

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO 23 OF 2012**

BETWEEN

TSANG CHI CHEONG

Plaintiff

and

THE INCORPORATED OWNERS OF
MEI KING MANSION (STAGE 1)

Defendant

Before: His Honour Judge Andrew Li in Chambers

Date of Hearing: 9 July 2014

Date of Decision: 22 July 2014

DECISION

1. This is a classic case of how the inaction of a plaintiff's solicitors in a personal injury case has made a mockery of the rules laid down in the Personal Injuries Practice Direction ("PD 18.1") and the Civil Justice Reform ("CJR").

Background

2. This is a straightforward personal injury action involving an electrician's claim against the incorporated owners of a building for the alleged acts of negligence and breach of the provisions of the Occupier's Liability Ordinance, Cap 314 and the Electricity Ordinance, Cap 406. The writ of summons was issued on 5 January 2012 with the statement of claim and statement of damages served on the same day on the defendant.

3. There had been serious delays in taking this case to trial since the commencement of the proceedings. They were mainly caused by the plaintiff's solicitors, although the defendant's solicitors were responsible for some of them. Eventually, a Check List Review ("CLR") hearing took place before Master SP Yip on 25 April 2014 where he made the following order:-

- "1. Unless by 4:00 pm on 9 May 2014, the Plaintiff files and serves the Supplemental Witness Statement of Tsang Chi Cheong as per the draft attached to the Plaintiff's Questionnaire for PI Action on 24 April 2014, the Plaintiff be debarred from adducing such supplemental witness statement at the trial;
2. Unless by 4:00 p.m. on 23 May 2014, the Defendant files and serves the Supplemental Witness Statement in reply, the Defendant be debarred from adducing such supplemental witness statement at the trial;
3. The leave to call the medical experts to give oral evidence at the trial shall be decided at the Pre-trial Review by the trial judge and not less than 14 days before the Pre-Trial Review, the parties shall file a short joint statement setting out in bullet points those issues relating to the expert's oral evidence, together with estimates of the time needed to hear those issues;

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4. No later than 14 days before the Pre-Trial Review, the parties shall file a signed Agreed Statement of Issues in Dispute pursuant to Order 18 rule 22 of the Rules of the District Court. If agreement cannot be reached, parties shall inform the court by way of a joint letter giving full reasons for the disagreement shall file their respective Statement of Issues in Dispute at the same time;
5. The action be set down for trial before a Bilingual Judge in the fixture list, to commence at 9:30 a.m. on 8 September 2014 in court no. 8, the estimated length of trial being 4 days, i.e. with 10-12 September 2014 reserved;
6. There be a Pre-Trial Review fixed at 9:30 a.m. on 18 July 2014 in court no. 8 with 3 hours reserved;
7. The Plaintiff shall file and serve an Application to Set a Case Down for Trial by 9 May 2014;
8. The Plaintiff shall prepare the agreed trial bundle in accordance with Practice Direction 27 and 5.6 and to lodge the same with the court and serve it on the Defendant not less than 14 days before the Pre-Trial Review;
9. Language of trial shall be decided by the Trial Judge;
10. PI Master be notified with details in writing within 3 days if any of the above directions are not met or if the case is not set down for trial on time;
11. The costs of the checklist review hearing shall be in the cause; and
12. The Plaintiff shall draw up, file and serve this order.”

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4. The above-mentioned Pre-Trial Review (“PTR”) was moved forward from 18 July 2014 to 9 July 2014 due to the status of the court’s diary, with notice given to the parties.

5. By 7 July 2014, it was apparent to the court that the parties, in particular on the plaintiff’s side, had done absolutely nothing in

preparation for the PTR. Hence, a letter was sent out through the clerk of the court in the afternoon of 7 July 2014 with the following directions to the parties:-

“The parties please explain in writing before the Pre-trial Review hearing scheduled for 9 July 2014 as to the reasons why:-

1. Paragraphs 3, 4 & 8 of the Order of Master S.P. Yip dated 25 April 2014 have not been complied with; and
2. who should bear the costs of the Pre-trial Review hearing if the same have to be adjourned due to the failure in observing the above order; if so, on what basis.”

6. On the same day ie 7 July 2014, the defendant’s solicitors, Messrs Wong, Fung & Co wrote to the court and gave their explanations.

7. It should be noted that the defendant’s PTR notice was only filed on 7 July 2014 and their draft Statement of Issues in Dispute was given to the plaintiff on the same day with the same filed on 8 July 2014 only.

8. On 8 July 2014, the defendant’s solicitors, further to the letter dated 7 July 2014, wrote to the court to put forward further submissions.

9. By the afternoon of 8 July 2014, which was the day before the PTR, it is clear that the plaintiff had no intention to respond to the letter of the court dated 7 July 2014. I therefore instructed my clerk to

write to the parties on 8 July 2014 giving the following directions to the parties:-

“The solicitor in charge of the case to attend the Pre-trial Review hearing on 9 July 2014 at 9:30 am, disregard of whether the parties have instructed counsel to attend the hearing or not.”

10. Then on 8 July 2014, at 3:25 pm, the court received a bundle of documents from the plaintiff’s solicitors marked “Trial Bundle”. This trial bundle consisted of 7 different parts. They are from Part A to Part F (with 2 “Part F” instead of Part A to Part G). The index appeared in the front of the bundle. There was no separate index or any divider separating the different parts of the bundle. In one of the pleadings, namely, the revised statement of damages, recycled papers containing confidential information from 2 different matrimonial cases were used instead of plain papers. There was no cover letter to explain why the trial bundle was lodged as such late stage and whether any agreement had been made with the defendant’s solicitors regarding the contents of the bundle.

11. At 4:25 pm on the same day, another bundle was sent to the court marked “Trial Bundle B” containing documents pertaining to the liability and quantum issues. Again, no cover letter accompanied the bundle to explain why the trial bundle was lodged late and whether any agreement had been obtained from the defendant’s solicitors regarding to the contents.

12. By the evening of 8 July 2014, no PTR notice or separate PTR bundle was filed or lodged by the plaintiff's solicitors pursuant to §§128-129 of PD 18.1.

The PTR hearing on 9 July 2014

13. At the PTR hearing on 9 July 2014, Mr Tim Wong represented the plaintiff on the instructions of the plaintiff's solicitors. Mr Cheng Tze Kui, the solicitor in charge of the case for the plaintiff, who is a consultant at the plaintiff's firm, also attended the hearing.

14. At the beginning of the hearing, I asked the plaintiff's solicitor who was in charge of the case through his counsel of why the court's letter dated 7 July 2014 went unanswered. Mr Wong informed the court that the solicitor had not read it as the clerk had just filed away the letter without showing it to him.

15. Mr Wong then tried to apologize on behalf of the plaintiff's solicitors for their delays and conduct in this case. I said to Mr Wong that before the court considers whether it should accept the apology, I would like the plaintiff's solicitor in charge of the case to answer a list of questions I had prepared which summarized the blatant breaches of the master's order. Copies of the list of questions were provided to both sides. Those breaches included:-

- (1) Failure to draw up the order of Master SP Yip dated 25 April 2014 on time.

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- (2) Failure to provide the following documents:-
- (a) PTR notice;
 - (b) joint statement on issues to be addressed by medical experts;
 - (c) agreed Statement of Issues in Dispute;
 - (d) agreed trial bundle;
 - (e) separate PTR bundle.
- (3) Failure to file the application to set down the case for trial on time and to serve the same on the defendant's solicitors.
- (4) Failure to inform the PI Master of the non-compliance of any part of his order as required.
- (5) The extremely late delivery of the trial bundles.
- (6) The improper preparation of trial bundles including:-
- (a) missing of the CLR order of Master SP Yip dated 25 April 2014;
 - (b) missing divider or separate indexes where necessary;
 - (c) typing mistake in the trial bundle index.
- (7) The negligent inclusion of recycled paper which contained apparently privileged/confidential

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information on some matrimonial cases, in the trial bundle.

Purported explanations given by the plaintiff's solicitors

16. The explanations given by the solicitor in charge of the case, through the plaintiff's counsel, can be summarized as follows:-

- (1) The clerk in the plaintiff's firm who previously handled the file had resigned in June and his last day of work was at the end of June 2014.
- (2) The solicitor in charge did not take any steps to prepare the case until the last couple of days prior to the PTR.
- (3) The solicitor himself had allegedly suffered back injury in an accident which required attendance at the out-patient department of Kwong Wah Hospital.
- (4) The solicitor in charge did not take any further action regarding the preparation of the trial bundle or the PTR until after the clerk had left the employment of the plaintiff's firm. He however did the preparation in a hurry and therefore the bundle contained several mistakes despite the solicitor's checking.
- (5) Regarding the failure to respond to the court's letter dated 7 July 2014, the solicitor claimed that the letter was not brought to his attention.

(6) The solicitor also claimed through his counsel that although the breaches were serious, they were nonetheless “one-off” in nature.

(7) The solicitor admitted that there was a lack of supervision of the clerk on his part.

The court’s findings

17. Despite Mr Wong’s admirable efforts in protecting his instructing solicitor, in my view, the above breaches are simply unacceptable and totally unjustified given that this is a rather straightforward case. In my opinion, they represent a total and flagrant disregard of the order of the master made on 25 April 2014 and the practice directions laid down in PD 18.1.

18. First, I do not for one moment accept the lame excuse that the order of master was not followed due to the resignation of the clerk who had been handling the case. We all know that solicitor firms are not run by unqualified clerks. They are supposed to be run by legally qualified solicitors who are supposed to exercise reasonable diligence supervise their clerks and staff. Ultimately, it is the qualified solicitors, who, as officers of the court, are responsible for the conduct of the firm and not its clerks. A solicitor in charge of a file should use his best endeavour to ensure that a case is run smoothly and all the orders of the court are observed diligently and in a timely fashion. Files should not be handled by unqualified legal clerks without the proper and close supervision of qualified solicitors. If a staff or clerk leaves the employment of a firm, it is the responsibility of the partners or principals

of the firm to ensure that the files would be handled by another staff or qualified solicitor. In our case, there is absolute no excuse not to follow the order of the master when the plaintiff's solicitors had more than 2 months to put their house in order before the clerk's alleged resignation at the end of June 2014.

19. Second, I do not accept the above breaches were caused by the alleged recent back injuries suffered by the solicitor in charge of the case which required consultation at the out-patient department of a public hospital. If this is true, I see no reason why this matter could not have been mentioned by them to either the court or the other side and asking for further time. Also, I noted the fact that this matter has only come out for the first time during the PTR hearing, without any support such as a medical certificate or report.

20. Third, in my opinion, the last minute scrambling on the part of the plaintiff's solicitors in order to try to comply with the orders made by the master and the requirements under the practice direction came too little too late. The master had given ample of time for the parties to follow his directions in order to bring the case to trial. Had the parties found themselves not having sufficient time to comply with any part of the order, they should have written to the court and ask for further time. This was provided in the order itself. However, it was not done. The last-minute instruction of counsel to appear at the hearing, which no doubt was done with the view to lessen the criticism directed at the solicitors, does not really help at all. I have sympathy for Mr Wong who was only instructed 2 days prior to the PTR. I fully appreciate the fact that none of the failures or breaches by the plaintiff's solicitors was

caused or contributed to by him. However, the last-minute attempts on his part to try to agree with the defendant's counsel on various outstanding matters, admirable as they are, have come too late. In my judgment, the above breaches committed by the plaintiff's solicitors have rendered the order made by the master at the CLR or having a PTR completely meaningless. It has reduced this whole exercise a complete waste of money and time.

21. In the circumstances, I have refused to hear any of the proposed directions or agreements purportedly made between the parties at the last minute. In my opinion, the court should not be forced to agree to last-minute agreement made between the parties while there was blatant disregard of its order. In my view, the proper course to take is to allow the plaintiff's solicitors time to take remedial steps to put all the outstanding matters back on track and to follow the practice direction regarding PTR hearing. I therefore order the PTR to be adjourned to a new date in order for the plaintiff's solicitors to comply with all the outstanding matters stated in the master's order dated 25 April 2014.

22. As regards to today's wasted costs, I take the view that while the defendant had been late in filing their PTR notice as well as the agreement to the issues in dispute, the majority of the delays and failures in complying with the master's order and the practice direction lies with the plaintiff in this case. As the plaintiff's solicitors in a personal injury action, they are charged with the responsibility of prosecuting the case in an efficient and timely manner. I consider that the plaintiff's solicitors should be personally responsible to pay for the costs wasted at the PTR hearing. I therefore directed the plaintiff's solicitors to write to the court,

with copies to the other side, within 7 days from the date of the order to give reason as to why a wasted costs order should not be made against the solicitor in charge of case for the delay / non- compliance / adjournment of the PTR in accordance with the steps stated in Practice Direction 14.5.

23. I note that the plaintiff's solicitors have, by their letter dated 16 July 2014 to the court, stated that they have "no reason to support (them) to make any objections to a wasted cost (sic) order" to be made against the solicitor in charge of the case and that they undertake not to seek the wasted costs from the plaintiff personally. I therefore will make an order that all costs thrown away as a result of the adjourned PTR hearing be borne by the plaintiff's solicitors personally, with certificate for counsel, such costs to be assessed summarily.

Conclusion

24. In conclusion, I would like to remind all practitioners in personal injury cases to pay close attention to the order made by the PI master at any stage of the proceedings. As the PTR and the trial dates are milestone dates under the Rules of the High Court, Order 25 rule 1B(8), they will not be moved unless with very strong and convincing reasons. Any blatant breaches or non-compliance of the order made by the PI master, as were found in this case, will inevitably lead to adjournment of the PTR and wasted costs order made against the solicitor(s) responsible for the delays or breaches personally. The lack of supervision on the part of a solicitor over the conduct of its staff, may, in appropriate cases, even lead to disciplinary actions by the Law Society. With such dire consequences, I would urge the practitioners to take heed and to ensure

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that they would observe the order made by the court closely if they
choose to practise in this area of law.

(Andrew SY Li)
District Judge

Mr Tim Wong, instructed by Wong & Wong, for the plaintiff
Mr Jackson Poon, instructed by Wong, Fung & Co, for the defendant

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