DCPI 2692/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2692 OF 2009

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BETWEEN

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| CHAN SZE WING | Plaintiff |
| and |  |
| TSANG PUI CHONG (曾佩粧) | 1st Defendant |
| CONGRUENCE CHINESE MEDICINE  & JING LUO HEALTH LTD  (三和堂中醫藥經絡保健有限公司) | 2nd Defendant |
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Before : H H District Judge Leong in Chambers (Open to the Public)

Date of Hearing : 16 July 2014

Date of Handing Down Decision : 19 August 2014

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D E C I S I O N

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1. This is the 1st defendant’s application for firstly, leave to appeal out of time and secondly, leave to appeal.

*I. Background*

1. The 1st defendant acted in person in this personal injury case before me. The judgment was handed down on 23 March 2012.
2. According to the 1st defendant, she had intended to appeal since the handing down and she had applied for Legal Aid. She produced two “Memorandums of Legal Aid” dated 17 and 25 April 2012.
3. Legal Aid refused the application on 21 June 2012 and a “Memorandum of Notification that a Party has been refused Legal Aid” was filed.
4. 17 months later, a Notice to Act for the 1st defendant was filed by S H Chan & Co dated 21 November 2013.
5. However, nothing was done until the current Summons which was taken out on 30 May 2014 (which should be made under Order 58 Rule 2(4) and Rule 2(10) of the Rules of the District Court respectively, not Order 52 as stated on the Summons).
6. According to the rules, the application for leave to appeal should be taken out 28 days from the date of the judgment, so there is an exceptional delay of over 2 years in the current case.

*II. The issues*

1. Paragraph 59/4/9 of the “Whitebook 2014” provides the factors to be considered for an extension of time for leave to appeal: (1) the length of the delay; (2) the reasons for the delay; (3) the chance of the appeal succeeding if time for appealing is extended; (4) the degree of prejudice to the potential respondent if the application is granted.
2. The 1st defendant explained that she was acting in person and was not aware of the appeal procedure. However, her counsel, Mr Enzo Chow, accepted that ignorance of the law was not a good reason to explain such delay.
3. The 1st defendant also claimed that she was under the misunderstanding that her application for Legal Aid meant that the application for appeal had been made.
4. I cannot understand how this misunderstanding can occur: I would expect that a reasonably diligent person would have make enquiries with Legal Aid Department or otherwise investigate what procedures for appeal needed to be done and what deadlines needed to be complied with, even if I assume that Legal Aid Department did not volunteer such advice.
5. And even if the 1st defendant was really under this misunderstanding, by the time she received the refusal of her Legal Aid application, she must then realise that she should take up matters in her own hands. A reasonably diligent litigant-in-person would have, under such circumstances, investigated or made inquiries as to how to proceed with the appeal. Instead, according to the 1st defendant, she passively waited for “notification from the Court for her appeal date” for 17 months.
6. I do not accept such an explanation.
7. The 1st defendant finally instructed lawyers in November 2013. I would expect that her lawyers would be aware of the delay and its consequences, and yet nothing was done for another 6 months.
8. Mr Chow explained that the lawyers had taken this time to investigate the case, seeking a transcript of the proceedings etc. to assess the merit of the appeal.
9. However, I note that the 1st defendant has written a letter to the Hong Kong Bar Association as early as 27 April 2012 (exhibit “TCP-3” enclosed in her affirmation filed on 30 May 2014) setting out five grounds for appeal. This showed that the 1st defendant had all along capable of putting forward her grounds of appeal.
10. I would therefore have expected that her lawyers should have made the “out-of-time” application as a matter of urgency, and perhaps consider making more in-depth investigations later by applying for court transcript, and amending the Notice of Appeal if needed.
11. Indeed, it would be making a mockery of the appeal procedures (not to mention the CJR) if lawyers need to apply for court transcript before applying for leave to appeal.
12. Mr Chow spent some time discussing the chance of success of the appeal. One argument was on the issue of causation and Mr Chow argued that this was not supported by the experts. I need not go into details of this argument but on perusing the transcript, I think that the issue of causation was, in fact, supported by the plaintiff’s expert.
13. Another ground of appeal was whether the plaintiff had sufficiently pleaded her case. There were arguments for and against this (as raised by Mr Andy Lam for the plaintiff). I need not go into details but this may well be the only possible meritorious ground of appeal that I can see.
14. Mr Chow also suggested that there was no prejudice against the plaintiff should a time extension be granted.
15. I disagree: up to now (some 2 years and 4 months after the judgment), the judgment sum, costs and interest in the personal injury case remained unpaid and the plaintiff had commenced action in an attempt to recover. Again, I need not go into details of this action but suffice to say, I am of the view that the plaintiff’s position will be further prejudiced if there is further delay.

*III. Conclusion*

1. Accordingly, I would dismiss the 1st defendant’s application with an order nisi that the costs of this application, with Certificate for Counsel, be to the plaintiff to be taxed in the District Court scale if not agreed.

(Harold Leong)

District Court Judge

Representation:

Mr Andy Lam, instructed by Ivan Tang & Co, for the plaintiff

Mr Enzo Chow, instructed by S H Chan & Co, for the 1st defendant