# DCPI 3993/2019

[2020] HKDC 1239

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 3993 OF 2019

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##### BETWEEN

CHEUNG KIN (張建) Plaintiff

### and

SUN BUS LIMITED Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 21 December 2020

Date of Decision: 21 December 2020

Date of handing down Reasons for Decision: 24 December 2020

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REASONS FOR DECISION

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1. This is a case management matter in a personal injury (“PI”) claim.

*Background*

1. The parties having taken out a total of 4 summonses before me managed to settle all but one of them at the hearing. Even with this last remaining one, the outstanding issue is on costs only.
2. That summons was in relation to a striking out summons dated 3 November 2020 taken out by the plaintiff’s (“P”) solicitors to apply to strike out the defence filed by the defendant (“D”) on 23 October 2020 without leave (“the Summons”).
3. D asks for costs of the Summons while P agrees to costs of the Summons be in the cause with certificate for counsel.
4. Having read all the correspondence in relation to this issue (in particular of the events leading up to the late filing of the defence) and having heard counsel for P and solicitor for D of their oral submissions, I am of the view that D should be entitled to the costs of the Summons.
5. The main reason I come to this decision is that, in my view, the Summons seeking to strike out the defence which had already been filed by the time of its issue, was a totally inappropriate and disproportionate means of trying to achieve its end, ie to force D to file the defence in time. In other words, it is like using a sledgehammer to crack a nut.
6. Admittedly, D was late in filing the defence and filed it out of time and without the leave of the court. D’s solicitors did not shy away from this fact.
7. However, in my view, this matter must be seen in the context that P had provided the “Second Draft” of the Consent Summons to D on 17 September 2020 (“the Second Draft”) asking them to endorse or comment on the same. Significantly, §1 of the Second Draft prepared by P contained the proposed agreement for D to “file and serve a Defence” “on or before 15 October 2020”.
8. D, having received this Second Draft did response to it and made some comments with their counter-proposals on 21 September 2020.
9. However, unfortunately, P did not respond to it despite a follow-up letter by D on 29 September 2020. A deadline of 4:00 pm on 30 September 2020 was given to P to do so, otherwise D said they would report the matter to the court.
10. No response was given by P.
11. Incidentally, Ms Lee’s instructions on this matter is that P’s solicitors were waiting for instructions from P. I do not know what instructions are required from a legally aided plaintiff on a simple case management issue like this. I am afraid I do not accept that explanation at all.
12. In any event, D wrote to one of the PI Masters, Master Catherine Cheng, on 20 October 2020 and reported the matter to her.
13. At the Checklist Review hearing on 24 November 2020 before her, she transferred the Summons, together with the 3 other summonses for me to deal with.

*The Court’s Findings*

1. In my judgment, this matter, like any late filing of a defence, could be easily and amicably resolved had P responded to D’s letter dated 17 September 2020 on D’s counter proposed directions contained in P’s Second Draft. The fact that P did not do so had only unnecessarily escalated the dispute. In my view, this could have been easily achieved by way of a simple letter to D pointing out to them the fact that they had filed the defence out of time and without leave. They should ask D to take out a summons to seek for retrospective leave from the court and asks to pay P’s costs on this (usually at a standard rate of HK$600 or HK$800 only). Only if D fails to respond to that then they should consider taking out a striking out summons, which, of course is one of the most draconian steps a party can take in a PI litigation. This is because, if granted, it would have the grave effect of depriving the D to defend the case and have his/its day in court. Hence, the court usually will be very slow in making such an order and will only consider striking out an otherwise arguable and legitimate defence in very extreme cases, for example, where a party has repeatedly fouled or non-complied with the court’s orders and after at least one if not two “unless orders” have been made against the party.
2. In my judgment, this is not the situation here.
3. Judging from the case’s history, it is clear to me that P’s solicitors were unhappy with the fact that D had failed to respond to some of their earlier letters on some other case management matters in the case. They were also not happy with the fact that D had forced their hands to file and serve the statement of claim and statement of damages by way of an unless order at the beginning of the proceedings when they had failed to do so for months after issuing a general endorsement of claim. So, to me, it was like a “tic-for-tac”. They took out the Summons in order to try to strike out the defence. However, I note the fact that the defence had already been filed in court by the time they took out the Summons and that P had also filed a reply on 27 October 2020, ie a week before the Summons was taken out.
4. In my judgment, what P did was totally unnecessary and out of proportion in the context of this simple PI claim. It was like creating a storm in a teacup. The subsequent filing of P’s affirmation in support of the application with almost 40 pages of correspondence as exhibits and D’s affirmation in reply with a further 168 pages of exhibits are totally unnecessary and could have been avoided altogether if P takes a sensible approach to this matter. In my view, what P did was against both the spirit as well as the letters of the underlying objectives of the CJR, ie to resolve the disputes among the parties in a cost effective and efficient manner. This is particular so when one of the parties is using public funds (as the legally aided P is in this case) to fund his litigation.
5. Last but not the least, it is clear to me that D was all along willing to pay for the costs to file the defence out of time with retrospective leave as they had proposed under their draft case management directions sent to P on 5 November 2020. That was what D’s solicitor who attended the hearing before Master Catherine Cheng had indicated to her on 24 November 2020. Regrettably, instead of accepting that reasonable proposal, P insisted on arguing the Summons for striking out before me and had, in the very last minute, even instructed counsel to do so. To me, that was totally unnecessary and rather unreasonable on the part of P’s solicitors.

*Conclusion*

1. Hence, based on my above findings, I ordered P to pay for the costs of the Summons to D, such costs to be taxed if not agreed. P’s own costs to be taxed in accordance with the Legal Aid Regulations with certificate for counsel.

( Andrew SY Li )

District Judge

Ms Christina Lee, instructed by Ellen Au & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Ringo Kwong of Cheng, Yeung & Co for the defendant