#### DCPI212/2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 212 OF 2007

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BETWEEN

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| --- | --- | --- | --- |
|  | CHAN PING CHEUNG | | Plaintiff |
|  | and | |  |
|  | | PANYU NANSHA PORT PASSENGER TRANSPORT LIMITED  (番禺南沙港客運有限公司)  ZHONGSHAN PORT & SHIPPING ENTERPRISE GROUP COMPANY LIMITED (中山市港航企業集團有限公司) | 1st Defendant  2nd Defendant |

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##### Coram: H H Judge Marlene Ng in Chambers (Open to the Public)

Date of Hearing: 16th January, 2008

Date of Decision: 16th January, 2008

Date of Handing Down Reasons for Decision: 17th January, 2008

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REASONS FOR DECISION

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###### I. Introduction

1. The Plaintiff applied *ex-parte* for leave to renew the Amended Writ of Summons pursuant to Order 6 rule 8 of the Rules of the District Court (“RDC”) for a period of 6 months from 30th January to 29th July 2008. The Plaintiff filed the affirmation of his solicitor dated 10th January 2008 in support of the application.
2. At the hearing of the Plaintiff’s application before me on 16th January 2008, I made the following orders :
3. the validity of the Amended Writ of Summons in this action be extended for 6 months from 30th January 2008 to 29th July 2008;
4. costs of the application be costs in the cause;
5. for the avoidance of doubt, there will be no certificate for counsel.

I informed the Plaintiff’s counsel that I would hand down reasons for decision, and this I now do.

*II. Plaintiff’s claim*

1. According to the General Endorsement of Claim on the Amended Writ of Summons and the Statement of Claim, the Plaintiff claimed for loss and damages as a result of a collision on 17th February 2005 between a high-speed ferry operated by the 1st Defendant and a container vessel operated by the 2nd Defendant along Ma Wan Fairway to the south-west of Tsing Yi Island (“Accident”). The Plaintiff was a passenger of the high-speed ferry and sustained personal injuries as a result of the Accident which he claimed was caused by the negligence, breach of statutory duty and breach of common duty of care by the 1st and/or 2nd Defendants. The 1st and 2nd Defendants were/are PRC companies.

*III. Proceedings*

1. After the Accident, the Marine Department conducted an investigation and prepared an investigation report dated 17th February 2005. On 2nd January 2007, the Plaintiff’s solicitors wrote to the Marine Department seeking confirmation of the addresses of the 1st and 2nd Defendants. On the same day, the Marine Department replied by providing the PRC addresses of the 1st and 2nd Defendants and particulars of their Hong Kong agents. The Plaintiff’s solicitors also commissioned company searches of the 1st and 2nd Defendants in January 2007.
2. The Plaintiff’s solicitors issued pre-action letters dated 3rd January 2007 addressed to the 1st and 2nd Defendants at their PRC addresses. The 1st and 2nd Defendants responded through their Hong Kong solicitors and compensation agent respectively.
3. The Writ of Summons was issued on 30th January 2007, ie more than a year before expiry of the limitation period. When the Plaintiff attempted to serve the Wit of Summons on the 1st Defendant’s solicitors, such solicitors indicated they did not have instructions to accept service. On 7th February 2007, the Plaintiff’s solicitors posted the Writ of Summons and other documents to the 1st and 2nd Defendants at their PRC addresses. This was, of course, ineffectual service of the Writ of Summons.
4. The Writ of Summons was amended once without leave on 6th March 2007. The effect of the amendments was to remove certain Hong Kong addresses for service for the 1st and 2nd Defendants leaving only their PRC addresses.
5. On 12th April 2007 the Plaintiff applied *ex-parte* for leave to serve the Amended Writ of Summons on the 1st and 2nd Defendants out of jurisdiction. The application was supported by an affirmation of the Plaintiff’s solicitor filed on the same day. The Plaintiff suggested that the Hong Kong courts were *forum conveniens* since the Accident occurred within Hong Kong waters and that the Plaintiff had a good cause of action since the masters of the high-speed ferry and container vessel involved in the Accident, being respectively servant/agent of the 1st and 2nd Defendants, were convicted of various statutory offences in relation to their sailing and navigation of the 2 involved vessels at the material time.
6. On 18th April 2007, Master C P Pang granted leave sought by the Plaintiff and his order was sealed on 7th June 2007. Since the 1st and 2nd Defendants were PRC companies, service out of jurisdiction should be effected in accordance with the provisions of Order 11 rule 5A of RDC.
7. The Plaintiff’s solicitors then engaged translation agents to prepare Chinese translations of the Amended Writ of Summons, Statement of Claim, Statement of Damages and other documents. The Plaintiff’s solicitors received such Chinese translations on 25th May 2007.
8. On 30th May 2007, the Plaintiff’s solicitors wrote to the Personal Injuries Master advising they had lodged the Chinese translations of the Amended Writ of Summons and relevant documents with the court interpreter’s office for certification. They applied for an adjournment of the Check List Review hearing scheduled for 7th June 2007 for 3 months.
9. On 1st June 2007, Master C P Pang vacated the hearing on 7th June 2007 and adjourned the Check List Review hearing to 10th September 2007.
10. Notwithstanding the letter of the Plaintiff’s solicitors to the Personal Injuries Master dated 30th May 2007 (see paragraph 11 above), it was on 25th June 2007 that the Plaintiff’s solicitors lodged the Amended Writ of Summons, Statement of Claim, Statement of Damages and Order dated 18th April 2007 together with their Chinese translations with the court interpreter’s office for certification. The certified translations were ready for collection (and collected) on 13th July 2007.
11. On 3rd September 2007, the Plaintiff’s solicitors lodged the Notice of Check List Review and Medical Report of the Plaintiff together with their Chinese translations with the court interpreter’s office for certification. The certified translations were ready for collection (and were collected) on 20th September 2007.
12. On 3rd September 2007, the Plaintiff’s solicitors wrote to the Personal Injuries Master advising that the Chinese translations of the Amended Writ of Summons, Statement of Claim, Statement of Damages, and Order dated 18th April 2007 had been certified by the court interpreter’s office, but the certification of the Chinese translations of the Notice of Check List Review and Medical Report of the Plaintiff was still pending. In the circumstances, the Plaintiff sought leave to adjourn the Check List Review hearing scheduled for 10th September 2007 for 3 months.
13. On 5th September 2007, Master C P Pang vacated the hearing on 10th September 2007 and adjourned the Check List Review hearing to 10th December 2007.
14. A Concurrent Writ of Summons was issued on 26th October 2007. On the same day, the Plaintiff’s solicitors lodged the documents listed in the paragraph below with the District Court Registry for arranging service to the 1st and 2nd Defendants.
15. On 29th October 2007, the District Court Registry forwarded to the High Court Registry the following documents in duplicate (together with Chinese translations for items (c) to (h) below) to arrange service pursuant to Order 11 rule 5A of RDC :
16. request for service of writ in PRC and undertaking to pay expenses of service;
17. 委托書;
18. sealed copy of the Order dated 18th April 2007;
19. sealed copy of Concurrent Writ of Summons issued on 26th October 2007;
20. Statement of Claim;
21. Statement of Damages;
22. Medical Report of the Plaintiff;
23. Notice of Check List Review.
24. On 6th November 2007, the High Court Registry informed the Plaintiff’s solicitors that the Order dated 18th April 2007 only gave leave to serve the Amended Writ of Summons out of jurisdiction, and urged them to apply for leave to serve the other documents on the 1st and 2nd Defendants out of jurisdiction.
25. On 14th November 2007, the Plaintiff’s solicitors wrote to the Personal Injuries Master advising they had lodged the Amended Writ of Summons and relevant court documents with the High Court Registry for the purpose of sending the same to the PRC judicial authorities for arranging service on the 1st and 2nd Defendants. However, since the court had not granted leave to serve the other court documents out of jurisdiction, the High Court Registry would not accept such other court documents to arrange service. Consequently, the Plaintiff’s solicitors applied *ex-parte* for leave to amend the Order dated 18th April 2007 to include leave for service of other relevant court documents on the 1st and 2nd Defendants out of jurisdiction.
26. On 26th November 2007, Master C P Pang pointed out there was no ambiguity in the Order dated 18th April 2007 and raised requisitions as to (a) whether the Plaintiff intended to apply for a fresh order and (b) what the “relevant court documents” were.
27. In such circumstances, the Plaintiff’s solicitors decided to first serve the Amended Writ of Summons on the 1st and 2nd Defendants out of jurisdiction.
28. On 30th November 2007, the Plaintiff’s solicitors again lodged the documents listed in the paragraph below with the District Court Registry for arranging service on the 1st and 2nd Defendants.
29. On the same day, the District Court Registry forwarded to the High Court Registry the following documents in duplicate (together with Chinese translations for items (c) and (d) below) to arrange service pursuant to Order 11 rule 5A of RDC :
30. request for service of writ in PRC and undertaking to pay expenses of service;
31. 委托書;
32. sealed copy of the Order dated 18th April 2007;
33. sealed copy of Concurrent Writ of Summons issued on 30th November 2007.
34. On 1st December 2007, the Plaintiff filed an *ex-parte* application for leave to serve the Statement of Claim, Statement of Damages, Notice of Check List Review and Medical Report of the Plaintiff out of jurisdiction.
35. On 3rd December 2007, the Plaintiff’s solicitors wrote to the Personal Injuries Master advising that on 30th November 2007 they had lodged the Amended Writ of Summons and the Order dated 18th April 2007 to the District Court Registry for the purpose of sending the same to the PRC judicial authorities for arranging service on the 1st and 2nd Defendants. They were then in the course of seeking leave to serve the Statement of Claim, Statement of Damages, Notice of Check List Review and Medical Report of the Plaintiff on the 1st and 2nd Defendants out of jurisdiction. In the circumstances, the Plaintiff sought leave to adjourn the Check List Review hearing scheduled for 10th December 2007 for 2 months.
36. On 6th December 2007, Master C P Pang granted leave sought by the Plaintiff and his order was sealed on 19th December 2007. He also vacated the hearing on 10th December 2007 and adjourned the Check List Review hearing to 11th February 2008.
37. On 9th January 2008, the Plaintiff’s solicitors again lodged the documents listed in the paragraph below with the District Court Registry for arranging service on the 1st and 2nd Defendants.
38. On 9th January 2008, the District Court Registry forwarded to the High Court Registry the following documents in duplicate (together with Chinese translations for items (c) to (g) below) lodged by the Plaintiff’s solicitors for arranging service pursuant to Order 11 rule 5A of RDC :
39. request for service of writ in PRC and undertaking to pay expenses of service;
40. 委托書;
41. Statement of Claim;
42. Statement of Damages;
43. Notice of Check List Review;
44. Medical Report of the Plaintiff;
45. sealed copy of the Order dated 6th December 2007.
46. Up till the hearing of the Plaintiff’s *ex-parte* application before me, he was still awaiting the outcome of the service on the 1st and 2nd Defendants by the PRC judicial authorities. The Plaintiff was unsure whether the Amended Writ of Summons would be served in time before the expiry of the validity of the Amended Writ of Summons on 29th January 2008. The relevant limitation period would *prima facie* expire on 16th February 2008.

*IV. Law*

1. Order 6 rule 8(2) of RDC provides as follows :

“Where a writ has not been served on a defendant, *the Court may by order extend the validity of the writ* from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.” (my emphasis)

1. Pursuant to *Chow Ching Man & ors v Sun Wah Ornament Manufactory Ltd & ors* [1996] 2 HKC 460 recently affirmed by the Court of Appeal in *Grand Pacific Equity Ltd v RSH Sports (HK) Ltd & ors* [2006] 4 HKLRD 617, it was held that the discretion to be exercised pursuant to Order 6 rule 8(2) was not an unfettered one. A two-stage approach should be adopted. The first stage required the Plaintiff to establish matters capable of amounting to “good reason” for renewal. If and only if “good reason” was established, the court would move to the second stage and consider whether in the exercise of its discretion leave should be given to renew the writ of summons.

*V. First stage : good reason shown*

1. The headnote in *Chow Ching Man* summarised the principles on the need to show “good reason” :

“(3) Where the failure to serve a writ within its normal validity period was the result of a choice, then it was necessary to decide whether the choice had been made for a good reason, meaning one which supported a deliberate failure to comply with the time limit involved. And no discretion to extend the writ would arise unless the choice was made for a reason which was at least capable of amounting to a good reason ……

(4) Nothing short of a good reason was enough, however well-intentioned it may have been, when dealing with a deliberate decision not to comply with a highly important and already generous time limit. ……”

1. I fully agree with the editors of *Hong Kong Civil Procedure 2008* Vol.1 para.6/8/3 at p.68 that “[it] is the duty of the plaintiff to serve the writ of summons promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result, he will get scant sympathy”.
2. Unlike *Chow Ching Man*, this was not a case in which the Plaintiff or his solicitors chose to withhold or delay service. Since the issuance of the Writ of Summons, the Plaintiff took active steps to effect service. When service on all the local addresses failed largely because the Hong Kong solicitors and/or agents of the 1st and 2nd Defendants had no instructions to accept service, the Plaintiff applied for service out of jurisdiction within 2½ months of the issuance of the Writ of Summons.
3. Service on the 1st and 2nd Defendants out of jurisdiction pursuant to Order 11 rule 5A of RDC must *inter alia* meet the requirements as to certified Chinese translations of the writ and other documents to be served. Here, time was taken up in preparing Chinese translations of the Amended Writ of Summons and various court documents and in obtaining certification of those translations. In the meantime, the Check List Review hearing was adjourned several times to accommodate the time required for the aforesaid certified Chinese translations.
4. There were only 2 short periods of inaction, ie the period between 25th May 2007 (when the Plaintiff’s solicitors received Chinese translations from their translation agents) and 25th June 2007 (when such Chinese translations were lodged for certification), and the period between 20th September 2007 (when the Plaintiff’s solicitors collected the certified Chinese translations) and 26th October 2007 (when the Concurrent Writ of Summons was issued). The latter period could perhaps be explained by the need to adjourn the Check List Review hearing so that proper notice would be given.
5. As Bokhary JA (as he then was) said in *Chow Ching Man* at p.467, a perfect reason was not necessary. All that was required was a good reason. Here, notwithstanding the above, the tenor of the chronology of events did not give any impression of the Plaintiff sitting back and letting time go by. In my view, there was reasonable activity on the part of the Plaintiff in effecting service of the Amended Writ of Summons and other court documents.
6. There was, of course, a slight problem of having overlooked the need for leave of the court to serve the court documents apart from the Amended Writ of Summons. But when the Plaintiff’s solicitors realised such problem, they made a swift decision to proceed with service of the Amended Writ of Summons pending application to the court for leave to serve the other court documents out of jurisdiction.
7. In all the circumstances, I find there was no unreasonable delay in effecting service of the Amended Writ of Summons during the period of its validity. The Plaintiff had completed his steps in effecting service and is now awaiting the results from the PRC judicial authorities. I find that good reason was shown for extending the validity of the Amended Writ of Summons.

*VI. Second stage : discretion in favour of the Plaintiff*

1. Having found there was a good reason for the first stage, it is necessary to move to the second stage to consider whether the discretion should be exercised in favour of the Plaintiff.
2. There is no doubt that the 1st and 2nd Defendants were aware of the Accident. The masters of the 2 involved vessels as well as other personnel were interviewed by the Marine Department during its investigation of the Accident. The 2 masters were legally represented when they were convicted on their own plea in respect of various statutory offences in relation to the Accident. Correspondence between the Plaintiff’s and the 1st Defendant’s solicitors showed that the 1st Defendant must have been aware of the present proceedings. Likewise, the Amended Writ of Summons and other court documents were posted to the 2nd Defendant’s PRC address which was shown to be an address where it could receive mail (see previous reply by the 2nd Defendant’s compensation agent referred to in paragraph 5 above).
3. In the circumstances, the 1st and 2nd Defendants would have been aware of the circumstances of the Accident and the Plaintiff’s claim. It was submitted they should have been in a position to make their own investigations and look into the matter of their liability/defence to the claim. I also bear in mind the Plaintiff was a passenger and not involved in the navigation of the vessels that were involved in the collision. I also note the investigation report by the Marine Department and the convictions against the 2 masters lend some weight to the Plaintiff’s contention that it had an arguable claim. I hasten to make clear that I do not form (and there is no need for me to form) any definitive view on the merits. Also it did not appear from the materials before the court that there would be any specific prejudice or detriment to the 1st and 2nd Defendants in conducting their defence. On the other hand, if the Amended Writ of Summons were not renewed and service of the same on the 1st and 2nd Defendants (which after 30th November 2007 was outside the Plaintiff’s control) could not be effected before 29th January 2008, the Plaintiff would by 16th February 2008 lose his right to sue the 1st and 2nd Defendants.
4. Taking into account all of the above circumstances, the efforts of the Plaintiff in effecting service of the Amended Writ of Summons out of jurisdiction and balancing the hardship between the parties, I consider it just and appropriate to exercise the discretion in favour of the Plaintiff to renew the Amended Writ of Summons.

*VII. Order for renewal*

1. The Plaintiff asked for extension of the validity of the Amended Writ of Summons for 6 months. The burden was on the Plaintiff to show that such period of extension was justified for the court would not allow an extension for any longer period than was shown to be justified. Here, the Plaintiff had done all steps on his part for effecting service and was awaiting the results of the service arrangement by the PRC judicial authorities. However, it was unclear when a response would be received. Bearing in mind that the Amended Writ of Summons and the relevant court documents were received by the High Court Registry on 30th November 2007 and 9th January 2008 respectively, and there had been no response to date, I find the suggested period of 6 months reasonable.
2. In the circumstances, I granted the orders as set out in paragraph 2 above at the hearing yesterday.

# (Marlene Ng)

District Court Judge

Representation:

Mr Steven Lau instructed by Messrs Huen & Partners for the Plaintiff