# DCPI 1771/2017

[2022] HKDC 314

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 1771 OF 2017

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BETWEEN

KWAN HO LAM (a minor) Plaintiff

suing by his father and next friend

KWAN WAI HEI

and

JUMPIN GYM USA LIMITED Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (by paper disposal)

Date of submissions: 26 January 2022 & 21 February 2022 by the plaintiff

Date of handing down Decision: 14 April 2022

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DECISION

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*INTRODUCTION*

1. This is an application made by the plaintiff under Order 21 of the Rules of the District Court (“RDC”) to withdraw a notice of discontinuance filed on 20 July 2018 (“the NoD”).
2. The adjourned hearing of the application was supposed to be heard before me on 25 February 2022. However, due to the rapid surging of Covid-19 cases in Hong Kong at the time, I ordered the case to be dealt with by way of paper disposal.

*BACKGROUND*

1. The summons for the withdrawal of the NoD was first taken out on 13 September 2018 (“the NoD Summons”) to be heard before His Honour Judge Kent Yee (“Judge Yee”). It was taken out at the same time as a summons issued under Order 80, rules 11 & 12 of the RDC for the approval of a settlement involving infant interest (“the Order 80 Summons”).
2. At the hearing on 2 October 2018 before Judge Yee, he ordered the 2 summonses to be adjourned pending the plaintiff’s affirmation explaining the sequence of events leading to the filing of the NoD. He further gave the plaintiff liberty to restore the 2 summonses with half an hour reserved before him. In the same order, the court specifically mentioned it expected full submission should be made on the jurisdiction of the court to first allow the plaintiff to withdraw a valid NoD before dealing with the Oder 80 Summons. The court reserved the costs in respect of the 2 summonses on that occasion (“the October 2018 Order”).
3. On 2 January 2019, the plaintiff made an *ex parte* application before Master SH Lee seeking leave to withdraw the NoD filed on 20 July 2018 (“the *ex parte* Application”). The application was supported by an affirmation filed on the same date by a junior solicitor, who was the then the case handler in the plaintiff’s firm. However, no “full submission” was lodged with the application in relation to the withdrawal of the NoD as ordered by Judge Yee.
4. On 4 January 2019, the master rightly referred the plaintiff to the October 2018 Order and refused to deal with the application.
5. Nothing further was done by the plaintiff’s solicitors for another 17 months until 9 June 2020 when a notice of intention to proceed was filed on behalf of the plaintiff.
6. A notice to act was filed by the defendant’s solicitors on 1 April 2021.
7. However, the plaintiff only restored the hearing of the summonses before me on 13 January 2022, which was more than 3 years after the October 2018 Order and 18 months after they had filed the notice of intention to proceed.
8. At the hearing on 13 January 2022, the plaintiff was represented by Ms Eugenia Yang, counsel who was instructed by the plaintiff’s solicitors on a private basis.

1. On that occasion, Ms Yang informed the court that the plaintiff wished to withdraw the NoD and to seek a compromise of the claim which purportedly had been agreed with the defendant.
2. However, what Ms Yang could not explain to the court on that occasion was why no written submission had been filed in respect of the application to withdraw the NoD as specifically ordered by Judge Yee under the October 2018 Order. Furthermore, Ms Yang was not able to explain to the court why there had been a delay of more than 3 years before the plaintiff restored the hearing. The purported explanation that the case handler had only joined the plaintiff’s firm in or about 2019 was not accepted by the Court.
3. The defendant who was represented by Mr Simon Lam Siu-On of the defendant’s solicitors at the hearing took a neutral stance on the matter.
4. As a result of the plaintiff’s submissions, I gave the following order at the end of the hearing:-
5. Leave to the principal of the plaintiff’s solicitors, namely, Mr Francis Kong of Francis Kong & Co to:
6. file and serve an affirmation within 14 days from today to explain the 3¼ years of delay in restoring the 2 summonses since the Order of Judge Yee dated 2 October 2018 and why paragraph 3 of Judge Yee’s Order was not complied with; and
7. to re-lodge and serve a full written submission within 14 days from today on the jurisdiction of the court on whether it has power to allow the plaintiff to withdraw a valid notice of discontinuance; and if such power exists, why the court should exercise the discretion in the plaintiff’s favour.
8. This hearing of the summonses will be adjourned to Friday, 25 February 2022 at 2:30 pm in Court no.8 before the PI Judge (with 2 hours reserved) and the principal of the plaintiff’s solicitor firm is expected to attend the hearing in person; and
9. Costs of today be reserved.

(“the January 2022 Order”)

1. Then, on 26 January 2022, pursuant to the January 2022 Order, the sole proprietor of the plaintiff’s solicitors, Mr Kong Tak Yuen (“Mr Kong”) filed an affirmation purportedly tried to explain the delays in restoring the hearing before Judge Yee and asked the court’s leave for the withdrawal of the NoD.
2. Also, on the same day, the plaintiff’s solicitors filed a written submission in support of its application to withdraw the NoD.
3. On 17 February 2022, I gave directions to have the case to be dealt with by way of paper disposal in view of the deteriorating Covid-19 situation.
4. On 21 February 2022, Mr Lawrence Cheung, another counsel instructed by the plaintiff’s solicitors, lodged a supplemental submission with the court in support of the application for the Order 80 Summons. It does not however address the NoD Summons.

*DISCUSSION*

1. There are 2 issues which need to be decided by the court under the NoD Summons. They are:-

1. whether a party is entitled to withdraw a notice of discontinuance once it is filed with the court; and
2. if so, who should be responsible for the wasted costs and the wasted interest caused by the delay in settling the case.

*(i) Whether the plaintiff is entitled to withdraw the NoD?*

1. The starting point in considering whether a party who has filed a notice of discontinuance is entitled to withdraw it can be found in §21/5/5 of the *Hong Kong Civil Procedures 2022 Vol 1*:-

“A plaintiff is not able to withdraw a notice of discontinuance and thereby review proceedings (*cf* by consent para. 21/5/16) since (1) the inherent jurisdiction of the court to set aside a notice of discontinuance is in place to protect the defendant, not the plaintiff; and (2) defendants would be deprived of certainty …”

1. In the recent case of *Hui Chi Fung v Commissioner of Police* [2021] HKCFI 1213, HCMP 79/2020, unreported (13 April 2021), Wilson Chan J summarized the law as follows:-

“8.   First, by filing and serving the Notice of Discontinuance in February 2021, the plaintiff has evinced his unequivocal position that he had no intention to pursue the present proceedings.  The fact that leave was required under Order 21, rule 3 of the Rules of the High Court does not change this, even though the Notice of Discontinuance did not operate as discontinuance automatically. It has been held that the fact that a Notice of Discontinuance is irregular or ineffective (for failing to seek leave) does not mean that it has no effect whatsoever, and it would be an abuse of process if the plaintiff wishes to revive the claim, per Lam J (as Lam VP then was) in *Supply Chain and Logistics Technology Limited v NEC Hong Kong Limited*, (unreported, HCA 1939/2006, 24 November 2008) paragraphs 6 to 10.

9.   As held by Lam J, and relying on *Grovit v Doctor* [1997] 1 WLR 640, the abuse of process is for a party to revive the claim in question, having unequivocally intimated by filing a Notice of Discontinuance that he had no intention to pursue the claim.  The abuse does not depend on the trial date having been vacated.

10.   Second, as stated at Practice Note 21/5/5 in the Hong Kong Civil Procedure 2021, “A plaintiff is not able to withdraw a notice of discontinuance and thereby revive proceedings since (1) the inherent jurisdiction of the court to *set aside* a notice of discontinuance is in place to protect the defendant, not the plaintiff; and (2) the defendants would be deprived of certainty.”

11.   Third, before the court is to exercise its discretionary jurisdiction to allow the plaintiff to withdraw the Notice of Discontinuance (assuming that it has such jurisdiction), it has to be satisfied that there are good reasons to do so.  However, the only reasons given by the plaintiff through his solicitor’s affidavit is that he “has recently taken further legal advice” and that he “decides that there are good merits to continue this action against the defendant”.

12.   I agree with the defendant that this is far from being a good reason because all along the plaintiff had been legally advised and represented (by counsel Mr Joe Chan and Ms Jessica Leung and by the plaintiff’s former solicitors, Messrs Victor Yeung & Co).

13.   For the reasons stated above, I would dismiss the Withdrawal Summons.”

1. Reading from the above, there is no doubt that the court has a discretionary jurisdiction to allow a plaintiff to withdraw a NoD if there are good reasons to do so. The burden however is on the plaintiff to establish that it is just and fair to do so, in particular taking into account of the interests of the defendant.
2. In this case, the plaintiff’s solicitors has admitted to a series of blunders leading to the current situation as set out in the affirmation filed by Mr Kong. They included:-
3. The insurer of the defendant had as early as on 19 July 2018, on a without admission of liability basis, sent a cheque in a certain sum in settlement of the plaintiff’s claim as well as the costs of the proceedings which were agreed between the plaintiff’s solicitors and the insurer;
4. On 20 July 2018, the then case handler of the case, an associate solicitor with the plaintiff’s firm, “inadvertently jumped the gun and filed the Notice of Discontinuance before seeking directions from the court in relation to the purported settlement and without serving the same on the Defendant.”;
5. On 13 September 2018, the plaintiff took out the NoD Summons purportedly to withdraw the NoD and the Order 80 Summons to accept the settlement sum paid by the insurer to the plaintiff’s solicitors on 19 July 2018;
6. The October 2018 Order was given by Judge Yee on 2 October 2018;
7. The solicitor who “inadvertently jumped the gun” had left the employment of the plaintiff’s firm at the end of 2018 and the case was passed to the new case handler who made the *ex parte* Application before the master in January 2019;
8. The case was put to a “standstill” amidst “internal discussion” in the plaintiff’s firm of whether the case should continue to be handled by the new case handler who was “relatively junior” and later due to the outbreak of COVD-19;
9. It was not until early 2021 when the insurer of the defendant contacted the plaintiff’s firm in relation to the settlement of the case that “the progress of the case was picked up again”;
10. It was then that the defendant’s solicitors filed a notice to act as well as a notice of sanctioned payment in the previously agreed sum for the purpose of settling the case; and
11. In the circumstances, the plaintiff solicitors say that the filing of the NoD was “purely a premature step taken by mistake” and the plaintiff’s intention as a layman was indeed to continue with the action until the finalisation thereof.
12. Mr Kong further owned up responsibility for failing to supervise the proper handling of the case by the 2 “case handlers” employed by his firm. He asked for the court’s pardon for the premature filing of the NoD and the subsequent delay in the conduct of the case. He stated that his firm is willing to bear the costs incurred by the defendant as occasioned by the NoD Summons and by the delay in proceeding with the Order 80 Summons as described in his affirmation.

1. In my judgment, it is extremely regrettable that the plaintiff’s junior solicitors, due to the lack of supervision on the part of its principal (as frankly admitted by Mr Kong in his affirmation) and the failure of the junior solicitors to check the rules on settling a case involving an infant plaintiff under Order 80, rules 11 & 12 of the RDC (as is obvious from the multiple blunders made by the case handlers), have caused the delay of the settlement of a simple personal injury case involving a relatively small amount.
2. I consider it is inexcusable for the plaintiff’s solicitors to try to restore the matter by making the *ex parte* Application before the master in January 2019 when the October 2018 Order had made it clear that the matter should be adjourned to be heard before the same judge at the time.
3. In addition, I do not accept the plaintiff solicitors’ explanations of why the matter was left idle for over 3 years from the date of the October 2018 Order of Judge Yee to the first time when they tried to restore the hearing before me in January 2022. In any event, they have failed to explain why the “full submission” ordered by Judge Yee in the October 2018 order was not complied with when the hearing was restored before me on that occasion.
4. All in all, I find the above multiple blunders and explanations not acceptable and fall far short of the standard to be expected from an experienced solicitor who supposed to have supervision over his junior associates.
5. However, balancing that, I remind myself that, in order to achieve the underlying objectives of the Civil Justice Reform, I must take into account of the following matters in this case.
6. First, this case involves an infant plaintiff. It is not due to the fault of the infant plaintiff or his next friend and father that this simple matter was dragged on for more than 3½ years before the plaintiff solicitors started to address the requisitions made by the court under the October 2018 Order. In my view, it will not be in the interests of the infant plaintiff to see a further delay in the settlement of this matter.
7. Second, this case involves with a very modest claim and settlement sum which should have been settled (including obtaining the approval of the court on settlement) in either late 2018 or early 2019. Any further delay will only add to the already disproportionate amount of costs incurred by the parties in dealing with the blunders made by the plaintiff’s solicitors.
8. Third, I note that the defendant is taking a neutral stance on this matter. I suppose as long as their positon, both in terms of costs and the damages their insurer client had agreed to pay back in 2018, is not in any way affected by the multiple blunders made by the plaintiff’s solicitors, they would rather to have the matter settled earlier than later.
9. Fourth, if I were to refuse the plaintiff’s application to withdraw the NoD now, it would only mean that the infant plaintiff will have to instruct another firm of solicitors to renew the Order 80 Summons application and may have to pursue after the plaintiff’s firm for any loss resulting from the blunders made. This will not in my view be in the interests of the infant plaintiff to do so.
10. Last but not the least, given the fact that the principal of the plaintiff’s solicitors is now prepared to bear the costs of the defendant for the NoD Summons and the delay in proceeding with the 2 summons, I consider that as long as any damages to be recovered by the infant plaintiff (including the interest he has been deprived of in the past 3½ years) will not be affected by the delay caused by his own solicitors, it will definitely be in his benefit and in the interest of justice to to have the NoD set aside and to allow the Order 80 Summons to proceed forward.
11. Balancing all the above matters, I therefore reluctantly will allow the plaintiff to withdraw the NoD.

*(ii) Who should be responsible for the wasted costs and the lost interest caused by the delay in settling the case?*

1. In my judgment, there is no doubt that the plaintiff’s solicitors who have made the multiple blunders and delayed the settlement of the matter for over 3 years should be made personally liable for any wasted costs resulting therefrom. This does not only include the costs incurred by the defendant as occasioned by the NoD Summons which Mr Kong has conceded in his affirmation, it should also include any wasted costs incurred by the plaintiff’ solicitors in dealing with the matter. Those costs should not be borne either by the infant plaintiff or the defendant. I shall ask the plaintiff’s solicitors to give the court an undertaking that they will not recover those costs from the infant plaintiff or his next friend in this case.

1. Further, as a result of the mistakes made by the plaintiff’s solicitors and the delay in restoring the application, the infant plaintiff has been deprived of any interest he may able to accumulate during the past 3½ years, I would like to hear submissions from the plaintiff’s solicitors of why they should not be personally responsible for those lost interest for any settlement sum the court may approve at the end of the day.

*CONCLUSION*

1. In conclusion, based on the aforementioned discussions, I shall grant leave to the plaintiff to withdraw the NoD dated 20 July 2018 with costs in favour of the defendant, such costs to be borne by the plaintiff’s solicitors personally and on an indemnity basis. The costs will be summarily assessed by the court and to be paid forthwith. For the purpose of assessment, I hereby direct the defendant to lodge a statement of costs with the clerk of this court within 14 days after the handing down of this decision and thereafter the plaintiff will have 14 days to lodge its list of objections, if any. The court will then dispose of the matter on paper.

1. I would also direct the plaintiff to restore the hearing of the Order 80 Summons before me with a date to be fixed as soon as possible and in any event no later than 21 days after the handing down of this decision where I shall hear the plaintiff’s submissions as to the reasonableness of the proposed settlement and whether the plaintiff’s solicitors should be made personally liable for the interest lost during the past 3½ years’ delay caused by them.

( Andrew SY Li )

District Judge

Mr Kong Tak Yuen of Messrs Francis Kong & Co., for the plaintiff

Mr Simon Lam of Messrs Paul C.K. Tang & Chiu, for the defendant