# DCPI 1134/2019

[2021] HKDC 1127

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1134 OF 2019

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BETWEEN

LO KING HUNG Plaintiff

and

ETERNAL RICHEST LIMITED Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 17 August 2021

Date of Decision: 17 August 2021

Date of handing down Reasons for Decision: 3 September 2021

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REASONS FOR DECISION

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1. This is a summons taken out by the plaintiff for an “unless order” under Order 3 rule 5, Order 24 rule 16 and Order 42 rule 2 of the Rules of the District Court, Cap 336H (“RDC”) in the context of a personal injuries (“PI”) action.
2. At the end of the hearing on 17 August 2021, I made the following orders:

“1. Unless by 4:00 p.m. on 24th August 2021 the Defendant do comply with paragraphs 1 and 2 of the Order made by Master Matthew Leung dated 4th January 2021, the Defence filed by the Defendant dated 6th May 2019 be struck out and judgment on liability be entered for the Plaintiff with costs;

2. Time be extended for the Plaintiff to comply with paragraph 6 of the Order of Master Matthew Leung dated 4th May 2021 to file and serve the Application to set a case down for trial within 7 days from paragraph 1 hereinabove;

1. The costs of the Plaintiff’s Summons dated 19th July 2021 and this application to be paid by the Defendant to the Plaintiff on an indemnity basis to be summarily assessed by the Court and to be paid forthwith. The Plaintiff is directed to submit a statement of costs within 7 days and the Defendant to lodge with the Court a list of objections, if any, within 7 days thereafter;
2. All costs wasted as a result of the inactions and the non-compliances of the Plaintiff’s requests and/or court’s orders on the part of the Defendant between November 2019 and July 2021 be borne by the Defendant;
3. The Defendant’s solicitors do show cause within 21 days after the handing down of the Reasons for Decision in this case as to why they should not personally bear those wasted costs and on an indemnity basis;
4. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations; and
5. Liberty to apply.”
6. I said I would give the reasons for my decision in due course. Here are my reasons.

*Background*

1. This is a straightforward PI action arising out of an accident at work. The accident happened on 24 September 2016 when the plaintiff was employed by the defendant as a carpenter, working at its warehouse in Kam Sheung Road, New Territories. The defendant is a limited company registered in Hong Kong carrying on the business of advertisement production. The accident happened when the plaintiff was in the process of helping some of his colleagues to transport a few pieces of wooden planks on a trolley when the trolley suddenly turned over causing the wooden planks to fall onto the plaintiff’s leg. As a result, he sustained serious injuries to his left leg (“the Accident”).
2. By a summons dated 19 July 2021, the plaintiff seeks the following:-

“(1) Unless by 4:00 p.m. on 24th August 2021, the Defendant complies paragraphs 1 or 2 of the Order made by Master Matthew Leung dated 4th January 2021, the Defence filed by the Defendant dated 6th May 2019 be struck out and judgment on liability be entered for the Plaintiff with costs;

(2) Time be extended for the Plaintiff to comply with paragraph 6 of the Order made by Master Matthew Leung dated 4th May 2021 to file and serve the Application to set a case down for trial within 7 days from the paragraph 1 above;

(3) Costs of this application be to the Plaintiff in any event to be taxed if not agreed; and

(4) The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.”

*History of the proceedings*

1. There have been some extraordinary delays caused by the inaction of the defendant in this case as the history set out below will show.
2. The writ of summons (“the writ”) of this case was issued on behalf of the plaintiff on 27 March 2019. On the same day, the statement of claim and the statement of damages were filed and served.
3. On 3 April 2019, the defendant’s solicitors filed an acknowledgment of service on behalf of the defendant.
4. On 6 May 2019, the defendant filed the defence where, *inter alia,* allegations of contributory negligence have been made against the plaintiff.
5. On 9 May 2019, the plaintiff filed his reply where specific averments of facts regarding how the Accident happened have been raised.
6. The plaintiff filed his list of documents on 19 June 2019 while the defendant filed its on 28 August 2019, with a supplementary list filed on the next day, ie on 29 August 2019.
7. In accordance with the standard practice under Practice Direction 18.1, the first checklist review (“the 1st CLR”) hearing was scheduled to take place on 2 September 2019, which was set at a date between 5 and 6 months after the issue of the writ.
8. As of usual in such cases, on 30 August 2019, the parties filed a consent summons (“the Consent Summons”) which contained some agreed case management directions for the court’s approval. In the meantime, they asked the court to adjourn the 1st CLR hearing.
9. Among other things, in the Consent Summons, the parties agreed that the plaintiff shall make specific discovery on certain documents in relation to his income prior to the Accident. It also included an agreement made by the parties that they would, by 26 October 2019, serve and exchange the witness statements as to facts in this case.
10. The Consent Summons was subsequently made into an order of the court by Master Peony Wong on 30 August 2019 (“Master Peony Wong’s Order”). The dates contained in Master Peony Wong’s Order to take various steps in the case were principally based on the dates which had been agreed by the parties in the Consent Summons.
11. On 24 October 2019, the plaintiff filed his supplementary list of documents, enclosing the documents which the defendant had sought specific discovery upon under the Consent Summons. The plaintiff also filed an affirmation to comply with §2 of Master Peony Wong’s Order.
12. The plaintiff then filed the revised statement of damages (“RSD”) on 8 November 2019, again, pursuant to Master Peony Wong’s Order.
13. The plaintiff made further discovery of documents in relation to his income by way of 2nd supplementary list of documents and 3rd supplementary list of documents respectively on 8 November 2019 and 13 March 2020.

*The plaintiff’s “unless order” summons dated 12 August 2020*

1. Apparently after Master Peony Wong’s Order was made, the defendant had not done anything that it was supposed to do under the Order. This included filing and serving its witness statement; filing and serving an answer to the RSD; and agreeing to the contents of the draft trial bundle index. As a result, the plaintiff issued a summons under Order 1B rule 1(3) of the RDC on 12 August 2020 (“the 1st “unless order” summons”) asking the defendant to comply with those directions.
2. In the affidavit filed by the plaintiff’s solicitors (who was assigned by the Director of Legal Aid) in support of the application, the following facts have been revealed.
3. In relation to the filing and exchange of the witness statements, the parties agreed in the Consent Summons that they would file and exchange the witness statements by 26 October 2019. Since 7 November 2019, the plaintiff had written a total of 5 separate letters to the defendant’s solicitors, informing them that the plaintiff’s witness statement was ready for exchange and they were just waiting for the defendant to confirm with them the date/time when they were able to do so.
4. Those 5 letters were written over a period of 7 months from November 2019 to June 2020, viz. 7 November 2019, 13 November 2019, 17 February 2020, 3 April 2020 and 3 June 2020.
5. Sadly, the plaintiff did not receive one single reply from the defendant’s solicitors. There was not even the courtesy from the defendant’s solicitors of sending a simple letter to acknowledge that they had received any of those 5 letters.
6. In respect of the directions directing the parties to agree on the contents of trial bundles and to submit an agreed trial bundle index or indices initialed by the solicitors of the parties to the court for record purposes, Master Peony Wong’s Order directed that the parties to do so by 30 December 2019, a date which had been agreed by the parties themselves under the Consent Summons.
7. On 9 April 2020, the plaintiff’s solicitors had sent a draft trial bundle index to the defendant’s solicitors for their comment. Again, the plaintiff’s solicitors received no reply whatsoever from the defendant’s solicitors.
8. In short, all their letters asking the defendant’s solicitors to comply with the court order were simply ignored by the defendant.

*The necessity of issuing peremptory orders*

1. On 14 July 2020, the plaintiff’s solicitors reported the matter of the defendant’s non-compliance of Master Peony Wong’s Order to another PI Master. On 22 July 2020, the court directed, among other things, that the plaintiff may consider taking out a summons to force the defendant to respond to the case management directions. Hence, the plaintiff took out the 1st “unless order” summons.
2. It was only upon the issue of the 1st “unless order” summons that the defendant had, on 20 August 2020, finally filed the answer to the RSD. I note that this was done more than 8 months after it was supposed to have been filed by the defendant on 2 December 2019 as directed by the Court. Unsurprisingly, it was again done without as much of an apology or an explanation to the court or to the plaintiff from the defendant.
3. In any event, on 20 August 2020, Master Matthew Leung, the PI Master, gave an order (“Master Matthew Leung’s Order”) that, unless the defendant do file and exchange its witness statement as to fact by 4 pm on 11 September 2020, it shall be debarred from calling any witness on facts and quantum at the trial of this action. Further, §3 of Master Matthew Leung’s Order specified that unless the defendant comments on the draft trial bundle index containing in the plaintiff’s solicitors’ letter dated 9 April 2020 on or before 11 September 2020, the defendant shall be deemed to agree with the said draft index to trial bundle.
4. It comes as no surprise perhaps in the context of this case that the defendant’s solicitors had again failed to comply with those orders of the court. It necessitated the issue of another “unless order” summons by the plaintiff before Master Matthew Leung on 22 April 2021 (“the 2nd “unless order” summons”). On this occasion the plaintiff asked, *inter alia*, the defendant to provide comments in writing on the draft agreed trial bundle index within 7 days of the order to be made. In the supporting affidavit filed by the plaintiff’s solicitors, it was revealed that the defendant’s solicitors had failed to comply with Master Matthew Leung’s Order. In respect of the specific discovery which the master ordered the defendant to provide to the plaintiff on or before 22 February 2021, the defendant’s solicitors not only had failed to provide such documents, they had also failed to respond to the 2 reminder letters sent to them by the plaintiff’s solicitors respectively on 3 March 2021 and 17 March 2021.
5. As had happened since day one of this case, the defendant’s solicitors chose to completely ignore the letters from the plaintiff’s solicitors and did not bother to make any reply to them at all.
6. In relation to the mediation response which the defendant was directed to file and serve on or before 18 January 2021 under §3 of the Order of Master Matthew Leung dated 4 January 2021, again, the defendant had ignored the Order and failed to make any response to the plaintiff.
7. In relation to the trial bundle index which they were supposed to agree upon on or before 22 March 2021, again, the defendant’s solicitors had failed to do so. 2 letters were sent out by the plaintiff’s solicitors as reminders respectively on 26 February 2021 and 17 March 2021 on this matter. Again, no response had been received by the plaintiff’s solicitors up to the date when they issued the 2nd “unless order” summons.
8. As the plaintiff’s solicitors have rightly pointed out in their affidavit in support of the application, it was not the first time that the defendant had failed to comply with the court orders in this case. They referred to the 1st “unless order” summons in relation to the filing of the witness statement; answer to the RSD and reply to the trial bundle index. The plaintiff quite rightly stated that the defendant’s repeatedly non-compliance of the court orders had not only delayed the case progress, but had also caused unnecessary costs to be incurred in the action.
9. The hearing of the 2nd “unless order” summons was fixed to be heard on 21 August 2020. Only a day before the hearing, the defendant agreed to the requests made under that summons and a consent summons was filed in court on 20 August 2020.
10. The plaintiff’s solicitors were correct to say that had the defendant complied with the previous directions of the court, the action would have been ready to be set down for trial by the adjourned checklist review hearing on 22 April 2021. However, due to the defendant’s unacceptable conduct, that checklist review hearing was put at risk of being adjourned unnecessarily. This is unfair to the plaintiff who is entitled to have his claim resolved in a timely and cost-effective manner.
11. On 4 May 2021, Master Matthew Leung gave another “unless order” for the defendant to provide comments on the draft trial bundle index within 7 days from that order. He also set down the case for trial on the running list not to be warned before 20 September 2021 with an estimated length of 2 days.
12. The summons dated 19 July 2021 (“the 3rd “unless order” summons”) was listed before me for hearing on 17 August 2021. However, on the day before the hearing, ie 16 August 2021, the defendant’s solicitors wrote to the court to try to vacate the hearing by agreeing to certain proposed directions in purported compliance with the Orders given by Master Matthew Leung some 7 months ago. They also asked for an extension of time for the plaintiff to file and serve the application to set down the case for trial upon the defendant fulfilling the directions previously made by the master.
13. I refused the defendant’s application and ordered that the parties to appear before me at the scheduled hearing on 17 August 2021.

*The hearing on 17 August 2021*

1. At the hearing, having gone through the history of the case with Mr Ringo Kwong, the solicitor who is responsible for handling the case at the defendant’s firm, I asked for an explanation as to why the defendant had repeatedly flouted the Orders of the court and failed to comply with the directions agreed between the parties. Mr Kwong could not provide any to the court.
2. When asked why the simple directions given under Master Peony Wong’s Order were not complied with, Mr Kwong told the court that it was because they could not locate their insured client, namely, the defendant. When asked by the court whether he had mentioned this anywhere, whether to the plaintiff or to the court, Mr Kwong replied in the negative. When asked when was the first time he realized that he could not locate his insured client, Mr Kwong was not able to give the court a specific time. However, he said it was sometime after the 1st CLR hearing in September 2019. When asked why the court was not informed of this matter, he could not provide any answer. When further asked by the court what steps had he taken in locating the defendant, Mr Kwong could only say that the defendant had not “unregistered” the company from the Companies Registry, and therefore it is still a company with a valid registered address. He said he had tried to call the number of the defendant and sent the draft witness statement to it for comments but with no reply received. He also had sent a staff to attend the registered address of the defendant and found that it was occupied by another company. However, he was not able to explain to the court as to why all these had not been mentioned to the plaintiff or reported to the court.
3. In particular, Mr Kwong was not able to explain to the court why he had failed to reply to any of the 5 reminder letters sent by the plaintiff to his firm between 7 November 2019 and 3 June 2020 when the plaintiff was pressing for the exchange of witness statements which was supposed to have taken place on 26 October 2019. Mr Kwong could not provide one single valid reason why a reply was never made to those letters.
4. For the draft trial bundle index, the parties were supposed to do it by 30 December 2019. Mr Kwong again was not able to provide one single valid reason why he could not have responded during the 16-month period even until the issue of the 2nd “unless order” summons in April 2021. Mr Kwong was not able to provide any valid reason of why for the 16- month period he could not make a simple reply to the plaintiff’s request to agree to a simple matter like that of a draft trial bundle index. Mr Kwong tried to explain in court that he was hoping to wait for the particulars of the earnings from the defendant in this case. However, with respect, he knew from day one of this case that he had had difficulties in locating his insured client and nothing had changed during this period. Instead of informing the plaintiff or the court of this matter, Mr Kwong chose to bury the plaintiff’s letters under the pile of documents in his file and chose not to make any reply to it at all.
5. When asked what he had done to try to locate the defendant between November 2019 and April 2021, Mr Kwong could only say that he had sent out an e-mail on 21 October 2019 and tried to call the defendant 7 days later but without success. He could not give any plausible explanation as to why such matter was not mentioned either to the plaintiff or to the court.
6. Only when the defendant was faced with the 3rd “unless order” summons taken out by the plaintiff that the defendant’s solicitors had, for the first time in these proceedings, mentioned in their letter to the court on 16 August 2021 (when it tried to vacate the hearing for the summons), to state that the defendant’s firm “is still locating the defendant”.

*Reasons for the court’s ruling*

1. In my judgment, the way the defendant’s solicitors have handled this case is wholly unacceptable. It makes a complete mockery of the case management system in PI cases in the District Court. It defeats the whole purpose of having a checklist review hearing before a PI Master. It undermines the goodwill amongst members of the profession in trying to agree case management directions without going to court to seek directions on each occasion. It goes against the letters and the spirit of the Civil Justice Reform. It severely undermines its underlying objectives.
2. Due to the total silence and non-compliance on the part of the defendant, the plaintiff’s solicitors in this case were literally like dealing with a stone wall as their opponent. All the letters sent by the plaintiff from early November 2019 to April 2021 had simply fallen on deaf ears. All this time the plaintiff was like dealing with a phantom opponent as if it did not exist at all. In my view, the plaintiff may as well deal with a stone wall as there was no difference between the two.
3. In my judgment, not only the defendant’s handling solicitor owed a duty to his client (whether it was the insurer or the insured) to conduct the case in a diligent and conscientious manner, he also owed a duty to the court to ensure that the case would progress in a timely and efficient manner. Regrettably, in this case, I find the defendant’s handling solicitor has completely ignored the correspondences from the plaintiff’s solicitors for over 7 months on the issue of exchange of the witness statement and for 16 months on the issue of agreeing to the trial bundle index for no valid or justifiable reason at all. As a result of the failures on the part of the defendant’s solicitors, a simple PI case has been unreasonably delayed for almost 20 months (from November 2019 to July 2021) when no real progress has been made in this case at all. In short, the plaintiff who has a strong case on liability has been deprived of his chance to receiving his just compensation during this time.
4. In my view, these are all unacceptable conducts on the part of a solicitor who conducts PI litigation. By completely ignoring the other side’s correspondence and the court’s Orders, not only it shows a lack of professional courtesy to his opponent, it also shows a lack of respect to the court. Such conduct would not be tolerated by the court and therefore I have ordered that all the costs wasted by the plaintiff from November 2019 to July 2021 as a result of the inaction and non-compliance to be borne by the defendant. I further directed the defendant solicitors to show cause as to why they should not bear those costs personally and on an indemnity basis. The wasted costs will be summarily assessed by this court on paper and to be paid forthwith.
5. To prevent such unacceptable conducts from happening in future, parties are now required to report any non-compliance of any orders or directions given by the PI masters at the checklist review hearings (whether they were by way of consent summons or ordered by the court), usually within 7 days after such events, with detailed reasons or explanations. This would include failures on the part of their opponent in responding to their correspondence. Failing to do so may lead to appropriate sanctions against the offending party from the court.
6. Further, any delay caused by the failure to respond to the requests/reminders from the opponent and/or inaction on the part of a solicitor to comply with the agreed directions and/or order of the court may be met with a costs order to be personally borne by the solicitor responsible on an indemnity basis and to be paid forthwith.

( Andrew SY Li )

District Judge

Miss Lai Wing Yan Winnie of Chan & Chan, assigned by the Director of Legal Aid, for the plaintiff

Mr Ringo Kwong of Cheng, Yeung & Co, for the defendant