## DCPI 1649/2015

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1649 OF 2015

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BETWEEN

CHAN WAI HING, the administratrix Plaintiff

of the estate of LEE GUN, deceased

and

MTR CORPORATION LIMITED Defendant

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Before: Deputy District Judge Johnny Ma in Chambers (Open to Public)

Date of Hearing: 3 February 2017

Date of Decision: 3 February 2017

Date of Reasons for Decision: 16 February 2017

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REASONS FOR DECISION

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1. This is a personal injury action commenced on 27 July 2015. On 15 November 2016, upon the joint application of the parties’ respective solicitors, this action was set down for trial commencing on 7 February 2017 with an estimated length of 4 days.
2. By Summons dated 10 January 2017 (“the Summons”), the defendant sought leave to serve 3 Supplemental Witness Statements of Wong Shu Hong (transliterated) (“Wong”), Lau Wing Nam (transliterated) (“Lau”) and Yim Po Ki (transliterated) (“Yim”) respectively as per the drafts attached thereto. On 16 January 2017, the defendant sent 3 signed supplemental witness statements of the abovementioned 3 persons (“the Signed Supplemental Witness Statements”) to the plaintiff which (as I was told at the hearing) contained some “cosmetic changes” to the said drafts. The application came before this court on 3 February 2017, just 4 days before the trial was due to commence.
3. As Ms Wai of the Solicitors acting for the defendant rightly acknowledged, this application was late. The plaintiff objected to certain parts of the Signed Supplemental Witness Statements being admitted. Having heard submissions from both parties, I granted leave to the defendant to serve the Signed Supplemental Witness Statements except that certain parts thereof and certain annexure thereto be expunged and removed. These are the reasons for my decision.

*Background*

1. The defendant was the owner and manager of Telford Plaza. On 26 March 2013, Thunderstorm Warning was issued at 1530 hours and lowered by 2220 hours, and Amber Rainstorm Warning was issued at 1650 hours and lowered by 1935 hours.
2. The plaintiff’s case is that in the evening of 26 March 2013, Lee Gun (who was the plaintiff at the commencement of this action but passed away on 23 October 2015) (“Lee”) slipped and fell down as he intended to pull open a glass door at the entrance CA1 (“the Entrance”) of Telford Plaza to get into it, and suffered personal injuries as a result (“the Accident”). The particulars of negligence as pleaded in paragraph 4 of the Statement of Claim (filed on 27 July 2015) included, *inter alia*, an allegation that the defendant has failed to place anti-slip carpet on the floor in the vicinity of the Entrance.
3. On 18 September 2015, the defendant filed its Defence. Among other matters, the defendant denied that the Accident was caused by the negligence on its part whether as alleged in paragraph 4 of the Statement of Claim or at all, and put the plaintiff to strict proof of each and every allegation contained therein. The defendant further pleaded, in paragraph 8 of the Defence, precautionary measures that were said to have been put in place at the material time due to the rainy weather / Amber Rainstorm Warning. In paragraph 9 of the Defence, the defendant further pleaded, *inter alia*, that at all material times it entrusted the cleaning work of Telford Plaza to Tsang Lik Services Limited (“Tsang Lik”), and engaged Dragon Guard Security Limited (“Dragon Guard”) to perform security services within Telford Plaza. For present purposes, it is noted that in its Defence the defendant has not specifically traversed to the plaintiff’s allegation that it has failed to place anti-slip carpet on the floor in the vicinity of the Entrance.
4. On 13 July 2016, the plaintiff’s solicitors wrote to the defendant’s solicitors asking, *inter alia*, for a confirmation whether there was any carpet and/or anti-slip mat placed at the Entrance outside Telford Plaza at the material time, and supporting documents such as any photographs showing its existence before or at the time of the Accident. On 19 July 2016, the defendant’s solicitors replied that there was no supporting document to show that carpet / floor mat was placed at the Entrance at the time of the Accident.
5. In the Witness Statements of Wong, Lau and Yim all dated 25 August 2016 and served for the defendant, there was no mention of there being any carpet or mat having been placed at the Entrance at all, whether before or at the time of the Accident.
6. On 28 September 2016, the plaintiff’s solicitors wrote to the defendant’s solicitors asking again for a confirmation whether at the time of the Accident there was any anti-slip carpet or mat placed at the area marked on the photograph enclosed therewith, ie at the Entrance outside Telford Plaza. On 3 October 2016, the defendant’s solicitors replied that since there was no record of whether a carpet / floor mat was placed at the Entrance at the time of the Accident, the defendant was not in a position to make the confirmation as requested.
7. On 15 November 2016, upon the joint application of the parties’ solicitors by way of Consent Summons filed on 3 November 2016, Master Rita So ordered by consent, *inter alia*, that this action be set down for trial commencing on 7 February 2017 with an estimated length of 4 days.
8. On 29 December 2016, the plaintiff’s solicitors filed an Application to Set a Case Down for Trial.
9. It was against the above background that the defendant issued the Summons.

*The plaintiff’s objections*

1. The plaintiff’s objections to parts of the Signed Supplemental Witness Statements can be sub-divided into 2 broad categories.
2. First, the plaintiff submitted that the defendant was seeking to introduce evidence, including 2 photographs bearing the date 20 March 2013 (“the Photographs”), that there had been a carpet at the Entrance outside Telford Plaza prior to and at the time of the Accident. The plaintiff objected to it on the grounds that (a) it formed no part of the defendant’s pleaded case; and (b) the application was late without satisfactory explanation for the lateness, and the plaintiff would suffer severe prejudice if the application was allowed. I shall refer to this as “the Carpet Objection”.
3. Second, the plaintiff submitted that parts of the Signed Supplemental Witness Statements contained merely guesswork or speculation, and hence should not be admissible. I shall refer to this as “the Guesswork Objection”.

*The carpet objection*

1. If a party fails to plead his own version, he will be taken not to have put forward any positive case, and accordingly he will not be entitled to call any evidence of fact contrary to or inconsistent with the other party’s pleaded contentions: *Wu Ching Sau v New World First Bus Services Ltd*, HCPI 767/2009, 9 September 2010, Master Marlene Ng (as she then was), at paras. 54-55; *Samlane Development Ltd v Fung Chi Fai*, HCA 318/2006, 22 April 2013, Registrar K.W. Lung, at paras.13-14.
2. As noted above, in its Defence, the defendant has not specifically traversed to the plaintiff’s allegation that it has failed to place anti-slip carpet on the floor in the vicinity of the Entrance. On the existing state of the pleadings, Mr Wong of the Solicitors acting for the plaintiff submitted that the defendant was not entitled to adduce evidence (including the Photographs) to prove that there was a carpet at the Entrance outside Telford Plaza prior to and at the time of the Accident.
3. Ms Wai indicated at the hearing of this application that if this court were minded to grant leave to the defendant to serve the Signed Supplemental Witness Statements including the evidence relating to the existence of a carpet at the Entrance, the defendant could amend the Defence accordingly and no delay would be caused to the trial. For present purposes, I was prepared to proceed to consider the merits of the defendant’s present application notwithstanding that there was in fact no application for amending the Defence placed before this court.
4. Whether the court should allow a late application (be it amendment of pleadings, discovery of new documents, or service of additional witness statements) is a matter of case management and balancing exercise having regard to all relevant circumstances in light of the underlying objectives. See: *Guangzhou Green-Enhan Bio-Engineering Co Ltd & anr v Green Power Health Products International Co Ltd & ors*, HCA 4651/2002, HCA 2802/2003, HCMP 74/2004, 22 July 2004, Lam J (as he then was), at para.14; *Chan Wing Cheung Allan v Ho Shu Yee Susana*, CACV 393/2004, 10 January 2005, Ma CJHC (as he then was), at para. 9; *Liu Chen v Chan Poon Wing & anor*, HCPI 779/2006, 7 October 2009, Master Marlene Ng (as she then was), at paras. 32-37 & 55; *Kinetics Medical Health Group Company Limited & ors v Dr Tse Ivan Cheong Yau*, HCA 1115/2010, 8 May 2013, Deputy High Court Judge Marlene Ng, at paras. 36 & 49.
5. Regarding late discovery of documents, among other matters, the Court expects the applicant to provide full and accurate information or justification at least as to (a) the reasons why the subject documents were not disclosed earlier; (b) the provenance and the makers of such documents; (c) the relevance of such documents to the issues before the court; (d) the availability or non-availability of the makers to attend trial for cross-examination in case the opponent objected to the hearsay evidence; and (e) why the application should be entertained at all at such late stage notwithstanding the underlying objectives. See: *Hong Lok School Ltd & anor v Chow Sai Yiu & anor* [2003] 2 HKLRD 782 at para. 6; *Liu Chen* (*supra*) at paras.32-37; *Kinetics Medical Health Group Company Limited* (*supra*) at para. 36.
6. In support of this application, the defendant has filed an affidavit made by Ms Wai. According to Ms Wai, since the commencement of proceedings, “the defendant has conducted a diligent search to trace any record to show that an anti-slip carpet was placed at the subject entrance at the material time but in vain”. A pre-trial conference with the defendant’s trial Counsel was held on 6 January 2017. As Counsel has “requested the defendant to conduct a further search to ascertain if a carpet was indeed placed at the subject location”, Wong “therefore searched again and was finally able to find” the Photographs taken by the defendant’s promotion team. Ms Wai then said that “Wong has explained in his supplemental witness statement how he finally came to locate the said photographs recently”. Apart from the aforesaid, I have also taken into account what Wong has said in his Signed Supplemental Witness Statement in this regard.
7. Regarding the “diligent search” said to have been conducted, there is no information as to how many times the defendant’s staff had attempted to search for such documents, and how the search had been conducted. The Counsel’s request was nothing other than a mere request to conduct a further search without any specificity. In any event, there is no good reason why such a further search (prompted by Counsel or otherwise) ought not to have been conducted earlier, at least prior to the parties’ solicitors making their joint application in early November 2016 to set this case down for trial.
8. There is also little information regarding the provenance and the maker of the Photographs. It was said that they were taken by the defendant’s “promotion team”, but there is no information as to who took them, by what device they were taken, and how they had been kept since then. Mr Wong indicated that the plaintiff did not accept the authenticity of the Photographs, and the plaintiff might wish to serve interrogatories against and/or cross-examine their maker. Besides, he also made an observation that the carpet as shown in the Photographs appeared to be red in color, and I note that in the photographs annexed to Lee’s witness statement (which was said to be taken in June 2013) (“Lee’s Photographs”), the carpet as shown therein appeared to be grey in color. In my view, the aforesaid makes it even more important that full and accurate information should have been given by the defendant as to the provenance and the maker of the Photographs, which is lacking.
9. In the premises, I consider that the explanation and information given by the defendant was not a satisfactory one. This is one relevant factor which I should, and did, take into account in considering the defendant’s present application.
10. Regarding prejudice, the court has to balance the prejudice suffered by the defendant by not having the evidence relating to the carpet (including the Photographs) admitted against the prejudice caused to the plaintiff in allowing such evidence in at this late stage, having regard to the underlying objectives including, *inter alia*, the securing of the just resolution of disputes in accordance with the substantive rights of the parties: *Chan Wing Cheung Allan* (*supra*) at para. 9; *Kinetics Medical Health Group Company Limited* (*supra*) at para. 49.
11. Besides, post-CJR case management recognizes that the closer to trial an applicant makes an application to adduce late discovery the more likely it is to cause real prejudice to the other party, especially when a milestone date is likely to be compromised by there being insufficient remaining time until the commencement of trial to accommodate the other party’s response to the application if granted: *Kinetics Medical Health Group Company Limited* (*supra*), para.52.
12. Mr Wong referred to the pre-action protocol under Practice Direction 18.1 for mutual discovery with respect to issues of liability, and submitted that had the Photographs been disclosed in accordance with such protocol, Lee would at least get a chance to give further instructions before he passed away, and the plaintiff thus suffered prejudice as the opportunity to take such instructions from Lee has gone. He also submitted that should the Photographs and the evidence relating to the carpet be admitted, the plaintiff would very likely have to take out interlocutory applications such as serving interrogatories to deal with it, particularly in view of the lack of information regarding the provenance and the maker of the Photographs and the circumstances under which the Photographs were said to have been found only recently, and the plaintiff would not have sufficient time to deal with it. By contrast, the defendant has run its case on several fronts, and non-admission of the aforesaid evidence would result in only limited prejudice to the defendant.
13. Ms Wai, on the other hand, submitted that the aforesaid evidence was directly relevant to the issue in this case, and justice required it to be admitted with weight to be decided at trial. She queried what instructions could possibly have been given by Lee other than merely maintaining that no carpet was there at the time of the Accident, even if such evidence had been disclosed prior to Lee’s death. She further submitted that the plaintiff’s indication of taking out interlocutory applications was speculative, and that no new dimension would be introduced to the case if the evidence was admitted.
14. While I acknowledge the prejudice suffered by the defendant by not having the Photographs and the evidence relating to the carpet admitted into evidence, in my view, this prejudice is entirely of the defendant’s own making. The issue as to whether a carpet (or, more specifically, an anti-slip carpet) was in place at the time of the Accident must have been obvious to the defendant since at least the pleadings stage if not earlier. While it was said that the defendant had not been able to find any documentary record in relation to the carpet until very recently, as I said above I am not satisfied with the explanation and the information given on behalf of the defendant in this regard.
15. Besides, as I noted above, there is apparently a difference in color between the carpet as shown in the Photographs (which appeared to be red) and that as shown in Lee’s Photographs (which appeared to be grey). The plaintiff did not admit the authenticity of the Photographs, and in light of the aforesaid, the plaintiff is entitled, if so advised, to pursue against the defendant for further information and/or documents, for instance, as to whether the carpet as shown in the respective photographs was one and the same, and if not, why was there a change and when such change took place. Moreover, if the defendant’s case is that there was a carpet at the Entrance at the time of the Accident, new issues may arise as to whether, and if so why, the surface where Lee stepped onto was slippery despite the existence of such a carpet. In my view, the admission of the evidence (and, if admitted, the corresponding amendment to be made to the Defence) could at least potentially give rise to a new dimension to the case, and the trial may have to be adjourned if the plaintiff seeks to be allowed a fair opportunity to deal with it in such manner as she may be advised. The plaintiff would be prejudiced by the admission of the evidence at this late stage.
16. In all the circumstances, taking into account, *inter alia*, the lack of a satisfactory explanation of the lateness, and having balanced the prejudice suffered by the defendant against the prejudice caused to the plaintiff, and also bearing in mind the underlying objectives, I have declined to allow the defendant to adduce and rely on the Photographs and the evidence relating to the carpet.

*The guesswork objection*

1. As noted above, the plaintiff also objected to parts of the Signed Supplemental Witness Statements to be admitted on the ground that such parts contained merely guesswork or speculation, and hence should not be admissible.
2. Ms Wai submitted that those parts were factual and related to the procedures or practice to be adopted by the cleaners of Tsang Lik and/or the security guards of Dragon Guard when certain problems arose.
3. I have considered the contents of the objected parts, and the parties’ submissions as to their admissibility. In my view, this aspect is better left to the trial so that those objected parts would be seen in light of all the evidence and the parties can make submissions as to how such parts of the evidence should be understood, whether and if so how the defendant can rely upon the same, and how much weight if any should be attached thereto.
4. In the premises, I rejected the Guesswork Objection.

*Conclusion*

1. I have thus granted leave to the defendant to serve the Signed Supplemental Witness Statements of Wong, Lau and Yim with signed Statement of Truth as per the signed version sent to the plaintiff’s solicitors on 16 January 2017, subject to and except that (a) paragraph 4 of the Supplemental Witness Statement of Wong together with Anenxure 6 thereto shall be expunged and removed; and (b) paragraph 7 of the Supplemental Witness Statement of Yim shall be expunged and removed. I directed that such statements shall stand as evidence in chief unless the trial judge otherwise directed.
2. I ordered costs of the application be to the plaintiff, to be taxed if not agreed, and that the plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

( Johnny Ma )

Deputy District Judge

Mr W Wong, of Cheng & Wong, assigned by the Director of Legal Aid, for the plaintiff

Miss Karen Wai of Deacons, for the defendant