## DCPI 2109/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2109 OF 2013

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##### BETWEEN

CHEUNG YUEN YING Plaintiff

### and

INTEGRATED DISPLAY TECHNOLOGY

LIMITED Defendant

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Before: Deputy District Judge Liu Man Kin in Chambers

Date of Hearing: 9 May 2016

Date of Decision: 13 May 2016

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DECISION

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*INTRODUCTION*

1. The trial in this case was conducted before me on 28-30 October 2015. At the time of the trial, both parties were legally represented. On 16 November 2015, this court handed down a judgment (“the Judgment”) in which I dismissed Madam Cheung’s claim against IDT. The facts have been set out in the Judgment. For ease of reference, I adopt the abbreviations used in the Judgment herein.
2. After the handing down of the Judgment, Madam Cheung applied for legal aid to assist her to lodge an appeal, but eventually her application was unsuccessful. On 15 January 2016, Madam Cheung took out a summons (“the Leave Application”) to apply for leave to appeal and filed an affirmation made by her in support of the application (“the Supporting Affirmation”). IDT’s position is that since the time for Madam Cheung to lodge an application for leave to appeal has stopped to run while Madam Cheung’s legal aid application was in place, Madam Cheung’s leave application was made within time. I proceed to hear the Leave Application on this basis.
3. Pursuant to the directions given by this court on 15 February 2016, IDT filed an affirmation in opposition made by Madam Lo on 7 March 2016 (“Madam Lo’s Affirmation”). Madam Cheung has leave to file an affirmation in reply on or before 28 March 2016, but she did not do so and only filed an affirmation in reply (“the Reply Affirmation”) on 7 April 2016. Accordingly, Madam Cheung would only be able to rely upon the Reply Affirmation with leave of this court.
4. On 27 April 2016, Madam Cheung took out another summons (“the New Evidence Application”) to apply for leave to rely upon certain new documents in the Leave Application.
5. In the Supporting Affirmation and the Reply Affirmation, Madam Cheung produces many new documents. By the New Evidence Application, Madam Cheung seeks leave to introduce some other new documents. At the beginning of this hearing, Madam Cheung made an application orally for leave to rely upon a video and further new documents in support of her application for leave to appeal (“the 2nd New Evidence Application”). I have seen that video and read all those new documents on *de bene esse* basis.

*THE LEGAL PRINCIPLE*

1. District Court Ordinance (Cap.336) s.63A(2) provides:-

“Leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that—

(a) the appeal has a reasonable prospect of success; or

(b) there is some other reason in the interests of justice why the appeal should be heard.”

1. A reasonable prospectus of success means a appeal with prospects that are more than “fanciful” but which do not need to be shown to be “probable”: see *SMSK v KL* [2009] 4 HKLRD 125 at [17], and *Lee v Tse* (HCMP 968/2014, 8 October 2014) at [15].
2. In respect of an appeal against findings of fact made by the trial judge, the Court of Appeal would only intervene if those findings are plainly wrong. The principles have been recently recapped by the Court of Appeal in *China Gold Finance Limited v CIL Holdings Ltd* (CACV 11/2015, 27 November 2015):-

“11. It is well settled that in respect of findings of fact, this court can only intervene when we are satisfied that the findings by the primary judge is plainly wrong: *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 is often cited and applied in this court.

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17. We respectfully agree with the judgment of the Privy Council in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*, supra, where Lord Hodge explained at paragraph 12 the phrase “plainly wrong” in the context of an appeal against a finding of fact:-

“This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts … Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge’s evaluation of the evidence that is sufficiently material to undermine his conclusions.”

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19. The kinds of mistake which could engage an appellate court’s power of intervention were recently explained by Lord Neuberger in *In re B (A Child)* [2013] 1 WLR 1911, at paragraph 53:-

“ …where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.”

1. As to admission of new evidence on appeal, it is trite that in order to succeed, the applicant must satisfy the 3 conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489. See the recent Court of Appeal’s judgment in *The Bank of New York Mellon v Sun Jianrong and Another* (CACV 166/2015, 25 November 2015):-

“18. It is trite that the test in *Ladd v Marshall* [1954] 1 WLR 1489 applies to an application to adduce fresh evidence on appeal.  In gist, the applicant must satisfy three conditions:-

1. that the evidence could not have been obtained with reasonable diligence for use at the hearing below;
2. that the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(3) that the evidence must be such as is presumably to be believed or its must be apparently credible, though it need not to be incontrovertible.”

1. With these principles in mind, I now turn to the applications made by Madam Cheung.

*THE LEAVE APPLICATION*

1. Madam Cheung raises 4 grounds of appeal.

*The 1st ground*

1. Madam Cheung in the Supporting Affirmation says that she suspects IDT has used forged evidence to mislead this Court. Madam Cheung alleges that the Exhibition Counter as shown in the Video Footages produced by IDT at trial is not the counter in the 2010 exhibition, but is the counter in the 2012 exhibition. Madam Cheung puts forward the following in support of her allegation:-
2. In the Video Footages, Mrs Chan (the wife of IDT’s boss) was promoting a new product of IDT, “NanoActiv Skin Restoring System” (納米活性煥膚儀).
3. According to the information discovered by Madam Cheung in the internet, “NanoActiv Skin Restoring System” was developed by IDT in 2011 and won the IF product design award in 2012. Madam Cheung produced an extract from the IDT’s 2012 Annual Report as a supporting document (“the Extract”).
4. Based upon the above, Madam Cheung alleges that IDT had used the Video Footages to mislead the court, as the Video Footages are showing the exhibition in 2012 but not the exhibition in 2010.
5. Reading Madam Cheung’s allegation as a whole, she is not suspecting, but is in fact accusing IDT of having produced forged evidence to mislead the court. This is a very serious allegation. Madam Lo has on behalf of IDT denied this in her affirmation.
6. Having reviewed the evidence, there is no merit in Madam Cheung’s allegation.
7. Madam Cheung was represented by counsel at the trial. During the trial, after taking instruction from Madam Cheung, Madam Cheung’s counsel accepted that the Video Footages were showing the exhibition in 2010. Madam Cheung’s counsel agreed that one Video Footage captured the Exhibition Counter’s situation in the afternoon on 13 October 2010, and the other Video Footage captured the Exhibition Counter’s situation on 14 October 2010. Madam Cheung’s counsel would not make this admission unless there is a specific instruction from Madam Cheung accepting the same.
8. I have reviewed the 2 Video Footages. Contrary to Madam Cheung’s allegation, Mrs Ho did not mention “NanoActiv Skin Restoring System” (納米活性煥膚儀), or that IDT was having a product using nanotechnology, in those Video Footages. Mrs Ho only mentioned that *in future*, they might have a face steamer using nanotechnology.
9. According to the Extract (there is no reasonable explanation as to the non-production of the Extract at trial), “*[t]he new NanoActiv Skin Restoring System, applying the advanced Nano-Cyclone Technology, has won the IF product design award (2012), the HKEIA award on innovations and technology (2012) and has been selected as one of the finalists in the Hong Kong Award for Industries (2012).*” I do not see how the Extract can support Madam Cheung’s allegation.
10. I would disallow Madam Cheung to rely upon the Extract in the Leave Application, for it is clear that Madam Cheung would not be allowed to adduce the Extract on appeal as conditions (1) and (2) in *Ladd and Marshall* are not satisfied.
11. I regret to say that the one trying to mislead the court is not IDT but is Madam Cheung. Madam Cheung was present in the 2010 exhibition, and she herself has actual knowledge as to whether the Video Footages are showing the scene of the 2010 exhibition. During the trial, Madam Cheung clearly and unequivocally through her counsel agreed that the Video Footages were showing the scene of the 2010 exhibition. Now Madam Cheung is not only trying to resile from the admission, but is trying to make a very serious allegation against IDT in the absence of any relevant evidence and to mislead the court to accept a new case which is untrue. I take this opportunity to remind Madam Cheung that she may pursue her interest by any legitimate means, but she should never make any groundless allegation against anyone and should never try to mislead any court.

*The 2nd ground*

1. Madam Cheung alleges that in respect of the Feb Report made by Mr Chu and mentioned in paragraph 15(f) of the Judgment, Mr Chu made 2 mistakes in the report: (1) the complaint should not be “painful and swelling *left* knee” but should be “painful and swelling *right* knee”, and (2) the sentence “The patient fell down floor *carelessly* 3 weeks ago, causing the above symptom” is incorrect, and the correct version should be “The patient fell down floor *accidentally* 3 weeks ago, causing the above symptom.” Madam Cheung produced an amended report (“the Amended Report”) signed by Mr Chu on 15 January 2016 to support her allegation. Madam Cheung says that she has never seen the Feb Report before the trial, as the Feb Report was handled by an assistant in the law firm representing her at trial.
2. I refuse to allow Madam Cheung to rely upon the Amended Report, for Madam Cheung would not be able to adduce the same on appeal as condition (1) in *Ladd v Marshall* is not satisfied. The Feb Report was produced by Madam Cheung’s solicitors in their list of documents filed on 22 May 2015. As said in paragraph 15(f) of the Judgment, Madam Cheung had ample time to make correction to the Feb Report before the trial.
3. Further, the Feb Report is a factor but is not the only factor taken into account by this court in assessing Madam Cheung’s evidence: see paragraph 15 of the Judgment. Even if the Amended Report is evidence in the appeal, I am of the view that it would not have an important influence on the result of the case. In my view, condition (2) in *Ladd v Marshall* is not satisfied.
4. Further, it is not known why Mr Chu in 2016 amended the Feb Report made in 2014. There is no evidence showing that the amendments made are presumably to be correct or apparently credible. I am of the view that condition (3) in *Ladd v Marshall* is also not satisfied.
5. There is no substance in this ground.

*The 3rd ground*

1. Madam Cheung takes issue with Dr Tsoi in respect of the joint medical report dated 22 August 2015, in which Dr Tsoi said:-

“1. Dr Tsoi opines that chondromalacia (thinning of patellar cartilage is a common condition in middle age ladies. While the onset of right knee symptoms was mainly caused by the subject contusion injury, the poor progress and incomplete recovery were portably caused by the pre-existing chondromalacia. This also explained her spontaneous onset of *left* knee pain 6 months later. ……”

1. Madam Cheung alleges that Dr Tsoi has made a mistake, ie the word “left” in italics above should be “right”. Madam Cheung says that the mistake has seriously prejudiced her interest.
2. I do not think Dr Tsoi has made any mistake as alleged by Madam Cheung. In that paragraph, Dr Tsoi just recorded Madam Cheung’s complaint of onset of left knee pain 6 months after the Accident.
3. Further, even if Dr Tsoi has made a mistake as alleged by Madam Cheung, I am not satisfied that the mistake has prejudiced Madam Cheung’s interest in any way.
4. There is no substance in this ground.

*The 4th ground*

1. Madam Cheung alleges that the “white strip” as shown in “LYK-2” is fabricated.
2. The “white strip” is the Concealed Light. At trial, there was a dispute as to whether the Concealed Light was on before the Accident, but there was no dispute that the Platform was built with Concealed Light thereunder. I made a factual finding that the Concealed Light was on before the occurrence of the Accident.
3. Apart from her bare allegation, Madam Cheung has provided no basis in support of her allegation. There is no merit in this ground.

*Other new documents produced in the Supporting Affirmation*

1. Apart from the Extract and the Amended Report, Madam Cheung produced many other new documents in the Supporting Affirmation.
2. In respect of the psychiatric reports, the appointment slip, the referral letter, and the registration card for people with disabilities (now on pp 64-72, 74-77 and 100 of the hearing bundle), Madam Cheung has been disallowed to produce these documents by the Order of HH Judge Leung’s Order dated 26 October 2015. Madam Cheung cannot now try to produce documents in respect of which she has been disallowed to produce at trial.
3. In respect of other documents, it is clear that Madam Cheung cannot satisfy conditions (1) and (2) in *Ladd v Marshall*.
4. I would disallow Madam Cheung to rely upon all the new documents produced in the Supporting Affirmation.

*New documents in Madam Lo’s Affirmation*

1. Madam Lo produced some documents in her affirmation. Save and except a transcript showing what has been said by Mrs Chan in the Video Footages, the other documents are new documents. The purpose of producing these new documents is to refute Madam Cheung’s allegation that IDT had used the Video Footages to mislead the court.
2. For the reasons set out in paragraph 14 above, I am of the view that Madam Cheung’s allegation must be rejected. It would not be necessary for me to consider the new documents produced by Madam Lo. For the avoidance of doubt, this decision is not based upon any of the new documents produced in Madam Lo’s Affirmation.

*New documents produced in the Reply Affirmation*

1. The mere purpose of the Reply Affirmation is to produce some medical reports and appointment slips obtained by Madam Cheung in 2016. I do not see how these documents can satisfy condition (2) in *Ladd and Marshall*. Accordingly, I would refuse to grant leave to Madam Cheung to rely upon the Reply Affirmation.

*No reasonable prospect of success*

1. In my judgment, Madam Cheung does not have a reasonable prospect of success in an appeal against the Judgment.

*No other reason*

1. I also do not see any other reason that in the interests of justice the appeal should be heard.

*THE NEW EVIDENCE APPLICATION*

1. By this application, Madam Cheung seeks leave to rely upon 7 categories of new documents in this hearing. Having considered these documents, I refuse to grant leave as Madam Cheung would not be able to overcome the *Ladd v Marshall* hurdle to introduce these documents in the appeal, if there is one.

*1st Category – A medical report by Dr Chung Chor-yat of Princess Margaret Hospital*

1. This report is made upon the request made by Madam Cheung on 12 February 2016 and is complied upon available medical records. There is no reason why Madam Cheung did not make the request at an earlier time. Further, having read the report, I do not think the contents of the report would have any important influence on the outcome of the case. I am of the view that conditions (1) and (2) in *Ladd v Marshall* are not satisfied.

*2nd Category – Letters from Social Welfare Department notifying Madam Cheung of the granting of Disability Allowances in 2015-2017*

1. On the question of liability, these documents certainly cannot be relevant evidence.
2. On the question of quantum, the relevant evidence is the evidence showing the injuries suffered as a result of the Accident and the impact of those injuries on Madam Cheung’s life and incomes. The mere fact that Madam Cheung is now receiving disability allowances cannot be such evidence.
3. Condition (2) in *Ladd v Marshall* is not satisfied.

*3rd Category – Documents showing incomes from part-time job*

1. Madam Cheung says that the court has not taken these documents into account at trial.
2. The court has not considered these documents at trial simply because the documents had not been produced at the trial. There is no reason why these documents could not have been obtained with reasonable diligence before the trial.
3. During the trial, Madam Cheung stated in her Revised Statement of Damages that her monthly income at the time of the Accident was HK$7,188.10 plus MPF, which was accepted by IDT (see paragraph 55 of the Judgment) and applied by this court in calculating the loss of earnings (see paragraph 58 of the Judgment). Madam Cheung cannot now deviate from the figure put down in her Revised Statement of Damages and try to put forward another figure.

1. In my view, both conditions (1) and (2) in *Ladd v Marshall* are not satisfied.

*4th Category – A medical insurance policy covering Madam Cheung while Madam Cheung was employed by IDT*

1. It is not known (a) why Madam Cheung did not produce this document before the trial, and (b) how this document would be relevant to the appeal. Conditions (1) and (2) in *Ladd v Marshall* are not satisfied.

*5th Category – 2 hospitalization claims settlement forms issued under the said medical insurance policy*

1. For the reasons set out in paragraph 48 above, I disallow these documents.

*6th Category – Table showing Madam Cheung’s medical expenses*

1. For the same reasons, I disallow this document.

*7th Category – 6 photos showing the injury of Madam Cheung’s right knee after the Accident*

1. There is no dispute that Madam Cheung has injured her right knee at the Accident. The questions are (a) whether IDT is liable to Madam Cheung; and (b) if liability is established, the quantum of damages. After trial, this Court has answered both questions in the Judgment. These photos cannot show that the court has erred in any aspect in the Judgment.
2. I am of the view that Madam Cheung cannot satisfy conditions (1) and (2) in *Ladd v Marshall*. I refuse to grant leave to Madam Cheung to rely upon these photos.

*THE 2nd NEW EVIDENCE APPLICATION*

1. Madam Cheung seeks leave to rely upon a video from YouTube and some further new documents. According to Madam Cheung, the video is IDT’s promotion of “NanoActiv Skin Restoring System” on 22 June 2012.
2. The further new documents can be divided into 3 categories, ie (a) documents showing some products promoted by IDT in 2013 (“IDT 2013 Documents”); (b) a document allegedly relating to Madam Cheung’s income from part-time job; and (c) documents allegedly showing that Madam Cheung is still receiving treatments.
3. In respect of the video and all these further new documents, I am not satisfied that Madam Cheung can fulfill condition (1) in *Ladd and Marshall*.
4. Further, I am also not satisfied that Madam Cheung can satisfy condition (2) in *Ladd and Marshall*.
5. Madam Cheung’s point is that Mrs Chan in the Video Footages was promoting “NanoActiv Skin Restoring System” and the other new products mentioned in IDT 2013 Documents. According to Madam Cheung, this shows that the Video Footages are not showing the 2010 exhibition but the 2012 exhibition. The short answer to Madam Cheung’s point is that Mrs Chan in fact had not promoted “NanoActiv Skin Restoring System” and the other new products mentioned by Madam Cheung in the Video Footages. With respect to Madam Cheung, Madam Cheung’s point is a non-point.
6. As to the alleged part-time income, for the reason set out in paragraph 46 above, Madam Cheung cannot now deviate from the figure put forward in her Revised Statement of Damages.
7. Whether Madam Cheung is now receiving medical treatment is not relevant to the intended appeal.
8. I am of the view that Madam Cheung would not be entitled to adduce all these on appeal, and accordingly I would disallow Madam Cheung to rely upon these in the Leave Application.

*CONCLUSION*

1. For the reasons above, I refuse to grant leave to allow Madam Cheung to rely upon the Reply Affirmation, and I also dismiss the Leave Application, the New Evidence Application and the 2nd New Evidence Application.
2. I have heard the parties’ submissions on costs. In my view, costs should follow the event. I have considered whether I should order Madam Cheung to pay costs on a scale higher than party and party basis for the reason stated in paragraph 16 above. Since Madam Cheung is acting in person and, as far as I know, there is no similar misconduct by Madam Cheung in these proceedings previously, I would give Madam Cheung a chance. However, Madam Cheung should pay heed to what I have said in paragraph 16 above, and should not do similar things in future. I order that the costs of all these applications be paid by Madam Cheung to IDT, to be taxed on party and party basis if not agreed.
3. I direct that this decision be interpreted to Madam Cheung by a court interpreter at a mutually convenient time.
4. Lastly, it remains for me to thank Miss Chan Wai Ling, solicitor for IDT, for the helpful assistance rendered to this court.

( Liu Man Kin )

Deputy District Judge

The plaintiff appeared in person

Ms Chan Wai Ling of Winnie Leung & Co, for the defendant.