## DCPI 1429/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1429 OF 2013

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##### BETWEEN

KHALIL MUHAMMAD Plaintiff

### and

THE INCORPORATED OWNERS OF Defendant

NAM YEUNG MANSION (MUT WAH

STREET)

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

Date of Hearing: 25 August 2015

Date of Decision: 8 September 2015

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DECISION

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1. This is an application by the defendant under Order 12 rule 8 and Order 18 rule 19 of the Rules of the District Court (“RDC”) seeking to strike out the writ and dismissing the action on jurisdictional grounds as well as the ground that the present proceedings amount to an abuse of process.
2. More specifically, the applicant seeks to strike out the writ on the ground that it was not served within 12 months of its issuance.

*BACKGROUND*

1. These proceedings arose out of an alleged accident which occurred outside the defendant’s building known as Nam Yeung Mansion, 31-41 Mut Wah Street, Kwun Tong, Kowloon, Hong Kong (“the Site”). On 18 July 2010, the plaintiff allegedly was struck by a metal bar which fell from height while walking past the Site (“the Accident”). The plaintiff claims to have sustained personal injuries, loss and damage as a result.
2. On 15 July 2013, the plaintiff issued the writ of summons in the present proceedings.
3. There is a dispute over the date of the service of the writ as the plaintiff claims to have inserted the writ into the defendant’s letterbox on 3 July 2014: (See affirmation of service by Au Kin Chung, a clerk from the plaintiff’s solicitors filed on 3 September 2014). The defendant on the other hand claims that the writ only came into the notice and attention of the chairman of the defendant on 15 July 2014, even though the letterbox was purportedly checked by him on a weekly basis: (See affirmation of Law Yung Tai filed on 23 April 2015).
4. On 11 September 2014, the writ was amended without leave of the Court.
5. On 30 September 2014, the defendant issued a notice of intention to defend.
6. On 4 December 2014, the statement of claim was filed and served by the plaintiff. This was however 2 months after the expiry of the time for the service of the same and 4½ years after the date of the Accident according to the defendant.

*DISCUSSION*

*Relevant legal principles*

1. Under Order 6, rule 8(1) of the RDC, “(f)or the purpose of service, a writ [...] is valid in the first instance for 12 months beginning with the date of its issue[...].”
2. Such time would be strictly construed, even 1 day delay would result in a plaintiff not able to proceed with the action: see the decision of this Court in *Yung Mei Chun Jessie v Merrill Lynch (Asia Pacific) Ltd* DCCJ 3068 of 2013 (unrep., 11.2.2015) and the Court of Appeal’s recent judgment in HCMP 1648 of 2015 when refusing the plaintiff’s leave to appeal in that case (Hon Lam VP and Yuen JA; 25.8.2015).
3. Under Order 18, rule 19, it is trite that only in “plain and obvious” cases that the Court will exercise its summary power to strike out the indorsement of any writ or any pleading under the rule. It is also trite that disputed facts were to be taken in favour of the party sought to be struck out: see §18/19/4 Hong Kong Civil Procedure 2015.

*The defendant’s case*

1. The defendant claims that the writ was not brought to its notice and attention until 15 July 2014 based on the evidence given by the chairman and a set of meeting minutes: (See §4(2) of affirmation of Law Yung Tai filed on 23 April 2015). Allegedly, by that time, the validity of the writ had already been expired. The defendant therefore submits that there is no particular reason for the Court to extend the validity of the writ.
2. A letter sent by the defendant’s solicitors to the plaintiff’s solicitors on 19 August 2014 however stated almost right at the beginning of the letter that *“(O)ur client received the said Writ of Summons from you on 10th July 2014, …”*. In sub-paragraph (2) of the same paragraph, in the context of alleging that the address stated in the writ was wrong, the defendant’s solicitors mentioned that *“(A)s such our client merely received the said Writ of Summons in late July supposedly addressed to the Defendant stated therein…”* [underline added]
3. As is apparent, the above 2 dates are in direct conflict with each other and also at odds with the claim subsequently made by the chairman of the defendant. The solicitor in charge of the defendant’s case later tried to explain that the 10 July date had been mistakenly put in by the former legal executive of the firm. It is claimed that the legal executive, who had since left the employment of the firm, was laboured under the mistaken belief that the “deemed date” of service of the writ was 7 days after its alleged delivery on 3 July when drafting the letter, therefore 10 July was mentioned as a result: (See §4 of 2nd affirmation of Chan Chun Wa filed on 12 June 2015).
4. In addition, the defendant alleges that the writ of summons was not accurate in both the address and the name of the defendant.
5. The defendant also questions why the plaintiff has not given any explanation of why a more direct method of serving the writ, eg by serving it at the management office, was not used. Further, the defendant rejects the photograph attached to the affirmation of service as evidence of placing the writ in the letterbox on 3 July 2014 as there was no time chop appeared on the photograph.
6. The defendant also draws the Court’s attention to the delay in the prosecution of the plaintiff’s claim, allegedly making it difficult for the witnesses of the defence to recollect the exact events of the case and thus impairing the defendant’s case.
7. Lastly, the defendant submits that there is an abuse of the process of the Court where the plaintiff has no intention to bring the present proceedings to a conclusion due to the delays at various steps of the proceedings.

*The plaintiff’s case*

1. I find the 3 page written submissions of the plaintiff totally unhelpful as it fails to address any of the key issues raised by the defendant in this case.
2. However, at the hearing of the summons, through the oral submission of the plaintiff’s counsel, it appears that the plaintiff’s case is that he had served the writ of summons on the defendant by inserting the same in its letterbox on 3 July 2014: (See affirmation of service of Au Kin Chung, a clerk of the plaintiff’s solicitors filed on 3 September 2014). A photograph showing an envelope containing what appeared to be A4 size documents protruding from the letterbox of the defendant has been exhibited to the affirmation.
3. Mr Clough, counsel for the plaintiff, contends that the Court cannot reject the plaintiff’s case regarding the timing of the writ as it was supported by the testimony from the plaintiff’s clerk. It is submitted on the plaintiff’s behalf that the inconsistencies of the case regarding service should be resolved in the plaintiff’s favour once an affirmation of service has been filed to verify the same.

*Determination of Issues*

1. In my view, this application can be decided by answering the following questions.

*Question (1): which was the correct date of service of the writ?*

1. First, let me state from the outset that I have no difficulty in rejecting Mr Clough’s rather absurd submission above. In my judgment, it is incorrect to say that once the timing of the writ is supported by the testimony of a server, the Court have to accept the plaintiff’s evidence and any inconsistences shall be resolved in his favour. Each case will depend on its own circumstances and a defendant is of course entitled to file evidence to rebut such evidence. If there is any difference, it is for the Court to resolve the matter by evaluating the evidence filed by the parties and decide the matter on a balance of probabilities.
2. In this case, 4 different dates for the service of the writ have been canvassed by the parties: 3 July 2014 according to the plaintiff; 10 July, 15 July and “late July” 2014 according to the defendant.
3. As the defendant bears the burden of proof and any dispute on fact will be resolved in favour of the party whose claim is sought to be struck out (see §11 above), it is clear that the defendant must overcome the evidential hurdle of proving which was the actual date of service first before able to strike-out the plaintiff’s claim. Further, as it is only in plain and obvious cases that the Court will exercise its discretion to strike out a claim, the defendant will have to demonstrate to the Court that this is one of those cases here.
4. In my judgment, the defendant has fallen far short of the standard required. Not only there are internal inconsistencies within the defendant’s own case regarding the date on which it claims the writ was served, but I also find the explanations given by the defendant and its solicitors not at all convincing.
5. First, I do not find the explanation given by the defendant’s solicitors regarding the mistaken date of 10 July convincing. In my view, even if the letter dated 19 August 2014 might have been drafted by the legal executive as alleged, it has been clearly stated at the top of the letter that the “partner in charge” of the case was one Mr CW Chan from the defendant’s solicitors. In fact, the initials of both Mr Chan and the legal executive Mr Michael Soong appeared at the end of the letter. Thus, before the letter was sent to the plaintiff’s solicitors, one can only assume that the partner in charge of the case must have checked the contents before he signed it. In my judgment, he cannot now hide behind the alleged mistake of the legal executive as an excuse.
6. Second, when reading the 10 July date in the context of the letter, it simply stated that *“(O)ur client received the said Writ of Summons from you on 10th July 2014, which it seems that your client intends to have our client as the Defendant in the captioned action.”* I noted that there was no qualification to that statement. Further, there is no explanation provided by the defendant to say why the legal executive could have mistaken this as the “would-be” deemed date (ie 7 days after it was allegedly served on the defendant), and not the actual date of service of the writ now purportedly put forward by the defendant’s solicitors.
7. Third, at the beginning of the same letter, it has been specifically mentioned that the letter was written with the instructions of the Incorporated Owners. Given the fact that it was written on 19 August 2014, in my judgment, it could not have been possible that the chairman or the committee of the Incorporated Owners who gave those instructions to the solicitors would have failed to inform the solicitors that the actual date of receiving the writ was on 15 July 2014, which is a date now maintained by the defendant’s chairman in his affirmation: (See §8 of affirmation of Law Yung Tai).
8. In the later part of that letter, the defendant stated that the defendant had *“received the said Writ of Summons in late July”* in the context of alleging that the wrong address had been put down in the writ.
9. It is not clear why “late July” was mentioned when 10 July was stated in the preceding paragraph of the same letter. However, no matter how one interprets the dates, both 10 and 15 July cannot be described as “late July” by any stretch of imagination. Hence, it seems to me that even the defendant itself was not sure when it had actually received the writ when they instructed its solicitors to issue the letter dated 19 August 2014.
10. Lastly, I am not persuaded that the writ was only served on the defendant on 15 July as currently alleged by the chairman of the defendant in his affirmation. Several reasons have led me to this conclusion.
11. First, I do not find the so-called contemporaneous document in the form of the minutes of the Incorporated Owner EGM on 12 September 2014 helpful to the defendant’s case. It merely recorded the fact in Chinese, which I would roughly translate as, that “*during the meeting, the management company explained and distributed the letter from Messrs Massie & Clement which the Incorporated Owner had received on 15 July to the owners who attended the meeting*”. It does not explain the circumstances under which it was received and who had received the letter. With respect, this document is at best self-serving and hardly could be described as contemporaneous as it came into existence almost 2 months after the alleged service of the writ.
12. Second, I find it difficult to accept the allegation put forward by the defendant that the chairman had checked the letterbox of the Incorporated Owner every week, allegedly either on a Tuesday or Wednesday, but still could miss the writ and the documents allegedly served on 3 July by the plaintiff’s solicitors. There is no specific explanation other than the bare assertion made by the chairman to say that he could not remember he had departed from his practice of checking the letterbox every week. As 3 July 2014 was a Thursday and 15 July 2014 was a Tuesday, it seems rather unlikely that the chairman could have missed the documents (which were conspicuously protruding from the top of the letterbox), if he had in fact checked weekly as claimed.
13. Third, in comparison with the chairman’s assertion, I find the allegation made by the clerk of the plaintiff’s solicitors much more straightforward and believable. As this was a standard service, I see no reason for the clerk, who was working for the plaintiff’s firm (and not for the plaintiff), to lie on oath about this. Further, his service is backed up by a photograph taken by him of the writ of summons and other documents being inserted into the letterbox of the defendant, including a cover letter from the plaintiff’s solicitors dated 3 July 2014. I find it difficult to imagine that the plaintiff’s solicitors would prepare a cover letter dated 3 July but only have the writ served some 12 days later.
14. Based on the above, I would reject the defendant’s allegations and find that it had failed to discharge the burden placed upon it to prove which was the actual date the writ was served on it. Instead, I prefer the plaintiff’s case and find that the writ of summons was in fact served on the defendant by the solicitor’s clerk when he inserted the same into the letterbox of the defendant on 3 July 2014.

*Question (2): Whether the writ had been served on the correct address and stated the correct name of the defendant*

1. In light of my findings above, I shall be brief in dealing with this issue.
2. In my judgment, the defendant’s allegation that the writ was not served on the defendant’s registered address cannot be substantiated. While it is true that the correct registered address of the defendant is at “*Management Office, Nam Yeung Mansion, Nos. 31-41 Mut Wah Streeet, Kwun Tong, Kowloon, Hong Kong*” and the one stated in the writ of summons was merely “*31-34 Mut Wah Street, Kwun Tong, Kowloon, Hong Kong*”, in my view, this does not make any difference in the circumstances of this case. The reason being that Order 10, r.1(2)(b) of the RDC provides an alternative way of service, ie for the plaintiff to insert the writ in the letterbox of the defendant. If a party choose to serve in such a way, “the date of service shall, *unless the contray is shown*, be deemed to be the seventh day … after the date on which the copy was … inserted through the letterbox, for, the address in question.: [emphasis added] See Order 10, r.1(3)(a) of the RDC.
3. This was the mode of service the plaintiff had chosen. As I found above, it was effected through his solicitor’s clerk inserting into the letterbox of the defendant (with the name of the defendant cleared marked in front of the letterbox) on 3 July 2014 and not on 10, 15 or late July as claimed by the defendant.
4. While I agree with the defendant’s counsel Mr Matthew Ho that the proviso to the deeming provision makes it clear that if the writ was not brought to the actual attention of the defendant, the deemed date of service would be rebutted and service would only be effected if the proceedings are brought to the actual notice of the defendant: see Hong Kong Civil Procedure 2015 at §10/1/13; *Sonokawa Investment (Holding) Ltd v Li Chun* [2006] 2 HKLRD 441 at §15 (Sakhrani J), this will not however apply in this case as I find as a matter of fact that the plaintiff had served the writ on 3 July 2014 by having it inserted into the letterbox of the defendant. The defendant had failed to rebut the presumption by evidence that it was not brought to its attention. Thus, the writ was deemed to have been served on the defendant by 10 July 2014.
5. The alleged incorrect name appeared on the writ is another red-herring. While the proper registered name of the defendant should read “*Incorporated Owners of Nam Yeung Mansion (Mut Wah Street)*”, the writ originally has omitted “*(Mut Wah Street”)*” when it was first issued.
6. However, since the writ had been properly served and the defendant has since acknowledged service of the same, this matter becomes academic. The alleged defect can be easily cured by amending the title of the writ, which was exactly what the plaintiff did on 11 September 2014.
7. Thus, I find no substance in the defendant’s arguments on this issue.

*Question (3): Has there been any abuse of process by the plaintiff in issuing proceedings in the District Court?*

1. The defendant claims that there was an abuse of process of the Court on the part of the plaintiff by delaying in the prosecuting of the claim after issuing the writ only 3 days before its expiry. Mr Ho for the plaintiff contends that the defendant has been “warehousing” the claim which has been considered as a form of abuse of process: see *Wing Far Construction Co Ltd (In Liquitation) v Yip Kwong Robert* (20110 14 HKCRAR 935 at §75(2) per Ma CJ.
2. While there had been some delays in the issue of the writ, nonetheless, the writ was issued within the statutory time limit and served within the 12 months limit as I have found above. While it is also true that the plaintiff did not file and serve his statement of claim until almost 5 months after the service of the writ, it was still done within the permitted time limit.
3. Thus, while I find the plaintiff or his solicitors have been less than conscientious in prosecuting the present claim, in my judgment, it cannot be said that they have been “warehousing” the claim as contended by the defendant. However, in my view, should there be further delays in the prosecution of the claim in this case, the defendant no doubt can apply to strike out the plaintiff’s claim and the Court will no doubt take into account of the whole history of the case then.

*CONCLUSION*

1. In conclusion, in my judgment, the defendant has failed to establish the plaintiff’s claim is scandalous, frivolous, vexatious and/or otherwise amounting to an abuse of the process of the Court. Therefore, its summons dated 17 April 2015 is hereby dismissed.
2. Costs will follow the event. I make an order nisi that the defendant do pay the costs of the plaintiff in this application, such costs to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. The order nisi will become absolute after 14 days in the absence of any application to vary the same.

( Andrew SY Li )

District Judge

Mr Neal Clough, instructed by Massie & Clement, for the plaintiff

Mr Martin Ho, instructed by S K Lam, Alfred Chan & Co., for the defendant