DCPI 2188/2022

[2023] HKDC 670

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2188 OF 2022

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BETWEEN

WU YURONG Plaintiff

and

ON TIME BUILDING MATERIAL AND Defendant

ENGINEERING COMPANY LIMITED

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Before: Deputy District Judge Kenneth KY Lam in Chambers

(Open to public)

Date of Hearing: 17 May 2023

Date of Decision: 17 May 2023

Date of Reasons for Decision: 25 May 2023

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REASONS FOR DECISION

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*Introduction*

1. On 18 April 2023, the defendant (“**D**”) took out a discovery summons (“**the Summons**”) against the plaintiff (“**P**”) which asked for an order that:-
   1. Within 28 days [hereof], P is to make discovery of all medical reports, notes and records of P for the period from 29 April 2021 up to [the date hereof] from [Dr X];
   2. In the event P fails to make discovery of [the above], P do within 14 days file and serve an affirmation to state whether the document(s) have at any time been in her possession, custody or power, and if they are no longer in her possession, custody or power, since when she parted with them and what have become of them; and
   3. The costs of and incidental to this application be to D, to be taxed if not agreed.
2. P opposed the Summons.
3. I raised two requisitions by letter on 15 May 2023. The parties attempted to answer them by letters dated 15 May 2023 and 16 May 2023 respectively.
4. At an oral hearing on 17 May 2023, I heard the parties’ further arguments and dismissed the Summons, ordering D to pay costs to P (“**the Decision**”). I indicated there and then that I would hand down my reasons for the Decision within 3 months.
5. These are the reasons for the Decision.

*Background*

1. This is a personal injuries dispute. Both liability and quantum are disputed, and both parties are legally represented.
2. In P’s Statement of Damages filed on 5 July 2022, P disclosed the fact that she had sought treatment from a named doctor (“**Dr X**”) after the alleged accident. P obtained sick leave certificates, and receipts, from Dr X, which P disclosed in her List of Documents filed on 25 August 2022 (“**P’s LoD**”).
3. P’s LoD included the standard declaration that P did *not* have, and *never* had, in her possession, custody or power, any document relevant to the issues in dispute *except* those set out in P’s LoD. By that declaration, P confirmed she did *not* have the *internal* attendance notes of Dr X, if any ever existed.
4. As part of D’s case on quantum, D intended to challenge the basis, if any, for the sick leave period certified by Dr X. D is in law entitled to do so, and the future trial judge is perfectly entitled to go behind any and all sick leave certificates. See, eg, *Yeung Lai Ping v Secretary for Justice* [2022] HKCA 689 (at §36 per Kwan V-P) and *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210 (at §18 per Le Pichon JA).
5. On 6 February 2023, D’s solicitors wrote to P’s solicitors and asked for the *internal* attendance notes of Dr X, if any ever existed. On 20 February 2023, P’s solicitors wrote back and confirmed P did *not* have the documents sought, explaining, with fully particularized details and copies of open letters written to Dr X, their repeated attempts to try to get hold of all such documents since November 2021. It is crystal clear, from the open letters written to Dr X, that P’s solicitors had diligently tried to get hold of all such documents. Dr X was, most irresponsibly, “*ghosting*” everyone.
6. Most importantly for our present purposes, in their open letter dated 20 February 2023, P’s solicitors said they would “*have no objection*” if D’s solicitors, being keen to get hold of Dr X’s *internal* attendance notes, *etc*, were to take out a third-party discovery summons against Dr X.
7. On 18 April 2023, instead of taking out an appropriate third-party summons against Dr X, D chose to take out the Summons against P, and P only.
8. On 15 May 2023, having read all the papers in the court file, I raised two requisitions by letter. The first was whether it would be more sensible for the parties to direct their applications against Dr X, personally and directly. The second was whether asking P to file an affirmation saying she did not have, and never had, Dr X’s *internal* attendance notes, *etc*, in her possession custody or power, would serve any meaningful purpose.

*D’s Arguments*

1. Ms Avis Pun, on behalf of D, sought to persuade me there was *some* utility in asking for an affirmation from P confirming P did *not* have Dr X’s medical notes with her. According to Ms Pun, an affirmation from P would be “*more serious*” than an open letter from P’s solicitors and upon receiving an affirmation from P, D may take further steps.

*P’s Arguments*

1. Ms Dorothy Lau, on behalf of P, agreed with my observations and added that on 9 May 2023, P’s solicitors had written a long open letter to D’s solicitors, §22 of which also mentioned the futility of the Summons, but on 12 May 2023, D’s solicitors wrote back to them and, with the use of some strong language, refused to withdraw the Summons.

*My View*

1. I agree with D that the documents sought are necessary for the fair disposal of this action, but I disagree with D that the Summons, or any order in terms of the Summons, would serve a meaningful purpose. As this court should *not* be making a useless order, or be compelling people to take useless steps, the Summons was misconceived.
2. On the first point, I agree with D that at the end of the day, the fact-finder is the future trial judge. The future trial judge will of course be assisted by experts, but he is quite entitled to look at the contemporaneous “*raw materials*”. Even the experts themselves should be provided with Dr X’s contemporaneous notes (*if any ever existed*), as their opinions on what should be an appropriate period of sick leave for P can only be as good as the raw materials provided to them by the parties.
3. On the second point, one must be realistic about asking parties to file affirmations *vis-à-vis* discovery issues. In some scenarios, such as a *dubious* allegation that a person accidentally dropped her smartphone into the sea (see, eg, *Vardy v Rooney* [2023] EMLR 1 [2022] EWHC 2017 (QB) at §69 to §71), asking the person in question to verify the story on affidavit would be essential. However, in our present scenario, the only person who can reliably verify the existence, or completeness, of Dr X’s internal notes (*if any ever existed*), is Dr X himself. Those of us who have had experience going to a clinic as a patient (*to get medication for a flu, for example*) would know that a doctor’s notes are usually *not* provided to the patient at the end of a medical consultation and would *only* be released to the patient upon a written request being made under the Personal Data (Privacy) Ordinance (Cap 486). Importantly, *even after* the doctor had purportedly released all documents, the only person who can verify the completeness of such notes is *still* the doctor, not the patient. Therefore, in the scenario of our present case, asking P to verify the completeness of her doctors’ notes would never serve any useful purpose, and would indeed be wholly unfair to P. Asking rhetorically, how does P know whether her doctors had or had not provided all of *their* notes to *her*?
4. Finally, there are *many other ways* through which the parties could have obtained Dr X’s notes with great efficiency. The most obvious choice would be for either party to invoke Section 47B of the District Court Ordinance (Cap 336), and also Order 29 rule 7A of the Rules of the District Court (Cap 336H) (**“RDC”**), to obtain what is usually called a “*non-party property inspection order*” from this court, since for the purpose of these provisions “*property*” includes all medical notes, in physical or electronic format, in the possession of a doctor, clinic or hospital, and inspection of Dr X’s internal medical notes on P appears to be “*necessary*” for the fair disposal of the issue of quantum within this case. Another obvious choice would be to apply for a *subpoena duces tecum* under Order 38 rule 14 of the RDC and serve it on Dr X by personal service (as to which, see *HKCP 2023*, §38/19/7 to §38/19/9). Whilst I am *not* in any way saying the parties *must* take out such applications, or such applications *must* be successful, the existence of these other choices does go to show how misconceived it was for D to have taken out the Summons.
5. In my view, all legal practitioners contemplating a procedural step should always take a closer look at their armouries and double-check which of their weapons is the most appropriate one for the specific purpose they have in mind. In personal injuries litigation in particular, authorities like *Lo Kwok Kit Sam v Leung Kwok Hung* [2023] 2 HKLRD 119 [2023] HKDC 268, *etc*, should never be overlooked. Parties should also focus on assisting the future trial judge and stop all “*bickering*”.

*Costs*

1. The futility of the Summons was plain and obvious. With the greatest respect, D should never have taken out the Summons, or insisted on an order in terms of it. P’s solicitors were forced to write lengthy letters in order to address various issues raised by the Summons, and to attend the hearing on 17 May 2023. In my view, costs should follow the event.

*Final Remarks*

1. Despite the wholly unnecessary strong words used in *some* of the letters exchanged between the two firms of solicitors, Ms Avis Pun and Ms Dorothy Lau had in fact tried their very best to assist *me*, with courtesy, both before and at the hearing on 17 May 2023. I do thank both of them for their able assistance.

( Kenneth KY Lam )

Deputy District Judge

Ms Dorothy Lau, of WK To & Co, assigned by the Director of Legal Aid, for the plaintiff

Ms Avis Pun, of Winnie Mak, Chan & Yeung, for the defendant