DCPI 1960/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1960 OF 2011

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BETWEEN

YUEN PUI MAN ELLEN Plaintiff

and

MAJESTIC FURNITURE & INTERIOR DESIGN LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Before: Deputy District Judge D Ho in Court (Open to Public)

Date of Hearing: 12 January 2016

Date of Judgment: 15 January 2016

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JUDGMENT

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1. This is a claim of the plaintiff (“Ellen”) against the defendant (“Majestic”) for breach of a contract for sale and purchase of certain made-to-measure furniture (“Furniture”) and personal injury arising therefrom.
2. Majestic had all along been disputing Ellen’s claim to the last day before trial when its solicitors, Messrs Lim & Lok filed a summons to apply for leave to cease to act for Majestic. It transpired that Majestic had by a letter dated 11 January 2016 terminated the retainer to Messrs Lim & Lok. At the hearing of their summons, Mr Lok of Messrs Lim & Lok handed up a copy of the said letter signed by a director of Majestic as well as an email by which Majestic acknowledged service of the summons and indicated it would not attend the trial of the present action. Mr Lok asked to be excused from attending the trial proper.
3. In the circumstances and even though the order by which leave was granted for Messrs Lim & Lok to cease to act for Majestic had yet to take effect, not at least on the first day of trial, it would serve no meaningful purpose to detain the solicitor who in any event had no instructions to conduct the trial proper on Majestic’s behalf. The trial proper therefore proceeded in the absence of Majestic’s solicitors on record or any other representative. In the court’s eyes, however, Majestic nonetheless remained to be legally represented as there was no chance of the requirements under Order 67, rule 6(1) being complied with before the trial proper ended in order for the order for the solicitors to cease to act for Majestic to take effect.

*Ellen’s case and evidence*

1. On 12 July 2008, Ellen visited Majestic’s store in North Point with a view to purchasing made-to-measure wooden household furniture and was attended to by two salesmen who referred to newspapers clippings made available to Ellen at the store reporting that most furniture sold in Hong Kong would contain or be contaminated by toxins harmful to human and assured Ellen that this problem could be avoided if the she purchased furniture from them.
2. In particular, the salesmen emphasized that the furniture sold by Majestic was made of E-1 grade timber and toxin-free plywood from Indonesia. According to the raw materials fact sheet provided by the salesmen to Ellen, the rate at which these materials emit toxins was less than 0.1 ppm or smaller than 8 mg/100g, which would not affect human health.
3. In reliance on the said representations of the salesmen as well as the documents shown to her by the salesmen, Ellen agreed to purchase the Furniture from Majestic at the price of HK$38,000. Upon partial refund by Majestic in October 2008, the price paid by Ellen was reduced to HK$31,560.
4. The sale of the Furniture by Majestic to Ellen is a contract for sale of goods by description under the Sales of Goods Ordinance, Cap 26 (“SOGO”) and is therefore subject to the terms implied by ss. 15 and 16 of SOGO including an implied condition that the Furniture shall correspond with the description, namely it is furniture containing low level of formaldehyde (of a rate of emission at less than 0.1 ppm or smaller than 8 mg/100g) and would not affect human health, and should be of merchantable quality and reasonably fit for the purpose for which Ellen required them.
5. On 5 October 2008, Majestic delivered the Furniture to Ellen at her residence. Thereupon, Ellen discovered, inter alia, that the said representations as made by Majestic’s salesmen were materially false or not substantially true as the Furniture contained extremely high levels of formaldehyde and total VOC (Volatile Organic Compounds) and were not safe.
6. This constitutes a total failure of consideration on the part of Majestic and Ellen is entitled to recover from Majestic the sum of HK$31,560 under s.56 of SOGO.
7. Furthermore, Ellen has as a result suffered personal injury in that she had allergic symptoms in the eyes, throat, nose, lung and skin which persisted up to June 2009 and which has since recurred intermittently when she is exposed to odours from substances such as fresh paints, certain perfumes and shampoos.
8. Apart from her own evidence verifying the factual allegations against Majestic, Ellen has adduced in evidence an expert report of Professor Christopher Y.H. Chao (“Professor Chao”), an expert in Engineering and Indoor Air Quality, which states, inter alia, that:
9. VOCs at high concentration can become potent narcotics exposure to which can cause irritation of the eyes and respiratory tract and sensitization reactions involving the eyes, skin and lungs;
10. exposure to high levels of formaldehyde via inhalation can cause irritation of the eyes, nose, throat and result in coughing, wheezing, chest pains and bronchitis;
11. the acceptable level of formaldehyde and TVOCs applied in Hong Kong should be below 81 and 261 ppbv respectively but the test conducted by the Environmental Management Division of the Hong Kong Productivity Council (“EMD”) on 27 October 2008 revealed that the concentration level of formaldehyde at Ellen’s residence was about 310 ppbv on average and the TVOCs level at about 1,906 ppbv on average which were way above the acceptable indoor air quality objective and would affect human health.
12. EMD conducted a second round of tests on 20 February 2009 and 7 March 2009 and the level of formaldehyde and TVOCs recorded on 20 February 2009 was 150 ppbv and 1100 ppbv on average. After removal of the Furniture, the test conducted on 7 March 2009 showed the formaldehyde and TVOCs levels to be within the acceptable indoor air quality objective.
13. it is therefore very likely that there was strong formaldehyde and TVOCs emanation from the Furniture, probably due to poor grade of wood based panels having been used in the Furniture.
14. The emission level of formaldehyde from the Furniture as aforesaid did not match the value claimed in Majestic’s raw materials fact sheet.
15. On 2 May 2014, Professor Chao persoanlly inspected and tested the Furniture. When the Furniture was unwrapped, a strong smell was detected and the TVOCs level stood at about 1500 ppbv, about 5 times higher than the acceptable level. A few minutes later, the TVOCs level dropped to about 300 ppbv which is still higher than the acceptable level.
16. The inspection and test conducted on 2 May 2015 re-confirmed the results of the EMD tests, making it unnecessary to conduct separate laboratory testing on each piece of the Furniture.
17. It is believed that it could be difficult to mitigate the problem simply by ventilation. It is advisable to remove the Furniture from the premises permanently.

*Finding*

1. Despite the strong stance it appeared to have taken in its correspondence with Ellen before action and in its pleadings filed herein, Majestic had surprisingly opted not to adduce any expert evidence, whether on liability or quantum at the interlocutory stage. In any event, in light of its practical abandonment of defence, this court is left with Ellen’s evidence.
2. Having heard Ellen’s testimony in court, I find her to be an honest and credible witness and accept her evidence in its entirety.
3. As to Ellen’s expert evidence on liability, I find the expert report of Professor Chao to be extremely helpful in terms of its discursive exposition of issues relating to high levels of formaldehyde and TOVs as well as its analysis of the test results of both the EMD and the learned professor himself in coming to the conclusion that the Furniture was the source of the high level of toxins recorded in Ellen’s residence.
4. That being so, it is beyond argument that Majestic is in breach of the contract with Ellen as pleaded on Ellen’s behalf and that Ellen is entitled to a refund of the sum of HK$31,560. Majestic is further tortiously liable for the personal injury suffered by Ellen as a result of exposure to toxins emitted from the Furniture.

*Ellen’s medical evidence*

1. Ellen adduced in evidence an expert report of Dr Joseph Pang (“Dr Pang”) which confirms, inter alia, that:
2. Acute and chronic exposure to formaldehyde by inhalation can cause irritation of the eyes, nose and throat and affect the nasal cavity resulting in coughing, wheezing, chest pains and bronchitis.
3. In case of susceptible individuals, formaldehyde can also cause asthma and/or reactive airways dysfunction syndrome.
4. The very high levels of formaldehyde and TVOCs recorded by EMD far exceeded the acceptable levels of formaldehyde and TVOCs applied in Hong Kong.
5. The clinical course of Ellen’s illness and documented exposure to high concentrations of formaldehyde for 4.5 months leaves little doubt that it was the cause of her illness.
6. I am satisfied that Ellen has suffered personal injury as a result of exposure to the toxins emitted from the Furniture and shall proceed to assess damages due to her.

*PSLA*

1. Ellen’s allergic symptoms persisted for about 8 months from October 2008 to June 2009 which symptoms have since recurred intermittently whenever Ellen is exposed to fumes and odours. Dr Pang believes this is an accurate estimate of the duration of her allergic symptoms and that Ellen has received appropriate symptomatic treatment and largely recovered from her exposure to formaldehyde. Her disability as at September 2014 was minimal and does not prevent her from doing her job.
2. During the 8 months when allergic symptoms persisted, Ellen’s daily activities at her residence including dining, reading, resting and other leisure activities were seriously affected despite the removal of the Furniture in February 2009. She had to wear a protective mask at her own residence. She still occasionally suffers from shortness of breath and has the feeling of reduced lung capacity. She has becomelesstolerable to offensive odour and environment of a poor quality and would feel uncomfortable whenever she smells strong or chemical-like odour, including smell from fragrance, shampoos, detergent, bathing soap and cigarette smoke. She has also displayed a depressive mood and a lack of interest in previous hobbies and has sleeping problems. Ellen claims HK$200,000 for PSLA.
3. In support of her claim, Mr Ng, counsel for Ellen, places particular reliance, among the authorities cited, on *Andrew William Maxwell v Keliston Marine (Far East) Ltd* (HCPI 945/2003), unrep, Bharwaney J, 20 January 2012. There the plaintiff developed asthma due to exposure to a certain substance used for repair works inside tunnels between September 2000 and February 2001. He had a long-standing history of rhinitis but otherwise enjoyed normal lung function before working in the tunnel and had no history of asthma and skin/food allergy. Two months after working in the tunnel, he developed a persistent cough, dry and worse at night and in early morning, with audible wheeze and chest tightness. He continued to have intermittent symptoms and became short of breath easily on walking and swimming and had to give up sports altogether. The court took the view that the case fell within category (c) of the UK Judicial Studies Board Guidelines in respect of asthma which would attract an award up to £17,250 and awarded the plaintiff HK$250,000 for PSLA.
4. I find *Andrew William Maxwell, supra* useful and award Ellen HK$200,000 as claimed.

*Loss of earning capacity*

1. Ellen used to teach arts in tertiary institutions as a full-time course instructor earning a monthly income of about $36,549 from April to August 2008. She changed to work as a free-lance teacher in August 2008 for family reasons. Due to the damage to her health, she now has difficulty to concentrate at work and has become more prone to tiredness and fatigue resulting from work. She cannot withstand strong or chemical-like odour at workplace and cannot take up as many teaching tasks as before or resume full-time working other than working as a part-time tutor.
2. I am satisfied that Ellen, aged 47, has suffered a disadvantage in the labour market because of her injury and the risk of her losing even her current employment in the days to come is not an imaginary one.
3. In *Andrew William Maxwell, supra*, a sum of HK$150,000 was awarded for loss of earning capacity caused by the plaintiff’s asthmatic condition. Here I award Ellen a sum of HK$80,000 under this head as claimed.

*Special damages*

1. The following items of special damages set out in paragraph 5 of Ellen’s revised statement of damages were not disputed by Majestic and are awarded to Ellen accordingly:
2. Medical expenses HK$16,493.60
3. Dr Fung’s medical report HK$1,500.00
4. EMD tests HK$6,800.00
5. Loss adjuster’s fee HK$6,500.00
6. Ellen claims a sum of HK$6,045 (with receipts) for removing the Furniture from her residence to a warehouse. The same as evidenced by receipts is attributable to Majestic’s breach and is allowed accordingly.
7. Ellen incurred a total sum of HK$2,156.50 (with receipts) for the cost of protective masks for her own use as well as for friends/workers assisting in dismantling and moving the Furniture. No doubt Ellen is entitled to claim the cost of protective masks for her own use. As to those for friends/workers, the same can be said to be for Ellen’s well being in ensuring proper handling of the Furniture or the removal thereof from her residence. The whole sum of HK$2,156.50 is therefore awarded.
8. Ellen incurred HK$5,000 (with receipts) for storage of her belongings in a warehouse between September 2008 and March 2009 when the Furniture remained inside her residence without serving its intended purposes but otherwise reducing the storage space of Ellen’s residence. An award to cover such expenses is therefore justified.
9. Ellen further incurred expenses for storage of her belongings from April 2009 up to December 2015 totalling HK$79,590 (with receipts). Before me, Ellen said she had tried but failed to procure replacement furniture with safety guarantee while furniture made of solid wood which is therefore safe would cost her around HK$80,000 to HK$90,000 which she could not and cannot afford. As an alternative, she has purchased furniture items from IKEA which she believes to be safe but which offer less storage capacity than the Furniture. She has managed to retrieve some of her belongings (mostly books or teaching materials) from the warehouse but the charge for storage would not go down as the same is already the minimal one. I am satisfied with Ellen’s explanation for not being to mitigate her loss in this regard and award her the sum of HK$79,590.
10. Ellen incurred manual labour costs in the sum of HK$2,200 in arranging for Dr Chao’s inspection and testing of the Furniture on 2 May 2014. Mr Ng did not pursue the same as this should form part of Ellen’s legal costs.
11. Ellen further claims the costs of storage of the Furniture from 20 February 2009 up to 19 June 2014 when Dr Chao opined that the Furniture need not be kept for further testing. Despite Dr Chao’s opinion, Ellen has since kept the Furniture in a warehouse for her own purposes but she is not claiming any further storage costs.
12. I accept Ellen’s case that storage of the Furniture in a warehouse was a mitigation measure to reduce the levels of toxic substances at her residence to acceptable levels. As shown in the correspondence between Ellen and Majestic, Ellen had been demanding Majestic to take back the Furniture and refund the price therefor but to no avail and there is no evidence to suggest otherwise. Majestic should therefore be held liable for such storage costs.
13. However, once the matter proceeded to litigation, the predominant purpose in keeping the Furniture should be to keep the same as evidence. That may also explain why Ellen is limiting her claim as aforesaid. I am therefore limiting my award to the period from February 2009 to September 2011 which is the month immediately preceding the commencement of action herein. According to my reckoning, the total award should come to HK$49,429.[[1]](#footnote-1)

*Conclusion*

1. There be judgment for Ellen for the sum of HK$31,560 being refund of the price she paid for the Furniture.
2. As to the personal injuries caused by the toxic substances emitted from the Furniture for which Majestic’s liability is established, damages due to Ellen are assessed as follows:

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| --- | --- |
| 1. PSLA | HK$200,000.00 |
| 1. Loss of earning capacity | HK$80,000.00 |
| 1. Medical expenses | HK$16,493.60 |
| 1. Dr Fung’s medical report | HK$1,500.00 |
| 1. EMD tests | HK$6,800.00 |
| 1. Loss adjuster’s fee | HK$6,500.00 |
| 1. Removal costs | HK$6,045.00 |
| 1. Protective masks | HK$2,156.50 |
| 1. Storage of personal belongings (September 2008 to March 2009) | HK$5,000.00 |
| 1. Storage of personal belongings  (April 2009 to December 2015) | HK$79,590.00 |
| 1. Storage of the Furniture (February 2009 to September 2011) | HK$49,429.00 |
| Total: | HK$453,514.10 |

*Order*

1. I order that judgment be entered in Ellen’s favour.
2. Majestic is ordered to pay to Ellen the sum of HK$31,560 with interest thereon at 4% from the date of writ until judgment and thereafter at judgment rate.
3. Majestic is further ordered to pay to Ellen damages for personal injuries assessed above. There will be interest on damages for PSLA at 2% per annum from the date of writ until judgment and thereafter at judgment rate. Interest on special damages at 4% per annum shall run from 5 October 2008 to the date of judgment and thereafter at judgment rate.
4. There be an order nisi that Majestic do pay Ellen her costs of this action, to be taxed if not agreed. Ellen’s own costs shall be taxed in accordance with the Legal Aid Regulations. A certificate for counsel is also granted.
5. I thank Mr Ng for his assistance.

(D Ho)

Deputy District Judge

Mr Stanley Ng instructed by Liu, Chan & Lam, for the plaintiff

The defendant represented by Lim & Lok and did not appear

1. (HK$1,116.25 x 4 months = HK$4,465) + (HK$1,488 x 13 months = HK$19,344) + (HK$1,708 x 15 months = HK$25,620) = HK$49,429 [↑](#footnote-ref-1)