## DCPI 631/2012

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 631 OF 2012

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BETWEEN

MA YONG MEI Plaintiff

and

CHENG MUK LAM Defendant

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Before: HH Judge Levy in Chambers

Date of Hearing and Decision: 28 October 2014

Date of Handing Down of Reasons for Decision: 4 November 2014

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REASONS FOR DECISION

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*A. The Application*

1. The plaintiff, Ms Ma, in this action claims against the defendant, for damages for an injury to her right eye she allegedly sustained while she was playing water volleyball with her friends and the defendant in a resort in Kota Kinabalu in Malaysia in April 2009.

2. Ms Ma engaged solicitors to commence this action in March 2012 and was represented throughout until 14 October 2014 when a “Notice of Intention to Act in Person” (which should have been a “Notice to Act”) was filed. On the same day, Ms Ma also took out a summons (“**the Summons**”) to adjourn the trial of this action which had been fixed to commence on 17 November 2014 in the fixture list with 5 days reserved by the order of a master on 18 June 2014 (“**June 2014 Order**”).

3. The Summons was in English but Ms Ma’s supporting affirmation (“**the Affirmation**”) was handwritten in Chinese. At the hearing, Ms Ma was still unrepresented while the defendant was represented by Mr Tam. As Ms Ma opted to speak in Cantonese and Mr Tam was also conversant in Cantonese, I directed the hearing to be conducted in Cantonese.

4. The Summons was opposed. At the conclusion of the hearing, I dismissed the Summons. Here are the reasons for my decision for the dismissal. Notwithstanding the hearing having been conducted in Cantonese, I am disinclined to give my reasons in Chinese as all the filed documents were in English. An interpreter will be arranged to interpret this Reasons for Decision to Ms Ma in Cantonese at the time of the handing down of this Reasons for Decision.

*B. Reasons for adjourning the trial*

5. The reasons for vacating the trial dates, according to the Affirmation, which reasons were further elaborated at the hearing, were mainly due to the following alleged medical complaints which Ms Ma said that she has been suffering from:

1. Depression

It was averred that since the date of accident, she has been suffering from depression.

1. Traction Bronchiectasis (支氣管擴張)

Ms Ma complained that since 2013 she has been suffering from this symptom and coughing a lot, and that the doctor had told her that she might be suffering from lung cancer.

1. Menopause

Ms Ma said she was suffering from menopausal symptoms to the extent that she had poor sleep as well as urinary incontinence. She further said at the hearing that she had a tumor in her uterus.

1. Mental disturbance due to the recent “Occupy Central” movement in Hong Kong

Ms Ma submitted that due to the recent demonstrations and the occupation of the streets in Hong Kong, she had been suffering mentally and physically.

6. As a result of the above alleged health problems; Ms Ma said that she had accepted her sister’s advice to leave Hong Kong for the USA to seek medical treatment. She had therefore bought a ticket for that purpose and could not attend the trial in November.

*C. Defendant’s objection*

7. At the hearing, Mr Tam vigorously opposed an adjournment on the grounds that the application was not only made late but that the reasons given were tenuous.

8. The alleged medical complaints, Mr Tam contended, were supported by very little medical evidence. In relation to the alleged depression, Mr Tam submitted that throughout the proceedings, Ms Ma’s former solicitors had in fact agreed that no psychiatric assessment was required and thus no such reports or evidence had been adduced in support of Ms Ma’s claim for the various heads of damages.

9. As for the bronchiectasis Ms Ma allegedly had been suffering from, Mr Tam referred to “Exh 1” to the Affirmation, which consisted of copies of four treatment cards in one single copy of paper issued by the South Kwai Chung Chest and Lung Clinic; and a report on the adrenal gland and a CT Scan report of the thorax both of which were dated 10 October 2013 from a Dr Simon Wong of Central Medical Diagnostic Centre addressed to Yan Chai Hospital. Mr Tam suggested that the said treatment card records did not show that Ms Ma was not fit to attend trial. Neither had the reports from Dr Simon Wong helped Ms Ma when the reports were already one year old (October 2013). It was therefore argued that had Ms Ma’s medical complaints been genuine, her former solicitors would not have signed the consent summons of 10 June 2014 to apply for leave to set this action down for trial, and subsequently filed on 23 July 2014 an “Application to Set a Case Down for Trial” as well as a “Notice to Setting Down”.

10. In respect of the alleged symptoms brought about by menopause and the recent “ Occupy Central ” demonstrations, Mr Tam argued that there was absolutely nothing showing that Ms Ma was not medically fit to attend trial, and *a fortiori*, the alleged need for leaving Hong Kong for the USA to allegedly seek medical treatment.

11. In support of his objection, Mr Tam further submitted that the trial dates are mile-stone dates within the context of Practice Direction 5.2, which are mandated to be immovable save in the most exceptional circumstances (Practice Direction 5.2, §42; *Sidepec International Limited v Cheung Hing,* HCA829/2010 (unrep) (24 July 2013) at §§11 & 12). These reasons for vacating the trial, Mr Tam contended, did not show any exceptional circumstances.

*D. The Relevant Principles*

12. Under O.25 r.3, Rules of the District Court, the court will not grant an application by a party to vary a ‘milestone date’ which includes a trial date unless there are exceptional circumstances. Practice Direction 5.2 at § 42 emphasizes that milestone dates are immovable save in the most exceptional circumstances (*Arko Ship Leasing Ltd v Winsmart International Shipping Ltd* [2013] 2 HKLRD 121 at § 13, cited in *Sidepec*).

13. In view of the fact that the reasons Ms Ma had provided for applying to vacate the trial dates are medical ones, I’d be inclined to echo what the Court of Appeal has stated in *Lam Yin Pok Bosco v Dr Chan Yee Shing & Anor,* HCMP 2256/2012 (unrep) (2 November 2012) (cited in *Sidepec*) as follows:

“9. In the ordinary course of events, milestone dates such as the dates fixed for the trial of an action must, on occasion, yield to the vicissitudes of life. The illness of a party or a necessary and important witness may, depending on the circumstances of the case, justify vacating and re-fixing the trial dates. This is simply a manifestation of the principle recognised in *Dick v Piller* [1943] 1 KB 497, the headnote of which reads:

“When a witness in, or a fortiori a party to, an action in a county court is alleged to be prevented by illness from attending the court for a hearing of the case and the judge is satisfied of the fact of his illness and of the materiality and importance of his evidence and that the granting of an adjournment will not cause an injustice to the other party which cannot be reduced by costs, it is the duty of the judge to grant an adjournment, it may be on terms, and failure on his part to do so constitutes a miscarriage of justice which necessarily involves an error of law on which an appeal may be founded.”

10. By way of example of the operation of the principle: see, as regards a material witness of fact, *Fairwing Investment Limited v China and Canton (Properties) Company Limited & Anor*, unrep., HCA 2137/2004, 16 June 2009; as regards an expert witness, *Joyce & Anor v King*, unrep., Times Law Reports, 13 July 1987; and, as regards a litigant, *Teinaz v Wandsworth London Borough Council* [2002] ICR 1471.

11. However, in order for an adjournment to be granted on this basis, the court is entitled to be satisfied that the inability of the litigant to be present is genuine and the onus is on the applicant for an adjournment to prove the need for such an adjournment: *Teinaz v Wandsworth London Borough Council* at §21.”

(Per Hon Fok JA (as he then was).

14. In this application, the Summons to adjourn the date fixed for trial was made just less than 4 weeks before the trial, and on the date of the hearing of the Summons, there were only about two weeks to go. Thus, not only was the Summons an application to vary a milestone date, it was also a very late application. Ms Ma would therefore be required, according to the principles discussed above, to show not only exceptional circumstances, but also - given the lateness of the application, and the grounds Ms Ma relied on being medical ones - to satisfy me that her alleged medical complaints must be genuine and an adjournment would have been needed before discretion could be exercised in her favour.

*E. Analysis*

15. When a medical disability is being relied on as a ground of adjournment, I think it is of vital importance for the court – apart from taking into account all relevant circumstances including matters such as the nature of the claim and the antecedents of the litigation - to examine the medical evidence the applying party has adduced for the purpose of considering the genuineness of the complaints; and if they were found to be genuine, their nature and the seriousness of the conditions.

16. The medical evidence Ms Ma relied on in this application consisted of two exhibits- “Exh 1” and “Exh 2”. “Exh 1”, as previously discussed § 9 above, did not, in my view, support Ms Ma’s complaints of suspected lung cancer. Neither did it show that she was suffering from a condition rendering her unfit to attend the trial. The attendance cards from South Kwai Chung Chest and Lung Clinic showed that the last and the next appointment dates were respectively 14 July 2014 and 14 January 2015. There was, however, no evidence as to her condition. Further, the trial dates would not be clashing with the date of the next appointment which had been scheduled to take place on 14 January 2015. Thus, I could not be satisfied that the treatments from the government clinic would prevent her from attending the forthcoming trial.

17. As regards the reports from the Diagnostic Centre, I was in respectful agreement with Mr Tam that they did not support Ms Ma’s complaints. The reports had been prepared about a year ago, and further they did not reveal any conditions Ms Ma was alleging to have been suffering from. The findings according to the reports were negative and within normal limits.

18. As a result, Ms Ma, according to my analysis of the evidence as disclosed in “Exh 1”, failed to satisfy me that she had been suffering from a debilitating condition relating to any chest/lung problems that would have prevented her from attending the trial.

19. “Exh 2”, which was a record in Chinese dated 9 October 2014 issued by a registered Chinese medicine practitioner of “香港佛教聯同會–香港大學中醫臨床教研中心”. The diagnosis was stated to be “絕經前後諸病”, which I understood to be relating to pre-menopausal symptoms. Apart from the said stated diagnosis , the said document also failed to specify the symptoms such as urinary incontinence, poor sleep or uterine tumor Ms Ma alleged she had been suffering from the alleged pre-menopausal condition. In the circumstances, I could not be satisfied that Ms Ma had been suffering from a pre-menopausal condition of such a nature that would have the effect of affecting her ability to attend trial.

20. Apart from the said exhibits, there was no other medical evidence to support Ms Ma’s complaints of her various ailments. I noted that her complaint of depression, being one of the major medical complaints, was not supported by any medical evidence. It is significant perhaps to observe, as Mr Tam also pointed out, that Ms Ma’s former solicitors had agreed that no psychiatric evidence was to be adduced for the damages Ms Ma was claiming in this action. I was not persuaded that Ms Ma’s mental condition was of such a nature that it would disable her from attending the forthcoming trial.

21. Ms Ma’s complaint of the worsening of her mental condition caused by the recent so-called “Occupy Central” movement – in the light of the matters I discussed in the preceding paragraph – was, in my view, one that she had conveniently trumped up to perhaps to bolster the said complaint, which she knew full well that she had not been able to find any convincing evidence for.

22. Neither did the last exhibit, “Exh 3” to the Affirmation, help Ms Ma’s application. “Exh 3” was a faxed record of Ms Ma’s flight booking confirmation bearing a fax date of 18 August 2014. According to the itinerary shown in the booking confirmation, Ms Ma was to depart from Hong Kong for Los Angeles on 30 October 2014, returning to Hong Kong on 21 January 2015. Quite apart from the fact that I had not found the said booking record helpful to the application, I in fact took the view that the said information revealed therein had the effect of undermining the application because:

(a1) First, Ms Ma, according to the date (18 August 2014) of the flight booking confirmation, would have likely made the travel booking after the trial dates had been fixed by the June 2014 Order. It therefore begged an explanation as to why Ms Ma had chosen the said travel dates to clash with the trial period.

(a2) At the hearing, Ms Ma had indeed attempted to offer a reason. It was submitted that her former solicitors only informed her of the trial dates after the said booking had been made.

(a3) I was not impressed by this empty allegation. Were the allegation true, Ms Ma would have either (as one would have reasonably been expected to have done) instructed her former solicitors to make or made the application in person (as she had subsequently chosen to do so since 14 October 2014) to vacate the trial date at once (around August 2014). No explanation had been provided as to why the Summons was only issued some two months after the said booking had been made.

(b1) Secondly, I was unable to accept Ms Ma’s given reason for having chosen to leave Hong Kong for the alleged purpose during the trial period. As Mr Tam correctly suggested, Ms Ma had failed to specify the kind of treatment she wanted to receive in the USA, let alone having fixed any medical consultation. I found that Ms Ma’s explanation at the hearing that she would only decide on the type of medical treatment to be received when she got to the USA rang hollow.

(b2) It was, in my view, rather contradictory for Ms Ma to ask the court to vacate the trial dates in order that she could seek the right medical treatment for the host of her alleged medical ailments, when the return date to Hong Kong (21 January 2015) that she had chosen would clearly have prevented her from attending the appointment at the government chest/lung clinic, which was scheduled for 14 January 2015.

(b3) In the circumstances, I was inclined to the view that the reasons Ms Ma put forward in vacating the trial dates were not genuine, and I was not satisfied that there were exceptional circumstances for acceding to her application.

23. For these reasons, the Summons was dismissed.

*F. Costs*

24. Since Ms Ma had failed in her application, I did not see any reason why costs should not follow the event, and I thus awarded costs to the defendant at the conclusion of the hearing with costs to be assessed summarily. Mr Tam submitted a costs statement in the sum of $12,000. Having had regard to the nature of the application, I was of the view that the amount claimed was excessive. I had disallowed the one-hour Mr Tam claimed for doing legal research, and only allowed his claim for 30 minutes, 1 hour, 15 minutes and 1 hour respectively claimed for perusal of papers, preparation for the hearing, taking instructions from client and attending the hearing, which were all claimed at the hourly rate of $2,000. The total amount I allowed was $5,500, and Ms Ma was given 14 days to pay the said amount of the assessed costs.

*G. Further Case Management Directions for Trial*

25. Since Ms Ma would likely be attending the trial unrepresented, I considered it necessary to hold a Pre-trial Review (“PTR”) before the trial, and to give further case management directions to facilitate the conduct of the forthcoming trial. In order to enable Ms Ma to follow the following case management directions that I gave at the end of the hearing, Chinese copies of the relevant passages of the Practice Direction 18.1 and the “E-submission Platform – Quick User Guide” had also been provided to her.

1. The parties are to attend a PTR on 4 November 2014, 2:30 pm with ½ hour reserved.
2. §§128 (lodging of Appendix G) to 135 (lodging of the PTR bundle) of Practice Direction 18.1 are to be followed. The stipulated period of 7 days specified in §§128 and 129 is to be abridged and substituted by 31 October 2014.
3. The defendant’s solicitors (instead of the plaintiff) are to be responsible for the preparation of the PTR bundle, and to follow §§ 165 to 181 of Practice Direction 18.1. If there are any documents that the defendant’s solicitors take the view that the plaintiff cannot or is not in a position to agree to, they should be filed in a separate bundle and so marked clearly.
4. The parties at the PTR are required to confirm whether the time estimates previously given still hold good and further to confirm the matters stated in §§141 (giving of time estimates) and 142 (any change of circumstances that may impact on the time estimates) of Practice Direction 18.1.
5. The parties are required to deal with the direction on E-submission in §3(b) of the June 2014 Order.
6. If any of the English documents need to be translated into Chinese, the plaintiff should inform the defendant’s solicitors by 30 October 2014 and specify the document(s) that require Chinese translation, failing which, it is deemed that no translation is required.
7. This order is to be drawn up by the defendant’s solicitors in Chinese within 2 days.

(Katina Levy)

District Judge

The plaintiff appeared in person

Mr Tam Wai-kay Wilson of Kennedys, for the defendant