DCPI 3161/2019

[2020] HKDC 813

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 3161 OF 2019

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BETWEEN:

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| LEE KA CHUN | Plaintiff |
| and |  |
| SECRETARY FOR JUSTICE | Defendant |
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| Coram:  Date of hearing: | His Honour Judge Harold Leong in Chambers  29 June 2020 |
| Date of Decision: | 18 September 2020 |

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DECISION

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1. This is the plaintiff’s application for specific discovery of the following documents:
   1. The closed-circuit television footages recorded by CCTV cameras in Prince Edward MTR Station (“the Station”) from 22:15 to 23:30 on 31 August 2019 covering the following areas:
      * + 1. Trains of Tsuen Wan Line to Central entering the Station; and
          2. Lower Platform Floor of the Station, i.e. the floor on which Platforms 3 and 4 locate (“the CCTV Footages”)
   2. The name, unique identification (UI) number and address of the police officer(s) who, whether jointly with others or otherwise by himself; hit the head of the Plaintiff with baton(s) inside the train stopped at Platform 4 of Prince Edward Station bound for Central along Tsuen Wan Line at about 22:00 on 31 August 2019 (“the Identity Information”).
   3. Any correspondence, operation log, memoranda, minutes, reports, entries in the Occurrence Book, police notebooks, computer records and any other documents, including documents which are stored electronically or by any means which are relevant to the incident (“the Police Documents”).

*Background*

1. This is a straightforward personal injury claim: the plaintiff alleged that he suffered from injuries, loss and damages after he was hit on the back of his head whilst inside an MTR train. He did not see the actual incident but as he turned around after being hit, he claimed that he saw police officers brandishing batons.
2. A writ was issued against the Secretary for Justice for and on behalf of the Commissioner of Police, but this has not been served.
3. This summons was made under Order 24 rule 7A(2) of Rules of the District Court and Section 47B of the District Court Ordinance. The initial specific discovery was directed towards both the MTR Corporation Limited (“MTRC”) for the CCTV Footages and the Commissioner of Police for the Identity Information and the Police Documents.
4. However, upon further inquiries, the plaintiff became aware that a copy of the CCTV Footages had been provided by the MTRC to the police pursuant to a police warrant.
5. The plaintiff amended the summons to drop proceedings against MTRC but instead direct the specific discovery of the CCTV Footages against the Commissioner of Police.

*Section 47B*

1. As a preliminary point, Mr Chan, Counsel for the defendant, argued that the Commissioner of Police was a party to this action (being sued for vicarious liability) so Order 24 rule 7A(2) and Section 47B, which concerned discovery against a non-party, were inappropriate.
2. Mr Lee, Counsel for the plaintiff, argued that the Secretary for Justice, and not the Commissioner of Police, was the true defendant in this action, citing sections 4 and 13(1) of Crown Proceedings Ordinance.
3. I am not prepared to go into any legal arguments on this, suffice to say that Mr Lee agreed that at the time that discovery would be conducted, the defendant would be disclosing the relevant documents in the possession of the Commissioner of Police and not just, if any, in the possession of the Secretary of Justice.
4. As such, whoever we may define as the defendant, in practice, the plaintiff was now, at a stage before the writ was even served, seeking discovery of documents which would in any case be disclosed (insofar as they exist and were relevant in the *Peruvian Guano* sense) at the discovery stage which normally would be conducted after the close of pleadings in accordance with the usual proceedings of civil procedures.

*Legal principles*

1. The plaintiff is seeking a *Norwich Pharmacal* order.
2. In my view, cases like *Chan Chuen Ping v Commissioner of Police* [2014] and *Leung Yiu Ting v MTR Corporation Limited* [2020] are “Red Herrings”. These cases were dealing with discovery applications against an “involved” party or a third party on documents that were normally regarded as confidential under the common law or protected by the Personal Data (Privacy) Ordinance, for the purpose of “righting a wrong”.
3. But this is not the issue here: the question here is not whether such documents (if they exist) should be disclosed, but why such documents should be disclosed at this stage before the writ was even served. In other words, the plaintiff is seeking to “jump the gun”.
4. Sir Alan Huggins, V.P. in *Yew Seng Computer (H.K.) Ltd. and Others v Computerland Corporation* (Civil Appeal No. 98 of 1985) stated that a party trying to *“obtain discovery at an earlier stage than otherwise would be available”* should show that there is a **reason** and **necessity** for this (emphasis added).
5. A similar situation was discussed in another Court of Appeal case, *Manufacturer’s Life Insurance Co. of Canada v Harvest Hero International Ltd & Others* [2002] 1 HKLRD, under paragraph 36 of that judgment:

“One of the matters of the Judge took into consideration was the fact that information sought would in due course be discoverable...Assuming that to be the case, the Judge was nonetheless duty-bound to consider whether or not discovery ought to be ordered. In *Societe Romanaise de la Chaussure SA v British Shoe Corp Ltd* [1991] FSR 1, when confronted with a similar situation, Millett J went on to consider whether or not to exercise his discretion to grant discovery immediately. He held...that the relevant test to be applied in that situation was either the balance of convenience test or that the plaintiff would suffer irreparable harm by failure to obtain the information immediately...In our judgment, the fact that discovery may in due course be obtained, is not of itself a sufficient reason not to consider the exercise of the discretion. If the plaintiff is delayed further in obtaining the information sought, it may well be hampered....in taking action against the parties whose identities are sought....”

1. I agree with Mr Chan that in the *Societe* case, Millet J was not proposing 2 tests: *“irreparable damage”* and *“balance of convenience”* should be one of the same test. Millet J had allowed the applicant to “jump the gun” because delay would cause the plaintiff to suffer *“irreparable harm”*, and he later stated that on the test of *“balance of convenience”*, the defendant has no good reason for withholding the information, and would suffer no harm if ordered to release the information then rather than later.
2. Like the *Societe* case, the *Manufacturer’s Life Insurance* case I mentioned earlier also concerned with delay causing *“irreparable damage”*: that case concerned a fraud and a delay in discovery would risk further dissipation of assets.
3. As such, I am of the view that *“irreparable harm”* is just one end of the scale in the *“balance of convenience”* test where there is a clear basis to allow “jumping the gun”.
4. As such, the proper test to apply in this situation is just the *“balance of convenience”* test.

*The CCTV Footages*

1. The CCTV Footages are produced by MTRC under a police warrant for the purpose of criminal investigation.
2. Although the CCTV Footages are in the possession of the Commissioner of Police, as a matter of law (which is not disputed by the plaintiff), the MTRC retains the ownership. The Commissioner of Police cannot use the CCTV Footages for any purpose other than the purpose for which it was obtained, that is, for criminal investigation: *AG v Ocean Timber Transportation Ltd* [1979] HKLR 298, *Keen Lloyd Holdings Ltd v Commissioner of Customs* (HCAL 113/2012) approved by the Court of Appeal [2016] 2 HKLRD 1372.
3. As such, the defendant cannot use or disclose the CCTV Footages for an extraneous purpose without either the consent of MTRC or by a court order: *Marcel v Commissioner of Police* [1992] Ch 225.
4. MTRC has refused to consent (see page 229 of the hearing bundle) so the Commissioner of Police requires a court order for the disclosure.
5. It is therefore entirely proper that, as stated in paragraph 20 of the Affirmation of Leung Mei Po, Mable (“Inspector Leung”) that:

“The team of police officers responsible for handling civil claim cases in connection with the incidents that allegedly took place at Prince Edward MTR Station on 31 August 2019…has no access to and has not viewed the footages seized from MTRC.”

1. In the same affirmation, Inspector Leung stated that, despite ongoing investigations, the defendant is presently unable to identify the police officer(s) allegedly involved in the incident. But:

“That said, I wish to emphasize that, if the Seized Footages later becomes available for the purpose of this Action because of a court order to that effect, the Police will review them and conduct further investigation and enquiries with a view to identify the police officer(s) suspected to have hit the plaintiff with baton(s)….”

1. I think this is also entirely proper on the part of the defendant.
2. In line with the spirit of the *“balance of convenience”* test in so far as to enable the defendant to investigate and identify any relevant parts of the CCTV Footages, I see no harm in granting the defendant an earlier assess to the CCTV Footages. In fact, if there were police officers who acted as alleged without proper and reasonable justification, it would serve the benefit of both the defendant and the plaintiff, not to mention public interests, to identify them earlier rather than later.
3. However, as I mentioned above, this case (at least from what one can gathered from the plaintiff’s Affirmations) is a simple incident: the plaintiff alleged that he was hit in the back part of his head from behind inside a MTR train.
4. As such, the CCTV Footages requested are clearly too wide for the purpose of this claim: I cannot envisage any use of video footages showing anything other than footages directly related to this one incident. In other words, the only video footages relevant would be any that showed the incident of the plaintiff inside a MTR train being hit in the back part of his head from behind, any footages that might assist in identifying the alleged assailants and any footages that might assist on the issue of liability related to this incident.
5. If any such footages can be identified, the defendant should disclose such to be made available in the current proceedings.
6. Further, as discovery is a continuous duty of the parties, I trust that the defendant will disclose any appropriate documents that stem from any further investigations conducted subsequent to this disclosure.
7. Having said that, I am minded that this court is not granting a specific discovery order: it is trite that such an application should be supported by an affidavit or affirmation stating, amongst others, why the applicant believe that such documents exist and why such documents are relevant to the issues in question. In other words, the court will not entertain any “fishing exercise”.
8. The solicitors of MTRC, in a letter dated 19 December 2019, already stated that there was no CCTV camera inside the relevant MTR train (see page 236 of the hearing bundle). As the incident allegedly happened inside the train, it is unclear whether any footages from the platform would be relevant.
9. The court is not in a position to grant a specific discovery order when there is no convincing evidence that any relevant document actually exists.
10. Given that the defendant has no access to the CCTV Footages at this stage, the appropriate order to seek is an order to grant the defendant access to such footages to see if there are any relevant footages and to make disclosure of such.

*The Identity Information*

1. Inspector Leung already affirmed that at this stage, no police officer(s) has been identified so no such documents or information are available.
2. Mr Lee agreed that this would be taken as conclusive at this stage. As such, there was no legal basis to pursue specific discovery of such subsequent to Inspector Leung’s Affirmation.
3. In passing, I also find that the plaintiff has advanced no convincing evidence to support the necessity of the release of identity information other than the name(s). I see no reason why the police unique identification number(s) or address(es) (which Mr Lee now confirmed to mean “service address(es)”) should be released.

*The Police Documents*

1. Similarly, Inspector Leung affirmed (in paragraph 23) that:

“As part of the investigation, I also reviewed the official notebooks of the police officers…deployed at the scene…Ordinarily, a police officer hitting a third party with a baton would be expected to record such an event in his or her notebook. However, I was unable to find any document or record that any of the police officers…had used his or her baton to hit the plaintiff on 31 August 2019 as alleged.”

1. This, again, should be taken as conclusive at this stage and there was no basis to pursue further.

*Conclusion*

1. Accordingly, I will make the following orders:
   1. The plaintiff’s application be dismissed;
   2. The defendant be granted access to the CCTV Footages previously produced by MTRC to identify and disclose:
      * + 1. any footages that showed the alleged incident of a passenger fitting the plaintiff’s description of his appearance (as stated in page 108 of the hearing bundle under paragraph 22(2) of the 2nd Affirmation of Lee Ka Chun) inside a MTR train situated on Platform 4 of Prince Edward MTR station being hit in the back part of the head from behind between 22:15 to 23:30 on 31 August 2019;
          2. any footages that might assist in identifying the assailants involved in the alleged incident, and
          3. any further footages that might be relevant in the issue of liability related to the alleged incident.
   3. There be an order *nisi* that costs of this application be to defendant with certificate for counsel. If there is no agreement on costs, the defendant shall lodge and serve a summary bill of costs within 28 days and the plaintiff shall lodge and serve a list of objections within 14 days thereafter. The costs shall be summarily assessed on paper. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Harold Leong)

District Judge

Mr Lee Siu Him, instructed by Kenneth Lam Solicitors, for the plaintiff

Mr Anthony Chan, instructed by Department of Justice, for the defendant