## DCPI 1694/2013

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1694 OF 2013

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BETWEEN

WONG FONG YUK Plaintiff

and

黃興醒 1st Defendant

黃利華 2nd Defendant

(Discontinued)

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 6 June 2017

Date of Decision: 6 June 2017

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DECISION

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1. This is a decision resulting from the failure on the part of the plaintiff’s solicitors to comply with the case management directions given by the court on the preparation of an assessment of damages hearing which was supposed to commence this morning.

*BACKGROUND*

1. The hearing was originally scheduled for the assessment of damages of the above personal injury action brought by the plaintiff against the 1st defendant (the action against the 2nd defendant had been discontinued).
2. Interlocutory judgment had been entered against the 1st defendant on 2 December 2014 as no notice of intention to defend had been received from the 1st defendant. The case then proceeded to the case management stage with several checklist review (“CLR”) hearings listed before the masters.
3. On 5 December 2016, at the CLR hearing before Master Rita So, the master fixed the assessment of damages hearing on 6 June 2017 with an estimated length of two days (with 7 June 2017 also reserved). Master So also fixed a pre-trial review (“PTR”) hearing for this case to be heard on 6 April 2017. Pursuant to Master So’s Order, the plaintiff served a notice of appointment of assessment of damages on the 1st defendant on 14 December 2016. Master So also ordered that the plaintiff was to translate the English documents contained in the assessment bundle into Chinese and have them served on the 1st defendant on or before 13 March 2017.
4. At the PTR hearing before Deputy Judge S P Yip on 6 April 2017, the plaintiff was represented by his solicitors whilst the 1st defendant who was acting in person was absent. Having heard the representations made by the plaintiff’s solicitor who attended the hearing, Deputy Judge Yip ordered that the assessment of damages hearing would proceed at the originally scheduled dates on 6 June 2017, still with an estimated length of 2 days. Deputy Judge Yip also allowed the plaintiff an extension of 14 days to serve the Chinese translation of the English documents contained in the assessment bundle. The extended deadline to serve such translated documents would be on or before 20 April 2017. Deputy Judge Yip also ordered that the plaintiff’s solicitors to prepare the hearing bundle in accordance with practice directions 27 and 5.6 and have them lodged with the court and served on the 1st defendant on or before 23 May 2017. Further, the plaintiff was ordered to lodge its opening submission, list of authorities and copies of the authorities (with Chinese translation of relevant paragraphs in the authorities) with the court and serve on the other side on or before 23 May 2017. The 1st defendant was ordered to lodge his opening submission, list of authorities and copy of the authorities with the court and serve on the other side on or before 30 May 2017.
5. It is to be noted that copies of the Notice of Trial (「審訊通知書」) have been sent to the plaintiff’s solicitors and the 1st defendant respectively by the registry of the court on 22 February 2017.

*DISCUSSSION*

*Complete failure to observe the court orders*

1. In breach of Deputy Judge Yip’s Order made at the PTR, the plaintiff’s solicitors had failed to serve the Chinese translation of all the English documents contained in the assessment bundles on or before 20 April 2017. The plaintiff’s solicitors had also failed to prepare the assessment bundles and have them lodged with the court and served on the other side on or before 23 May 2017. Further, the plaintiff’s solicitors had failed to lodge and serve the opening submission and list of authorities (with Chinese translation of the relevant excerpts) on or before 23 May 2017.
2. It was not until the clerk of this court asked the plaintiff’s solicitors for the above documents on 1 June 2017 that the plaintiff’s solicitors seemed to have suddenly woken up to the fact that they had not complied with any of the above orders made by Deputy Judge Yip.

*Request to adjourn the hearing*

1. On Friday, 2 June 2017, the plaintiff’s solicitors wrote to the court and purportedly tried to explain that, due to their “oversight”, they were not prepared for the assessment of damages hearing as the Chinese translation of the documents had not yet been prepared nor sent to the 1st defendant. They said that, at the time of writing the letter, they were still in the course of translating the same and could do so within the next 14 days (ie from 2 June 2017). The plaintiff’s solicitors asked the court to adjourn the assessment hearing to August 2017 in order to allow them to have more time to finish the translation and sent to the 1st defendant.
2. On Monday, 5 June 2017, this court gave the following written directions to the plaintiff’s solicitors:-

“The trial dates fixed for the Assessment of Damages on 6 June 2017 (with 7 June 2017 reserved) are “milestone dates” under Order 25, Rule 3 of the Rules of the District Court, Cap.336H. They cannot be varied unless there are exceptional circumstances. Oversight or failure to prepare the case properly for the assessment by the plaintiff’s legal representatives are not “exceptional circumstances”: see 25/1B/1 of *Hong Kong Civil Procedure 2017*.

Hence, the plaintiff’s application to adjourn the assessment hearing is hereby refused. The assessment hearing will proceed as scheduled.”

*Milestone dates*

1. Under Order 25 rule 3 of the Rules of the District Court (“RDC”), which is equivalent to Order 25, rule 1B of the Rules of the High Court, a party may apply to the court if he wishes to vary a milestone date. However, the court shall not grant an application under this rule unless there are exceptional circumstances justifying the variation. Under sub-rule (8), “milestone date” include a date which the court has fixed for (i) a case management conference; (ii) pre-trial review; or (iii) the trial. In this context, the “trial” would have included the assessment of damages hearing.
2. According to para 25/1B/1 of the Hong Kong Civil Procedure 2017, the CMC, PTR and most importantly, the trial date, are “milestone dates”. It has been said that these dates cannot be varied by agreement and a party who wishes to vary any of the milestone dates must apply the court showing that “exceptional circumstances” apply. It has been said that late instructions from clients, a change in the team of lawyers and the absence of prejudice to the other party which cannot be compensated for by costs, will not be treated as exceptional circumstances. Further, it is stated that the court will not be pre-disposed to delaying the trial and very cogent arguments and the reasons will be required in order to achieve any variation.
3. In this case, I note that this was not the first time that the plaintiff’s solicitors have failed to observe the “milestone dates”.
4. On 5 November 2014, the plaintiff’s solicitors had failed to attend the CLR hearing scheduled before Master M Lam. In a letter dated 11 November 2014 to the court, the plaintiff’s solicitors explained that the non-attendance was due to the fact that the solicitor who had attended the previous CLR hearing on 14 August 2014 had failed to inform them about the adjourned CLR hearing. The solicitor had since resigned from the firm without informing them of the new hearing date. They apologized for the “oversight” on their part on that occasion.
5. On 27 April 2015, the plaintiff’s solicitors had failed to turn up at the CLR hearing before Master J Chow. On that occasion, the master adjourned the CMC for 3 months and gave an order that the plaintiff’s solicitors were to explain their absence within 3 days. She also issued a written warning that if they fail to appear at the CMC hearing, the claim will be provisionally struck out without further notice pursuant to Order 25, rule 4 of the RDC. The plaintiff’s solicitors were reminded that the court shall not grant an application to vary such milestone dates unless there are exceptional circumstances pursuant to Order 25, rule 3.
6. On that occasion, the plaintiff’s solicitors wrote to the court on 27 April 2015 explaining that their non-attendance was due to an omission by the plaintiff’s trainee solicitor who had attended the hearing to make the necessary entry to the principal’s diary for attending the hearing.

*The plaintiff’s failure to prepare for the assessment*

1. As appears from the history of this case, since the hearing date was fixed at the CLR hearing before Master Rita So on 5 December 2016, the plaintiff’s solicitors were well aware of the fact that the assessment of damages would take place on 6 June 2017. In other words, they had had more than 6 months to prepare the documents for the hearing.
2. Under Master So’s Order, the plaintiff’s solicitors were supposed to prepare the draft assessment hearing bundle index and have it served on the 1st defendant on or before 28 November 2016. However, the assessment bundle index was not prepared and a revised copied was only handed up to the court at the PTR hearing before Deputy Judge Yip on 6 April 2017. Further, the plaintiff’s solicitors had completely ignored Master So’s Order to prepare the Chinese translation of the English documents contained in the assessment bundle. They had more than 3 months to prepare the translation as the original deadline was on 13 March 2017. At the PTR before Deputy Judge Yip, the deadline to prepare the Chinese translation of the English documents was extended to 20 April 2017. The plaintiff’s solicitors had not mentioned that they would have any difficulties in preparing the translation, whether at the CLR hearing before Master So or at the PTR hearing before Deputy Judge Yip. Indeed, I fail to see why it would take more than 4 months for the plaintiff to prepare then as there were not many documents which required translation.
3. In considering whether to grant an adjournment for the hearing it this case, I took into account of the test laid down by Registrar Madam Au Yeung (as The Hon Madam Justice Au Yeung then was) in the case of *Fortune Asset Development Limited v De Monsa Investments Limited* (unrep., HCA 167/2009; [2009] HKEC 609), a summary of which appears at §1B/1/1 of Hong Kong Civil Procedure 2017.
4. Further, I consider that this case falls within all fours with what the court has stated in the case of *Liu Chen v Chan Poon Wing* (unrep., HCPI 779/2006, [2009] HKCE 1650) where the court stated that:-

“Practitioners should bear in mind that it is the duty of the handling solicitor to ensure that his client’s case is properly prepared for assessment of damages. The court expects that careful and conscientious consideration and attention be given to the completion of the Checklists (or timetabling and/or listing questionnaires) before the case is set down for assessment hearing. As Lam J said in paragraph 19 of *Wong Siu Yeung v Chu Kwong Wing & Ors* (HCA 5249/1999, unreported, 20 May 2005), ‘[the] court should be able to rely on the diligent conduct of solicitors in the preparation of his client’s case for trial otherwise it will make *a mockery of our case management system.*” (emphasis added). See §1A/0/11 Hong Kong Civil Procedure 2017

1. In my judgment, there had been repeated failures on the part of the plaintiff’s solicitors to observe the “milestone dates” in this case. On at least 2 previous occasions, they had failed to turn up at the CLR hearings with different, but rather lame, excuses. On this occasion, they have not been able to explain what was the “oversight” which had let them to fail to prepare for the assessment of damages hearing. Mr Daniel Wong, a newly qualified solicitor who was given the task to handle this file on his own, said repeatedly in court today that they have no excuses and no good reasons not to comply with the court order other than due to their own negligence and failure to adhere to the timetables laid down by the court. On my part, I at least would admire his honest and readiness to take on the responsibility. However, I believe the repeated failures show a lack of proper supervision and monitoring system by the principal at the firm.
2. As the notice of hearing had been served on the parties by the registrar of the court in February 2017 and a solicitor from the plaintiff’s solicitors firm (not Mr Wong himself) had attended the PTR before Deputy Judge Yip on 6 April 2017, I fail to see there are any “exceptional circumstances” in this case which would warrant an adjournment of the assessment hearing. In this regard, I notice that the 1st defendant, who was acting in person, had on a previous occasion wrote to the court and complained that he had not received any court documents from the plaintiff’s solicitors regarding some of the hearings. He also requested the plaintiff’s solicitors to cause all the documents to be written in Chinese (as he does not read English) so that he could prepare the case in good time.
3. In the aforesaid circumstances, I have regrettably come to the conclusion that the failure to prepare this assessment of damages hearing was completely due to the dereliction of duty on the part of the plaintiff’s solicitors. The failures are not in my view only confined to the preparation of the Chinese translation of the English documents in the assessment bundle, they went much further than that. The plaintiff had failed to prepare the assessment bundle, the opening submission, list of authorities and Chinese translation of the excerpts of passages in the authorities they are going to rely on. In short, they have made a mockery of the case management orders made by Master So at the CLR hearing and by Deputy Judge Yip at the PTR hearing. They have also caused a waste of judiciary resources as the trial dates reserved for the assessment hearing could have been used for hearing other cases.
4. In considering whether to strike out or to dismiss the plaintiff’s claim, I have also taken into account of the interest of the plaintiff in this case. Generally speaking, I would agree that a litigant should not suffer due to the failures on the part of his legal representatives in observing the timetables laid down by the court. However, in this case, I noticed that the plaintiff had already obtained a judgment in a related employees’ compensation proceeding against the 1st defendant. Further, it is of course also open for the plaintiff to seek any redress against his own legal representatives for any act of omission or negligence caused by them.
5. Hence, in my judgment, had it not been for the last minute attempt made by the plaintiff’s solicitors to salvage the case (which I would explain below), I would have no hesitation to have the plaintiff’s claim to be struck out and order the plaintiff’s solicitors to bear all the costs thrown away on both sides as a result personally.

*Last minute attempt to salvage the milestone date*

1. At 5:18 pm on 5 June 2017, ie the evening before the hearing, the plaintiff solicitors lodged the hearing bundle with the court. Further, at 5:44 pm the same evening, they sent the plaintiff’s opening submission and list of authorities to the court by fax.
2. The above acts are clearly a desperate and last ditch attempt to salvage the milestones date which the court had already indicated earlier that it would not move.
3. In my judgment, such last minute lodging of the hearing bundle and opening submissions not only amount to a flagrant breach of the orders made by the masters and the deputy judge, they made a total mockery of the reasons of why having the case management directions at all, ie to assist the parties and the court to achieve the underlying objectives of the CJR. Further, it demonstrates a strong sense of arrogance on the part of the plaintiff’s legal representatives who effectively tried to dictate to the court (and the other side) of the time they would allow them to read into those documents.
4. That is not right. In my view, the court (or indeed the other party) should not be taken hostage by the legal representatives of a party due to their own negligence, omission, inefficiency and/or sheer incompetence, whatever the case may be which have caused their failures in complying with the orders of the court in the first place. The court should not be given limited time to read those documents. On that count alone, eventhough the directions given at the PTR have now been complied with, albeit completely out of time and at the very last minute, I am of the view that the case cannot and should not proceed today.
5. On this occasion, having taken into account of the fact that if I were to strike out or dismiss the case, it would have a dire consequence and irreparable damage to the plaintiff’s claim and would no doubt adversely affect his rights to obtain his damages in good time. Now that all the outstanding orders have been complied with, the assessment hearing in theory at least can now proceed. Hence, with great reluctance, I am prepared to give the plaintiff’s solicitors one more chance to put their house in order. I am prepared to have this case adjourned one last time for the plaintiff to apply to restore the assessment hearing within 7 days and to re-lodge and re-serve his opening in Chinese (instead of current one which was written in English as the trial has been ordered to be conducted in Chinese) within 14 days from today.
6. I would also propose the costs caused by the adjournment to be borne by the plaintiff’s solicitors personally on an indemnity basis. If the plaintiff’s solicitors take issue with this proposed costs order, I would invite them to make written representations within 14 days to vary the same. Otherwise, the proposed costs order will become absolute after the specified time.
7. Lastly, I would like to remind the plaintiff’s solicitors that should this pattern of failures to be repeated in other cases they are handling, I would have no hesitation to strike out their claims in future.

( Andrew S Y Li )

District Judge

Mr Daniel Tien-Yau Wong of B Mak & Co., for the plaintiff

The 1st defendant was not represented and being absent