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DCCJ 4172/2023

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[2024] HKDC 214

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IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO 4172 OF 2023

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BETWEEN

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KUO TSZ WAI (顧子威)

Plaintiff

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and

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WONG SAU YUEN (王秀婉)

Defendant

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Before: Deputy District Judge Zabrina Lau in Chambers

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Date of Hearing: 30 January 2024

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Date of Judgment: 30 January 2024

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JUDGMENT

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Introduction

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1. This is a water seepage case concerning the properties situate at Flat B on the 8th Floor, Nos. 186, 186A & 188 Cheung Sha Wan Road, Kowloon, Hong Kong (“P’s property”) and the unit above on the 9th Floor of the same building (“D’s property”).

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2. By summons dated 21 December 2023, the plaintiff (“P”) applies for default judgment against the defendant (“D”).

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Service on D

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3. On 26 September 2023, the Writ of Summons specifically indorsed with a Statement of Claim was issued and served on D at D’s property, being the usual and last known address of D.

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4. On 17 November 2023, P’s solicitors received from court a copy of Acknowledgement of Service filed by D on 15 November 2023, indicating her intention to contest these proceedings.

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5. Despite her indication in the Acknowledgement of Service, D has failed to file or serve any defence.

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6. P took out the present summons on 21 December 2023, which was first served on D at D’s Property on 22 December 2023. It was subsequently discovered that D had in her Acknowledgement of Service provided another address in Wong Tai Sin. Hence, on 16 January 2024, the summons was served on D again at her address at Wong Tai Sin.

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7. Based on the materials before me, I am satisfied that due notice has been given to D in respect of these proceedings and the summons, and it is expedient for the hearing to be proceeded with in her absence, pursuant to Order 35 rule 1(2) of the Rules of the District Court.

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C *Default judgments*

D 8. The principles applicable to default judgments are well
E established. The court's power to give default judgment is discretionary.
F The court cannot receive any evidence, but must consider whether to give
G judgment according to the pleadings alone. The statement of claim must
H show a proper case for the order the applicant seeks to obtain, and the court
I shall give such judgment as the plaintiff appears entitled to on his statement
J of claim only, and only if the pleaded facts give rise to the relief sought:
K *Hong Kong Civil Procedure 2023 §19/7/11 and §19/7/13.*

L *P's pleaded case*

M 9. At all material times, P is the registered owner of P's property
N and D is the registered owner of D's property.

O 10. The Deed of Mutual Covenants (the "DMC") governing the
P two properties provides, *inter alia*, that:-

Q (1) The expenses of keeping in good and tenantable repair
R and condition the interior of such part or parts of the
S said building and all the fixtures and fittings therein or
T appertaining thereto and all the windows and doors
U thereof shall be borne by such of the parties hereto as is
V entitled to the sole and exclusive use occupation and
enjoyment thereof. (*Clause 6*)

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(2) Each of the parties hereto may at his own expenses make any non-structural improvement inside such part or parts of the said building which he is entitled to the sole and exclusive use, occupation and enjoyment, such as mantels, lights, fixtures, wood-work, paneling, doors or decorations provided such improvement can be removed without causing any structural alteration or damage to the said building and providing the same does not contravene the Building Ordinance or any Regulations and the party making the same shall have the right to remove the same at any time at his own expense on making good any damage caused by such removal. *(Clause 6(a))*

(3) Each of the parties hereto shall allow the other of them and his surveyors or agents with or without workmen and others at all reasonable times on notice to enter into and upon such part or parts of the said building of which he is entitled to the exclusive use occupation and enjoyment or any part thereof for the purpose of making repairing maintaining and testing drainage gas and water pipes and electric wires and cables and for similar purposes Provided that the works inspections and repairs shall be done with all dispatch causing as little disturbance as possible and the party making and carrying out the said works inspections or repairs shall make good all damages done in carrying out the said works inspections or repairs to such premises and to all

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decorations fixtures and movable chattels therein.

(Clause 9)

(4) Each party hereto doth hereby covenant with the other parties as follows:-

(i) Not to make any structural alterations to the said building or to such part or parts of the said building to which he is entitled to the exclusive use, occupation and enjoyment nor make any alteration to any installation or fixtures so as to affect or be likely to affect the supply of water, electricity or gas nor cut or damage the main walls or beams or the floors of the said building.

(Clause 12(a))

(ii) Not to use or cause or suffer or permit to be used such part or parts of the said building of which he is entitled to the exclusive use, occupation and enjoyment or any part thereof for any illegal, unlawful or immoral purpose or shall do or cause or suffer or permit to be done therein or thereupon anything which may create unnecessary noise or which may be or become a nuisance, annoyance or inconvenience to the occupiers of the other part of the said building or of the premises in the neighbourhood. *(Clause 12(c))*

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(iii) Not to do or cause to be done or suffer or permit any act deed matter or thing whatsoever which will amount to a breach or non-observance of the terms and covenant under which the said premises are held of the Crown. *(Clause 12(f))*

(5) Each of the parties hereto shall have the fullest right and liberty without any consent of or reference to the other parties hereto, and without the necessity of making the other parties hereto parties thereto, (a) to sell, mortgage, charge or otherwise dispose of or deal with his share and interest of and in the said premises and such part or parts of the said building of which he is entitled to the exclusive use, occupation and enjoyment but subject to and with the benefit of these presents and (b) to let or demise to any tenants or lessees such part or parts of the said building of which he is entitled to the exclusive use, occupation and enjoyment but he shall be responsible to the other parties hereto for the due performance and observance by his tenant or lessee of the covenants terms and conditions herein contained. *(Clause 15)*

(6) No Owner shall use or permit or suffer the part of the Estate owned by him to be used for any illegal or immoral purpose nor shall he do cause or permit or suffer to be done any act or thing which may be or become a nuisance or annoyance to or cause damage to

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the other Owners and occupiers for the time being of the Lot and the Estate. Each Owner shall comply with all the relevant bye-laws and regulations laid down in the Public Health and Municipal Services Ordinance.

(Clause 13 of Sub-section A of Section IV)

(7) No Owner shall use or permit or suffer any part of the Estate owned by him to be used except in accordance with the Government Grant and any applicable Building Regulations or other Ordinances and Regulations or other permit, consent or requirement from time to time applicable thereto and also in accordance with the covenants terms and conditions herein contained. *(Clause 14 of Sub-section A of Section IV)*

(8) All Owners and occupiers shall at all times observe and perform the House Rules. *(Clause 21 of Sub-section A of Section IV)*

(9) Save and except as herein provided each Owner may at his own expense install in the part of the Estate owned by him such additions, improvements, fixtures, fittings and decoration and/or remove the same Provided however that no such installation or removal shall cause any structural damage or interfere with the enjoyment by other Owners of any other part of the Estate. *(Clause 22 of Sub-section A of Section IV)*

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(10) No Owner shall do or suffer or permit to be done anything whereby the flush or drainage system of the Estate may be clogged or the efficient working thereof may be impaired. *(Clause 23 of Sub-section A of Section IV)*

(11) No change or alteration shall be made to the existing plumbing and other pipeworks of the Estate unless with the prior written consent of the Manager and the relevant Government authorities. *(Clause 26 of Sub-section A of Section IV)*

(12) No Owner shall make any alterations to his Unit or make any alteration to any installation or fixture therein so as to affect or be likely to affect the supply of water, electricity, telephone or gas or cut, maim, injure, damage, alter or interfere with any of the sewers, watercourses, conduits, pipes, cables, wiring, fixtures, equipment, apparatus or services of the Estate. *(Clause 27 of Sub-section A of Section IV)*

(13) All Owners shall at all times observe and comply with the terms and conditions of the Government Grant so long as they are Owners. *(Clause 28 of Sub-section A of Section IV)*

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11. Under section 34H of the Building Management Ordinance, Cap. 344 (“**the Ordinance**”), it is stipulated that:

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(1) Where a person who owns any part of a building, has the right to the exclusive possession of any part of a building or has the exclusive right to the use, occupation or enjoyment of that part, as the case may be, but the deed of mutual covenant in respect of the building does not impose an obligation on that person to maintain the part in good repair and condition, that person shall maintain that part in good repair and condition.

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(2) The obligation in subsection (1) shall be deemed to be an obligation owed to all owners of the building under the deed of mutual covenant.

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12. Since about 9 June 2023, D has caused, permitted and/or allowed water to leak and/or escape from D’s property. Such water seeped through and fell upon the ceiling and wall of P’s property, including his two bedrooms.

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13. In or about June 2023, the P appointed his expert – Silver Consultants Engineering Limited (“**P’s Expert**”) for conducting the investigation of the cause of water source of the water leakage.

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B 14. Based on the result of the investigation, in particular, a site
C visit to P's property on 27 June 2023, P's Expert issued a report on 7 July
D 2023 ("the Expert Report") showing the following:

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E (1) There was water leakage in the floor slabs of D's
F property, which had spread to the ceiling of P's two
G bedrooms.

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H (2) Flooding had occurred on the floor slabs of D's
I property near the outer wall and had not been dealt with
J immediately, so there was evidence and signs of
K defective floor slabs of D's property (which had led to
L massive leakage and spread to two bedrooms at P's
M property) as well as the suspected defective
waterproofing of the outer wall (which had led to
flooding on the floor slabs of D's property).

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N 15. The Expert Report indicates that the extent of damage to P's
O property is as follows:-

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P Bedroom 1:

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Q (1) High humidity was recorded at the ceiling;

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R (2) Water leakage was found at the ceiling;

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T (3) Cracks were also found at the ceiling;

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(4) The affected area of Bedroom 1 is near the outer wall.

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Bedroom 2:

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(1) High humidity was recorded at the ceiling and wall;

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(2) Water leakage was found at the ceiling and wall;

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(3) Peeling paint was also found at the ceiling and wall;

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(4) The affected area of Bedroom 2 is near the outer wall.

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16. It is averred by P that the matters complained of above were caused by the breach of DMC on the part of D, her servants, agents, tenants and/or guests. Further or alternatively,

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(1) the water leakage constituted a non-natural use of land on the part of D, her servants, agents, tenants and/or guests and water escaped therefrom and seeped to P's property and damaged the same;

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(2) the water leakage constituted a nuisance caused or permitted by D, her servants, agents, tenants and/or guests; and/or

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(3) the matters complained of were caused by the negligence of D, her servants, agents, tenants and/or guests and particulars of negligence are pleaded in the Statement of Claim.

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17. As a result of D's conduct mentioned above, P has suffered damage.

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19. In addition to damages, P also seeks:

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(1) an injunction to restrain D whether by herself, her servants and/or agents or otherwise from allowing, causing or permitting any water seepage or leakage from D's property to P's property; and

(2) a mandatory order that D do forthwith carry out all necessary works and repairs to stop water from leaking or escaping from D's property.

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Discussion and disposition

20. I have considered the Statement of Claim and I am satisfied that P has made out a valid claim against D in respect of the water leakage from D's property affecting P's property. D is deemed to have admitted the particulars in default of filing any defence.

21. I agree with P's submission that P has a genuine need for relief, as D's breaches, nuisance and/or negligence will continue unless restrained by court.

22. Subject to the minor amendments made at the hearing, I make an order in terms of the draft submitted to me. Meanwhile, interlocutory judgment should be entered in favour of P, with damages to be assessed.

23. Costs of this action, including costs of this hearing, be to P to be taxed if not agreed.

24. I thank Mr Lam for his assistance.

(Original signed)

(Zabrina Lau)
Deputy District Judge

Mr Lam Chi-yau of C.Y. Lam & Co. for the plaintiff

The defendant was acting in person and did not appear