DCPI 46/2001

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 46 OF 2001

BETWEEN

CHAN CHUN KAM, the administratrix to the

estate of CHAN KWOK WING , deceased Plaintiff

and

CHU NGA KAM (A Female) and FONG YUK CHOI

both trading as LOY LOY APARTMENT 1stDefendants

CHU NGA KAN (A Female) 2nd Defendant

NAIS’ INVESTMENT LIMITED 3rd Defendant

and

LOY LOY GUEST HOUSE also known as

LOY LOY APARTMENT HOUSE (Sued as a Firm) 1st Third Party

CHU NGA KAN (A Female) 2nd Third Party

FONG YUK CHOI 3rd Third Party

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Coram : H.H. Judge Lam in Court

Dates of trial : 2nd – 4th May 2001

Date of judgment : 14th May 2001

Appearances : Mr Geoffrey Chang instructed by M/s M.K. Kwan & Co.,

assigned by DLA for the Plaintiff

Mr Fung Kwok Ki of M/s Yuen & Partners for the 2nd

named of 1st Defendant

JUDGMENT

The Guest House and the fire

There was a guest house at No.12 Yue Man Square, 1st and 2nd floors, Kwun Tong known as Loy Loy Guest House [“the Guest House”]. In the late evening of 5th August 1993 at about 11:00 p.m., a fire broke out which caused the death of three persons inside the Guest House. Chan Kwok Wing was one of the deceased. The Plaintiff is the administratrix of the estate of Chan Kwok Wing [“the Deceased”]. She brings this action on behalf of the estate of the Deceased and for the benefit of his dependants. The body of the Deceased was found by firemen at Room 303 on the 2nd Floor of the Guest house. He was certified death on arrival at the United Christian Hospital. According to Dr. Khoo Tun Oo, Roddy, the forensic pathologist who conducted the post mortem in respect of the Deceased, the cause of death was adverse effect of carbon monoxide. This was probably caused by smoke inhalation during the course of fire.

According to the investigation by the Fire Services Department and eyewitness present at the scene, the fire started at room 203 on the 1st Floor. Although it spread to the other parts of the Guest House at the 1st Floor and caused extensive property damage there, the fire did not spread to the 2nd Floor. The Deceased did not sustain any burnt injuries.

However, due to the special layout of the Guest House, the 2nd Floor was seriously affected by the heat and smoke generated by the fire on the 1st Floor. The two floors were connected by an internal spiral staircase. Although in the original design of the building there was an exit at the 2nd Floor, at the time of the fire such exit was hidden behind a wooden board affixed thereat. No exit sign was installed there. I have examined the photos taken in respect of the exit by the Fire Services Department. I find that the operators of the Guest House did not intend the patrons to use that as an exit. A guest on the 2nd Floor was supposed to come down to the 1st Floor to make payment at the reception before he left. There was no reception counter on the 2nd Floor. If a guest could leave by the exit on the 2nd Floor, this would present a security problem to the operators.

Although the metal grille at the outside could be opened, from the inside the exit was hidden. There was no door handle on the wooden board to indicate that it was actually a door. It was unnoticed by the guests on the 2nd Floor in the Guest House on that fateful night when they were trying to escape during the fire. It has to be remembered that the premises would be completely dark soon after the fire started when the electricity supply was cut. The only person who successfully escaped from the 2nd Floor managed to do so by getting out through the only window at the 2nd Floor and climbing down to street level along the scaffolding erected outside the building. Obviously, he needed not do so if the exit at the 2nd Floor was readily noticeable.

As mentioned, there was only one window at the 2nd Floor. That window was at the end of the corridor at the 2nd Floor. All other windows had been sealed up. The top of the internal spiral staircase was at the other end of the corridor. The hot air and smoke generated by the fire on the 1st Floor rose up along the staircase had to travel all the way through the corridor (and the rooms alongside) before they could get out into open air through the window. This accounted for the rapid deterioration of condition at the 2nd Floor. Despite the swift response of the firemen, the Deceased and two other persons at the 2nd Floor still died of smoke inhalation.

# History of the action

The case has a long history. For reasons which would become apparent later, this trial only concerns one Defendant, Fong Yuk Choi. The Writ was issued on 3rd August 1996 as High Court Personal Injuries Action No.839 of 1996 after the Letters of Administration was granted on 2nd August 1996. Initially, Fong Yuk Choi was not named as a defendant. The 1st Defendant was Loy Loy Guest House sued as a firm. Statement of Claim and Statement of Damages were filed on 11th September 1996. After police statements were received, the Writ was amended on 11th December 1996. The 1st Defendant became “Chu Nga Kam and Fong Yuk Choi both trading as Loy Loy Apartment”. Fong Yuk Choi [“Fong”] was thereby named as a defendant. The amended Writ was served on the defendants, including Fong. Fong filed an Acknowledgment of Service on 27th December 1996. No defence having been filed on behalf of Fong and Chu Nga Kam [“Chu”], default judgment for damages to be assessed was entered against them on 12th February 1997. The default judgment was served on Fong and Chu by post on 13th February 1997. Thereafter, the Plaintiff discontinued the action against the 3rd Defendant on 14th October 1997.

On 8th October 1997, Messrs.Josip Ma & Co. filed a Notice to Act for Fong and Chu. On 31st March 1998, Fong and Chu filed a Notice to Act in Person. On 9th April 1998, Fong and Chu took out a summons for setting aside the default judgment. That summons was dismissed by Master Chu (as she then was) on 12th June 1998 due to the non-attendance of Fong and Chu. Another summons for setting aside was taken out by Fong and Chu on 8th July 1998. That was heard and dismissed by Master Kwan on 29th July 1998. Chu and Fong appealed against that decision and the appeal was heard and dismissed by Pang J. on 25th August 1998.

Assessment of damages took place before Master Lok (as he then was) on 22nd January 1999. Both Chu and Fong were present. By a judgment delivered on 5th March 1999, damages were assessed at $576,868.00 plus interest. In the meantime, Chu and Fong sought leave to appeal against the decision of Pang J. out of time. That application was heard and dismissed by Leong J.A. (as he then was) on 25th January 1999.

After damages had been assessed, the Plaintiff took steps to enforce the judgment by way of charging orders in respect of the properties of Fong. In the course of resisting the application for charging orders absolute, Fong instructed Messrs.Yuen & Partners and filed an affirmation on 13th April 2000. In that affirmation, Fong raised the defence that he was not a partner of the Guest House and Chu was the sole proprietress of that business. He said he sub-let the premises to Chu. By a summons dated 5th May 2000, Fong made another application for the setting aside of the default judgment. On 23rd June 2000, Master Barnes set aside the default judgment against Fong on condition that Fong paid into court a sum of $600,000. I was told by Mr.Chang counsel for the Plaintiff that the learned Master so ordered on the basis that although the Amended Writ was served on Fong, the Statement of Claim and Statement of Damages were not served. As far as Chu was concerned, the default judgment stands. The case was transferred to the District Court by the order of Master Cannon on 16th January 2001.

# The issues

The parties agreed that they would be bound by the assessment by Master Lok and I need not concern myself with quantum. On the question of liability, there is no dispute that the fire took place and that the Deceased was a guest of the Guest House staying at Room 303 at the time of the fire. There is also no dispute as to the lay-out of the Guest House as shown in the sketch plans produced at B213 and 214 of the Trial Bundle. Mr.Fung, solicitor for Fong, indicated in his closing submissions that there are only two outstanding issues,

1. whether Fong was an occupier;
2. whether there had been a breach of duty.

# Fong’s relationship with the Guest House

As I have mentioned in reciting the history of the action, Fong now asserts that he was only a principal tenant of the premises at the time of the fire. Having rented it from the 3rd Defendant, Nais’ Investment Limited, he said he let it to Chu for her to run the business of the Guest House as sole proprietress. He was therefore not a partner. He produced a number of documents to support his case including Business Registration record, tax return, Certificate of Exemption issued by the Hotel and Guesthouse Accommodation Authority and tenancy agreement. On the other hand, the Plaintiff’s case is that although Chu might be depicted as sole proprietress of the business in various documents, this was only a façade. In truth and in substance, the Plaintiff says, Fong was a partner of the business.

The Plaintiff relies on the following evidence,

1. the statements given by Fong to the police on 18th August and 20th August 1993 shortly after the fire when the police was investigating the cause of fire;
2. the evidence given by Fong at the Inquest in respect of this incident held in June 1994;
3. the statement given by Chu to the police on 14th August 1993;
4. the evidence given by Chu at the Inquest.

Fong and Chu said in these evidence that Fong was at the time of the fire one of the operator of the Guest House.

Fong himself gave evidence at the trial. Chu was also called on behalf of Fong as a defence witness. Both of them testified that Fong was only a principal tenant and the Guest House was solely run by Chu. When Mr.Fung asked him about the admissions by him in the police statements, Fong said that those were made up by the police basing on their belief. He said his father had operated the Guest House and police saw him there. The statements were written down by the police and he was asked to signed. He said he did not read the contents. He denied he had told the police that he operated the Guest House. The police did not give him time to consider the contents before he was asked to sign. When he was cross-examined by Mr.Chang about the police statement, he pleaded that his memory about such things was blurred and the information in the statements could have been supplied by third parties. Fong also said that he was only acting out of a sense of righteousness to help Chu when she was blackmailed. Hence, he offered to help the police. As to the evidence at the Inquest, he simply said he could not remember.

Chu was also cross-examined as to her police statement. She said at that time, she was being blackmailed and she sought help from Fong. She asked Fong to pretend to be her husband in dealing with the triads. Fong agreed and she slept with Fong. She lived with Fong as husband and wife at the Guest House at the time of the fire (although she later denied that she was cohabiting with Fong). Since they held themselves out to be husband and wife to the outside world, she told the police that they were so. She initially denied telling the police that she and Fong ran the business together. When pressed further, she agreed she had said so but the police had misunderstood her real meaning. As to her evidence at the Inquest, she explained that Fong’s interest in the Guest House business was to collect rent from her. She admitted that she did testify at the Inquest that she managed the Guest House for Fong. But she thought that leasing the property from Fong was equivalent to managing it for him and no further details were asked about that at the Inquest.

I do not accept these explanations. There was no reason why the police had to put words into the mouth of Fong when they took statements from him. He was being interviewed as a witness and the police had no motive to prejudice him. The matters recited in the statements were of such a nature that it was impossible for the police to make them up. Fong simply could not explain about his admission as to the ownership of the Guest House in his evidence given under affirmation before the Coroner. He only sought refuge behind his purported loss of memory. I do not believe him. His professed motive in helping Chu was inconsistent with Chu’s evidence about his character. Chu said he was a mean person. Chu’s evidence as to the intimate sexual relationship between them is also inconsistent with Fong’s repeated denial of the same.

As to Chu, I cannot accept that she did not understand the difference between leasing a property and managing a business. I find her to be a person of strong character and reasonably intelligent. She had conducted this action for herself and Fong prior to April 2000. She managed to make applications for setting aside the default judgment and presented arguments for the defence in an intelligible manner before Master Kwan, Pang J. and Leong J.A. Her reason for misleading the police as to the true relationship between her and Fong is also unconvincing. I cannot see any reason why she could not have told the police that Fong was only her landlord if that was the true position.

Another reason why I do not believe Chu is that she was obviously a witness who would make up matters in the course of her evidence. She testified before me that there were sprinklers at the Guest House. This is blatantly untrue. The photographs taken at the scene by the Fire Services Department did not show any sprinklers, whether on the 1st Floor or 2nd Floor. During the Inquest, Chu was questioned about fire fighting equipment and she only mentioned about one fire extinguisher on the 3rd Floor. I am satisfied that she was not telling the truth when she told me that there were sprinklers.

With regard to the documentary evidence relied on by the defence (viz. the tenancy agreement, tax return, Business Registration etc.), I do not regard them as being conclusive. Whether Fong was an owner of the Guest House is a question of fact. These evidence are relevant but I have to decide the question on all the evidence, including the police statements and evidence at the Inquest. I have no doubt that those documents were produced for certain purposes. But in the light of the other evidence, I find that they do not reflect the true relationship between Fong and the business. As I said earlier, I disbelieve the oral testimonies of Fong and Chu to the effect that Fong was not an owner of the business.

Further, if Fong was not a partner, he would have raised such defence at an early stage of this action. However, he did not do so. On 9th April 1998 and 8th July 1998, he and Chu made two affirmations in support of their application to set aside the default judgment. In none of those affirmations did he mention that he was not a partner although other lines of defence were raised. Despite attention being drawn to this during the opening of the Plaintiff’s case at the trial, Fong did not explain this in his evidence. Neither did Chu. Faced with the prospect of legal liability being attached to him, the most obvious thing for Fong to do was to protest to the court that he was not a partner at all if this was true. It was a simple point and Fong should not have any difficulty in putting that forward even if he was unrepresented.

Mr.Fung tried to explain on behalf of Fong that he was not well at that time and he left the defence of the case to Chu. However, the record showed that not only was Fong a deponent to those affirmations (which were in Chinese), he did appear at various hearings before the court in which he did not raise the defence of not being a partner. Apart from the vague and general assertion by Fong that he was not in good health, there is no evidence at all as to the medical condition of Fong during that period of time. I do not accept that explanation.

Mr.Fung also submitted that the police statements and the evidence at the Inquest were ambiguous as to the role of Fong in the business. Reading all these evidence together, I do not find them to be ambiguous. The admission by Fong before the Coroner cannot be clearer. He said, “I owned Loy Loy Apartment House.”

On the balance of probabilities, I find that at the time of the fire Fong was actually a partner in the business. That was the reason why he had to take care of the extortion by triads and came to be involved in the negotiation with them concerning protection fees. That also explained why he gave the statements to the police. The police statements of Fong and Chu and their evidence at the Inquest did in fact give the true picture of the relationship between Fong and the business.

Legal implications of Fong’s role in the business

Having found that Fong was actually a partner, I hold that he fell within the meaning of an occupier of the Guest House. Fong therefore owed the Deceased the common duty of care under the Occupiers Liabilities Ordinance Cap.314. Further, as an operator of a guest house business, I hold that Fong owed a duty of care to the customers of the Guest House to see to the safety of the premises, including safety with regard to fire hazards.

Breach of duties

There is no doubt that the concealment of the exit on the 2nd Floor and the sealing up of the windows (thereby rendering the Guest House to be poorly ventilated) contributed significantly to the death of the Deceased. The China Re-entry Permit of the Deceased was found at the top of the internal staircase. Having reached that point, it would be easy for the Deceased to escape through the exit at the 2nd Floor if it was not concealed. The bodies of the other two persons who were killed in the fire were found in Room 302 although they were guests staying in Room 301. I infer, on balance of probabilities that these three persons were aware of the fire and had tried to escape. But they were forced back into Rooms 302 and 303 respectively by the heat and smoke emerged from the spiral staircase. If proper and adequate notice was given to them as to the existence of the exit on the 2nd Floor (which was at the same end of the corridor as the internal staircase), it was highly probable that they could have escaped from the scene in time. Also if the 2nd Floor was better ventilated and if the windows were not sealed, they would probably be able to escape through the windows at Room 303 and climbed down via the scaffolding.

Further, I find as a fact that there was no proper fire fighting equipment or fire alarm installed in the Guest House at the material time. This is the evidence of the firemen who testified before the Inquest (CW16 and CW 17) and the Electrical Inspector (CW20). Their evidence was admitted at this trial by consent. In this connection, I prefer their evidence to that of Chu.

Section 3(2) of the Occupiers Liability Ordinance set out the common duty of care of an occupier as follows,

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

Was Fong in breach of such duty? Was Fong also in breach of the duties of care owed by him to the Deceased under the law of negligence? On this point, Mr.Fung made these submissions. He argued that expert opinion was required to establish liability. I fail to see why it is necessary. The matters to which I have referred are just matters of common knowledge. No expertise is required. Mr.Fung then argued that the fire was according to the investigation report of the Fire Services Department caused under suspicious circumstances. Whilst this is correct, I am of the view that it does not assist the defence. The liability of the defendants (if any) in this case does not rest on their parts in causing the fire. It rests on the failure on their parts to provide safe and adequate means of escape in case of fire. The cause of the fire therefore has no bearing.

The last point of Mr.Fung is more formidable. He relied on a Certificate of Exemption issued by the Hotel and Guesthouse Accommodation Authority on 1st September 1991 permitting the premises to be run as a guesthouse. The Certificate was renewed up to 31st August 1994. Condition No.3 of that certificate said,

“Any change in the details contained in the application or any alteration or additions to the layout of the premises must be made known to and be acceptable to the Authority prior to implementation as this certificate is granted based upon the existing situation.”

Mr.Fung said the layout of the premises had been approved by the Fire Services Department prior to the grant of the certificate. He based his submission on the evidence of Fong and Chu.

Unfortunately, Mr.Fung did not see fit to adduce evidence from the Authority as to circumstances under which the Certificate was issued. The Authority might have kept a record of the layout of the premises when the Certificate was issued. Although Chu testified to the contrary and she said the layout had not been altered, due to the observations I have made as to her credibility, I am unable to rely on her evidence. The same applies to her evidence and Fong’s evidence that the Fire Services Department had been satisfied with regard to the safety of the premises. If the defence is serious about this argument, Mr.Fung should have called evidence from the Authority and the Fire Services Department. For reasons unknown to me, he did not do so.

Moreover, this was a point relied upon by Chu and Fong in their joint attempts to set aside the default judgment. It was rejected by Pang J. and by Leong J.A. I agreed with them. The Certificate did not bar the court from enquiring whether the defendants have fulfilled their duties under common law and the Occupiers Liability Ordinance.

In my judgment, it is reasonable for a guesthouse operator to ensure that there is a safe means of escape for each and every guest in case of fire. In the present case, it would not be difficult for the defendants to give adequate notice to all guests as to the exit on the 2nd Floor and to provide illuminated sign for the same. This was particularly important in view of the special lay-out of the whole premises. I also see no reason why the windows had to be sealed up and Fong was unable to explain the need for that. As it was, the 2nd Floor of the Guest House was a death trap and I hold that Fong was in breach of his duties towards the Deceased.

Conclusion

I therefore hold that Fong is liable to the Plaintiff. I order that judgment in the sum of $576,868.00 with interests on $70,000, $27,000 and $131,020 at the respective rates as provided for by Master Lok in his assessment dated 5th March 1999 from 5th August 1993 up to today be entered in favour of the Plaintiff. There will be payment out to the Plaintiff’s solicitors the sum of $600,000 paid into court pursuant to the condition imposed by Master Barnes in partial satisfaction of the judgment.

Costs

On the question of costs, Mr.Fung asked for the costs of the first day of the trial. That day was taken up wholly by arguments as to the admissibility of some documentary hearsay evidence. It ended up with the parties agreeing on several items set out in the Plaintiff’s summons dated 24th April 2001. The matter was dealt with by a Consent Order made by me on 4th May 2001. Mr.Fung argued that it was due to the Plaintiff’s failure to issue hearsay notice with regard to these documents in good time that the summons was necessary. Although the Plaintiff indicated in the Checklist dated 10th January 2001 that hearsay notice would be served within 42 days, it was not served until 24th April 2001. The trial was set down on 23rd February 2001 at the Checklist Review before Judge Carlson. Apparently, the failure to serve Hearsay Notice within time was not drawn to the attention of the court at the Checklist Review. Under the old Order 38 Rule 21(1)(a) (which is applicable to the present action due to Section 7 of the Evidence (Amendment) Ordinance 1999), the hearsay notice should have been served not later than 21 days before application is made for setting down.

Mr.Chang for the Plaintiff conceded that the hearsay notice was late. However, he submitted that since the Defendant disputed the admissibility, a summons has to be taken out in any event and no further costs were incurred by reason of the delay. Mr.Chang asked for costs of that application since he was successful in respect of some items. However, at the end of that hearing the Plaintiff did not press for the admissibility of the other documents. Hence, the Plaintiff did not succeed entirely.

In my judgment, unless there is good excuse for not doing so, the parties should have dealt with matters relating to hearsay evidence at or before the Checklist hearing. It could be disruptive to the court’s schedule if these matters have to be dealt with at the trial. Take the present case as an example, the trial was fixed for three days and one whole day was used for the purpose of the summons. Luckily, we could still manage to finish within 3 days. Had the Plaintiff served the hearsay notice within time, the matter could have resolved either by consent or at the Checklist hearing.

On the other hand, I do not consider that it is right for the Defendant to adopt the attitude of sitting there to wait for the Plaintiff to issue hearsay notice when it must have been obvious to them that the Plaintiff would seek to rely on these documents at the trial. In the present case, the Plaintiff has given notice to the Defendant of such intention in Paragraph 6 of the Statement of Claim. Further, the documents were included in the Checklist Bundle. If the Defendant intended to object to such evidence all along, such objection should be raised, at the latest, at the Checklist Review so that the matter could be dealt with before setting down. Mr.Fung said he thought the Plaintiff would call the makers of the documents to give evidence. There was no basis for such belief. In the Plaintiff’s Checklist of 10th January 2001, it was clearly stated that only one witness would be called by the Plaintiff.

In the circumstances, I consider that both parties are at fault and a fair order would be that each party bears his own costs of the summons. Other than that, I make an order nisi that Fong shall pay the costs of the Plaintiff in this action. The Plaintiff’s own costs shall be taxed in accordance with Legal Aid Regulations.

J. Lam

District Judge