#### DCPI 76/2002

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 76 OF 2002

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| BETWEEN | COLEMAN, TERESA | Plaintiff |
|  | and |  |
|  | HONG KONG & KOWLOON FERRY LIMITED | Defendant |

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##### Coram: Deputy District Judge Bernard Mak in Chambers (open to the public)

Date of Hearing: 16th February 2009

Date of further affidavit filed by Plaintiff’s solicitors: 27th February 2009

Date of Handing Down Judgment: 20th May 2009

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###### JUDGMENT

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1. By this action started in 2002, the Plaintiff seeks to claim damages for personal injuries suffered by her on 8 April 1999 whilst she was disembarking from a ferry operated by the Defendant at the old Central Ferry Pier. The Amended Writ of Summons, which was generally indorsed, was served on the Defendant in early 2003. Since then no further step was taken by the Plaintiff in these proceedings until 10 October 2008 when the Plaintiff’s current solicitors took out a summons for leave to file Statement of Claim out of time. The Defendant in response took out a summons on 5 October 2008 to dismiss the Plaintiff’s claim for want of prosecution under “O.3, r.5(9) & O.18, r.19 RDC and [the] inherent jurisdiction” of the District Court.
2. There was yet another summons by the Defendant returned at the hearing to strike out certain paragraphs of the Plaintiff’s affirmation in opposition to the Defendant’s application, on the ground that they referred to without prejudice communications between the Plaintiff and the Defendant back in 1999. The issue arising out of this summons boiled down to primarily one of costs, because Mr Alder for the Defendant did not press for the striking out of the paragraphs set out in the summons after Ms Leung indicated that she would withdraw the last letter in the series of without prejudice correspondence exhibited as PL-1. Before the hearing the Defendant also had an objection to the content of the hearing bundle. Mr. Alder, who originally opposed to my reading of the draft Statement of Claim and Draft Statement of Damages, sensibly withdrew such opposition at the hearing.
3. Mr. Lunning, solicitor acting for the Plaintiff since July 2008, swore an affidavit in support of the Plaintiff’s application for extension of time for service of statement of claim and in opposition to the Defendant’s application but he did not depose to the circumstances which to his knowledge or understanding accounted for the Plaintiff’s inactivity over the last 6 years. Upon undertaking by the Plaintiff’s solicitors to set out and verify by further affidavit evidence, at the hearing I allowed Ms Leung, Counsel for the Defendant, to rely on Mr. Lunning’s instructions as to what transpired before he was on board as her basis for submissions. Basically it was the understanding of Mr. Lunning that before he was on board, the Plaintiff, who was frequently out of Hong Kong, was in dialogue with her then solicitors on how to formulate her claim. As ordered, Mr. Lunning made a 2nd affidavit on 27 February 2009; but it set out details which went beyond what the Court was informed of at the hearing. The Defendant’s solicitors opposed the introduction of new materials by letter dated 2 March 2009 though they did not request an oral hearing. For the present purposes, I do not rely on the details of the matters or correspondence that were firstly canvassed in the said 2nd affidavit of Mr. Lunning.
4. At the end of hearing I indicated that I shall reserve judgment on these summons which I now give.

Procedural History

1. After the writ was issued on 19 March 2002, it was amended under O.20 r.1 RDC and was reissued on 24 June 2002. A Checklist hearing was fixed for 19 July 2002, but the Plaintiff on 9 July 2002 applied by letter to adjourn the said Checklist hearing to a date to be fixed not earlier than December 2002, on the pretext that the Plaintiff’s medical report in support of her claim was not ready and the Amended Writ together with all relevant documents had yet to be served on the Defendant. The ex parte application was granted by letter and it is apparent that no further Checklist hearing was fixed for any date after December 2002.The Plaintiff did not serve the Amended Writ until sometime in February 2003 as the Defendant acknowledged service of the Amended Writ only on 20 February 2003.
2. The Plaintiff altogether filed 3 Notices of Intention to Proceed after a year’s delay on 26 June 2005, 26 September 2005 and 3 April 2007 respectively. Save and except the making of these notices, which did not amount to steps in the proceedings at all, nothing was done by the Plaintiff to activate her claim.
3. After a more than 5 years’ delay counting from the time of service of the originating process, or a more than 6 years’ delay counting from the time of the issue of the writ, or a more than 8 years’ delay counting from the time of the accident, the present solicitors acting for the Plaintiff took over. A fourth Notice of Intention to Proceed after a year’s delay was filed on 23 July 2008 and the summons for extension of time to file statement of claim was taken out on 10 October 2008 without the proposed Statement of Claim and Statement of Damages attached or annexed, and without an affirmation in support.

Abuse of process

1. Ms Leung accepted that there has been inordinate delay, which is, in the circumstances, blatantly inexcusable. The nub of her submissions was that the Defendant had failed to prove any serious prejudice under the second limb of *Birkett v James*. She made reference to *Kristan Bowers Philips v Initial Environmental Services Ltd*, No. A3978/1990, unrep., Findlay J., 7 December 1994, paragraph 45, in support of her argument that any prejudice resulted from loss of memory and absence of witnesses’ proofs was a result of the Defendant’s informed decision not to take steps to protect their position and had nothing to do with the Plaintiff’s conduct. Ms. Leung directed her arguments on burden of proving serious prejudice because she saw her application for extension of time as a flip-side of the Defendant’s application for dismissal for want of prosecution – indeed both Ms Leung and Mr Alder proceeded on the basis that if the Plaintiff’s claim should not be dismissed for want of prosecution, extension of time sought by the Plaintiff should be granted. To me, there is a more fundamental point at play.
2. I believe that even if the Defendant had not taken out their summons under O.18, r.19 for dismissal for want of prosecution under the second limb of *Birkett v James*, there is already a question of whether the Plaintiff’s claim is liable to be dismissed under the abuse of process route distinct and separate from the *Birkett v James* doctrine. The Plaintiff asked for exceptional indulgence without proffering an explanation for the long delay. In considering whether the Plaintiff should be permitted to maintain and reactivate her claim, the Court’s consideration and concern that its machinery must not be abused is necessarily engaged. Indeed the current trend is that the Court should be more vigilant to ensure that economic, expeditious and just disposal of proceedings, and actions towards such end could be taken by the Court even in the absence of a specific application by any party (see *Hong Kong Civil Procedure 2009* 18/19/12). To dismiss an action which amounts to an abuse of process is within the inherent jurisdiction of the Court which is in no way affected or diminished by O.18, r.19.
3. On the materials before me, the default to fix the Checklist hearing after it was adjourned in 2003 could be intentional and contumelious. The Court is entitled to find the Plaintiff’s inactivity for over 5 years in the circumstances an affront to the court and its rules. Under *Grovit v Doctor* [1997] 1 WLR 640 line of argument, the application of which in Hong Kong has been adumbrated in *Chevalier (E&M Contracting) Ltd* *v Rotegear Development Ltd & Ors* HCA1717/1990, unrep., DHCJ Fung (as he then was), 9 June 2005, the Court is entitled to dismiss the proceedings if it concludes that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial. While *Grovit v Doctor* must not be used to emasculate the requirement in *Birkett v James* of proving serious prejudice and substantial risk to a fair trial by the backdoor, dismissal of a claim being an abuse of process is appropriate in exceptional cases, even where evidence of specified prejudice is absent.
4. At the beginning of the hearing I brought to the notice of parties the said case of *Chevalier (E&M Contracting) Ltd* *v Rotegear Development Ltd & Ors.* It was Mr. Alder’s considered decision not to pursue dismissal under the abuse of process route. I therefore would not explore whether the present case falls within the definition of an exceptional case under the *Grovit v Doctor* line of authorities, and would only focus on the Defendant’s application for dismissal for want of prosecution under the second limb of *Birkett v James.*

*The Defendant’s case*

1. Mr. Alder submitted that the Court may infer prejudice from overall delay and there is no need in this case for the Court to grapple with whether and to what extent to infer fading of memories or other prejudice from circumstances and general assertions of prejudice. The long and the short of his case is that the fading of memories of the eye-witnesses of the incident and the proximate circumstances makes future cross-examination of the Plaintiff’s evidence on the sea conditions at the material time and the happening of the “split second” incident inherently unfair.
2. Such submissions have to be considered against the following background and position of the Defendant as deposed to in the affirmation filed on its behalf for the present application:

“5. On 8 April 1999, the Plaintiff as a passenger on board the Vessel “SEA SPIRIT” (“the Vessel”), which was at the material time owned and operated by the Defendant. Whilst the Plaintiff was disembarking from the Vessel, as she was on the gangplank, it allegedly “suddenly” moved upwards and the Plaintiff’s head struck the ceiling of the pier (the “Incident”).

“6. The crew members of the Vessel immediately helped the Plaintiff to treat her wound and called for an ambulance. The Plaintiff was then admitted to the Queen Mary Hospital for treatment. I understand that she was diagnosed as suffering from a minor head injury (as can be seen from the hospital notes at pages 1-2 of “CTC-1”).

“7. While the Defendant do not admit the circumstances of the Incident as alleged by the Plaintiff, if however it did happen in the manner described, it appears to have been the result of waves and/or swell which would cause the Vessel to move up/down and which in turn would cause the gangplank to move.

“8. If the Incident did occur as described above, then it could not have been the alleged fault of the Defendant. The fact that the Vessel would move depending on the sea conditions is an inherent nature of sea travel. It is different to, say, travelling on a bus on land where the bus can come to a complete stop.”

1. It is not disputed that the ferry was sold and that the scene of the incident, i.e. Central Pier No.5, has been renovated by the Government some years ago in 2001. The Pier supervisor and crew member of the ferry also maintain that they have no recollection of the incident.

Discussion

1. If the Defendant is saying that the Plaintiff’s accident could only be the result of ordinary perils on the sea, which the Defendant could not have prevented by diligent discharge of any duty of care owed to the Plaintiff, then I cannot see how the Defendant suffers prejudice in their defence in spite of the lapse in time. Such a defence of inevitable accident could be run and tried at any time because apparently the Defendant is in the position to “*shew what was the cause of the accident, and that though exercising ordinary care, caution, maritime skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or other of which might have produced the effect, and shew with regard to every one, that the result was unavoidable*” (see *Re The Merchant Prince* [1892] P 179 per Fry LJ on plea of inevitable accident in a collision case). The sea condition might be a matter of historical record. I have no idea whether the ferry in the ordinary course of events maintained a log or records of unusual occurrence in its trips; or if not, why. All in all, the Defendant did not reveal what kind of inquiries they had made in this regard since having notice of the accident, and then notice of these proceedings. There is no way to tell how the long lapse of time impacted on the Defendant’s ability to gather evidence to make good such a defence.
2. A more pertinent point is that the Defendant has yet by affidavit deposed that the Defendant did not have any contemporaneous record of any kind which contained any information that might shed light on the circumstances in which the Plaintiff met with the accident. The Defendant simply stressed that the ferry was sold, the pier was changed and the sailors forgot what happened. Be that as it may; but the design, layout and conditions of the ferry and the pier could probably be found in records or archives, if not already recorded or archived by the Defendant. There might, or might not, be accident reports or staff reports. There might, or might not, be witnesses proofs in existence. The Defendant is holding its cards close to the chest and relying on the “obvious” prejudice to them resulted from the long lapse of time.
3. Leaving aside the *obiter dicta* in *Kristan Bowers Philips v Initial Environmental Services Ltd* cited by Ms. Leung, there is a long line of authorities binding on this Court stressing on the requirement of evidence of specified prejudice on specific issue for an application to dismiss for want of prosecution (see *Lui Chun Kwong v Kier Hong Kong Ltd* [1995] 1 HKC 695). Mr. Alder relies heavily on *Shtun v Zalejska* [1996] 1 WLR 1270 for the proposition that the Court is entitled to draw an inference that by reason of the delay complained of serious prejudice would be caused to the Defendant as a result of impairment of witnesses’ recollection. But in *Shtun v Zalejska*, the main issue in the underlying dispute was *“the ownership of the property the action would turn on the evidence of the parties as to the oral agreement in 1978 and their discussions”* (1276B). The Plaintiff therein was able to rely on documentary evidence to invoke the presumption of resulting trust, and the defence hinged on the Defendant’s recollection of events long ago to rebut the presumption (1285H – 1286A). Peter Gibson L.J. at no time sought to overrule or depart from such authorities like *Hornagold v Fairclough Building Ltd.* [1993] P I Q R P400 to say that irrespective of the issue or issues to which an inferred general impairment of memory of a witness is directed, the court is entitled to, without more, draw an inference of serious prejudice from such inferred general impairment of memory of witnesses; his Lordship only sought to make clear that the Court can infer impairment of memory of witnesses from long delay and it is not necessary for the applicant to allocate specific prejudice resulting from such inferred impairment of memory to specified periods of delay, and that is plain from the passage at 1285B:

“…In my judgment, in order to determine whether a defendant has suffered the necessary prejudice when it is in the form of impairment of witnesses’ recollections as result of inordinate and inexcusable post-writ delay, the court must examine with care all the circumstances of the case, including the affidavit evidence as well as the issues disclosed by the pleadings. It is not, in my judgment, essential in every case that there should be evidence of particular respects in which potential witnesses’ memories have faded, still less that it need be shown that such fading of memories occurred in a particular period. …”

1. In the present case the Court cannot even begin to consider whether the Defendant suffered serious prejudice, because in the absence of credible evidence indicating the kind and nature of evidence available to the Defendant at the time of its application, it would be mere speculation by the Court as to whether the Defendant suffered disadvantage, let alone prejudice, in terms of evidence. The Plaintiff, like the Defendant’s witnesses, would suffer general impairment of memory; with the aid of contemporaneous records or documents, it might be the Defendant who would enjoy advantage in cross-examining the Plaintiff as to the accuracy of her recollection of the accident happened so long ago. The Defendant being so coy as to what they possess in terms of evidence, the necessary consequence is that there is no sufficient material before me to entitle me to exercise discretion in the way they sought.
2. In the premises, I dismiss the Defendant’s application to strike out for want of prosecution. Extension of time to file Statement of Claim and Statement of Damages within 14 days hereof is granted to the Plaintiff.
3. Whilst the Plaintiff is the practical winner in these applications, I cannot overlook the fact that she is asking for exceptional indulgence from this Court. In the premises, I do not consider that costs of the Defendant’s summons should follow the event. I make no order as to costs on both the Defendant’s summons to strike out for want of prosecution and its summons to strike out certain paragraphs of the Plaintiff’s affidavit. The Defendant should have the costs of the Plaintiff’s summons for extension of time for filing her statement of claim and statement of damages, excluding the costs of the day. The aforesaid costs orders nisi should be made absolute in 14 days of today unless any party applies within the same time period.

# (Bernard Mak)

Deputy District Judge

Representation:

Ms Pauline Leung instructed by Messrs Hui & Lam for the Plaintiff.

Mr. Edward Alder instructed by Messrs Holman Fenwick Willian for the Defendant.