DCPI 4048/2019

[2022] HKDC 1245

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 4048 OF 2019

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BETWEEN

TSANG AH SHING Plaintiff

suing by his son and next friend

TSANG YUN LEUNG

and

CHAN HO MING 1st Defendant

THE KOWLOON MOTOR

BUS CO (1933) LIMITED 2nd Defendant

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Before: Master Louise Chan in Chambers (paper disposal)

Date of Plaintiff’s Skeleton Submission: 24 August 2022

Date of 1st and 2nd Defendant’s Skeleton Submissions: 24 August 2022

Date of Decision: 31 October 2022

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DECISION

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*Introduction*

1. By a summons dated 12 May 2022 (“Summons”), the Plaintiff seeks:

*“*(1)Leave be granted for the Plaintiff to adduce evidence from a neurologist, namely, Dr. Brian Chao;

(2) Leave be granted for the parties to arrange for a joint neurological examination, if applicable, within the next 28 days from the date hereof.”

1. A consent summons was filed by the parties on 17 May 2022 and I gave directions for this application with a timetable for exchange and filing of written submissions. The substantive hearing was scheduled to be heard on 29 August 2022 but upon the parties’ joint application dated 15 August 2022, I allowed this application to be dealt with by way of paper disposal.
2. The 1st and 2nd Defendants (“the Defendants”) opposed to the Plaintiff’s application as first, the proposed neurological expert evidence is not relevant, necessary and of no probative value, and secondly, the Plaintiff was deemed to have elected not to adduce medical evidence in respect of neurology pursuant to an earlier unless order.

*Background*

1. Indeed, an unless order in relation to the matter of neurological/ophthalmological expert evidence was made by myself on 22 March 2021 (“the Unless Order”), which read as follows:

“*Notwithstanding paragraph 4 of the Order of Master Louise Chan dated 9 December 2020 (“the Order”), unless the Plaintiff takes out an application for leave to adduce expert medical evidence on neurology and or ophthalmology (if so advised), within 28 days from the date hereof, the Plaintiff be deemed to have elected not to adduce medical evidence in respect of neurology and or ophthalmology.*”

1. The decision for making this Unless Order could be referred in light of the Plaintiff’s alleged injuries and parties’ conduct of this proceedings. A public bus which was operated by the 2nd Defendant and driven by the 1st Defendant was involved in a traffic accident on 10 February 2018 (“the Accident”) where the Plaintiff was a passenger. The Plaintiff filed and served the writ on the Defendants in early December 2019 claiming damages for the personal injuries he suffered in the Accident. By way of a Consent Order filed on 16 December 2019, an interlocutory judgment was entered on liability in favour of the Plaintiff against both the Defendants with damages to be assessed.
2. According to the Statement of Damages dated 13 December 2019, the Plaintiff was at the age of 70 at the time of the Accident where he suffered multiple injuries including but not limited to facial, orbit and head injuries. He was immediately admitted to the A&E Department of the Tuen Mun Hospital (“TMH”) with a CT brain performed two days later, showing acute subdural and subarachnoid haemorrhage which was treated conservatively. The Plaintiff also suffered from facial laceration and fracture involving his orbital area.
3. It was pleaded that the Plaintiff suffered from blurred and double vision in his right eye from time to time and a deterioration in memory after the Accident. With reference to the available medical records, the Plaintiff has continued receiving follow-ups from the Neurosurgery Department at TMH and the repeated CT brain showed that all the brain haemorrhages were completely resolved in April 2018.
4. Pursuant to a consent summons filed by the parties on 20 May 2020, the parties agreed and the Court ordered that the expert medical evidence be limited to one orthopaedic expert for each party and a joint examination of the Plaintiff was conducted on 2 April 2020. The Joint Orthopaedic Report (“the JOR”) was compiled by both experts on 5 June 2020 with paragraph 14 read as follows:

“*Tsang suffered from head injuries with SAH and SAD and probably a severe concussion. He still complains of residual headache and poor memory. A neurosurgeon’s assessment may be needed, if parties so wished. Tsang also suffered from a facial bone fracture involving the right orbit. There is reduced visual acuity and reduced extra-occular eye movement as reported. Tsang also complais of vision of the right eye, and Tsang’s driving stability may be depending on his eye. An ophthalmologist’s assessment may be needed.”*

1. The next Checklist Review Hearing was scheduled on 10 December 2020 and the parties asked for 42 days to decide if further medical expert evidence should be adduced and have the matters reported to the Court. In order to allow this outstanding matter be decided expeditiously, I granted the order but with a short adjournment for the next Checklist Review Hearing. As matter turned out, not only no reports were made to the Court within 42 days in relation to the expert issue, the parties filed another Consent Summons on 19 March 2021 proposing another 28 days for the Plaintiff to take out an application for leave to adduce expert medical evidence on neurology and or ophthalmology.
2. In view of the progress made, I made the Unless Order in order to compel the Plaintiff to take out any necessary Summons, if so desired, without delay.
3. The Plaintiff did not, however, make any applications to adduce further experts, nor did he comply with the direction to file his Revised Statement of Damages by early May 2021. In November 2021, the parties asked for time extension in complying with various orders made in March 2021 with no mention of the medical expert issue. Naturally one would think that the Plaintiff must have decided not to adduce further medical expert in this action.
4. Unexpectedly, the Plaintiff took out the Summons on 12 May 2022, i.e. 14 months after the Unless Order was made, for leave to adduce expert evidence in neurology, which is now contested by the Defendants.

*Applicable Principles*

1. The present application was made pursuant to, as the Plaintiff put it, ‘R.D.C. Inherent Jurisdiction Paragraph 10.8 and PD 18.1’. While it is unbeknown to this Court what Paragraph 10.8 the Plaintiff was referring to, the reliance on the Court’s inherent jurisdiction and PD 18.1 (the Practice Direction of the Personal Injuries List) is misconceived because the sanction imposed by paragraph 3 of the Order made on 22 March 2021 is in the nature of an ‘unless order’ and has already taken effect under Order 2, rule 4 of the *Rules of District Court*, Cap 336H. Accordingly, unless relief from sanction is sought and granted by the court, the application for an extension of time to comply with the Unless Order is doomed to fail.
2. Order 2, rule 4 states as follows:

*“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 an obtains relief from the sanction within 14 days of the failure.”*

1. In *Lee Sai Nam v. Li Shu Chung & Ors* HCA 1711/2009, 31 May 2013, Deputy High Court Judge Marlene Ng (as she then was) explained the meaning and effect of this rule as follows:

*“68. I next turn to the nature of the Unless Order. An unless order is peremptory in nature, ie it directs a party or parties to perform some requirement by a certain date and specifies the consequences of default. The consequences may differ according to the circumstances. Auld LJ in Hytec Information Systems Ltd v Coventry City Council, stated that such an order ‘is, by its nature, intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court’.*

*69. This means that the sanction imposed in any unless order takes effect automatically unless relief from sanction is obtained, and the non-defaulting party does not have to make any application in order to enforce the sanction.*

1. *In Foshan City Commercial Bank v Chen Yong Yi &Ors, Chung J said as follows:*

*‘4. … it has to be borne in mind that the events which occurred since the making of the ‘unless’ order were ‘automatic’ in the sense that default in complying with the ‘unless’ order would (in accordance with the terms of that order) result in the dismissal of this action. …’*

*More recently, in Daimler AG v Leiduck, Fok JA confirmed that ‘it is not for the party seeking to take advantage of a default to apply to the Court in order to render a sanction for that default effective. Instead, the sanction takes effect immediately and it is for the party in default to apply for relief from the sanction. Only if there is an application for relief from the sanction is the Court required to consider whether, in all the circumstances, it is just to make an order granting relief from the consequences that would otherwise follow’.*

1. *It is therefore important to keep in mind the distinction between the operation of the sanction which is automatic and the exercise of the court’s discretion to grant relief. In considering whether the sanction has become operative, the court must confine itself to deciding whether there has been any breach of the unless order, and must not embark on the exercise of examining whether there is any plausible explanation or justification for the default. Hence, in deciding whether the sanction under the Unless Order has come into effect, KJ’s and FS’ wish to “synchronise timetables” pending the Burrell Decision and KJ’s further wish to await the service of the YH Defence are neither here nor there. Further, since the sanction in any unless order becomes operative automatically upon breach, it is not for the court in deciding whether or not there has been such breach to question the suitability of the sanction vis-à-vis the default or to re-write the sanction imposed under such order.*
2. *This can be procedural tripwire for the unwary. Once a breach of the unless order occurs, the defaulting party cannot escape the guillotine effect of the sanction by seeking extension of time and/or by putting forward mitigating factors to explain the default. His only recourse is to apply for relief from sanction.”*
3. It is thus clear that the proper application for the Plaintiff is to apply to the court under Order 2, rule 5 for relief from the sanction within 14 days of the failure, which would allow the Court to consider a range of matters mentioned in sub-paragraphs (a) to (j) thereof before deciding whether relief should be granted. As a matter of procedural fairness, a party intending to apply for relief from sanction must give proper notice of the application to the other side so that it will have an opportunity, if so advised, to file evidence which may be relevant to the matters mentioned in sub-paragraph (a) to (j) to resist the application. Since this was not done so, the Plaintiff’s application for leave to adduce evidence from a neurologist must fail.

*Application of Order 2, rule 5*

1. Having thus dealt with the misconceived application made by the Plaintiff, for the sake of completeness, I would discuss briefly why it would still be unlikely to have leave granted even if the Plaintiff had made a proper application to the Court for relief.

Order 2, rule 5 provides as follows:

“(1) 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 order;
        6. whether the failure to comply was caused by the party in default or his legal representatives;
        7. in the case where the party in default is not legally represented, whether he was unaware of the rule or court order, or if he was aware of it, whether he was able to comply with it without legal assistance;
        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.
  1. An application for relief must be supported by evidence.”

1. The relevant principles governing the circumstances in which the court will extend time to permit compliance with an unless order had been thoroughly discussed in numerous cases. In *Top One International (China) Property Group Co Ltd v Top One Property Group Ltd*, Fok J (as he then was) noted that relief from sanction under Order 2 rule 4 of the RHC is not automatic, and Order 2, rule 5 of the RHC specifies the circumstances which the court shall consider on an application for such relief. The learned judge considered the *Hytec* approach to be consistent with the more proactive case management approach encouraged by the CJR such that the *Hytec* approach now reflects the approach that should be applied in Hong Kong:

*“… That is to say, although intentional and contumelious disregard of a court’s peremptory order may be the most usual circumstance leading to the refusal of an extension of time to comply with a peremptory order, the exercise of the discretion to refuse an extension or to relieve a party from sanctions is not limited to cases of intentional and contumelious default. As directed by O.2 r.5 of the [RHC], the court should consider all the individual circumstances including those listed in r.5(1) at subparas.(a)-(j). Depending on the circumstances, failure to comply with one or a number of orders through negligence, incompetence or sheer indolence may be such as to lead the court to conclude there is an existence and degree of fault which warrants a refusal of an extension of time, so that relief from a sanction for non-compliance specified in a peremptory order (including an order striking out a pleading) should not be granted. Any other conclusion would, in my opinion, be to ignore the positive duty placed on parties to assist the court to further the underlying objectives of CJR (O.1A r.3 of the [RHC]) and on the court to do so by actively managing cases (O.1A r 4(1) of the [RHC]).”*

1. The approach outlined in *Top One International (China) Property Group Co Ltd* is followed in subsequent authorities. In *An Zhou & ors v Zhou Zheng Kuan & ors*. To J held that in an application for relief from sanction the burden of proving entitlement to relief is on the party seeking relief, and the court will then decide whether in all the circumstances it is just to relieve the party in default from the consequences of its breach. “But, not unusually, as an act of prudence and depending on the seriousness of the consequence of the sanction, the court invites, as in the present case, the defaulting party to show cause why the sanction should not be applied against him. If appropriate and necessary, the court will give direction and grant extension of time for making an application under Order 2, rule 4” (paragraph 26).
2. To J went on to say at paragraph 27 that the list of factors in Order 2 rule 5 of the RHC is not exhaustive and that:

*“… Basically, the court considers the reasons for the default, explanation for the delay in applying for relief, whether there was a history of default, whether the sanction is out of line with the consequence of the breach and whether the breach was intentional and contumelious: see Top One International (China) Property Group Co Ltd v Top One Property Group Ltd [2011] 1 HKLRD 606 at 616.  Usually the court would have considered the appropriateness of the sanction at the time of making of the unless order.  However, circumstances may change.  The extent of the breach as it turned out may not be as serious as anticipated and there may be mitigating circumstances.  Worth noting is that Order 2, rule 5(f) expressly distinguishes between default caused by the litigant and that caused by his legal representative.  The court is inclined to grant relief to a litigant if he has no deliberate feet dragging and the default was caused by his legal representative.”*

1. As outlined in paragraphs 8-12 hereinabove, the orthopaedic experts commented in the JOR back in June 2020 that the Plaintiff could consult neurosurgeon in relation to his neurological complaints. The Plaintiff was then given around a period of 11 months, i.e. from the time the JOR was compiled up to the deadline imposed under the Unless Order to consider taking out relevant application to adduce experts.
2. The affirmation filed by the Plaintiff’s son explained that the reason for this late application was due to his father’s deteriorating condition. The Plaintiff was admitted to the A&E Department on 5 July 2021 and 15 December 2021 respectively due to cerebral haemorrhage and vascular occlusion of the right brain. His son believed the worsening conditions of the Plaintiff bears relevance to the Accident and thus the damages under PSLA, loss of amenities, loss of earnings and future loss of earning capacity could be further adjusted.
3. While it would be entirely just and fair to give consideration when there was a change in circumstances especially as to the Plaintiff’s alleged injuries, it is clear that Order 2, rule 5(2) requires such application be supported by evidence. The alleged ‘worsening conditions’ of the Plaintiff that was said to be relevant to the Accident was however more of some subjective belief of the Plaintiff’s son without any supporting medical evidence. On the other hand, the medical report from the Department of Neurology of PWH dated 2 February 2020 is to be taken as unequivocal evidence that the brain haemorrhage suffered by the Plaintiff from the Accident was treated and completely resolved by April 2018.
4. Further, bearing in mind that both these hospital admissions took place in the year of 2021, no explanation was provided as to why it took the Plaintiff or his solicitors another 5 months to take out the Summons. In fact, such Summons was not taken out until a week before the scheduled Checklist Review hearing, which was meant to have this case set down for trial. It also turned out that the Plaintiff did not comply with other directions the Court made in the last order.
5. As such, when looking into the failure on the Plaintiff’s part to comply with number of orders through negligence, incompetence, sheer indolence and/or indecisiveness of the Plaintiff or his solicitors, this Court considers it would not be appropriate to grant relief even if a proper application was made by the Plaintiff.
6. Accordingly, the Summons is dismissed with costs be to the Defendants, to be taxed if not agreed.
7. All parties shall submit a list of agreed case management directions to the PI Master by way of a joint letter within 7 days from the date hereof.

( Louise Chan )

Master

W T Law Offices, for the Plaintiff

Mayer Brown, for the 1st and 2nd Defendants