## DCPI 2390/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2390 OF 2011

--------------------

##### BETWEEN

LEE FU WAH Plaintiff

### and

MIU YIU LING 2nd Defendant

FAVOURABLE ISSUE COMPANY LIMITED 3rd Defendant

--------------------

Before: His Honour Judge Alex Lee in Chambers

Date of Hearing: 17 October 2013

Date of Handing down reasons for decision: 24 October 2013

--------------------------

DECISION

--------------------------

*Introduction*

1. On 17 October 2013, I dismissed the application of D2 and D3 to vary the costs order nisi that the plaintiff’s costs be paid by D2 and D3, to be taxed if not agreed, with certificate for counsel. I said that reasons would be handed down. This I now do.
2. The case was about the plaintiff’s claim for damages for personal injuries against D1, D2 and D3. The facts and evidence of the case were as stated in my judgment dated 25 June 2013 (“the Judgment”) which I am not going to repeat. In the event, I dismissed the plaintiff’s claim against D1, but allowed his claim against D2 and D3 and awarded him damages in the total amount of $42,250 comprising $35,000 for PSLA, $5,250 for sick leave, $1,000 for travelling expenses and $1,000 for medical expenses. I also made a costs order nisi in the plaintiff’s favour as aforesaid.
3. By a summons dated and filed on 4 September 2013, D2 and D3 asked that the costs order nisi be varied such that the plaintiff’s costs be paid by D2 and D3 according to the Small Claim Tribunal scale with no certificate for counsel.

*The application out of time*

1. According to O 42, r 5B(3) of the Rules of the District Court (“RDC”), an application for variation of an order nisi as to costs should be made within 14 days after the date of judgment. Therefore, in the present case the time expired on 9 July 2013. On the face of it, there was an almost two months’ delay in the present application.
2. What happened was that on 9 July 2013, the solicitors acting for D2 and D3 wrote to court saying that they had instruction to apply for review of the cost order nisi. The letter went on to state the grounds for variation and concluded by seeking the court’s “further direction”. It is pertinent to note that the letter had not been copied to the plaintiff or his legal representatives. On the same day, the court replied by saying that “if you wish to apply for variation, then a formal application by way of summons is necessary.” On 23 July 2013, a memorandum was filed indicating that the plaintiff was applying for legal aid to prosecute an appeal and as a result the proceedings were “automatically stayed” for a period of 42 days until 3 September 2013.[[1]](#footnote-1) On 4 September 2013, the solicitors acting for D2 and D3 filed the application for variation. On 16 September 2013, all parties were informed that the plaintiff’s application for legal aid was refused.
3. The first thing for the court to decide in the present application is whether it is made out of time. In my ruling it is and my reasons are as follows:-
4. an application to vary an order nisi as to costs should be made by summons: see *PCCW-HKT Telephone Ltd v Telecommunications Authority*, CACV 274/2003 (dated 7 September 2004); and also *Hong Kong Civil Procedure 2013*, para 32/6/9A. The letter dated 9 July 2013 should not be regarded as a proper application, as it was informal and it was not copied to the plaintiff. The solicitors should know that the costs order nisi could not be varied unilaterally by D2 and D3 without involving the plaintiff. Moreover, what the letter purported to do was to seek the court’s direction; and
5. despite the court’s speedy rely on 9 July 2013 that a summons was necessary, none was filed until 4 September 2013. The “automatic stay” as a result of the plaintiff’s legal aid application does not assist D2 and D3, as it cannot excuse the non-action on their part between 9 and 22 July 2013.

*The absence of reasonable excuse*

1. Despite the delay on the part of D2 and D3 and the fact that the summons was only filed after the expiration of the 14 days time limit, the court still have jurisdiction to grant an extension of time: see *Ma Wan Farming Ltd and Chief Executive in Council & Another* [1998] 2 HKLRD 314. Whether or not to grant an extension is a matter of discretion of the court and the relevant considerations include the length of the delay, the reasons (if any) for the delay and the merit of the application for variation: see *Tang Man Kit and Foo Tak Ching (suing as Managers of Wah Yan Mo Fan Heung) v Hip Hing Timber Co Ltd*, CACV 137/ 2002 and *Win Profit Corporation Ltd v World Orient Investment Ltd*, HCA 1487/2009.
2. In the present application, as noted above there was a delay of almost two months. Moreover, I find that no reasonable excuse has been shown for the delay:-
3. D2 and D3 had filed no affirmation to explain the delay and no reasons were proffered for the non-action between 9 and 22 July 2013;
4. a distinction should be made between the filing of a summons for an application and the hearing of the application. In my view, the plaintiff’s legal aid application would not prevent D2 and D3 from filing a summons for variation, it would only delay the hearing of the application. The solicitors for D2 and D3 could have filed the summons and sought a hearing date after 3 September 2013: see O 32 r 4, RDC; and
5. it could be seen from the legal aid memorandum that the plaintiff’s legal aid application was about a proposed appeal but not the costs order nisi. Moreover, according to s 15 of the Legal Aid Ordinance, the proceedings would be stayed “unless otherwise ordered by the court in which the memorandum is filed”. Therefore, what D2 and D3 could have done was to seek an order from the court that the application for variation be proceeded with regardless of the legal aid application. In fact, had the solicitors made enquiries with the plaintiff’s solicitors, they would have found out that the proposed appeal related only to the plaintiff’s claim against D1. In the circumstances, the likelihood was that the plaintiff would have consented to the application for variation being heard so as to avoid delay in the recovery of his costs from D2 and D3.

*The lack of merits*

1. In the present case, the length of the delay and the absence of reasonable excuse would be sufficient for me to decline to extend the time for making of the application for variation: see *Terkild Johan Terkildsen & Another v Barber Asia Ltd & Ors*, HCA 1963/2003 (dated 31 May 2007). However, for the sake of completeness I would also address the merits of the application.
2. In relation to the scale of costs to be applied in a civil case heard in the District Court, it has been held that O 62 r 3(2) combined with O 62, r 9(4)(b) of RDC are wide enough to entitle the court to order costs to be not more than a specified sum, or to be assessed on a basis, for want of a more certain term, similar to the scale applied in the Small Claims Tribunal: see *M Beraha & Co v Ng Wai Lun*, CACV 256/2003, applied in *Hoi Cheng Pan v Headstart Educational Group Ltd*, DCCJ 4028/2006 (dated 27 April 2007). In relation to cases of personal injuries, the Court of Appeal has said that the only relevant consideration is whether at the commencement of the action, in view of the nature of the injury of the plaintiff, it was reasonable to say that he would recover more than $50,000, which is the jurisdiction limit of the Small Claim Tribunal: see *Cheung Yu Tin v Ho Hon Ka* [2006] 2 HKLRD 674, 687J.
3. In the present case, with respect, I am unable to say that there was not, at the commencement of the action, a reasonable prospect for the plaintiff to recover more than $50,000 as damages. The two cases relied upon by the plaintiff, namely *Tsang Ka Hung Barry v Tang Yuk Ling*, DCPI 525/2007 and *Tse Parc Ki v Atlantic Team Ltd*, DCPI 1981/2006, show that for injuries similar to but a bit more serious than those suffered by the plaintiff, awards in the region of $40,000 to $50,000 have been made for PSLA alone. Although the total amount of damages awarded to the plaintiff was less than $50,000, it came very close to it. In my judgment, it was reasonable for the plaintiff to have brought his case against the defendants in the District Court rather than the Small Claim Tribunal.
4. As regards certificate for counsel, Ms Wang, counsel for D2 and D3, submitted that the plaintiff’s case could have been competently handled by a solicitor appearing alone without engaging counsel. On this I begged to differ. First, I note that D2 and D3 were represented at the trial by both Ms Wang and a firm of solicitors. Secondly, as can be seen from the judgment, a number of factual and legal issues arose during the trial. In my view, the degree complexity of a case should be not judged solely on the basis of the pleadings but also on what actually transpired or arose during the trial. This is because pre-trial assessment about the complexity of a case may turn out to be wrong and it is not uncommon to find, for all sorts of reasons, that a seemingly simple case may turn out to be more complicated that it appears on papers. In all the circumstances, it is my judgment that the attendance of counsel to represent the plaintiff at the trial was proper.
5. With respect, I am unable to accept Ms Wang’s submission on the applicable scale and the appropriateness of counsel certificate.

*Order*

1. Based on all of the above, I dismiss D2’s and D3’s application for variation of the costs order nisi. I make the costs order nisi absolute.
2. As regards the costs of the present application, both sides agree that the costs should follow the event. Therefore, I award the plaintiff costs of this application, to be taxed if not agreed, with certificate for counsel.

( Alex Lee )

District Judge

Mr Victor Chiu, instructed by Messrs Lee & Associates Law Office, for Plaintiff.

Ms Athena Wang, instructed by Messrs Cheung & Liu, for 2nd and 3rd defendants.

1. See s 15 of the Legal Aid Ordinance, Cap 91 and s7A of the Legal Aid Regulations, Cap 91A [↑](#footnote-ref-1)