# DCPI 1897/2012

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# PERSONAL INJURIES ACTION NO. 1897 OF 2012

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BETWEEN

WONG CHI HUNG Plaintiff

and

郭國基 1st Defendant

WEISHENG BUS LIMITED

(威盛直通巴士有限公司) 2nd Defendant

KEE KWAN TRAVEL TRANSPORTATION

(HONG KONG) COMPANY LIMITED

(岐關旅運(香港)有限公司) 3rd Defendant

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Before: His Honour Judge Kent Yee in Chambers (Open to Public)

Date of Hearing: 4 March 2013

Date of Judgment: 2 May 2013

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JUDGMENT

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*Introduction*

1. The defendants apply, by a summons dated 7 November 2012 under Order 12 rule 8(2) of the Rules of the District Court (“**the Summons**”), for a declaration that the court should not exercise any jurisdiction it may have in the proceedings or an order staying the proceedings. It is stated in the summons that the proceedings should be conducted in the PRC courts and the defendants are entitled to rely on an agreement to which the plaintiff is a party and whereby the jurisdiction of the court is excluded.

2. Shortly stated, the background to this action is that the plaintiff purchased his round-trip bus ticket in the 2nd defendant’s office in Mongkok for his trip to Taishan in the PRC. On 4 March 2012, the plaintiff boarded a bus driven by the 1st defendant and registered in the name of the 3rd defendant in Hong Kong (“**the Bus**”) with the said ticket making his way back to the office of the 2nd defendant in Hong Kong. There were altogether forty-four passengers on the Bus. At around 3:00 p.m., when the Bus was travelling along a highway in the Jiangmen district on the Mainland known as G94 heading in the direction of Zhongshan, it rammed into a truck. All the passengers and the 1st defendant were injured as a result.

3. The plaintiff commenced this action for damages for personal injuries by a writ of summons dated 11 September 2012. The Statement of Claim was filed on 10 October 2012. Before the due date of their defence, the defendants made the present application.

*Defendants’ late application*

4. At the outset of the hearing of the Summons, the defendants made another application by way of a summons dated 4 March 2013 (“**the late summons**”). They applied to file and serve the 3rd Affirmation of Chan Wei Ping (“**the Affirmation**”) so as to specify the plaintiff’s preferred court on the Mainland, namely, Jiangmen Intermediate People’s Court (“**the Jiangmen Court**”), which is said to be the only court in Jiangmen.

5. Mr Tim Wong, counsel for the defendants, urged me to grant the application with the concession that the plaintiff should be allowed to file his evidence in reply and the defendants should bear the plaintiff costs of the resultant adjournment of the hearing of the Summons. Mr Wong submitted that such an adjournment should not be lengthy and the delay would be minimal. He further argued that the Summons had all along been opposed by the plaintiff on the basis that Hong Kong, rather than any courts in the PRC, was a natural and convenient forum and the plaintiff had not taken any issue about the defendants’ failure to specify a court in the PRC which the defendants would prefer this action to be tried in the Summons and supporting affirmations. Mr Wong highlighted that the plaintiff did not suggest any differences of the local laws on the Mainland throughout. It was only when Mr Jonathan Chang, counsel for the plaintiff, filed his skeleton argument on 28 February 2013 that the challenge was made for the first time.

6. There are ample authorities to bring home to the legal practitioners the necessity of specifying the purportedly more appropriate forum in this kind of applications, which essentially involve a comparative exercise. Mr Chang referred some of these authorities to this court and they included *Hwoo Hwang Linda v Fu Being Sun* [2013] 1 HKLRD 259 at §§50 to 59 per Recorder Reyes SC (as he then was), S Megga Telecommunications Ltd v Etowaru Co Ltd [1995] 2 HKC 761 at 765 per Bokhary JA (as he then was) and *Greenwood Ltd v Pearl River Container & Anor*., unreported, CACV 27/1994, 25.5.1994. In particular, in *Greenwood Ltd v Pearl River Container & Anor*., supra, Litton JA (as he then was) pointed out that it was in the circumstances of that case plainly not enough for the defendant to assert that “China” or “the PRC” or “the city of Guangzhou” was an appropriate forum. This is exactly the deficiency of the Summons.

7. In the circumstances, the defendants’ glaring omission to identify which one of the PRC courts was contended to be a more appropriate for the trial of the plaintiff’s claim is inexcusable. It was the defendants who should ensure that their application was in good order. The plaintiff did not have any obligation to assist them. The defendants could not possibly rely on the lateness of the well-founded challenge raised by Mr Chang to justify the delay of their attempt to put their application in order.

8. This application was made far too late and no valid explanation for the delay was given. From the viewpoint of case management, I declined to exercise my discretion in favour of the defendants. Even though the defendants offered to bear the costs of the inevitable adjournment if the application was granted, the plaintiff would no doubt suffer prejudice caused by the delay, which could not be fully compensable by costs.

9. Therefore, at the hearing I dismissed the defendants’ application with costs to the plaintiff, to be taxed if not agreed with certificate for counsel. For taxation purpose, I put on record that the hearing of the late summons lasted for forty-five minutes. I indicated to the parties that I would give my reasons for my decision in this judgment.

*Defendants’ substantive application*

10. In the light of my dismissal of the late summons, Mr Wong indicated to me that that he no longer wished to address this court on the appropriateness of the PRC courts. Instead, he would rely solely on the doctrine of double actionability to show that the plaintiff’s claim is unsustainable in Hong Kong.

11. Despite his indication, I proceed to consider the Summons on the basis that the defendants has specified in the Summons that the Jiangmen Court is the appropriate forum in case that the exercise of my discretion against the defendants in the late summons is found to be erroneous.

12. I start with the applicable principles, which are not in dispute. First and foremost, the burden falls squarely on the defendants to persuade the court to exercise its discretion to grant a stay of proceedings by showing that there is clearly and distinctly another forum which is more appropriate for the trial of the plaintiffs’ claim: *Greenwood Ltd v Pearl River Container & Anor*., supra, per Litton JA.

13. Further, it is imperative to bear in mind the guiding principles expounded by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd, the Spiliada* [1987] 1 A.C. 460. Cheung JA in *DGC v SLC nee C*, unreported, CACV 37/2005, 1.8.2005 gave a convenient summary of the same, which is as follows:

* + - * 1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action i.e. in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
        2. In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum (‘appropriate’ in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.
        3. If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceeding has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.
        4. If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court’s satisfaction that substantial justice will be done in the available appropriate forum.

14. I would assess the merit of the defendants’ application with reference to the foregoing considerations. Before I do so, I further note that where an action is founded as of right in a forum which is being challenged, this is a relevant factor to refuse to grant a stay: Spilida at p.477 and *Pei Zheng Middle School and Anor. v China Pui Ching Education Foundation Limited formerly known as Pui Ching Educational Foundation Limited*, unreported, CACV 262/2005, 21.2.2006 per Cheung J.A. at §19.

15. In the present case, the plaintiff and the 1st defendant were at all material times ordinarily residents in Hong Kong. The 2nd and 3rd defendants are incorporated in Hong Kong. The plaintiff requires no leave to issue the writ against the defendants and the present action is founded as of right. I find this to be one of the decisive factors to tilt my discretion against the defendants’ application.

16. The defendants contend that Hong Kong is not the natural and appropriate forum by reason of the governing law of the plaintiff’s claim. To elaborate, Mr Wong contended that by virtue of a provision printed on the bus ticket (“**the Provision**”), the governing law should be the PRC law. The Provision was also contained in a notice posted in the office of the 2nd defendant (“**the Notice**”). The Provision is in the following terms:

“本公司依據中國法律,香港法律分別與國內和香港為乘客購買乘客座位責任保險和第三者保險與乘客在中國內地乘車期間遇上交通事故,必須按中國法律(不包括香港)處理,由保險公司依法作出賠償. 據此所作出之賠償屬對乘客的最終賠償. 乘客的任何其他申索,本公司概不負責,特此聲明.乘客如欲獲得額外保障, 可自行向有關保險公司購買保險.”

17. Mr Wong hence submitted that the plaintiff’s claim should be tried in accordance with the PRC law and so Hong Kong is not the natural and appropriate forum.

18. I cannot agree to this submission. First, as pointed out by Mr Chang, if the Provision constituted a valid contractual term, according to the case of the defendants, it would only be binding on the plaintiff and a PRC party named 廣東岐關旅運有限公司 (“**GKK**”). The contract was not made between the plaintiff and the defendants according to the evidence of the defendants.

19. Even on the assumption that the governing law is the PRC law, it does not render the Hong Kong court an unnatural and inappropriate forum to determine the plaintiff’s claim. The Hong Kong courts are well adapted to hearing cases with an element of foreign law. It is indeed increasingly commonplace that expert evidence of the PRC law is adduced in the Hong Kong courts.

20. Quite on the contrary, in my judgment, Hong Kong appears to be a perfectly natural and appropriate forum to determine the parties’ legal rights in relation to the accident though it took place in the Mainland. The unchallenged evidence is that all the parties are based in Hong Kong. The 2nd defendant operates its business in its Mongkok office and the return ticket was sold to the plaintiff in Hong Kong. All the passengers on the Bus are Hong Kong residents. All of them and the parties can testify in the Hong Kong courts to give an account of the accident out of their personal knowledge and first hand information. Their presence on the Mainland was merely on a temporary basis. On the other hand, the plaintiff received almost all the necessary medical treatments in Hong Kong meaning medical evidence would be adduced from sources in Hong Kong.

21. The defendants in their supporting affirmation asserted that the key witnesses of the accident would be the driver of the truck and the PRC investigating officers. The latter already indicated that they would not come to Hong Kong to testify. The defendants further claimed that their insurer by a letter dated 28 January 2013 maintained that they were not obliged to come to Hong Kong to testify. I note that the letter was actually issued by 中國人民財產保險股份有限公司 to GKK and not the defendants.

22. I fail to understand how the evidence of these people would be relevant to the trial of the plaintiff’s claim. There is no suggestion, let alone evidence, that the driver of the truck was in any way responsible for the accident. The defendants do not allege contributory negligence on the part of the driver of the truck at all. As regards the investigating officers and the insurers in the Mainland, there is no explanation as to why and how they can give evidence pertinent to the accident. In any event, I agree with Mr Chang that evidence of all these people could be taken through video-link if necessary.

23. I therefore conclude that Hong Kong has the most real and substantial connection with the plaintiff’s action and is the natural and appropriate forum. I am far from persuaded that the PRC courts are clearly or distinctly more appropriate than the Hong Kong courts.

24. In the premises, the defendants fail to discharge their burden to prove the existence of a more appropriate forum given the plaintiff’s action is founded as of right. This failure is fatal to their application and I have no discretion to exercise. The Summons must be dismissed.

25. For completeness, I should add that Mr Wong submitted that the Summons had to be decided in accordance with the PRC law. His submission was based on the contention that according to the Provision, the entire claim of the plaintiff including the Summons would be governed by the PRC law. It should be noted that despite this position, the defendants themselves did not adduce any evidence of the PRC law relating to how this application should be determined.

26. I reject Mr Wong’s submission. This application clearly concerns a procedural matter in a Hong Kong court and this court has to consider whether or not jurisdiction should be exercised. Even if the substantive dispute is to be governed by the PRC law as contended by Mr Wong, this application should be governed by the *lex fori*.

27. In deference to counsel’s submissions, I would briefly deal with the third and fourth limbs of the principles set out by Cheung JA in *DGC v SLC nee C,* supra though strictly speaking, in the light of my foregoing conclusion, I do not need to.

28. The plaintiff adduced expert evidence on the PRC law by way of a written opinion of Mr Stephen Wong (黄善端) dated 2 January 2013. There, Mr Stephen Wong explained by way of illustrations that the plaintiff would suffer considerable prejudice if his claim was to be determined in the PRC. The plaintiff cannot claim the usual heads of damages such as Pain, Suffering and Loss of Amenities in the PRC. There is also a statutory cap of RMB150,000 set in a provision of the relevant road transport legislation. Though it was repealed on 1 January 2013, it is still applicable to the plaintiff’s claim since the accident took place when the provision was in effect. As a result, the plaintiff would most probably receive substantially lower level of compensation even if he succeeds in his claim due to the PRC law.

29. Mr Wong’s answer was that the plaintiff would still be entitled to make such claims in the PRC though the standard of proof would be higher and the level of compensation would be lower. This answer, if accepted, merely confirms that the plaintiff would suffer a personal or juridical disadvantage if his claim is to be determined in the PRC courts.

30. There is no suggestion that the defendants have any assets in the Mainland on which the plaintiff can enforce any favourable judgment obtained in the PRC courts. Mr Chang further pointed out that the plaintiff would have difficulties in enforcing a PRC judgment in Hong Kong against the defendants. I agree that this is a valid concern. The fact that the plaintiff may have difficulties in enforcing a foreign judgment in Hong Kong is an important factor that I should consider in my exercise of discretion: §11/1/12E of Hong Kong Civil Procedure 2013 at p.149.

31. On the evidence, the plaintiff has satisfactorily proved that he will be deprived of a legitimate personal or juridical advantage if the action is tried in the PRC courts.

32. As regards the last consideration, I am unable to see any advantages of this action being tried in the PRC courts. The defendants fail to establish how substantial justice will be done in the PRC courts despite the inevitable deprivation of the plaintiff’s legitimate personal or juridical advantage.

33. To conclude, even if I had discretion to exercise in this matter, I would not have exercised it in favour of the defendants and stayed the proceedings on the evidence before me.

*Double Actionability*

34. Mr Wong submitted that the plaintiff’s claim is not sustainable in Hong Kong because it fails the test of double actionability. The bulk of Mr Wong’s submission was about the inherent weaknesses of the plaintiff’s claim in the light of the PRC law. Mr Wong submitted that since the plaintiff has no valid claim against the 1st and 3rd defendants according to both the PRC law and the local law and the 2nd defendant according to the local law, the plaintiff’s claim fails to pass the test of double actionability.

35. Simply put, Mr Wong’s argument was developed in the following manner. The 1st defendant was employed by the 3rd defendant but the employment was assigned to GKK. In other words, at the time of the accident, the 1st defendant was in the course of employment with GKK and not the 3rd defendant. Hence the 3rd defendant would not be liable for any acts of the 1st defendant under both the PRC law and the local law. The 3rd defendant was only the owner of the Bus in Hong Kong and GKK was the owner of the Bus in the Mainland by reason of a transfer of ownership by the 3rd defendant. In any event the 3rd defendant was only liable if the Bus was defective.

36. In regard to the 1st defendant, Mr Wong relied on the expert evidence of Mr Stephen Wong and submitted that the 1st defendant was merely an employee of GKK and in accordance with the PRC law, he would only be personally liable if he is found to have acted deliberately or there was serious dereliction in his duty.

37. The 2nd defendant, Mr Wong submitted, was and still is an agent of the 3rd defendant and/or GKK only. This status was indicated in both the bus ticket and the Notice in the 2nd defendant’s office. There were two Chinese characters “代理” in brackets after the printed name of the 2nd defendant in the two documents. Mr Wong submitted that though the principal was not disclosed, the 2nd defendant was an agent only and cannot be liable for any tort committed by the 1st and 3rd defendants in any event.

38. The Summons was taken out on the ground of forum *non conveniens* and this is the basis of the defendants’ application duly characterized by Mr Wong in his skeleton submission. This is not an application to strike out the plaintiff’s claim. I am of the view that it is inappropriate to assess the strength of the plaintiff’s claim against the defendants on this occasion.

39. Furthermore, Mr Wong’s analysis was made on the basis of a set of facts, which have yet to be proved. The proof or disproof of such facts involves factual and legal disputes to be resolved at trial. The allegations of the defendants including the alleged assignment of the employment of the 1st defendant to GKK cannot be accepted at their face value. At this stage I am really not in a position to make any findings of facts and make any assessment of the plaintiff’s claim even if I am allowed to do so in this application. I should also refrain from giving my view on the evidence at this stage.

40. I make it clear that the merit of the plaintiff’s claim is irrelevant to the defendants’ application for a stay on the ground of forum *non conveniens*. This was also Mr Chang’s primary submission on double actionability.

41. Accordingly, I dismiss the defendants’ application by the Summons. I make an order *nisi* that the defendants should pay the plaintiff’s costs with certificate for counsel. I consider summary assessment to be appropriate for both the late summons and the Summons. If there is no application made to vary the two costs orders *nisi* within 14 days of the date hereof, the plaintiff should lodge and serve his statement of costs pursuant to Practice Directions 14.3 within 7 days thereafter. The defendants should lodge and serve their summary of objections thereto 7 days thereafter. I shall undertake the summary assessment without a hearing unless otherwise directed. Lastly, I direct that the defendants should file their defence within 21 days of the date hereof.

42. It remains for me to thank Mr Chang and Mr Wong for their considerable assistance rendered to this court.

(Kent Yee)

District Judge

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Mr Jonathan Chang, instructed by Messrs B. Mak & Co. for the Plaintiff

Mr Tim Wong, instructed by Messrs Danny Ma & Co. for the Defendants