DCPI 759/10

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION DCPI 759 of 2010

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BETWEEN

HEUNG KWUN HUNG Plaintiff

And

SO WAI TIM 1st Defendant

HONG KONG & CHINA

TRANSPORTATION CONSULTANTS

LIMITED 2nd Defendant

(Discontinued)

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Coram: Before Master J Chow (Open to Public)

Date of Hearing: 13th June 2011

Date of Handing Down Decision: 20th July 2011

DECISION

Introduction

1. The 1st Defendant applies for specific discovery that the Plaintiff do file an affidavit stating whether the documents specified in the schedule[[1]](#footnote-1) to the summons or have at any time been, in his possession, custody or power, and if not been in his possession, custody or power when he parted with them and what has become of them (“the Schedule”). The Plaintiff resisted the summons.
2. The 1st Defendant’s application was premised on Order 24 rule 7 of the Rules of District Court,

“Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and, if not then in his possession, custody or power, when he parted with it and what has become of it.”

Order 24 rule 8, gave power to the Court if,

“On the hearing of an application for an order under rule 3 or rule 7, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

Background

1. The personal injury claim arose from a traffic accident occurred around midnight on 1st June 2007. Both the Plaintiff and the 1st Defendant were driving, respectively, a private car bearing registration number KZ 730 (“the Private Car”) and a public light bus bearing registration number LB 1256 (‘the PLB”) along the 1st lane, southbound of Nathan Road. The Plaintiff was followed by the 1st Defendant. On reaching the junction of Nathan Road and Pitt Street, the Plaintiff turned left and then stopped to give way to three pedestrians who were about to walk across Pitt Street. The 1st Defendant was unable to stop in time, the nearside front of the PLB collided with the rear of the Private Car (“the Subject Accident”). The Plaintiff sustained neck and back injuries.
2. The Plaintiff’s solicitors filed a Statement of Claim and Statement of Damages on 28th Feb 2011; the 1st Defendant’s solicitors filed an acknowledgement of service on 4th March 2011. The 1st Defendant took out a summons for the present application on 4th April 2011 before filing the Defence.

The 1st Defendant’s Application

1. Ms Chan, solicitors for the 1st Defendant, submitted she was in need of the documents in the Schedule to formulate the 1st Defendant’s defence, which has been crystallized as: (i) fraud and (ii) malingering acts on the part of the Plaintiff.
2. To understand why the 1st Defendant framed the issues with fraud and/or allegation of malingering acts in this personal injuries claim, Ms. Chan has taken me through the background of the Plaintiff’s conduct in two other similar traffic accidents occurred in the same year.

*Accident happened on 12th Jan 2007(“the 1st Accident”):*

1. The Plaintiff was injured in a rear end traffic accident. He was driving a motorcycle making a turn at the junction of Yum Chau Street and Fuk Wing Street. While he stopped to give way to pedestrians crossing the road ahead of him, the following vehicle could not stop in time and collided with the Plaintiff’s motorcycle.
2. The Plaintiff commenced a personal injury claim, DCPI 946 of 2008 to claim damages against the driver of the following vehicle. The claim was eventually settled.
3. In that, the Plaintiff’s pleaded case DCPI 946 of 2008 and the present action were not in line with each other, more particularly, monthly income and resumption of previous job.

*Accident happened on 1st June 2007 (The Subject Accident*)

1. The facts were similar facts with DCPI 946 of 2008.

*Accident happened on 15th July 2007(“the 3rd Accident”)*

1. The 1st Defendant became aware of the 3rd Accident in a medical report prepared by Dr. Wong Shu Kai dated 16th December 2010[[2]](#footnote-2), other particulars of this accident were not disclosed.
2. Ms Chan submitted the Plaintiff’s acts were suspicious. The facts of the 1st and the Subject Accident were similar. She alleged the Plaintiff was bringing false claims for damages against the 1st Defendant. She was eager to obtain information on the 3rd Accident, which happened few months after the Subject Accident.
3. Ms Chan further submitted, the Schedule identified those usual documents that the Plaintiff must have obtained in a traffic accident, she believed the documents existed and the Plaintiff should have access to them. Discovery before defence is also a costs saving exercise when future amendment can be prevented.

The Plaintiff’s Objection

*Timing of the Application*

1. Ms Yang, counsel for the Plaintiff, submitted it was procedurally wrong to allow discovery for the Defendant before defence, it is more particularly so when the Defendant has made clear that information obtained was vital for them to plead their defence.
2. An authority on point is Wong Hon Wai v. The Secretary of Justice (HCPI 664 of 2009, unreported, 24th June 2011), Master Marlene Ng decided “such order should not normally be made and the practice is to refuse discovery before close of pleadings save in exceptional circumstances”[[3]](#footnote-3). Ms Yang said, the 1st Defendant’s application fall outside the ambit of the category of exceptional circumstances.

*Fishing Request*

1. It follows the 1st Defendant is attempting a fishing request as discussed in Wong Hon Wai.

“This is no doubt that discovery will not be ordered for the purpose of “fishing” or to enable a party to turn a non issue into an issue (See HKFE Clearing Corp Ltd. v. Yicko Futures Ltd [2006] 2 HKC 233). In Re the Estate of Ng Chan Wah, Chu J stated that “[it] is not sufficient for the plaintiffs to say that because there is on the pleading allegation of improper conduct against the defendants as executors, they are entitled to test the basis of the estate accounts generally or to check the accuracy of the items presented in the estate accounts, irrespective of whether they are in issue. It is not the purpose of discovery to give the plaintiffs an opportunity to hunt around documents in the hope that they will reveal some improprieties on the defendants’ part or will provide information for them to pursue more enquires.”

1. The HKFE Clearing Corp Ltd. case, Yuen JA enunciated the same principle,

“What a company is seeking is discovery of materials to see if it might be able to turn a non-issue into an issue. That is not permitted under the principles of discovery, and **especially not when the purpose is to see if an allegation of fraud can be made**. **It is well established that a party should not be allowed to plead a vague case and unparticularised case of fraud in the hope of making it good after discovery.”**

*The Class of Documents: Police Documents, Sick Leave Certificates & All Documents relating to claim arising from the 3rd Accident.*

1. Ms Yang said the documents referred to in the Schedule bear no relevance in formulating the 1st Defendant’s defence.

Analysis

1. The issues to be decided are (i) whether the 1st Defendant’s reasons justifies an exceptional circumstance to grant discovery before filing defence; (ii) if so, whether the documents in the Schedule are of relevance.
2. When the 1st Defendant sets out a prima facie case, the burden shifts to the Plaintiff to prove why discovery either by list or by affidavit is unnecessary.
3. The Plaintiff’s case did not disclose relevant medical evidence: in the Plaintiff’s Statement of Damages, he pleaded he had obtained sick leave from June to August 2007. In other words, the 3rd Accident occurred during the sick leave period of the Subject Accident. In fact, sick leave was further granted until 7th October 2007. But surprisingly, he did not plead the extension of the sick leave period therein.
4. The Plaintiff failed to disclose his past illness and/or the alleged injuries sustained in the Subject Accident and the 3rd Accident to
5. the physiotherapist of Prince of Wales Hospital on 28th June 2007 with regard to the Subject Accident that he has medical history from the 1st Accident. The medical notes revealed “NIL” under this head.
6. Dr. Fu Wai Kee, the orthopaedic expert of the 1st Accident. Nothing was mentioned in his expert report dated 31st May 2011 with regard to both the Subject Accident and the 3rd Accident. Dr. Fu was driven to the conclusion that the upper limb weakness, numbness and soft tissue injury was a result of the 1st Accident and concluded the Plaintiff has reached maximum medical improvement.
7. The previous personal injuries claim about his loss of earnings was inconsistent with present action. On the one hand, in DCPI 946 of 2008 he has resumed work as a clerk of 銀振工程公司 from June 2007 at $8,900 per month; for the same overlapping period, he claimed loss of 3 months’ earnings in the present action from 5th June 2007 to 6th September 2007 at $8,000 per month for the same period.
8. Having encountered the 3rd Accident, surprisingly, the Plaintiff did not plead the Subject and 3rd Accident in his Revised Statement of Damages in DCPI 946 of 2008.
9. Albeit the Plaintiff’s driving manner and the occurrence of three accidents may justify some scrutiny, it is nevertheless too far-fetch and premature to conclude the Plaintiff is a malingerer.
10. I am satisfied that the 1st Defendant is able to put up a prima facie case, the 1st Defendant is entitled to discovery of documents to formulate his defence to the extent of damages claimed by the Plaintiff. This falls into an exceptional circumstance.

*What documents are of relevance?*

1. The scope should be limited to the documents indicating the Plaintiff’s injuries in the 3rd Accident.
2. *Documents relating to the 3rd Accident (paras (a) to (d) of the Schedule)*
3. Those documents concerned the occurrence of the 3rd Accident. I agree with Ms Yang that they are not relevant for the 1st Defendant to formulate the defence. As I have said, at this stage, the 1st Defendant has pitched his case too high to allege fraud on the part of the Plaintiff by comparing the occurrence of the three accidents. The 1st and 2nd Defendants could have relied on the facts of the 1st Accident and the Subject Accident.
4. I refuse to grant leave for discovery under this head.
5. *Sick leave certificates & medical reports/notes (paras (e) & (f) of the Schedule)*
6. The sick leave period of both the Subject Accident and the 3rd Accident overlapped. I agree they are relevant and necessary for the 1st Defendant to quantify the damages claimed.
7. The Plaintiff seek medical treatments from different institutions in the three accidents, the 1st Defendant should be given an opportunity to peruse the diagnosis of the Plaintiff.
8. I grant leave for discovery under this head.
9. *Documents setting out claims arising from the 3rd Accident (para (g) of the Schedule)*
10. With regard to the documents of other claims, I find the scope is excessively wide and unparticularised. I agree with Ms Yang, on this part, would benefit the 1st Defendant to plead his defence with a hope that something might turn up to substantiate his assertions.
11. I refuse to grant leave for discovery under this head.

Conclusion

1. I allow discovery as those stated in para 1 of the Summons for those documents specified in para (e) and para (f) of the Schedule only.
2. For reason that the discovery is allowed in part, I invite parties to make costs submissions at the forthcoming Checklist Review Hearing, which is now fixed on 30th September 2011 at 2:30 pm in Court 46. I will determine costs by way of summary assessment. Both parties are directed to file their written submissions together with statements on costs at least 7 days prior to the Checklist Review Hearing.
3. Filing of the questionnaires by both parties be dispensed with and I shall rely on the questionnaires filed for the hearing on 13th June 2011.

(J Chow)

District Court Master

Representation:

Ms Elizabeth Yang, instructed by Messrs. Au Yeung Cheng Ho & Tin for the Plaintiff

Ms Anita Chan of Messrs. YT Chan & Co. for the 1st Defendant

1. Schedule

   In respect of the traffic accident on 15th July 2007 in which the Plaintiff was injured:-

   The statements made by the Plaintiff to the Police;

   The statements made by other witnesses to the Police including the statements made by the investigating police officer;

   The sketch plan of the scene of the accident;

   The photographs of the scene of the accident;

   All sick leave certificates issued to the Plaintiff;

   The medical reports and medical notes in relation to the consultation for medical treatments for neck and back pain or discomfort from 15th July 2007 up to date;

   The documents setting out the particulars of the claim or quantification of damages in relation to the claim for damages including but not limited to the pre action demand letter, without prejudice negotiation of settlement and court documents. [↑](#footnote-ref-1)
2. This medical report was disclosed by the Plaintiff to the 1st Defendant on 25th Jan 2011. [↑](#footnote-ref-2)
3. See Para 25 of the Judgment. [↑](#footnote-ref-3)