#### DCPI2488/2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2488 OF 2007

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| BETWEEN | MA OI LIN IRENE | Plaintiff |
|  | and |  |
|  | MA HING MING  WONG TAK CHEUNG | 1st Defendant  2nd Defendant |

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##### Coram: H H Judge Marlene Ng in Chambers (open to the public)

Date of Hearing: 11th September 2008

Date of Handing Down Decision: 17th September 2008

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###### DECISION

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I. Background

1. On 30th November 2007, the Plaintiff commenced the present action for damages for personal injuries sustained in a traffic accident on 18th April 2007 (“Accident”), which was caused by the negligent driving of the 1st Defendant for whom the 2nd Defendant was allegedly vicariously liable. The Statement of Damages averred that the Plaintiff suffered neck sprain injury, and her present complaints were neck pain and tightness at neck.
2. On 10th December 2007, the solicitors for the 1st Defendant (“D1’s Solicitors”) wrote to the solicitors for the Plaintiff (“P’s Solicitors”) inviting joint instructions to an orthopaedic expert, Dr Lam Kwong Chin (“Dr Lam”), to conduct medical examination of the Plaintiff. D1’s Solicitors invited the Plaintiff to attend medical examination by Dr Lam singly or alternatively jointly with her own orthopaedic expert.
3. On the same day, P’s Solicitors wrote to D1’s Solicitors to confirm the appointment for joint medical examination (“Joint Examination”) by Dr Lam and the Plaintiff’s orthopaedic expert, Dr Fu Wai Kee (“Dr Fu”), on 28th April 2008.
4. On 30th January 2008, the Plaintiff discontinued her claim against the 2nd Defendant. On 21st February 2008, interlocutory judgment was entered against the 1st Defendant for damages to be assessed.
5. On 12th March 2008, P’s and D1’s Solicitors jointly wrote to court to vacate the Check List Review (“CLR”) hearing scheduled on 10th April 2008 on the basis that the Joint Examination was fixed on 28th April 2008 and the joint orthopaedic expert report by Dr Lam and Dr Fu (“Joint Report”) would not be available in time for the CLR hearing.
6. On 20th March 2008, Master C Lee adjourned the CLR hearing to 7th July 2008. On 19th April 2008, a joint instructions letter was sent to Dr Lam and Dr Fu.
7. On 22nd April 2008, D1’s Solicitors wrote to P’s Solicitors to say they had “just been informed by Dr Lam’s nurse that she received a telephone call from Dr Fu’s nurse this morning requesting to postpone the appointment on 28th April 2008”. D1’s Solicitors objected to the postponement and demanded an explanation.
8. On 23rd April 2008, P’s Solicitors replied stating that “[due] to [the Plaintiff’s] unexpected commitment, she is not available to attend the said appointment” and that they shall inform Dr Fu to liaise with Dr Lam for another early appointment for the Joint Examination. No particulars were given of the alleged “unexpected commitment”.
9. On the same day, P’s Solicitors again wrote to D1’s Solicitors to say that the Joint Examination was re-scheduled to 20th August 2008.
10. By an undated letter received by the court on 26th June 2008, P’s and D1’s Solicitors jointly informed the court that the Joint Examination had been re-fixed to 20th August 2008 “to accommodate the Plaintiff’s diary”, and hence the Joint Report would not be available for the CLR hearing on 7th July 2008.
11. On 27th June 2008, Master K Lo raised written requisition for the parties’ joint reply as to why the Joint Examination was re-fixed. On 30th June 2008, P’s Solicitors sent a draft joint reply to D1’s Solicitors for their consideration. The draft reply stated that “due to the Plaintiff’s unexpected commitment, the parties have agreed that the [Joint Examination] be re-fixed on 20th August 2008”. There is no evidence before me that D1’s Solicitors endorsed such draft reply or that the draft reply was engrossed, signed and/or sent to the court.
12. It is not disputed that at the CLR hearing on 7th July 2008 P’s Solicitors did not give particulars of the alleged “unexpected commitment” that prevented the Plaintiff from attending the scheduled Joint Examination on 28th April 2008. At such CLR hearing, the Plaintiff agreed to waive interest for the period between 28th April and 20th August 2008 on any damages that might be awarded in her favour, and was directed to pay the 1st Defendant’s costs of the CLR hearing assessed on a gross sum basis.
13. After the CLR hearing on 7th July 2008, P’s Solicitors informed D1’s Solicitors that the Plaintiff failed to attend the Joint Examination on 28th April 2008 because she had to attend a Tin Hau ceremony.
14. On 18th July 2008, by consent of the parties, Master K Lo ordered *inter alia* that “[the] medical evidence be limited to [Dr Fu] for the Plaintiff and [Dr Lam] for the 1st Defendant. The joint assessment will be conducted by Dr Fu and Dr Lam on 20th August 2008 and the joint medical report shall be made available on or before 20th October 2008”. Master K Lo further directed that the CLR hearing be adjourned to 4th November 2008 (“Adjourned CLR”).
15. On 20th August 2008, a joint supplemental instructions letter was sent to Dr Lam and Dr Fu.
16. On the same day, D1’s Solicitors wrote to P’s Solicitors saying Dr Lam informed them “that [the Plaintiff] failed to turn up at the [Joint Examination on 20th August 2008]”. D1’s Solicitors noted this was the second time the Plaintiff failed to attend the scheduled Joint Examination, and warned that the 1st Defendant would apply to stay the present action pending such Joint Examination. D1’s Solicitors also demanded the Plaintiff to give an explanation for her failure to attend the Joint Examination on 20th August 2008, and to settle Dr Lam’s fees of HK$3,000.00 for the aborted Joint Examination (“Aborted Fees”) within 7 days.
17. On the same day, P’s solicitors replied they would revert with an explanation by the Plaintiff as requested, and convey Dr Lam’s fee note to the Plaintiff for her attention and conduct. P’s Solicitors further mentioned that the respective experts had re-rescheduled the date of the Joint Examination to 1st December 2008. However, there is no dispute that even up to the hearing before me the Plaintiff did not offer any explanation for failing to attend the Joint Examination on 20th August 2008.
18. On 21st August 2008, P’s Solicitors wrote to the PI Master (with copy to D1’s Solicitors) to vacate the Adjourned CLR on 4th November 2008 by reason that “the Plaintiff did not turn up at the [Joint Examination]” which was re-fixed to 1st December 2008.
19. On 28th August 2008, Master K Lo by written requisition sought (a) comments from D1’s solicitors and (b) the reason for the Plaintiff’s failure to attend the Joint Examination (“Requisition”). P’s Solicitors received the Requisition on 2nd September 2008 and notified D1’s Solicitors of the same on 5th September 2008. However, by that time, the 1st Defendant had taken out the Summons referred to in the paragraph 21 below.
20. There is no evidence before me of any reply to the court by P’s Solicitors and/or D1’s Solicitors, whether jointly or severally, in relation to the Requisition. Currently, the Adjourned CLR returnable on 4th November 2008 before the PI Master has not been vacated.

*II. Summons*

1. On 5th September 2008, the 1st Defendant issued a summons seeking *inter alia* the following reliefs (“Summons”) :
2. the present action be stayed pending the Plaintiff’s attendance at a Joint Examination by Dr Fu and Dr Lam;
3. the Plaintiff shall not be entitled to any interest that may accrue on any damages that she may recover in the present action for the period from 20th August 2008 to the date of the Joint Examination to be attended by the Plaintiff;
4. the Plaintiff do pay to the 1st Defendant all wasted costs and disbursements of and incidental to the aborted Joint Examination on 20th August 2008 in any event.
5. At the hearing before me, Ms Yuen, solicitor for the Plaintiff, and Ms Wong, solicitor for the 1st Defendant, confirmed that the following orders were agreed and I now grant order in terms accordingly :
6. the Plaintiff do within 7 days from the date hereof pay to the 1st Defendant through D1’s Solicitors a sum of HK$3,000.00 in payment or reimbursement of the Aborted Fees;
7. the Plaintiff shall not be entitled to any interest that may accrue on any damages that she may recover in the present action for the period from 20th August 2008 to the date of the Joint Examination to be attended by the Plaintiff.
8. Although Ms Yuen and Ms Wong agreed that the Plaintiff should pay to the 1st Defendant all wasted costs and disbursements of and incidental to the aborted Joint Examination on 20th August 2008 in any event to be taxed if not agreed on party and party basis, I find it more appropriate to order that, subject to paragraph 22(a) above, the Plaintiff do pay to the 1st Defendant costs and disbursements incurred and thrown away the 1st Defendant by reason of the Plaintiff’s non-attendance of the aborted Joint Examination on 20th August 2008.

*III. 1st Defendant’s case*

1. Ms Wong in her affirmation filed in support of the Summons stated that orthopaedic expert evidence was required for fairly assessing damages, but the 1st Defendant objected to repeated postponement of the Joint Examination. She pointed out that D1’s Solicitors still had not received any explanation for the Plaintiff’s non-attendance of the re-rescheduled Joint Examination on 20th August 2008, and despite unilateral rescheduling of the Joint Examination to 1st December 2008 by P’s Solicitors, there was still no confirmation from the Plaintiff that she would attend such re-rescheduled Joint Examination.

*IV. Plaintiff’s case*

1. The affirmation by the Plaintiff’s solicitor, Wong Ka Yung (“Mr Wong”), filed in opposition of the Summons claimed that the original Joint Examination on 28th April 2008 was cancelled and postponed to 20th August 2008 “with consent of the [1st] Defendant”, so the Joint Examination was “only aborted once” on 20th August 2008. It was said that such conduct did not constitute repeated failure to prosecute the Plaintiff’s claim to justify “such draconian punishment” as suggested by the 1st Defendant in the Summons.
2. Mr Wong claimed the 1st Defendant issued the Summons on the misunderstanding that the Plaintiff had failed to confirm whether she would attend the re-rescheduled Joint Examination on 1st December 2008, but in fact P’s Solicitors had on 21st August 2008 confirmed such Joint Examination, which was merely about 2½ months away. Further, on 26th August 2008, P’s Solicitors also warned the Plaintiff of the importance of attending the re-rescheduled Joint Examination on 1st December 2008 and of “the consequence of further default”. But Mr Wong’s affirmation did not say what was the nature of the consequence that was brought home to the Plaintiff.
3. Mr Wong claimed that in any event no further action was required over the period from 11th September and 1st December 2008, and the only outstanding steps were the re-rescheduled Joint Examination, the Revised Statement of Damages and the Answer thereto.
4. Mr Wong suggested that had D1’s Solicitors replied to Master K Lo’s Requisition, the “PI Master will make a necessary direction to punish a wrongful party, including payment of costs and disbursement due to the aborted exam, and this is the prevailing practice of PI Court to deal with non-compliance of [CLR] direction upon receipt of either party’s report within 3 days after non-compliance”. Thus the Summons was “taken out unnecessarily and resulted in a complete waste of costs and the court’s time”.

V. Jurisdiction

1. Mr Wong in his affirmation claimed that the District Court did not have jurisdiction to grant the reliefs sought in the Summons because only the High Court and not the District Court had inherent jurisdiction (see section 3(2) of the High Court Ordinance Cap.4).
2. Since the only outstanding issue is the Plaintiff’s application for stay of proceedings, I disagree with Mr Wong’s contention. Section 48(5) of the District Court Ordinance Cap.336 specifically provides that the District Court may stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.
3. Further, H H Judge Z E Li in *Ho Ki Hung also known as Ho Kee Hung v Chan Ngai Ho & anor* DCCJ 8177/1984 (unreported, 29th May 1985) held it was just on the facts of that case for the plaintiff to be examined by the defendant’s medical expert and for the proceedings to be stayed until all medical examinations, including that of the defendant’s medical expert, be completed.
4. In my view, it is plain that the District Court has jurisdiction to deal with the Summons, and indeed Ms Yuen conceded the same at the hearing before me.

*VI. Legal principles*

1. Neither Ms Yuen nor Ms Wong cited any authority on the exercise of judicial discretion on an application for stay of proceedings pending expert medical examination.
2. The leading authority in this area is *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67. In that case, after medical reports had been exchanged between the parties, the defendants found that the plaintiff’s doctor had laid stress on aggravation of an existing osteoarthritis, and they accordingly asked for the plaintiff to be examined by 1 of 6 named specialists on their behalf. The plaintiff’s solicitors, who were prepared to allow another examination by a doctor who had already examined the plaintiff on the defendant’s behalf, refused to agree to an examination by any of the 6 named persons. The court held that this was unreasonable on the part of the plaintiff, and made an order staying the action unless and until the plaintiff submitted to examination by 1 of the 6 specialists.
3. Lord Denning MR at p.71 stated as follows :

“…… This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so. It can, therefore, order a stay if the conduct of the plaintiff in refusing a reasonable request is such as to prevent the just determination of the cause. The question in this case is simply whether the request was reasonable or not.

I think that the request of the defendants was perfectly reasonable. They were faced with a new allegation which had not been made in the statement of claim, an allegation of osteo-arthritis. The defendants ought in all reason to have an opportunity of considering it and being advised upon it. They would need it in order to assess the amount to pay into court so as to dispose of the whole matter without it coming to trial. …… when six names are suggested and no reasonable objection taken to them, I have no doubt that the defendants ought to have the opportunity of having the plaintiff medically examined so that evidence can be given by one of those doctors. The court can ensure this result by granting a stay unless and until the plaintiff submits himself to such a medical examination. I would …… grant a stay accordingly.”

1. Widgery LJ agreed and stated that the test “is whether in the circumstances of the particular case it is reasonable that a stay should be ordered so that justice shall be done between the parties” (p.73).
2. In *Murphy v Ford Motor Co Ltd* (1970) 114 Sol Jo 886, 886-887, Lord Denning MR said that “[it] is now clearly established that if the defendants in a personal injuries case make a reasonable case for the plaintiff to be medically examined by a doctor, the plaintiff should accede to such request unless he had reasonable grounds for objecting to that particular doctor”.
3. In *Lane v Willis* [1972] 1 All ER 430, Sachs LJ said at p.436 that “[when] refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says that it is unreasonable and who applies for the order to show, on the particular facts of the case, that he is unable properly to prepare his claim (or defence) without that examination. The onus lies firmly on the applicant, as counsel for the defendants very rightly conceded ……”
4. In *Starr v National Coal Board* [1977] 1 All ER 243, Scarman LJ followed the *Edmeades* line of authorities and said as follows at pp.249-250:

“ So what is the principle of the matter to be gleaned from those cases? In my judgment the court can order a stay if, in the words of Lord Denning MR in *Edmeades’* case, ‘the conduct of the plaintiff in refusing a reasonable request [for medical examination] is such as to prevent the just determination of the cause’. I think that those words contain the principle of the matter. We are, of course, in the realm of discretion. It is a matter for the discretion of the judge, exercised judicially on the facts of the case, whether or not a stay should be ordered. For myself, I find talk about ‘onus of proof’ in such a case inappropriate. There is, I think, clearly a general rule that he who seeks a stay of an action must satisfy the court that justice requires the imposition of a stay.

In the exercise of the discretion in this class of case, where a plaintiff has refused a medical examination, I think the court does have to recognise (and here I think *Pickett's* case is helpful) that in the balance there are, amongst many other factors, two fundamental rights which are cherished by the common law and to which attention has to be directed by the court. First, as mentioned in *Pickett's* case by Willmer and Donovan LJJ, and by Sachs LJ in *Lane's* case, there is the plaintiff's right to personal liberty. But on the other side there is an equally fundamental right — the defendant's right to defend himself in the litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the witnesses that he will call. It is particularly important that a defendant should be able to choose his own expert witnesses, if the case be one in which expert testimony is significant.

…… But, if a defendant insists on examination of the plaintiff by the doctor he, the defendant, has nominated, then the problem does arise: in what circumstances will the court order a stay unless the plaintiff yields?

First, one has to look to the defendant's request and ask oneself the question: is it a reasonable request? …… The decisive factor, therefore, becomes, as I think Lord Denning MR recognised in *Edmeades v Thames Board Mills Ltd*, that of the interests of justice — of the ‘just determination’ of the particular case. I would add that it can only be the interests of justice that could require one or other of the parties to have to accept an infringement of a fundamental human right cherished by the common law. The plaintiff can only be compelled, albeit indirectly, to an infringement of his personal liberty if justice requires it. Similarly, the defendant can only be compelled to forgo the expert witness of his choice if justice requires it.

And so in every case, as I see it, the particular facts of the case on which the discretion has to be exercised are all-important. The discretion cannot be exercised unless each party does expose the reasons for his action. I have already indicated that I do not regard this as a question of onus of proof. There is, in my judgment, a duty on each party in such a situation to provide the court with the necessary material known to him, so that the court, fully informed, can exercise its discretion properly. However, I would add this comment: that at the end of the day it must be for him who seeks the stay to show that, in the discretion of the court, it should be imposed.

Applying those principles, I think that the first question, as one turns to he facts of the case, which one has to ask is: was the defendants' request for the examination of the plaintiff by Dr X a reasonable request? I ahev no doubt that it was. ……

Therefore the second question is: granted the reasonableness of the defendants' request, was the plaintiff's refusal of it unreasonable?

The test here must be related to the necessity, so far as the court can assist, of ensuring a ‘just determination of the cause’. ……”

1. Geoffrey Lane LJ said at p.254 as follows :

“One has to do one’s best to extract from the decisions such principles as seem best to accord with reason and with practice and with fairness. The court clearly has inherent jurisdiction to order a stay when the justice of the case demands such a stay. There are not infrequent occasions when justice demands that the plaintiff should undergo medical examination by a doctor appointed on behalf of the defendants. There are circumstances in which refusal by the plaintiff to undergo such examination should in justice be met by the imposition of a stay. In order to determine what those circumstances are, it is necessary to bear in mind the competing considerations. On the one hand, any medical examination carried out on him on behalf of the defendants is, as has rightly been said, an invasion of the plaintiff's privacy and is not lightly to be enforced, even indirectly, by a stay of the action. On the other hand, the defendants are not lightly to be deprived of the right to have the medical examination carried out by the doctor who, they are advised, would be the best doctor in the circumstances to carry out that examination.

…… What is unfair or unreasonable in the way of objection will, of course, depend necessarily on the facts of each individual case.”

1. These principles are cited with approval locally by Seagroatt J in *Wong See Ming, an infant by his mother and next friend, Mo Chor Wah v Alfulso Limited & anor* HCPI1012/1997 (unreported, 24th September 1998).
2. Whilst the above authorities deal with refusal by the plaintiff to submit himself to medical examination *per se* or on terms or by a particular doctor, I am of the view the principles deduced from the above authorities can also be applicable to a situation where the plaintiff who by uncooperative conduct rather than by express refusal or express imposition of terms refuses or fails to submit himself to medical examination. The categories of unfair and/or unreasonable behaviour are not closed, and must necessarily depend on the facts of each particular case.
3. Several broad principles can be extracted from the above authorities :
4. The court has jurisdiction to stay proceedings in personal injury claims if a party unreasonably objects or by conduct obstructs the other party’s request to submit himself to a medical examination where the justice of the case requires it.
5. The decision whether to grant or refuse a stay is a matter of discretion of the court to be exercised judicially upon taking into account all relevant circumstances.
6. In the exercise of such discretion, 2 fundamental rights, namely, one party’s right of privacy and the other party’s right to properly defend proceedings, should be recognised.
7. A stay is granted whenever it is just and reasonable to do so, eg where it is necessary for ensuring a just determination of the cause or for justice to be done between the parties.
8. Each party should disclose the reasons for the stance adopted in respect of the proposed medical examination to enable the court to exercise its discretion on a fully informed basis, but ultimately it is for the applicant seeking the stay to satisfy the court that justice requires the imposition of the stay.
9. On the basis of the above principles, I now turn to the particular facts of the present case.

VII. Discussion

1. The imposition of a stay is a significant step in any legal action. The first question to ask is : was the 1st Defendant’s request for the Plaintiff’s timely attendance of the Joint Examination a reasonable request?
2. The purpose of expert medical examination is to investigate the Plaintiff’s relevant injuries, complaints and disabilities arising from the cause of action, and to enable the medical expert to compile his expert medical report. In the present case, both parties considered orthopaedic expert evidence necessary, relevant and of probative value, and the court granted expert directions for such expert evidence to be adduced.
3. There is no dispute that both parties also considered it appropriate to obtain orthopaedic expert evidence by way of Joint Examination and Joint Report by Dr Fu and Dr Lam, and again the court granted directions to such effect. Given the Plaintiff’s efforts in inviting, agreeing and arranging the Joint Examination, she plainly had no qualms over the “invasion” of her fundamental right of privacy by the Joint Examination. Consequently, at issue is how the 1st Defendant’s fundamental right to defend himself as he and his advisers think fit should be recognised.
4. In this respect, timely delivery of the Joint Report (which entailed timely conduct of the Joint Examination) is necessary for anchoring reasonable timelines for ensuring expeditious trial or promoting early settlement. The 1st Defendant will likely require Dr Lam’s expert medical opinion to assess the issues/defence in relation to quantum as well as the amount to pay into court or to top up any sum already paid into court so as to dispose of the whole matter without it coming to trial.
5. In any event, both parties considered the availability of the Joint Report a prerequisite for any meaningful CLR hearing (see the joint letters of P’s and D1’s Solicitors to the court dated 12th March and 18th July 2008). In recognition of the necessity of prompt availability of orthopaedic expert evidence, the learned masters, on being informed that the Joint Examination was originally scheduled for 28th April 2008 and later rescheduled for 20th August 2008, directed that the CLR hearing be re-fixed to 7th July 2008 and later re-re-fixed to 4th November 2008 (ie on both occasions very shortly after the anticipated availability of the Joint Report pursuant to the Joint Examination).
6. Underpinning the above case management objectives and court-imposed deadlines (ie the adjourned CLR hearing on 7th July 2008 and the Adjourned CLR on 4th November 2008, and the availability of the Joint Report on or before 20th October 2008) is the Plaintiff’s necessary cooperation in submitting to the Joint Examination at the scheduled time and place. After all, if she fails to submit to the Joint Examination, neither Dr Fu nor Dr Lam can compile the Joint Report let alone meet the above deadlines. In the circumstances, the 1st Defendant’s right to properly defend himself may be adversely affected or stifled.
7. In my view, the 1st Defendant’s request for the Plaintiff’s timely attendance of the Joint Examination at the scheduled time and date is perfectly reasonable and indeed necessary in the interest of justice.
8. The second question is : granted the reasonableness of the 1st Defendant’s request, was the Plaintiff’s conduct and stance in relation to such request unreasonable?
9. According to the aforesaid authorities, a plaintiff is acting unreasonably if his conduct in refusing or preventing the defendant’s reasonable request is such as to prevent a just determination of the cause.
10. I do not think, exceptional circumstances apart, a plaintiff can for no or no good reason refuse to submit himself for examination by the medical expert nominated by the defendant if the request for such examination is reasonable and necessary for a just determination of the cause. Such refusal may be an express outright refusal or it may be conduct that prevents such expert medical examination from taking place, the most obvious of which is failure or refusal by the plaintiff to attend such examination for no or no good reason.
11. Consequently, the Plaintiff should expose the reason(s) for her failure to attend the Joint Examination so as to provide the court with the necessary material/information to enable the court (whilst bearing in mind that ultimately it is for the 1st Defendant to show a stay of proceedings should be imposed) to exercise its discretion on an informed basis.
12. Here, 6 days before the original scheduled date of the Joint Examination on 28th April 2008, the Plaintiff unilaterally cancelled the appointment. The explanation offered at the initial stage was her “unexpected commitment” with no particulars given. Indeed, no particulars were given even at the CLR hearing on 7th July 2008. It was only after such CLR hearing that D1’s Solicitors were told the Plaintiff had to attend a Tin Hau ceremony, but there was not even a hint of explanation as to why this cropped up only 6 days before the scheduled appointment of the Joint Examination and why the Plaintiff’s attendance at the ceremony was mandatory. In my view, a mere wish to attend such ceremony is most certainly not good enough, particularly as the Plaintiff has had more than 4 months’ notice of the original appointment for the Joint Examination on 28th April 2008 (which appointment was fixed on 10th December 2007). I find the offered explanation both feeble and unreasonable.
13. I reject any contention that the cancellation of the Joint Examination on 28th April 2008 and postponement to 20th August 2008 were made with the voluntary consent of the 1st Defendant. Nothing can be farther from the facts. On the very day of receiving notice of the Plaintiff’s unilateral cancellation of the Joint Examination (ie 22nd April 2008), D1’s Solicitors wrote to P’s Solicitors objecting to postponement of the Joint Examination and demanding an explanation. It was P’s Solicitors who arranged for rescheduling the Joint Examination to 20th August 2008 (see their letter of 23rd April 2008), and who unilaterally wrote to the court to vacate the CLR hearing on 7th July 2008 “to accommodate the Plaintiff’s diary”. There was no concurrence from the 1st Defendant, so the parties attended the CLR hearing on 7th July 2008, but the allegation that the Plaintiff had to attend a Tin Hau ceremony was only offered after such hearing. I accept that against such background, particularly the Plaintiff’s *fait accompli* in failing to attend the Joint Examination on 28th April 2008, there is little else the 1st Defendant could have done except to accept postponing the Joint Examination and Joint Report to 20th August and 20th October 2008 respectively. But it is a far cry from saying that the 1st Defendant voluntarily consented to a postponement of the Joint Examination.
14. There is no dispute that despite complaint by D1’s Solicitors and the Requisition by the learned PI Master and notwithstanding assurance by P’s Solicitors that an explanation would be given (see their letter to D1’s Solicitors dated 20th August 2008), the Plaintiff has not given any reason for her failure to attend the rescheduled Joint Examination on 20th August 2008. This is wholly inexcusable and unsatisfactory. It is also specious to suggest, as Mr Wong did in his affirmation, that the Plaintiff’s failure to attend the rescheduled Joint Examination on 20th August 2008 as the only time such examination was aborted. In my view, the Plaintiff failed to attend the Joint Examination on 28th April 2008 for no good reason, so there was repeated failure to attend scheduled or rescheduled Joint Examination.
15. Further, despite such repeated failure to attend the scheduled and rescheduled Joint Examination and the issuance of the Summons to stay the proceedings, there is still no confirmation *from the Plaintiff* that she would definitely attend re-rescheduled Joint Examination on 1st December 2008. The evidence before me at best showed P’s Solicitors having told the Plaintiff the importance of attending such examination and the “consequence of further default”, but there is no evidence that the Plaintiff has acknowledged such unidentified “consequence of further default” and/or has confirmed she would definitely attend the re-rescheduled Joint Examination.
16. The fact that P’s Solicitors made arrangements to re-reschedule the Joint Examination to 1st December 2008 is clearly insufficient redress of the Plaintiff’s unfair and unreasonable conduct. The suggestion that the re-rescheduled Joint Examination is merely 2½ months away is also a hopelessly inadequate answer. The reality is that although both parties first arranged the Joint Examination on 10th December 2007, such examination at best will only take place almost a year later (if the Plaintiff attends the appointment on 1st December 2008) and the Joint Report will be compiled even later. This sort of unwarranted delay, especially when it is brought about by the Plaintiff being the claimant in present action and when it is common ground that the 1st Defendant has behaved with perfect propriety, is the very sort of ill that bold and effective case management are targeted to remedy to ensure that justice be done between the parties.
17. There has been some suggestion that re-rescheduling the Joint Examination is not unacceptable given that nothing needs to be done between now and 1st December 2008, and that the only outstanding steps are the re-rescheduled Joint Examination, the Revised Statement of Damages and the Answer thereto.
18. But this suggestion conveniently ignores the Adjourned CLR on 4th November 2008 which has not yet been vacated. At the hearing, Ms Yuen submitted that there is no point in attending the Adjourned CLR and the Plaintiff will not waste costs to so attend such hearing since (a) the Joint Examination has not taken place and (b) the Joint Report is not ready yet, so P’s Solicitors will write to the PI Master to further adjourn the Adjourned CLR. The presupposition underlying such submission that the 1st Defendant and/or the court will have to accommodate the Plaintiff’s default in attending the Joint Examination, not once but twice, by further adjourning the Adjourned CLR flies in the face of the important case management objective of avoiding or reducing delay, which objective serves the interest of justice and fairness between the parties. I also bear in mind that the 1st Defendant is entitled to exercise his reasonable right to consider and be advised upon the allegations of damage or to settle the matter at an early stage by making adequate payment into court.
19. In light of the particular facts of the present case, I find it reasonable for the present action to be stayed until the Plaintiff attends the Joint Examination so that justice shall be done between the parties. I fail to see how such stay amounts to “draconian punishment” as suggested by Mr Wong. In my view, it is nothing more that an appropriate relief to redress the balance of justice between the parties.
20. I take this opportunity that make clear that the function of the court in granting case management directions to deal with unreasonable delay by one party is not, as suggested by Mr Wong and Ms Yuen, to mete out punishment, but to ensure that the goal of achieving fairness and justice between the parties is satisfied.
21. I should also disabuse the misconception that where a party fails to comply with court-imposed directions made at the CLR hearing or otherwise for no or no good reason, there is any “prevailing practice of the PI Court to deal with non-compliance of [CLR] directions” simply by ordering the defaulting party to pay costs and disbursements thrown away when the default is reported to the court. The fact that the court has on occasion granted such directions on the particular facts at the material time does not set any precedent, and appropriate directions to address each default depend necessarily on the particular circumstances.

VIII. Conclusion

1. I therefore direct that the present action be stayed until the Plaintiff attends and submits herself to a Joint Examination by Dr Fu and Dr Lam. By virtue of such order, the Adjourned CLR is necessarily vacated.
2. There is no reason why costs should not follow event. The hearing before me could not have been avoided in any event given that the concession to pay Dr Lam’s Aborted Fees and to waive interest on any damages that may eventually be recovered by the Plaintiff from 20th August 2008 to the date of the Joint Examination to be attended by the Plaintiff were only openly intimated at the hearing before me. I therefore grant a costs order *nisi* that the Plaintiff do pay costs of the Summons (including all costs reserved if any) to the 1st Defendant to be taxed if not agreed.

IX. Postscript

1. Parties and practitioners are reminded that court orders and directions are made to be obeyed as such, and where it is anticipated that a court-imposed deadline or date for a procedural step or event is not going to be met, it is incumbent on the party to apply *inter-partes* to court before such deadline or date to seek an extension or adjournment on good and sufficient grounds. It should not be assumed that extension or adjournment by consent will necessarily be endorsed since the court retains ultimate control. If the request for extension of time or adjournment of an event without adequate justification puts the litigation timetable at risk of being disrupted, the court may refuse the extension or adjournment sought.
2. No judicial system is proof against the twin problems of cost and delay, but that does not mean the court is powerless in dealing with such problems. Current case management powers when exercised firmly and boldly can be effective against such problems. The Civil Justice Reform, which will soon be upon us, heralds an even more responsive approach to considerations of costs and efficiency by enabling the court to assert greater judicial supervision over the preparation and conduct of litigation. Whilst procedural requirements must allow for human or inadvertent error, the administration of justice requires the court to ensure the cases that come before it are readied for trial expeditiously and efficiently, and adjudication is not unfairly prejudiced by delay.
3. I endorse the laudable case management principles for keeping reasonable litigation timetable on track as set out in the Australian Law Reform Report, *Managing Justice: A review of the federal court system* (2000) at para.6.11, which I have no hesitation in saying that they apply equally to this jurisdiction :

“…… There are, however, general principles for effective practices in case management. Generally courts and tribunals need to monitor cases from the start and maintain supervision throughout so that they know if a case is off track and not meeting time standards or complying with directions. This supervision can be undertaken electronically as well as by judges, members or registrars. Successful case management requires judicial and member commitment, and leadership and consultation with the legal profession. Most courts and tribunals have time standards and goals to measure case progress and utilise ‘short-schedule’ event techniques and procedures to prompt lawyers into, for example, filing documents before the set case event so that the event accomplishes its objectives. Given the cooperative interchange required in effective case management, courts and tribunals have to ensure lawyers do not accommodate one another to the prejudice of the parties and the efficiency of the court or tribunal. Listing dates must be credible and adjournments controlled. Courts and tribunals need to create among lawyers and parties an expectation that events will occur when scheduled.”

1. Upon implementation early next year, the Civil Justice Reform will empower the court to further the underlying objectives of reducing cost and delay by actively managing cases pursuant wide case management powers (see new Order 1A rule 4 and Order 1B of the Rules of the District Court pursuant to the Rules of the District Court (Amendment) Rules 2008). These powers include self-executing orders that specify the consequence of non-compliance, directions for payment of sum of money into court upon non-compliance of court directions as security for any sum payable by the paying party to any other party in the proceedings, and/or refusal to vary case management timetable to accommodate the defaulting party.
2. Subject to the underlying objective of ensuring fairness and justice between the parties, the court is expected to exercise bold and proactive case management to encourage a cultural change to the way civil litigation is conducted with strong emphasis on cost-reducing speed and efficiency. It is hoped that practitioners do ready themselves and their clients for a new age of civil litigation.

# (Marlene Ng)

District Court Judge

Representation:

Ms Nora Yuen of Messrs Alan Wong & Co for the Plaintiff.

Ms Wong Ho Yan of Messrs Kenneth C C Man & Co for the 1st Defendant.