provisions requiring Winson to provide competent staff: clause 6.2 (provision of a competent supervisor); clause 6.3 (provision of fully trained personnel necessary to perform the overall cleaning works); clause 8.3 (basic requirements of cleaning staff including the supervisor, the foreman and the cleaner); and clause 8.6 (the provision of training to its staff).*
13. *The learned judge has also failed to consider the General Specification for Service Contracts:-*
14. *Again, this document contains provisions which were relevant to, and would impact on and enhance the safety of the visitors to the shopping mall even though they did not refer to it expressly.*
15. *In particular, there were provisions requiring Winson to provide competent staff (clause 4.1); to comply with the laws of Hong Kong, which must include the Ordinance and the common law of negligence (clause 10.1); and to provide a competent management team which would be obliged to communicate with the defendant (clause 11).*
16. *Because of the said errors, the learned judge has failed to give any or any sufficient weight to the fact that one of the steps taken by the defendant to ensure that Winson would do its work properly was to impose the said contractual obligations on Winson.*
17. *The learned judge has correctly considered the evidence as to the steps that the defendant had actually taken to ensure that Winson had properly done the work, which included systematic checking by the cleaning foreman, random checking by the defendant’s own management staff during the office hours, and regular meetings between the defendant and Winson (judgment, para 119). However, he erred in overlooking an important element in the system adopted by the defendant, namely, the role of Dragon Guard Security Ltd (“Dragon Guard”):-*
18. *Under the Particular Specification (which formed part of the contract between the defendant and Dragon Guard), it was the duty of Dragon Guard to protect members of the public from nuisances (clause 5.1.2); to oversee and control the activities of various contractors employed by the defendant (which must include Winson) so as to prevent any nuisance to the visitors (clause 5.1.9). Further, the security guards had to patrol the shopping mall according to the pre-set patrol routing agreed by the defendant and to take note of defects, damages and cleanliness and report to the Security Control Room as soon as possible (Appendix D, clause 5).*
19. *The defendant gave evidence that there were four security guards on duty (for the night shift) at that time (as confirmed by the Daily Duty Roster & Checklist); and during the night shift, they would patrol the shopping mall 4 times in accordance with a pre-set route. If the security guard detected any unsafe condition, he would have to report immediately and, if necessary, cleaner(s) would be arranged to go to the scene, and the guard could only leave after the problem had been rectified (judgment, paras 71-74).*
20. *The learned judge had not mentioned the role of Dragon Guard at all, and there is no indication that he had taken it into account, when considering this issue.*
21. *The learned judge erred in rejecting the evidence of DW1 (Yung Chi Wing (“Yung”)) that the use of yellow warning sign was something covered in safety guideline(s) issued by Winson and was impressed upon cleaners in briefing and education: (judgment, para 121):-*
22. *The learned judge rejected Yung’s said evidence based on his views on the credibility and reliability of Yung. He did not find Yung a credible or reliable witness because of the evidence he gave about the content of the Security Incident Report (judgment, para 122). That was, however, an entirely separate and independent matter. It was wrong to reject Yung’s such evidence on such ground. In the absence of any evidence suggesting the contrary, on a balance of probabilities, Yung’s said evidence should have been accepted.*
23. *The learned judge also erred in holding that, even if such evidence was accepted, the CCTV record showed that the cleaner was habitually more concerned with the constant cleanliness of the floor than with the safety of the passers-by, which in turn indicated there was something systematically (sic) wrong with the said briefing and/or education:-*
24. *The CCTV merely captured what that particular cleaner did on one particular occasion for a short period of time. It was insufficient to support any inference that she had the said habit.*
25. *More importantly, even if that cleaner had such habit, the mere fact that one single cleaner had such habit could not support any inference that there was a habitual problem in the briefing and/or education.*
26. *Further, it was the duty of Winson, not the defendant, to train the cleaners properly. Even assuming that there was any deficiency in the briefing and/or education, there was no suggestion or evidence that the defendant knew or ought to have known about such deficiency.*
27. *The defendant has also given evidence that the service provided by Winson had been very good. There was no evidence that there was any similar incident involving the negligence of Winson’s employees before this incident. At the material time, there was no reason for the defendant to suspect that Winson had not done or would not have been able to do the work properly with due regard to the safety of the visitors of the shopping mall.*
28. *For the above reasons, the learned judge erred in:-*
29. *Concluding that there was little or no evidence to show that the defendant has satisfied the requirements laid down in s 3(4)(b) of the Ordinance; and*
30. *holding the defendant liable under the Ordinance and the law of negligence.*

*(judgment, paras 123, 126-128)*

1. *Having regard to the principle that an occupier is not the insurer of the visitors and does not guarantee their safety, and that the standard of care is one of reasonableness, the learned judge ought to have found that the defendant has discharged its common duty of care under s 3(4)(b) of the Ordinance (and, hence, also the duty of care under the general law of negligence).*

*Discussion*

*Regarding Ground I*

1. This is not a proper ground of appeal and as a result no more will be said.

*Regarding Ground II*

1. With respect, the applicant has got the burden of proof wrong in the formulation of this ground of appeal. Under s 3(4)(b) of Cap 314, in order for the applicant/defendant to escape liability, it is for the defendant to prove, inter alia, that the employer/occupier (ie the defendant) had acted reasonably in (selecting and) entrusting the work to the independent contractor concerned (see judgment, paras 99, 101 & 125). It is again important to stress that here we are dealing not with the standard of cleanliness but with the safety-to-mall-users aspect of the work (judgment, para 102).
2. Evidence tending to show the defendant had acted reasonably in entrusting the work to Winson would include the contractual terms that bound Winson to ensure safety to mall users (these may be aptly placed under the category of “documentary control”). There must be clear and unequivocal terms within the contract pointing towards and highlighting Winson’s duty in this respect, such that no arguments as to misunderstanding or ignorance could be made by the staff of Winson (who were naturally merely laymen).
3. At trial, contractual documents governing the obligations between the defendant and Winson had been adduced. However, no staff of Winson had been called to assist the court as to what they understood their duties were regarding this narrow aspect of their work. One is forced to look at the terms of the contract themselves. In defence’s closing submissions (per para 40), the court’s attention was specifically drawn towards clause 8.6 (trial bundle 156-7) of the contractual document known as “Tender No. Q009935 … Particular Specification” relating to, it was said, “Training to be provided by Winson under close documentary control of the defendant”. In para 103 of my judgment, I had already referred in some detail to those sub-clauses (I called them paras) under 8.6 relating to safety. These sub-clauses/paras were echoed in parts of clause/para 14 (trial bundle 163-4) of the same contractual document (discussed in paras 104, 105 of my judgment). Reading clause/para 14 as a whole (including sub-clauses/paras 14.4-14.9, it is abundantly clear that the safety there referred to relates not to safety to mall users but to employees’ safety (see judgment, paras 106-111).
4. Defence’s closing submissions para 40 also pointed to a Points Deduction Scheme referred to in sub-clause 14.11 of the same contractual document under which Winson’s safety performance was said to be monitored. However, it is clear that that scheme, along with other provisions of clause 14, deal with employees’ safety and not safety of mall users (judgment, paras 112-114).
5. There was a clear finding that the defendant had not shown that it had acted reasonably in (selecting and) entrusting the work to Winson (judgment, paras 123, 126).

*Regarding Ground III*

1. The strongest plank that the defendant could rely on is clause/para 27.1 of the Conditions of Contract for Supply of Services (trial bundle 202) which the defence had not mentioned either in its pleadings or in its final submissions, or indeed at all during the whole trial. The court of its own volition examined it and discussed it in its judgment at paras 117-8. The lack of mention by the defence shows that it was never the intention of the defendant to rely on this clause as an effective control over Winson. It was simply placed there as a boiler-plate clause. As already mentioned under discussion of Ground II above, no Winson staff gave evidence; and there was no other evidence to show whether there was any association between the “warning signs” under the clause and the yellow warning sign(s) subject of the proceedings (DW1 and DW2 from the defendant did not say anything in evidence touching on this aspect either). Given it is the defendant who bore the burden of proof in this aspect, the court found itself unable to rule in favour of the defendant.
2. Besides, the plaintiff argues that the lack of mention of clause 27.1 at trial had caused prejudice to the plaintiff in that as a result, there was no cross-examination of DWs in the area of what reminder and scope of training had been directed to Winson by the defendant in respect of clause 27.1. In my judgement, there is force in this submission.
3. Regarding clause 8.6 of the “Tender No. Q009935 … Particular Specification”, at the risk of repeating myself, it synchronizes in large measure with clause 14 of the same and deals with safety to employees and not safety to mall users. Clauses 6.2, 6.3 and 8.3 of the same do not assist much when the issue is squarely the safety aspect to mall users.
4. Regarding the General Specification for Service Contracts, in particular clause 10.1 thereof (trial bundle 212), it is important to remember it is part of clause 10 under the general topic of “Legislation, Health, Safety and Environmental Responsibility”. Clause 10.1 states “The Contractor shall at all times and in all respects comply with all ordinances, statutes, regulations, by-laws, published policies, directions, guidelines, recommendation etc of HKSAR.” Clearly, this deals with the legislation aspect. Clause 10.2 which states “The Contractor is required to comply with the Safety Rules for Contractors working in MTRCL Managed Properties” no doubt deals with the safety aspect and would likely include the health aspect as well. Clause 10.3 which states at length matters relating to the environmental aspect clearly deals with that sub-topic.
5. The defence now seeks to rely on this clause 10.1 by saying that it binds Winson to “comply with the laws of Hong Kong, which must include the Ordinance and the common law of negligence”. There are at least three problems with this proposition.
6. First, it does not say “the laws of Hong Kong”, though it does say all ordinances, statutes, regulations, by-laws …”. Hence, there is no way in which the defence can slip in the common law of negligence. Moreover, the defence has not specified in its ground of appeal which aspect(s) of the Occupiers Liability Ordinance, Cap 314, that it is relying on and which it says Winson (in whatever capacity) has failed to comply with. In this respect, it has to be remembered that it is the defendant, not Winson, who was the occupier under s 3(4)(b) of Cap 314.
7. Secondly, the clause is too general and does not serve the purpose of alerting Winson and its staff (who were after all laymen) to what they were supposed to do in relation to safety to mall users; and the defence has not averred anything as such. Indeed, insofar as ordinances, statutes, regulations and by-laws are concerned, with or without this clause, any legal entity operating within the jurisdiction would have to comply with them in any event.
8. Thirdly, clause 10.1 has never been raised by the defence in either its pleadings, closing submissions, or at all at any stage of the trial. With respect, it looks like it is coming in as a convenient after-thought and a last resort after all else had or would likely be seen as having failed.
9. Clauses 4.1 and 11 of the General Specification for Service Contracts simply do not touch on the safety-to-mall-users aspect and do not warrant further discussion.
10. With respect, the defendant’s duty was not to ensure that Winson would do its work properly. What the defendant needed to do, in order to discharge its common duty of care, was to show that:-
11. It had acted reasonably in (selecting and) entrusting the work to Winson;
12. it had taken reasonable steps to supervise the performance of the work by Winson; and
13. it had used reasonable care to check that the work undertaken by Winson had been properly done.

(judgment, paras 124-5; cf paras 98-9)

1. In the final analysis, there is nothing in the contractual terms between the defendant and Winson which has caused me to hold, in the defendant’s favour, that the defendant had acted reasonably in (selecting and) entrusting the work (here work includes issues of safety to mall users) to Winson.

*Regarding Ground IV*

1. The defendant now alleges that there is an important element in the system adopted by it in ensuring that Winson had actually done the work (properly), relying on the Particular Specification binding the defendant and the security contractor Dragon Guard (trial bundle 222-247), especially clauses 5.1.2 and 5.1.9, and Appendix D clause 5.
2. The defence complains that I had overlooked this aspect during the trial. However, what I distinctly recalled was that the defence at trial had categorically and unambiguously disavowed any notion of Dragon Guard supervising Winson’s work on the defendant’s behalf, and declared that the defendant was not relying on Dragon Guard to supervise Winson. This could be checked against the transcript if necessary. The defence’s stated position at trial caused the cross-examination of defence witnesses to take a different route and caused the court to concentrate on other issues when deliberating on the question of liability.
3. Not only was this notion of using Dragon Guard as a supervising agent not mentioned in the pleadings, it was not mentioned in the closing submissions of the defence either. Needless to say, there was no mention at any time during the trial of clauses 5.1.2, 5.1.9 or Appendix D clause 5 of the Particular Specification.
4. On the contrary, at para 46 of the defence’s closing submissions, the paragraph starts with “The supervision of cleaning services had not been delegated to Dragon Guard.”
5. Another point is, clause 5.1.9 seems to empower Dragon Guard to supervise (oversee and control) Winson with the object of preventing nuisance to visitors. But is there a reciprocal duty on Winson to take orders from Dragon Guard in this regard? I raised this with Mr Paul Lam, SC, appearing for the applicant/defendant here but not at trial, during the leave hearing and he replied that he was not aware of any such duty within the contractual documents binding Winson.
6. The plaintiff for her part complains that she has suffered substantial prejudice in this belated and about-turn reliance by the defence of Dragon Guard as the supervising body. The plaintiff says that had this been an issue at trial, she would have crossed examined the DWs in several other areas not touched on at trial. These include:-
7. Whether there was synchronization (at same place and time) of patrol by Dragon Guard personnel with cleaning by Winson staff;
8. When Dragon Guard was supervising or checking the cleaning service, whether they knew they had a duty to ensure a warning sign was placed; and
9. Whether Dragon Guard’s duty and responsibility was merely about the cleaning work done by Winson.
10. The defence says that even if the plaintiff had suffered prejudice in one or more of these respects, the result is not fatal.
11. With respect to Mr Lam for the defence, I tend to agree with the plaintiff. To allow the defence to rely on Dragon Guard as the supervising body at this late hour would be unfair to the plaintiff and would be a misuse of the court’s time at first instance. Parties ought to have made their respective cases clear at the time of service of their pleadings, and are generally bound by the way in which their advocates have conducted their respective cases. Besides, no one from Dragon Guand gave evidence and there was scant evidence at trial as to how they *actually* went about supervising and/or checking the work of Winson, and whether the steps and/or care that they had taken and/or used was/were reasonable or not.
12. The defendant also relies on the obligation on the security guards to report to the Report Room any hazards (such as dirts or obstacles) found on the floor when on patrol as a reasonable step to supervise the performance of the work by Winson and/or to check that the work undertaken by Winson had been properly done. With respect, in this case, we are rather more concerned with the failure by a cleaner to place a warning sign at or near the place being mopped, than with a hazard created by a dirt or obstacle on the floor and the patrolling guards’ reaction to it. Very often, a thin layer of water/wetness on the floor, though invisible to the naked eye is enough to cause a pedestrian to slip and fall. It must be remembered that the mischief in this case is the failure to place a warning sign.

*Regarding Ground V*

1. A witness’s credibility and reliability is a matter for the tribunal of fact. The tribunal is entitled to draw conclusions about a witness’s overall credibility and reliability from parts of the evidence which he/she had given. (see in gereral *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336).
2. One has got to remember that the defence bears the burden of proof here. There was no presumption in operation in favour of the defendant. The trial court had only been provided with one disk lasting about 30 minutes (discounting those parts which contained repetitions). No safety guidelines had been produced. There was no evidence as to the contents of the briefing and/or education provided to cleaners save a bare assertion by DW1 that the use of yellow warning sign was covered in it/them. As regards the manner of use of the yellow warning signs by cleaners, the court could only rely the one piece of evidence, that is, the video contents of the DVD. The defendant cannot be heard to complain, when that was the only piece of evidence it had furnished on the court.
3. The defendant bears a positive duty, in order to discharge its burden in these proceedings, to show that it had taken reasonable steps to supervise the performance of the work by Winson; and it had used reasonable care to check that the work undertaken by Winson had been done properly. Could the defendant succeed if there was such blatant deficiency (known or unknown to the defendant) in the briefing and/or education provided to cleaners?
4. Besides, according to clauses 8.6.4 and 8.6.6 of the Particular Specification (trial bundle 157), training and briefing records shall be properly kept by Winson for examination/inspection by the defendant as and when considered necessary. Could the defendant properly claim that it did not know or ought not to know about any deficiency in the briefing and/or education provided to cleaners?

*Regarding Ground VI*

1. The defendant bears the burden of proof. The fact that there was no evidence that there was any similar incident involving the negligence of Winson’s employees before this incident is neither here nor there. The defendant has to discharge its burden in order to escape liability.

*Regarding Grounds VII & VIII*

1. For the above reasons, these grounds cannot succeed.

*Ancillary matters*

1. During the leave hearing, a matter of law arose as to whether in law, an occupier may delegate his duty to supervise and check the work performance of an independent contractor to a third party (another independent contractor). In the context of this case, the question becomes whether the defendant may delegate the duty to supervise and check Winson’s work performance to Dragon Guard. Mr Tim Wong for the plaintiff insists on the proposition that the law does not permit such delegation; while Mr Lam for the defendant submits the opposite.
2. I have already averred to the fact that the defence at trial had disavowed the notion of Dragon Guard supervising Winson on behalf of the defendant thus causing a significant twist in the way the trial was run, and the obvious prejudice and unfairness it would generate against the plaintiff if the defendant were to be allowed to rely on the notion on appeal.
3. Hence, in my view, any discussion of this matter would entirely be academic and I decline to indulge in this academic exercise.

*Conclusion*

1. The intended grounds of appeal having been dealt with *seriatim*, it is my considered view that the intended appeal does not have a reasonable prospect of success; nor do I see any reason in the interests of justice that the appeal should be heard.

*Order*

1. For the above reasons, the application is refused.
2. The general rule is that costs follow the event. I make an order *nisi* that the applicant/defendant shall pay the respondent/plaintiff’s costs of this application to be taxed if not agreed with certificate for counsel; that the plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. The costs order will be made absolute should there be no application to vary it within 14 days of this Decision.

( Isaac Tam )

District Judge

Mr Wong Tim Wai, Tim, instructed by Lawrence YW Ng & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Paul Lam SC, instructed by Deacons, for the defendant