## DCPI 2709/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2709 OF 2012

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##### BETWEEN

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| SEE HA LI | Plaintiff |
|  |  |
| and |  |
| CHAN SUM | Defendant |
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Coram : His Honour Judge Ko in Chambers

Date of Hearing : 21st January 2014

Date of Decision : 21st January 2014

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D E C I S I O N

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1. There are two summonses before the court, both taken out by the plaintiff :-
2. The summons dated 5 November 2013 (“the 1st Summons”) is to set aside the order dated 31 October 2013 striking out the plaintiff’s claim herein (“the Striking Out Order”) on the ground that the plaintiff has failed to comply with paragraph 1 of an earlier unless order dated 24 June 2013 (“the Unless Order”).
3. The summons dated 7 November 2013 (“the 2nd Summons”) seeks to amend the 1st Summons to enable the substantive application therein to be made out of time.
4. The defendant opposes both summonses.

*Background*

1. The plaintiff and the defendant were involved in a traffic accident on 15 September 2011.
2. The plaintiff commenced this personal injury action on 18 December 2012 against the defendant.
3. By a consent order dated 15 April 2013, judgment on liability was entered against the defendant with damages to be assessed.
4. On 23 May 2013, the parties obtained some directions from the Master by consent for the further progress of this action and vacated a scheduled Check List Review hearing (“the Directions”).
5. Paragraph 1 of the Directions is for specific discovery of 14 categories of documents including :-
6. “Medical notes and records of the following covering the period from 15 September 2011 to present :–
7. A&E Department of Queen Elizabeth Hospital;
8. Dr Szeto Wai Keung; and
9. Dr David Ing;” (“para 1(a) of the Directions”); and
10. “All bank passbooks held by the plaintiff solely and/or jointly with other(s) covering the period from 2010 to present. Please indicate each and every monthly earnings for both the 1st and 2nd jobs of the plaintiff;” (“para 1(h) of the Directions”).

and the plaintiff was directed to provide those documents on or before 10 June 2013.

1. It is common ground that the plaintiff did nothing in compliance with the Directions and the court made the Unless Order with the consent of the parties to ensure compliance. The order was to the effect that unless the plaintiff would comply with paragraph 1 of the Directions by 3 July 2013, his claim would be struck out. It was also provided that if the plaintiff did not have those documents, he should file and serve an affidavit/affirmation by the same deadline to verify the same.
2. On 3 July 2013, the plaintiff filed his 1st affirmation exhibiting about 200 pages of documents in purported compliance with the Unless Order.
3. The defendant took the view that the plaintiff had failed to comply with the Unless Order and took out the summons dated 24 October 2013. Neither the plaintiff nor his solicitor turned up at the return date of the summons (ie 31 October 2013) and the Master made the Striking Out Order.
4. In early November 2013, the plaintiff took out the 1st and 2nd Summonses which were supported by the affirmation of his solicitor and his 2nd affirmation. The solicitor deposed to the fact that the defendant’s summons dated 24 October 2013 had been served with the defendant’s questionnaire for the Check List Review and she had mistakenly assumed that the summons would be returnable on the same date as the Check List Review hearing scheduled for 7 November 2013. The plaintiff’s 2nd affirmation disclosed further documents in purported compliance with paragraph 1 of the Directions.
5. The defendant’s solicitor filed an affirmation to oppose both summonses in which he reiterated that the plaintiff had failed to comply with paragraphs 1(a) and 1(h) of the Directions and the Unless Order. He doubted the plaintiff’s solicitor’s explanation for her absence as he had reminded her of the return date by a letter dated 25 October 2013. He also complained that the plaintiff had failed to file his witness statements in breach of paragraph 2 of the Directions.

*The submissions*

1. The primary stance taken by the plaintiff’s counsel (Deanna Law) is that there was no breach of the Unless Order on the part of the plaintiff. As a fall back, she invites the court to grant relief from sanction under Order 2, rules 4 and 5 of the Rules of the District Court and reinstate the plaintiff’s claim.
2. On the other hand, the defendant’s counsel (Tony Li) accuses the plaintiff of deliberately withholding the medical notes and records. He submits that the sanction specified in the Unless Order should take effect automatically in July 2013 so much so that the plaintiff was more than 4 months late in disclosing the ordered documents in his 2nd affirmation in November 2013.

*Discussion*

*(a) Whether the plaintiff was in breach of the Unless Order?*

1. Given the stance taken by the parties, the first issue that calls for determination is whether the plaintiff was in breach of the Unless Order.
2. The material part of the order reads:

“Unless by 4 pm on 3 July 2013, the Plaintiff do comply with paragraph 1 of the Order of Master J Chow dated 23 May 2013 to disclose the documents as specified in sub-paragraph 1(a) to 1(n) of the said Order and/or alternatively, if the Plaintiff is no longer in possession, custody or power of these documents do file and serve his affirmation/affidavit to verify the fact on or before the date and time as specified in this paragraph, the Plaintiff’s claim on PSLA, pre-trial loss of earnings (including loss of MPF), future loss of earnings and special damages in paragraphs 8 to 17 of the Plaintiff’s Statement of Damages dated 8 December 2012 be struck out with costs to the Defendant to be taxed if not agreed.”

1. Pausing here, two preliminary observations must be made:
2. The order is only concerned with paragraph 1 of the Directions. Whilst Mr Li may be correct in observing that the plaintiff has also failed to file his witness statement in breach of paragraph 2 of the Directions, that was not the condition that brought about the sanction.
3. The plaintiff was ordered either to: (i) disclose the ordered documents; or (ii) file an affirmation to verify the fact that he had no such document(s).
4. Mr Li submits that notwithstanding the plaintiff’s 1st affirmation, the plaintiff had failed to comply with paragraph 1 of the Directions in 3 aspects:
5. Only medical reports were exhibited to the 1st affirmation and no medical notes and records were provided.
6. The bank statement of the plaintiff’s account with Standard & Chartered Bank for the period from 2010 to June 2013 was not provided.
7. The plaintiff only provided the cover page of the passbook of his account with Bank of China without the page(s) containing the entries from 2010 to present.
8. I agree with Ms Law that the plaintiff did comply with the Directions in the last two aspects by deposing to the fact that he had no such documents. This is what he said in the 1st affirmation:-
9. 「而由渣打銀行在2010年1月至2013年6月期間發出予本人之渣打綜合月結單之中，2010年全年、2011年1月、2011年3月之第一頁、2011年5月之第三頁、2011年9月、2011年10月、2011年11月之第二頁、2012年1月之第三頁、2012年2月之第二頁、2012年10月及2013年3月之第一頁亦被本人不慎遺失，因此亦無法提供…」
10. 「本人現隨本誓章附上由恆生銀行... 發出予本人之銀行戶口月結單... 及中國銀行之銀行戶口存摺影印本"史廈利-6"... 而由於*恆生銀行*戶口本人自開戶至今從未使用，因此只能提供空白的銀行戶口存摺影印本。」(my emphasis)
11. The plaintiff must have made a mistake in referring to his “Hang Seng Bank” passbook (which should be a reference to his Bank of China passbook). The mistake should be quite obvious as the plaintiff has referred to and exhibited bank statements (not passbook) from Hang Seng Bank and exhibited copies of his Bank of China passbook in his 1st affirmation.
12. Subsequently, the plaintiff explained in his 2nd affirmation:

「另外，關於本人的中國銀行戶口，當年開立該戶口時，因為我正打算與朋友合資經營紅酒生意，但後來因為某些原因，我們放棄了做紅酒生意的計劃，因此我一直沒有用過該戶口。由於開立該戶口時，銀行並不需要我存款，因此該戶口亦一直沒有任何進支紀錄，直至2013年6月，律師事務所職員建議我將港幣100元存入戶口之中。本人現隨本誓章附上本人之中國銀行存摺副本"史廈利-4"。」

And he exhibited the same passbook, which now contains a new entry for the deposit in June 2013.

1. However, I think Mr Li is correct in saying that the plaintiff had failed to provide any medical note and record. The plaintiff only exhibited a medical report dated 13 July 2012 from Queen Elizabeth Hospital and deposed to the fact that he was in the process of obtaining medical reports from Dr Szeto and Dr Ing in his 1st affirmation. There was no mention of any medical note and record as required by paragraph 1(a) of the Directions. The relevant medical notes and records were only provided subsequently by means of the plaintiff’s 2nd affirmation.[[1]](#footnote-1)
2. Ms Law refers to the explanation in the plaintiff’s 2nd affirmation (「因為當時本人未曾取得醫療紀錄，因此先將醫療報告向法庭及被告人之代表律師披露。」) in an attempt to justify the failure. Be that as it may, the plaintiff had been given the option (by the Unless Order ) to file an affirmation by the deadline to put on record that he did not have the ordered documents if such be the case. The 2nd affirmation (which was only filed in November 2013) simply came too late.
3. I therefore find that as at the deadline provided in the Unless Order, the plaintiff had failed to provide the medical notes and records ordered by paragraph 1(a) of the Directions and failed to depose to the fact that he did not have them. The plaintiff was therefore in breach of the Unless Order.

*(b) What is the effect of the plaintiff’s breach of the Unless Order?*

1. Order 2, rule 4 of the Rules of the District Court provides that:

“Where a party has failed to comply with a rule or court order, any sanction for failure to comply imposed by the rule or court order has effect unless the party in default applies to the Court for and obtains relief from the sanction within 14 days of the failure.”

1. In my view, Mr Li is correct in saying that the sanction provided in the Unless Order should take effect automatically without the need for any application. This is all the more so as the defendant had consented to the terms of the order. The law should be pretty clear and Ms Law does not argue otherwise.
2. However, that was apparently not how the defendant’s solicitor saw it at the time. By the summons dated 24 October 2013, he (on behalf of the defendant) applied for, *inter alia*, the following orders:

“1. Unless by 4 pm on 7 November 2013, the Plaintiff do comply with paragraph 1 of the Order of Master J Chow dated 23 May 2013 to disclose the documents as specified in sub-paragraphs 1(a)(i) to (iii) and 1(f) [it is common ground that this should refer to 1(h)] of the said Order and/or alternatively, if the Plaintiff is no longer in possession, custody or power of these documents, do file and serve his affirmation/affidavit to verify the fact on or before the date and time as specified in this paragraph, the Plaintiff’s claim on PSLA, pre-trial loss of earnings and post-trial loss of earnings in the Plaintiff’s Statement of Damages dated 8 December 2012 be struck out with costs to the Defendant to be taxed if not agreed;

2. Unless by 4 pm on 7 November 2013, the Plaintiff do comply with paragraph 2 of the Order of Master J Chow dated 23 May 2013 to serve the witness statement as to quantum of the Plaintiff himself on the Defendant, the Plaintiff be debarred from adducing any witness statement as to quantum at the hearing for Assessment of Damages with costs to the Defendant to be taxed if not agreed;”

1. To a certain extent, the Master hearing the summons on 31 October 2013 was not swayed by the defendant’s solicitor’s argument and struck out the plaintiff’s claim there and then.
2. Strictly speaking, the Master needed not make the Striking Out Order as the sanction provided in the Unless Order was self-executing. So, Mr Li is not entirely wrong when he submits that the plaintiff’s claim should be taken to have been struck out in July 2013 and the plaintiff was about 4 months late in applying for relief in November 2013. If one counts from the Striking Out Order, the plaintiff is within time in applying for relief under Order 2, rule 4. This leads to the next question of whether I should entertain the 2nd Summons.

*(c) The plaintiff’s application for leave to apply for relief against sanction out of time*

1. By the 2nd Summons, the plaintiff seeks to amend the 1st Summons to additionally ask for leave to apply for relief against sanction out of time.
2. Ms Law explains at the hearing that:
3. Given the extent of the discovery given in his 1st affirmation, the plaintiff did make a genuine effort in complying with paragraph 1 of the Directions and the Unless Order.
4. The plaintiff and his legal team were under a *bona fida* belief that the plaintiff had complied with paragraph 1 of the Directions and the Unless Order, as nothing happened for almost 4 months after the filing of the plaintiff’s 1st affirmation.
5. The plaintiff’s solicitor had mistakenly thought that the defendant’s summons dated 24 October 2013 was returnable at the Check List Review hearing scheduled for 7 November 2013 and so did not turn up on 31 October 2013.
6. The plaintiff’s solicitor stated in her affirmation that she had only come to realise the mistake when she went through the papers on 5 November 2013 to prepare for the forthcoming Check List Review. The plaintiff’s solicitor was unable to speak to the defendant’s solicitor and enquired with the Master’s clerk directly, whereupon she was informed of the Striking Out Order.
7. The plaintiff promptly took out the 1st Summons on 5 November 2013 and, thereafter, the 2nd Summons two days later.
8. The Striking Out Order was only sealed on 6 November 2013 and served on the plaintiff after the 1st and 2nd Summonses had been taken out.
9. In the premises, Ms Law submits that the plaintiff’s failure to comply with the Unless Order and to make timely application for relief (if one counts from 3 July 2013) was unintentional.
10. The defendant’s side naturally doubted the plaintiff’s explanations but I do have some sympathy for the plaintiff.
11. I accept that the plaintiff had made a genuine effort in complying with paragraph 1 of the Directions and the Unless Order. Given the scope of the discovery given (about 200 pages of documents), it was not surprising that the defendant’s solicitor had taken some time to find out if the plaintiff had fully complied with the Unless Order.
12. Given the above, it was prudent on the part of the defendant’s solicitors to take out the summons dated 24 October 2013 to give an opportunity to the plaintiff to explain and for the Master to “confirm” if the sanction provided in the Unless Order should take effect. That, perhaps, was the thinking behind the defendant’s summons.
13. I accept the plaintiff’s solicitor explanation that notwithstanding the defendant’s solicitors’ letter dated 25 October 2013 she had got the return date of the summons wrong. The penultimate paragraph of that letter reads:

“Hence, your client has not complied with sub-paragraphs 1(a) and 1(h) of the Affirmation [sic]. Unless your client adhered with the Order by the close of business of 29 October 2013, we shall proceed to seek the directions and costs against your client as per our Summons returnable before Master J Chow on 31 October 2013 at 9:30 am.”

1. The plaintiff’s solicitor’s mistake is of course inexcusable, but the letter and the summons, when read together, did suggest that all was not lost and the plaintiff would be given a further opportunity to comply (the letter set the deadline of 29 October 2013; and the summons prayed for the deadline of 7 November 2013).
2. It was most unfortunate that the plaintiff’s solicitor was absent at the hearing on 31 October 2013 and the Master did not have the full picture when she made the Striking Out Order.
3. In the special circumstances of this case, I find that any delay in applying for relief from sanction is unintentional. There is nothing to contradict the plaintiff’s case that his solicitor only came to realise the Striking Out Order on 5 November 2013 and the application was taken out promptly on the same day. I approve the 2nd Summons and grant leave to the plaintiff to apply for relief against sanction out of time.

*(d) Whether relief from sanction should be granted?*

1. This is the most contentious part: Should I grant relief from sanction to the plaintiff and restore his claim?
2. Order 2, rule 5(1) sets out the relevant considerations:

“On an application for relief from any sanction imposed for a failure to comply with any rule or court order, the Court shall consider all the circumstances including –

1. the interests of the administration of justice;
2. whether the application for relief has been made promptly;
3. whether the failure to comply was intentional;
4. whether there is a good explanation for the failure to comply;
5. the extent to which the party in default has complied with other rules and court orders;
6. whether the failure to comply was caused by the party in default or his legal representative;
7. [not relevant];
8. whether the trial date or the likely trial date can still be met if relief is granted;
9. the effect which the failure to comply had on each party; and
10. the effect which the granting of relief would have on each party.”
11. Ms Law has also taken me through a number of weighty authorities, such as *Daimler AG v Leiduck[[2]](#footnote-2), Lee Sai Nam v Li Shu Chung[[3]](#footnote-3), Top One International (China) Property Group Co Ltd v Top One Property Group Ltd[[4]](#footnote-4)* and the first instance decision in *An Zhou v Zhou Zheng Kuan[[5]](#footnote-5)*. I have taken guidance from these cases.
12. I have touched upon the general circumstances of this case and some of the special considerations under rule 5(1) in the discussion above (eg rule 5(1)(b) and (c)). I shall now focus on the other considerations.
13. The defendant has admitted liability for the accident and we are in the process of ascertaining the amount he should pay the plaintiff in compensation. Justice demands that the plaintiff be properly and adequately compensated. Given my findings above, the plaintiff’s failure consists of the failure to give timely discovery of the medical notes and records. Ms Law emphasizes on proportionality in her submission, citing paragraph 57 of *Daimler AG*. Mr Li has addressed me on the usefulness of the medical notes and records. He says that the plaintiff can either commence a new action against the defendant or sue his own solicitors if I refuse to grant relief. In my view, the failure to provide the notes and records is not significant when one takes into account the other documents disclosed in the 1st affirmation. It appears to me that the plaintiff’s failure is likely caused by the fault of his solicitor, for he did give discovery of the medical report from the hospital and did say that he was in the process of obtaining medical report from the doctors in his 1st affirmation. Had his solicitor also requested for the medical notes and records from the hospital, the plaintiff might even be able to disclose them in his 1st affirmation. Had the drafter of the 1st affirmation paid more attention to the wording of paragraph 1 of the Directions and the Unless Order, the explanation in the 1st affirmation could have covered medical notes and records. Anyway, those medical notes and records were subsequently provided in the 2nd affirmation. For me, there is no conceivable reason for the plaintiff to choose to hide them in the first place. I therefore accept that the plaintiff’s failure in complying with the Unless Order was due to the fault of his legal representative. (rule 5(a), (d), (e) and (f))
14. Ms Law and Mr Li have crossed sword on the effect of a finding that the default was caused by the plaintiff’s solicitor (as opposed to by the plaintiff himself). Ms Law emphasizes on To J’s comment in *An Zhou* that the court should be more inclined to grant relief to a litigant if he has no deliberate feet dragging and the default was really caused by his legal representative.[[6]](#footnote-6) On his part, Mr Li prays in aid the English authority of *Hashtroodi v Hancock* in which Dyson LJ expressed that if the failure had been caused by the litigant or his legal representative overlooking the matter, that would be a strong reason to refuse any extension.[[7]](#footnote-7) In my view, the circumstances of this case are such that the plaintiff’s failure (which is attributable to his legal representative) should be looked at more sympathetically.
15. No trial date has been set for the assessment. (rule 5(h))
16. If I do not grant the relief, all the costs and efforts that the plaintiff has expended on this action will be lost. Whilst (as Mr Li has conceded) the plaintiff may commence a new action against the defendant on the same cause of action, the plaintiff would naturally feel aggrieved that he has to start all over again. I tend to agree with Ms Law that such a consequence is disproportionate to the relatively minor failure on the plaintiff’s side. On the other hand, I have not heard the defendant complaining that he would suffer much prejudice if relief is granted. Any inconvenience on his part can be compensated by costs, and the plaintiff is volunteering costs in this regard. (rules 5(i) and (j))
17. Taking everything into account, I am persuaded that I should grant relief to the plaintiff from the sanction of the Unless Order.

*Conclusion*

1. For these reasons, I make an order in terms of the 2nd Summons and approve the 1st Summons as amended, namely:
2. leave be granted to the plaintiff to apply for relief from sanction out of time;
3. the order of Master J Chow dated 31 October 2013 be set aside; and
4. the plaintiff’s claim in this action be reinstated.
5. On costs, both counsel agree that I should consider the costs of today’s argument separately from the other costs of the summonses.
6. The plaintiff is conceding all other costs save and except the costs of today’s argument. Ms Law has asked for costs as the defendant has lost the argument. Alternatively, she says I should consider making no order. Mr Li submits that the plaintiff would have to come to court to seek relief anyway and what the defendant did was merely to provide a balanced view of the matter.
7. In my view, the defendant should bear the costs of today’s argument. It is true that the plaintiff requires an order to relief him from the sanction imposed by the Unless Order and the defendant is entitled to be heard on that. But the defendant did more than providing a balanced view. It actually advocated against the grant of relief, doubting the plaintiff’s explanations. The defendant had the benefit of Ms Law’s written submissions before deciding to fight on today. Now that the defendant has lost the argument, I can see no reason why he should not be responsible for the costs of the argument.
8. I therefore grant the costs of today’s hearing to the plaintiff with certificate for counsel. Save as to that, I order the costs of and incidental to both summonses be to the defendant with certificate for counsel.
9. I further direct the parties to jointly write to the PI Master within 14 days from today with a view to restore the Check List Review hearing of this action.
10. I thank both counsel for their able assistance.

(Justin Ko)

Acting Chief District Judge

Ms Deanna Law, instructed by Wong & Tang, for plaintiff.

Mr Tony Li, instructed by M K Lam & Co, for defendant.

1. see para 1(a) and exhibits 1-3 thereof [↑](#footnote-ref-1)
2. [2012] 3 HKLRD 119. [↑](#footnote-ref-2)
3. Unreported, HCA 1711/2009, 31 May 2013. [↑](#footnote-ref-3)
4. [2011] 1 HKLRD 606. [↑](#footnote-ref-4)
5. Unreported, HCA 241/2010, 30 August 2012. [↑](#footnote-ref-5)
6. At para 27 of the judgment. [↑](#footnote-ref-6)
7. [2004] 1 WLR 3206 at para 20-21. [↑](#footnote-ref-7)