HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)

2. Instructions in relation to the Mini-Trial

3. Trial bundle for Interim Application and Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

As will appear from the evidential material for the mini-trial, Mr. Adam Smith ("Mr. Smith"), has instituted a High Court action by way of writ in the Court of First Instance, Hong Kong, on 20 February 2016. The defendants in the action are respectively Mr. George Wong ("Mr. Wong") and Adventure World Limited ("AWL"). Mr. Wong is a trainer for the tandem skydiving trip with AWL. Mr. Smith is a student skydiver who had enrolled in the course organised by AWL and Mr. Wong was the instructor assigned to Mr. Smith.

In a nutshell, Mr. Smith who had injured himself during the jump with Mr. Wong now sues the latter for negligence and claims that Mr. Wong had negligently failed to inform Mr. Smith that during landing of the tandem jump, Mr. Smith should keep his legs up. Mr. Smith further sues AWL as the 2nd Defendant for vicarious liability. A brief summary of the parties' respective substantive cases is contained in the Instructions for the Mini-Trial.

As will further appear from the evidential material below, just a few days before the scheduled trial of the action in the High Court, as advised by its Solicitor Advocate, AWL's solicitors have issued an application to amend its Defence with a view to plead clearly that (a) the Chinese Pamphlet had been given to the skydiving students prior to their training; (b) that the contents of the Chinese Pamphlet stated that "*you must keep your legs up before landing, otherwise you may injure your legs*"; (c) the Chinese Pamphlet was translated into English for Mr. Smith by Mr. Wong; and lastly (d) the fact that Mr. Smith had signed the said Chinese Pamphlet to acknowledge that he had read and understood the contents thereof.

Mr. Smith's instructions to his legal team are to oppose AWL's amendment application.

In light of the urgency of the matter, AWL's application has now been scheduled for argument (with 2 hours reserved) before Recorder Lucy Asplin SC in the High Court at 10:00am on 12 May 2018, which is the 1st day of the scheduled trial.

For the purpose of this contested interlocutory application, you may refer to the following evidential material which is to be used in this application only and should not be used in the mini trial:

1. *Inter partes* summons for amendment of the Defence returnable before Recorder Lucy Asplin SC

2. Supporting affidavit of Ms. Edith Siu, owner of AWL

3. Opposing affirmation of Mr. Adam Smith, the Plaintiff herein

The evidential material to be used in the mini-trial consists of the following witness statements:

1. The witness statement of Adam Smith for the Plaintiff;

2. The witness statement of Alexandra Chow for the Plaintiff;

3. The witness statement of George Wong for the Defendants;

4. The witness statement of Edith Siu for the Defendants.

In addition, for the purpose of this interim application, the Learned Recorder has directed through her clerks that the parties should address the Court on the following matters in their skeleton arguments which should be served and lodged with the Court in accordance with Practice Direction 5.6:

1. The application of the underlying objectives of the Civil Justice Reform to the present amendment application;

2. Whether or not there are “exceptional circumstances” in the present action to justify the lateness of the amendment application;

3. Prejudice to the Plaintiff (if any) if the amendment application is allowed; and whether such prejudice (if any) can be compensated by costs;

4. In light of the amendment application, whether the trial dates should be vacated and the trial be adjourned until further direction;

5. The question of costs of the amendment application.

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

i. Evidential material set out below for the purpose of this amendment application

ii. The following case authorities, copies of which are attached:

   a. *Li Shiu To v Li Shiu Tsang*, HCA 416 of 2003, 14/8/2012;

   b. *Topwell Corporation Ltd v Kwan Kam Kee* [2014] HKLRD 1;

   c. *Shine Grace Investment Ltd v Citibank, N.A. & Anor*, HCCL 28 of 2008, 20/10/2017;

   d. *Tsang Wai Fan v Hui Siu Kwong*, HCMP 409 of 2016, 12/4/2016

   e. *Chan Cheung Ming Jacky v Siu Sin Man* [2014] HKLRD 89

iii. Hong Kong Civil Procedure 2018 (the Hong Kong White Book).

Evidential Material

A. Summons for leave to amend the Defence of the 2nd Defendant

HCPI 1710/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

PERSONAL INJURIES ACTION NO. 1710 OF 2016

BETWEEN

ADAM SMITH	*Plaintiff*
and	
GEORGE WONG	*1st Defendant*
ADVENTURE WORLD LIMITED	*2nd Defendant*

INTER-PARTES SUMMONS

Order 20 rule 5 of the R.H.C; Inherent Jurisdiction

LET ALL PARTIES concerned attend before ***RECORDER LUCY ASPLIN SC*** *in Chambers (open to the public) sitting at the High Court of Hong Kong, 38 Queensway, Hong Kong on day, the day of 2018, at o'clock in the fore-noon on the hearing of an application on the part of the 2nd Defendant for an Order that:*

1. *The 2nd Defendant do have leave to amend the Defence dated 28 August 2016 in*

the manner as shown in red and underlined as per the copy attached thereto;

2. *The Plaintiff do have leave to amend his Reply (if any);*

3. *Service of the Amended Defence be dispensed with; and*

4. *Costs of and occasioned by this application be to the Plaintiff in any event.*

Dated the 30th day of April 2018.

Registrar

B. Supporting affidavit of Miss Edith Siu for AWL in support of the amendment application issued by the 2nd Defendant

AFFIDAVIT OF EDITH SIU

I, EDITH SIU, of [Hong Kong address], do make oath and say as follows:-

1. *I am the owner and a director of Adventure World Limited, the 2nd Defendant in these proceedings. I make this affidavit in support of the 2nd Defendant's Summons issued on 30th April 2018 which seeks leave from the Court to amend the Statement of Defence dated 28 August 2016.*

2. *Unless otherwise stated, all matters deposed to in this affidavit are within my personal knowledge and true. Regarding those matters, I come to know such matters from the sources of information specifically identified below in this affidavit and such matters are true to the best of my knowledge, information and belief.*

3. *I am advised that the purpose of this amendment application is to plead clearly that (a) the Chinese Pamphlet has been given to the skydiving students prior to their training; (b) that the contents of the Chinese Pamphlet stated that "you must keep your legs up before landing, otherwise you may injure your legs"; (c) the Chinese Pamphlet was translated into English for Mr. Smith; and lastly (d) the fact that Mr. Smith had signed on the said Pamphlet to acknowledge that he had read and understood the contents thereof.*

4. *As advised, I believe that there is no prejudice and surprise to the Plaintiff by the proposed amendments of the 2nd Defendant. This is because the Chinese Pamphlet had already been disclosed by the 2nd Defendant as early as in 2017. The contents of the Chinese Pamphlet as well as the fact that the Plaintiff had signed on it to acknowledge his understanding of the same have been mentioned in my 1st witness statement exchanged on 22nd June 2017. In addition, I note that in fact, the 1st Defendant (George Wong) has pleaded in his Defence dated 28 August 2016 substantially the matters now contained in the proposed amendments of the 2nd Defendant. In light of the above, I believe that the Plaintiff was thus all along fully aware of the Defendants' reliance on the Chinese Pamphlet at this trial.*

5. *I also wish to draw to the Court's attention that the amendment application has not been issued by the 2nd Defendant earlier because of the oversight of my previous team of lawyers. On 1st April 2018, I filed a Notice of Change of Solicitors with the Court. My current solicitors Messrs. ABC & Co. has since then taken over the conduct of the present action from my former solicitors Messrs. XYZ & Co. Upon my retaining of Messrs. ABC & Co., they have arranged a meeting for me with my Solicitor Advocate*

newly instructed for the conduct of this case. My Solicitor Advocate then advised that the present amendment application should be taken out before the trial of this action.

6. *I believe that my new team of solicitors and Solicitor Advocate did not have time to review the case files and conduct further preparations until early April 2018. The Solicitor Advocate does not wish for the 2nd Defendant's case to be potentially or possibly prejudiced or jeopardized by reason of a mere 'pleading point', and thereof on an Ex Abundanti Cautela basis he has advised that it would be prudent to effect the proposed amendments to put the matter beyond argument.*

7. *It is accepted that the application to amend could have been made earlier, and for the delay the 2nd Defendant's Solicitor Advocate and Solicitors do humbly apologise. However, I am advised that the 2nd Defendant should not be punished for this, and the merits of the respective parties' case has not been affected nor prejudiced.*

8. *Lastly, I believe that the proposed amendments to the Defence of the 2nd Defendant would not raise new issues in the trial of these proceedings. I crave leave to refer to the agreed list of issues dated 18th March 2018 (which is proposed and signed by the solicitors respectively acting for the Plaintiff and the 1st and 2nd Defendants). In the Agreed List of Issues, the parties' legal representatives have already identified 5 main issues for trial and issue 4 is namely: whether the Plaintiff had signed and fully understood the contents of the Chinese Pamphlet.*

9. *In the circumstances, I humbly pray to this Court for an order that leave be granted to the 2nd Defendant to amend the Defence in the manner as highlighted in red in the draft Amended Defence attached to the Summons herein dated 30th April 2018.*

SWORN *at the office of Messrs. D & D of Suites 2808-2810, St. George's Building, 2 Ice House Street, Central, Hong Kong this 30th day of April 2018.*)
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)
)

Before me,

C. The opposing affirmation of Adam Smith in respect of the 2nd Defendant's amendment application

AFFIRMATION OF ADAM SMITH

I, ADAM SMITH, of [Hong Kong address], do say and affirm as follows:-

1.) I am the Plaintiff in the present action. I make this affirmation in opposition of the 2nd Defendant's Summons issued on 30th April 2018 which seeks leave from this Court to amend its Statement of Defence.

2.) First, I wish to highlight to the Court the fact that there has been substantial delay on the part of the 2nd Defendant to take out the present application to amend.

(a) In November 2017, at the pre-trial review hearing, the 2nd Defendant had indicated to the Court that the case was ready for trial and confirmed that there would be no outstanding interlocutory applications on their part.

(b) The above position was also confirmed in two rounds of listing questionnaires filed by the 2nd Defendant respectively on 6th May 2017 and 31st August 2017, indicating that the pleadings of the 2nd Defendant were in order and would not require further amendments.

3.) Second, I have been advised that the Court's practice has been that unless there are exceptional circumstances, delay by itself is sufficient to justify the dismissal of the 2nd Defendant's application. I believe that there are not exceptional circumstances in this case and the belated change of the legal team is not a reason or valid ground which merits the indulgence of the Court.

4.) Third, if the proposed amendments of the 2nd Defendant are allowed, the Plaintiff will suffer serious prejudice in this case for that would necessarily mean that time should also be given to my legal team to amend and make consequential changes to the Plaintiff's Reply and sufficient time and opportunity should also be given to the Plaintiff to consider and ascertain whether or further evidence and additional witnesses would be required or called in response to the new amendments of the 2nd Defendant. The inevitable result of

the above is that the trial will have to be adjourned and the trial dates currently scheduled from 12 to 18 May 2018 will have to be vacated.

5.) *For the reasons stated above, I respectively invite this Honourable Court to dismiss the 2nd Defendant's amendment application with costs to the Plaintiff on an indemnity basis, payable forthwith.*

SWORN *at the office of Messrs. Leung & Leung of Suites 1326, Alexandra House, 18 Chater Road, Central, Hong Kong this 3rd May 2018.*)
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Before me,

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the positing of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that for the purpose of this assessment, your arguments must be limited to the case authorities attached and the White Book only.

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it will not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

ii. No reply submissions will be conducted.

iii. You should be prepared to deal with the Judge's interventions and questions in relation to your submissions.

iv. You should be prepared to address the court on the issue of costs as a matter of principle.

HCA 416/2003

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 416 OF 2003

BETWEEN

LI SHIU TO	Plaintiff
and	
LI SHIU TSANG	1st Defendant
LI SHIU KWAN	2nd Defendant
LI PO CHUN ESTATES LIMITED	3rd Defendant

Before: Deputy High Court Judge Lok in Chambers
Date of Hearing: 19 June 2012
Date of Decision: 19 June 2012
Date of Reasons for Decision: 14 August 2012

REASONS FOR DECISION

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1. This is an application by the plaintiff to amend the Re-Amended Statement of Claim. In the hearing on 19 June 2012, I allowed the plaintiff's application and I now give my reasons.

Background

2. These proceedings concern the administration of the estate of Li Po Chun ("the Estate") who died intestate in 1963. The protagonists are the 3 sons of the deceased and the only remaining beneficiaries of the Estate, all of whom are now well into their seventies.

3. The plaintiff's claim concerns primarily the existence of 3 registered shareholders of the 3rd defendant (Li Po Chun Estates Limited): Li Wai To, Li Sing Chi and Li Hoi Yeung ("the 3 Shareholders") who collectively hold 801 shares in the 3rd defendant ("the 801 Shares"). The plaintiff's claim is that the 3 Shareholders are fictitious persons and the 801 Shares belong to the Estate, and the 1st defendant, as the administrator of the Estate, has failed in his duty to collect in and distribute such assets.

4. The 3 Shareholders were allotted the 801 Shares on 25 March 1949. The plaintiff claims to have harboured suspicion that the 3 Shareholders were fictitious since December 1963.

5. Pursuant to an agreement made between them ("the 1971 Agreement"), the plaintiff sold his interests in the 3rd defendant to the 1st and 2nd defendants and resigned as director of the 3rd defendant in 1971. He also entered into an agreement with the 1st and 2nd defendants to distribute all the cash in the Estate in 1984.

6. In 1987, the plaintiff wrote to the 1st defendant and alleged that the 3 Shareholders were fictitious and the 801 Shares belonged to the Estate, but no action had been taken by the plaintiff until he commenced the present proceedings against the defendants on 30 January 2003, in

which the plaintiff was claiming for, *inter alia*, a declaration that he was entitled to the portion of 41/114th of the 801 Shares, ie 228 shares ("the 228 Shares"), and the loss or loss of value of the 228 Shares.

7. It is the plaintiff's claim that various resolutions were passed by the 3rd defendant in 1989 ("the Purported Resolutions") which would have a depletive effect on the value of the 3rd defendant's shares and he was only aware of the Purported Resolutions in May 2001.

8. The plaintiff discontinued the action against the 2nd defendant, Mr Li Shiu Kwan ("S K Li"), on 1 June 2005, and thereafter the action went to sleep. It was not until 13 July 2011 that the plaintiff issued a summons for leave to set down for trial out of time.

9. In response to the plaintiff's application to set down, the 1st defendant issued a summons to strike out the plaintiff's claim for want of prosecution and abuse of process, which was dismissed by Master Ho on 19 January 2012.

10. The plaintiff issued the present amendment summons on 3 May 2012.

11. As I see it, there is no serious objection to the following proposed amendments in the following paragraphs of the draft:

(i) §§6A to 6C: these facts have been mentioned in the witness statements, which only serve to complete the explanation as to why, by June 1981, only the plaintiff, the 1st and the 2nd defendants remained interested in the estate;

(ii) §13(aa): which only involves an allegation of law;

(iii) §§17A and 18A: which are facts based on the public records of the 3rd defendant and pleaded to complete the narrative of the changes in the 3rd defendant's shareholding;

(iv) §19B: which only sets out the detailed contents of the statutory declaration already pleaded in §19A;

(v) §§19C, 21, 32AA, 32AB, 32AC and 38B: facts which have already been mentioned in previous witness statements.

12. The main objection is related to the averments about the purported allotments of the shares of the 3rd defendant ("the Purported Allotments") and the purported dispositions of the 3rd defendant's properties ("the Purported Dispositions") mentioned in §§32A, 40, 40A, 40B, 41, 42, 42A and the new relief claimed in the prayer for relief.

13. Ms Sit, counsel for the defendant, opposes the application on the following grounds:

(i) there was substantial and unexplained delay on the part of the plaintiff in the making of the amendment application;

(ii) the court should not allow the amendments as the plaintiff had indicated to Master Ho in the striking out application that the case was by then ready for trial; and

(iii) the plaintiff is seeking to introduce new claims in the proposed amendments causing prejudice to the defendant.

Legal principles governing grant or refusal of leave to amend pleadings

14. The principles under which the court exercises its discretion to allow or refuse amendments to pleadings can be summarised into 4 prepositions (see: *Ketteman v Hansel Properties Ltd* [1987] 1 AC189, *per* Lord Brandon at p 212F-H):

(i) first, all such amendments should be made as are necessary to enable the real questions between the parties to be decided;

(ii) second, amendments should not be refused solely because they have been made by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights;

(iii) third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject-matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party; and

(iv) fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

15. Ms Wong, SC, counsel for the plaintiff, submits that the principles laid down in *Ketteman* remain good law after the CJR. She refers me to two cases. *In Re Sun Hung International Ltd* [2009] 2 HKLRD 418, Kwan J, as she then was, applied the *Ketteman* principles in an application for the amendment of a section 168A petition on the eve of the coming into force of the CJR. In the post-CJR decision of *厦門新景地集團有限公司 v Eton Properties Limited*, unreported, HCMP 13, 15, 18, 21/2012 (decision of the Court of Appeal on 3 February 2012), the Court of Appeal affirmed the decision of the lower court in allowing an application for amendment of the Statement of Claim on the ground that the same was necessary to enable the real questions and controversy between the parties to be decided, despite the fact that the application was made just a couple of months before the scheduled trial date.

16. I agree that the *Ketteman* principles remain good law after the CRJ, but I must put a *caveat* here. First, the new O 1A of the RHC makes it clear that the court shall give effect to the underlying objectives when it exercises its power or interprets the RHC, including increasing cost-effectiveness of litigation, ensuring that a case is dealt with as expeditiously as is reasonably practicable, promoting a sense of reasonable proportion and procedural economy in the conduct of proceedings, facilitating the settlement of disputes and ensuring that the resources of the court are distributed fairly. If the amendment application is made in circumstances offending these underlying objectives, the court may have to balance all the factors in the case in determining whether to grant the application.

17. Second, there is a heightened concern to guard against late applications after the implementation of the CJR. For case management

purposes, there are now certain milestone dates in the course of litigation, and one of which would be the trial date. If a party makes a late application to amend the pleading with the effect that the trial date may have to be adjourned, the court would be very reluctant in allowing the application unless there are exceptional circumstances. Indeed, adjournment of the trial is now considered as a serious prejudice to the parties involved in litigations. Hence, one should not assume that, once the *Ketteman* principles are satisfied, the court would automatically grant an application for amendment of pleading in particular at a very late stage of the proceedings.

Merits of the application

18. After considering all the circumstances of the present case, I exercised the discretion in favour of the plaintiff and allowed the amendment application. My reasons are three-fold.

19. First, the trial date has yet been fixed and so there is no question about the variation of a milestone date.

20. Second, the plaintiff's proposed amendments are, in my judgment, necessary to enable the real questions and controversy between the parties to be decided, and such proposed amendments have not substantially changed the nature of the plaintiff's claim.

21. In the existing pleading, the plaintiff has already pleaded that:

(i) the 1st defendant has been the sole surviving administrator since 14 September 1973 and has a duty to collect and

distribute all the assets of the Estate and to act in the best interest of the Estate and the beneficiaries;

(ii) the 1st defendant has been a shareholder and a director of the 3rd defendant since 18 July 1963 and 21 December 1963 respectively;

(iii) the 801 Shares form part of the Estate because the names in which they have been registered are fictitious names created by the deceased to hold the shares for him;

(iv) the 1st defendant, as the administrator, was and is obliged to get in, and distribute to the beneficiaries, the 801 Shares;

(v) the 1st defendant has failed to do so despite repeated requests by the plaintiff;

(vi) instead, the 1st defendant, as shareholder and director and together with S K Li, caused the 3rd defendant to pass the Purported Resolutions and make the Purported Allotments, which resulted in the issue to Gregson Limited and Dredson Limited of shares in the 3rd defendant which are preferred over the existing ordinary shares including the 801 Shares with regard to both dividends and return of share capital;

(vii) as a result of the Purported Resolutions and Allotments, the value of the ordinary shares of the 3rd defendant, including the 801 Shares, had been largely depleted;

(viii) by causing the Purported Resolutions and Allotments, the 1st defendant had acted in a manner detrimental to the interests of the Estate and the beneficiaries including the plaintiff; and

(ix) the plaintiff has suffered loss and damage.

22. Arising from such pleaded facts, in addition to the declarations that the plaintiff is entitled to have the 228 Shares transferred to him and the nullification of the Purported Resolutions, the following relief has been claimed in the existing prayer for relief:

(i) a full account of all dealings involving the 1st and the 3rd defendants since 1971;

(ii) the 1st defendant be removed as the administrator of the Estate;

(iii) an order for the purchase of the plaintiff's 228 Shares in accordance with Clause 5(i) of the 1971 Agreement, which requires the 1st defendant and S K Li to purchase any further shares in the 3rd defendant that the plaintiff may become entitled to at a price to be agreed, failing which to be fixed by arbitration;

(iv) damages; and

(v) such further or other consequential relief to give effect to the declarations and orders sought.

23. According to the existing pleading, it is clear that the plaintiff is asking for an order that he is entitled to the 228 Shares and claiming for all the loss and damages caused by the 1st defendant in depleting the value of the 228 Shares, including the making of the Purported Resolutions and Allotments. As I see it, the new amendments only add one more allegation about the 1st defendant's conduct in depleting the value of the 801 Shares, that was the causing of the Purported Dispositions of the 5 properties to Arracourt Limited and Aucilla Limited, and that the plaintiff is claiming for loss and damages resulting from such alleged wrongful conduct.

24. I agree that, if the court is to allow the amendments, the 1st defendant has to deal with one more allegation at the trial. However, since it has all along been the plaintiff's case that the 1st defendant had depleted the value of the 801 Shares by the Purported Resolutions and Allotments, the new allegation is closely connected with the substance of the existing claim. Further, the remedies already claimed in the existing pleading, if granted after trial, would necessarily require the 1st defendant to go into his ownership and management of the 3rd defendant over the past 40 years since 1971. In particular, the court has to inquire the adverse effects that the Purported Resolutions and Allotments have had on the value of the 801 Shares. If the 3rd defendant had wrongfully caused the Purported Dispositions in 1989, it would be quite unrealistic for the court to ignore such important fact in assessing the fair value of the plaintiff's 228 Shares. Hence, in order to ensure that the real questions and controversy between the parties are to be decided at the trial, the court should allow the amendments.

25. Third, I do not find that there is significant prejudice caused to the 1st and the 3rd defendants by the proposed amendments. As I have

mentioned above, the existing remedies claimed by the plaintiff, if granted by the court, would necessarily require an investigation about the 1st defendant's ownership and management of the 3rd defendant over the past 40 years, and so the 1st defendant should have expected to deal with the allegation about the Purported Dispositions of the 5 properties in any event.

26. Furthermore, the new allegation should not prolong the preparation work for the trial. As conceded by the plaintiff himself, he has no personal knowledge (other than what he can glean from the relevant documents) of, as he did not participate in, the Purported Resolutions, Allotments and Dispositions. His case on these transactions is essentially a documentary one to be proved by the production of the material documents all of which have already been disclosed. Hence, it is not expected that the plaintiff will adduce much new evidence in support of his claim.

27. As for the contribution by the Purported Dispositions to the depletion in value of the 801 Shares, the plaintiff is prepared to accept the considerations stated in the agreements for sale and purchase by which the Purported Dispositions were made as proper values of the relevant properties as at the date of those transactions. This is a formal concession by the plaintiff which would obviate the need for valuation evidence.

28. Having made the aforesaid observations, I am not suggesting that the inclusion of the new allegations in the proposed amendments would require no additional preparation work on the part of the 1st and the 3rd defendants. However, given the fact that they would have to deal with the plaintiff's existing allegations about the Purported Resolutions and Allotments, any additional preparation work should not be too excessive. In particular, it has all along been the 1st defendant's case that the plaintiff

has no right to question the Purported Resolutions and Allotments since he had ceased to be a shareholder of the 3rd defendant. Given that this is the defence to the existing claim, I wonder what additional preparation work is required to meet the new allegation. In any event, even if the parties apply to set down the case now, the trial date will still be some time away. In such circumstances, the additional preparation work should not delay the trial date, and so the complaint about the further anxiety caused by the delay in the resolution of the dispute may have been exaggerated.

29. In opposing the amendment application, Ms Sit submits that the court should take into account: (i) the history of this case including the delay on the part of the plaintiff in prosecuting the claim; (ii) the absence of explanation as to why the amendment application was taken out at such a late stage of the proceedings; and (iii) the representation made by the plaintiff to Master Ho in the striking out application that the case was by then ready for trial.

30. There is some force in such criticism. Whilst the court should not condone such delay on the part of the plaintiff, there are some materials in the affirmations of the plaintiff which can provide some explanation about the delay. According to the plaintiff, he suffered from a lack of means to further proceed with the action after mid 2005 until he secured legal aid on 14 September 2009. The present solicitors for the plaintiff were not assigned until 6 July 2010, and senior counsel was first instructed in September 2010. In December 2010, the plaintiff invited the 1st and the 3rd defendants to mediate, but the said defendants declined. In August 2011, the said defendants applied to strike out the claim for want of prosecution which was finally heard by Master Ho in January 2012.

During such time, the plaintiff and those representing him focused their efforts upon resisting the striking out application.

31. I agree with Ms Sit that the explanation may not be perfectly satisfactory, in particular no explanation has been given as to why the amendment application had not been taken out shortly after the instruction of senior counsel. Despite that, this should only be one of many factors that the court should take into account in considering whether to grant the amendment application.

32. In the *Eton Properties* case, the Court of Appeal, whilst acknowledging that there was delay in the making of the amendment application and lack of explanation for such delay, nevertheless allowed the application on the ground that the "primary aim" in exercising the case management (or other) powers of the court is to secure the "just resolution of disputes in accordance with the substantive rights of the parties": O 1A, r 2(2) of the RHC. I echo the same observation here.

33. Mr Sit also complains that there may be delay to the proceedings as the 1st defendant may have to join S K Li as a third party to the proceedings. Again I see no merit in such argument. First, the plaintiff is prepared to drop the allegations in the proposed draft about the joint acts of the 1st defendant and S K Li in respect of the Purported Resolutions, Allotments and Dispositions. Second, it is not clear why the 1st defendant did not see the need to join S K Li earlier. The involvement of S K Li in the Purported Resolution, Allotments and Dispositions is obvious even from the existing pleadings. Third, it is also unclear on what factual or legal basis the 1st defendant can rely on in seeking an indemnity or contribution against S K Li towards his liability to the plaintiff. Unlike the

1st defendant who is the administrator, S K Li did not owe the Estate or the beneficiaries any duty not to prefer or act in his self-interest. In any event, the joinder of S K Li may not take much time given that he has already filed a Defence, a list of documents and witness statements before the plaintiff discontinued the claim against him in 2005.

34. It is true that the plaintiff had earlier abandoned the claim for "usual account" (as opposed to account on the ground of wilful default) against the 1st defendant. However, it has all along been the plaintiff's case that he is pursuing an account on the footing of wilful default in requiring the 1st defendant to account for, not only what he has actually received, but also what he has not but should have received. In this regard, the new allegations add nothing new to the existing claims.

35. Based on the aforesaid reasons, I exercised the discretion in favour of the plaintiff and allowed the amendment application. However, taking into account the history of this case and the advance age of the parties involved, the court should impose a strict timetable for the conduct of the case to avoid further delay, and the plaintiff cannot expect the court to be generous in granting further indulgence to him in complying with the timetable.

36. Since the plaintiff is seeking the indulgence of the court in granting leave to amend the pleading at a late stage of the proceedings, I make an order *nisi* that the costs of and occasioned by the amendments and the costs of the plaintiff's amendment summons dated 3 May 2012 be paid by the plaintiff to the 1st and the 3rd defendants and the plaintiff's own costs to be taxed in accordance with Legal Aid Regulations, which shall be

made absolute 14 days after the date of the handing down of the Reasons for Decision.

(David Lok)
Deputy High Court Judge

Ms Lisa K Y Wong, SC, instructed by ONC Lawyers, for the plaintiff

Ms Eva Sit, instructed by Iu, Lai & Li, for the 1st and 3rd defendants

Topwell Corp Ltd

and

Kwan Kam Kee

(Court of Appeal)

(Civil Appeal No 88 of 2013)

Kwan and Lam JJA

14, 21 May 2013

Civil procedure — pleadings — amendment — litigant acting in person — exercise of discretion to refuse leave to amend pleadings — whether judge erred in drawing inference of deliberate delay — whether prejudice to opposing party — whether "sufficient grounds" for consequent variation of non-milestone dates — Rules of the District Court (Cap.336H, Sub.Leg.) O.25 r.3(5), (6)

民事訴訟程序 — 狀書 — 修訂 — 親自行事的訴訟人 — 行使酌情決定權拒絕修訂狀書的許可 — 法官是否錯誤地作出有關故意拖延的推論 — 是否使對方蒙受不利 — 是否有「充分理由」為著其後更改非進度指標的日期 — 《區域法院規則》(第336H章，附屬法例)第25號命令第3(5)及(6)條

P, the owner of two connected buildings (the Property), brought proceedings against D1 (關錦泉, a non-existent person according to D2) for trespass in respect of a hut on the roof of the Property (the Action). When the writ came to the knowledge of D2, acting in person, he filed an affirmation with the Court, but not served on P, in September 2011. P learnt of the affirmation in January 2012 and obtained an order in joining D2 as a defendant in the Action and the case proceeded against D2 alone. In his homemade defence filed in January 2012 and in his further and better particulars, D2 made factual averments that he purchased the rooftop hut in June 1988, renovated it, arranged for utility services and permitted his brother, B, to live there until B was forced to move out in October 2008 when P cut off the water supply. D2 continued to keep their father's ashes in the hut. In dismissing an appeal brought by D2 against an order to demolish the hut, the Appeal Tribunal (Buildings) (the Tribunal) held that the issue of the right to the area occupied by the hut was a private dispute between D2 and the registered owner. D2 complied with all directions made by the Master at the first case management conference (CMC), in August 2012 except

the deadline to take out all interlocutory applications. On 28 November 2012, D2's solicitors filed a notice to act on his behalf in the Action. In late December 2012, when filing the listing questionnaire for the second CMC, D2 indicated that he would seek leave to re-amend the defence and counterclaim and then served on P a summons seeking leave to re-amend those pleadings in order to plead a defence of adverse possession and limitation. At the second CMC in January 2013, the Master refused D2's application for leave to re-amend the pleadings (the Order). He then fixed the trial dates, taking into account that D2 intended to appeal against the Order. The Judge dismissed D2's appeal, holding that there was "deliberate delay", as D2 had evidence for a claim of adverse possession as early as the hearing on 14 February 2012 before the Tribunal and so could have raised it as a defence in the Action; and he had not explained why he had not raised it when he amended his defence and counterclaim in May 2012 and did not seek leave before December 2012. D2 appealed.

Held, allowing the appeal, that:

(1) The Judge had exercised his discretion on a misunderstanding of the law, a misapprehension of the facts and without regard to principle. His exercise of discretion was plainly wrong and must be set aside. First, that the material facts in support of a claim for adverse possession were pleaded in the homemade defence and disclosed in the documents D2 was ordered to file, and that he was continually acting in person, should constitute "sufficient grounds" under O.25 r.3(5) and (6) of the Rules of the District Court (Cap.336H, Sub.Leg.) (the RDC) for variation of non-milestone dates without the other party's agreement. Only the pleading of the point of law of adverse possession and limitation was missing. The Judge should have been prepared to be lenient towards this litigant in person and given him an opportunity to get his pleadings right so that the substantive disputes between the parties might be properly determined. (See paras.28–30, 38.)

(2) Second, even in the absence of an explanation as to why leave to amend was sought only in December 2012, the Judge plainly erred in drawing the inference that there was a "deliberate delay" by D2, implicit in which was a finding of bad faith. There was insufficient evidence to infer that the failure to raise adverse possession and limitation in the defence was not mere negligence by D2 but a deliberate decision to delay matters (*Honey Bee Electronic International Ltd v Golden Lucky Co Ltd* [2007] 3 HKLRD 524, *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 applied; *Tang Shun Hay*

v Jetline Co Ltd [2000] 1 HKC 417 distinguished). (See paras.31–33.)

(3) Third, delay on its own was not sufficient to justify a refusal of grant of leave to amend, there must also be prejudice to the opposing party and here, the amendment by pleading the legal issue of adverse possession would cause no material prejudice to P. There was no material change to the factual basis of D2's case and should not have involved any significant change in P's preparation of the factual aspect of the case it would have to meet. Even if the trial were delayed, it would be only a few months before new dates were fixed (*Tang Shun Hay v Jetline Co Ltd* [2000] 1 HKC 417 applied). (See paras.34, 36.)

(4) Fourth, while the Master had, at the second CMC set the case down for trial thereby setting as milestone date, case management powers must be exercised with regard to the prevailing circumstances and not rigidly. Had the Master granted leave to amend, it was unlikely that he would have set down the case for trial there and then. Insofar as "sufficient grounds" were required for the variation of non-milestone dates under O.25 r.3(5) and (6) of the RDC, there was no inflexible requirement that an applicant must file an affidavit providing an explanation. It should be sufficiently clear to the Court without an affidavit from D2 that there were "sufficient grounds" for the amendment of the pleadings and the consequent variation of such dates. (See para.37)

(5) Post-Civil Justice Reform, even if the principles in *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189 concerning the exercise of discretion to allow or refuse an amendment of pleadings were satisfied, the court would need to balance all relevant factors, if the application offended one or more of the underlying objectives. Here, a pertinent consideration was O.1A r.2(2) of the RDC, namely that the primary aim in exercising the court's powers was to secure the just resolution of disputes in accordance with the parties' substantive rights. Balancing all relevant factors in this case, the discretion should clearly be exercised to allow the amendment, to secure the just resolution of the disputes between the parties. (See paras.39–40.)

Appeal

This was an appeal by the second defendant against the dismissal of his appeal by Judge Stephen Chow in the District Court against the refusal of leave to re-amend his defence and counterclaim by a Master. The facts are set out in the judgment.

Ms Audrey Eu SC and Mr Benny Lo, instructed by Cheung & Choy, for the appellant/2nd defendant.
Mr Gerard McCoy SC and Mr Benjamin Chain, instructed by Leung Pansy Tang & Chua, for the respondent/plaintiff.

Legislation mentioned in the judgment
Rules of the District Court (Cap.336H, Sub.Leg.) O.1A, 1A r.2(2), O.25 rr.2(2)(b), 3(5), 3(6)
Rules of the High Court (Cap.4A, Sub.Leg.) O.1A, O.25 rr.1B(5), 1B(6)

Cases cited in the judgment
Beoco v Alfa Laval Co Ltd [1995] QB 137, [1994] 3 WLR 1179, [1994] 4 All ER 464
Chan Sing Chuk v Innovisions Ltd [1992] 1 HKLR 254, [1991] 2 HKC 305
HKSAR v Lee Ming Tee (2003) 6 HKCFAR 336, [2004] 1 HKLRD 513
Honey Bee Electronic International Ltd v Golden Lucky Co Ltd [2007] 3 HKLRD 524
Ketteman v Hansel Properties Ltd [1987] AC 189, [1987] 2 WLR 312, [1988] 1 All ER 38, [1987] 1 FTLR 284
Lessy SARL v Pacific Star Development Ltd [1996] 2 HKLR 1, [1996] 2 HKC 326
Li Shiu To v Li Shiu Tsang (unrep., HCA 416/2003, [2012] HKEC 1153)
Lipkin Gorman v Karpnale Ltd [1989] 1 WLR 1340, [1992] 4 All ER 409
Tang Shun Hay v Jetline Co Ltd [2000] 1 HKC 417

Other material mentioned in the judgment
Jourdan and Radley-Gardner, *Adverse Possession* (2nd ed., 2011), paras.9-39 to 9-43

Kwan JA (giving the reasons for judgment of the Court)

1. This is an appeal of Kwan Kam Kee, the 2nd defendant in this District Court action, from the judgment of HH Judge Chow on 6 March 2013. By that judgment, the Judge dismissed his appeal from the decision of Master KK Pang on 2 January 2013, refusing leave to re-amend his defence and counterclaim in order to plead a defence of adverse possession and limitation. This appeal is brought with leave granted by the Court (Kwan and Lam JJA) on 25 April 2013.

2. At the conclusion of the hearing, we allowed the appeal, set aside the orders of the Master and the Judge refusing leave to amend,

granted leave to the 2nd defendant to file his re-amended pleading and the plaintiff to file a re-amended reply, vacated the trial dates of 27 and 28 May 2013, and remitted the case to the District Court for further directions on the conduct of this case. We did not vary the costs order made by the Master but varied the costs order made by the Judge and awarded those costs to the 2nd defendant. We also awarded costs of the application for leave to appeal and of the appeal to the 2nd defendant, with a certificate for two counsel.

3. These are the reasons for our judgment.

4. This appeal challenges the exercise of the discretion of the Court below in refusing leave to amend the pleading. It is well established that the function of the appeal court is initially one of review. It may set aside the Judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or in disregard of principle, or under a misapprehension of the facts, or that he took into account irrelevant matters, or failed to take into account relevant matters, or that he was plainly wrong. If the Judge has exercised his discretion wrongly for one or other of the above reasons and his discretion must be set aside, then the appeal court becomes entitled to exercise an original discretion of its own.

5. Ms Audrey Eu SC, who appeared for the 2nd defendant in this appeal with Mr Benny Lo, submitted that the Judge was plainly wrong in refusing leave to amend in these respects:

(1) The proposed defence of adverse possession raises a serious issue to be tried, which was accepted throughout by Mr Benjamin Chain, who appeared for the plaintiff below and with Mr Gerard McCoy SC on appeal.

(2) There was no material evidence or finding suggesting that the proposed amendments would cause real prejudice to the plaintiff. There was no question of milestone dates being affected, since the action was not even set down for trial when the Master determined against the 2nd defendant on 2 January 2013 that leave to amend should not be granted.

(3) There was no evidential basis to infer that the 2nd defendant had acted in bad faith or with deliberate delay, particularly given that: (a) the factual averments in the proposed amendment to plead adverse possession are sourced from materials already pleaded or disclosed; (b) the 2nd defendant had acted in person all along until about one month before the case management conference (CMC) on 2 January 2013; and (c) the 2nd defendant had filed an affirmation in September 2011 deposing that the plaintiff had purported to effect service of the writ issued in August 2011 by leaving the same in the letter box and at the door of the hut structure in question when the only defendant named in the writ was

wrongly stated, and it was this that led to the order of Master T Chan on 4 January 2012 ordering him to be joined as the 2nd defendant in the action and the case thereafter proceeded against him alone.

The relevant background and the judgments below

6. The plaintiff, Topwell Corporation Ltd, is the registered owner of two connected old Chinese tenement buildings at Nos 3 and 5 Temple Street, Kowloon. It purchased the buildings in 2007 with the view to redevelopment. This action was brought against the 1st defendant (a non-existent person according to the 2nd defendant) and the 2nd defendant for trespass, in respect of a hut structure built on the roof of the buildings. The plaintiff seeks an order for possession of the floor space on the roof occupied by the hut structure and damages for trespass.

7. According to the existing pleadings and witness statement filed by the 2nd defendant, he purchased the hut structure on the roof in June 1988 from one Madam Chow Yuk at $30,000. He had the hut renovated in October 1989, arranged for the installation of telephone lines, replaced dilapidated water pipes with new pipes for fresh water and for fire services, and had electricity supply connected in 1992. He permitted his brother to reside in the hut, until his brother was forced to move out in October 2008 when the plaintiff dismantled the water pipes to the hut. He continued to keep the ashes of his father in the hut.

8. As mentioned earlier, the 2nd defendant filed an affirmation in the action when the writ came to his knowledge. As he did not serve this affirmation on the plaintiff (it ought to be borne in mind he was acting in person and there is nothing to suggest he knew of the requirement to serve any document filed in court on the opposite party), it only came to the plaintiff's knowledge in January 2012. Master T Chan then ordered the 2nd defendant to be joined as a defendant in the action.

9. The 2nd defendant filed a homemade defence and counterclaim in Chinese on 17 January 2012. The plaintiff filed an amended statement of claim on 26 April and the 2nd defendant filed his amended defence and counterclaim on 19 May 2012.

10. The 2nd defendant's application for legal aid was refused in May 2012.

11. On 22 August 2012, Master Pang gave various directions on the plaintiff's case management summons. This was the first CMC. Directions were made for discovery, the exchange of witness statements and the service of a list of issues in dispute. The 2nd defendant complied with all these steps within time. The Master

also ordered both parties to ensure that all interlocutory applications should be taken out on or before 7 November 2012.

12. At the time when the action in the District Court was going on, the 2nd defendant also acting in person appealed to the Buildings Appeal Tribunal against an order for the demolition of the hut structure as an unauthorised building work carried out in contravention of the Buildings Ordinance (Cap.123). There were hearings before the Tribunal on 14 February 2012 and 10 September 2012. The Tribunal gave a ruling on 26 September 2012 dismissing his appeal, holding among other things that the dispute between the 2nd defendant and the registered owner on the right to occupy the space taken up by the hut was a private dispute and not relevant to the issue if the hut was required to be demolished under the Buildings Ordinance.

13. On 28 November 2012, the 2nd defendant's solicitors filed a notice to act for him in the District Court action. By then, the time within which to file interlocutory applications ordered by the Master in August 2012 had expired.

14. On 27 December 2012, the 2nd defendant's solicitors filed the listing questionnaire for the 2nd CMC, to take place before Master Pang on 2 January 2013, in which they stated that the 2nd defendant would seek leave to file a re-amended defence and counterclaim and leave to adduce expert evidence from a surveyor to confirm the boundary of the roof of the subject property under adverse possession by the 2nd defendant.

15. On the same day, the plaintiff's solicitors wrote to the 2nd defendant's solicitors referring to the latter's listing questionnaire and stating that a draft re-amended defence and counterclaim should be sent to them for consideration, "although [they] may have an idea what the major amendment is about". The letter went on to state that if the proposed amendment was to raise "an entirely new defence of limitation/adverse possession", the plaintiff's solicitors took the view that the 2nd defendant "should only be allowed to amend on condition that he should pay all costs thrown away". Other than the question of costs, there was no suggestion that any prejudice would be occasioned to the plaintiff by the amendment.

16. On 31 December 2012, the 2nd defendant's solicitors served on the plaintiff's solicitors a draft summons seeking leave to re-amend the defence and counterclaim with a draft re-amended pleading annexed as settled by Mr Lo. In the draft amendment, it was pleaded that the plaintiff's title in the floor space on the roof occupied by the hut has been extinguished and that the 2nd defendant has, through adverse possession, acquired a possessory title of that floor space. The 2nd defendant's solicitors were not able to file the summons before the CMC on 2 January 2013 and

the draft summons with the proposed amended pleading was placed before the Master without objection from the plaintiff.

17. At the 2nd CMC, the plaintiff's counsel, Mr Chain, opposed the 2nd defendant's application for amendment. He made the point that the 2nd defendant was all along aware of the issue of adverse possession, it was raised in the hearings before the Buildings Appeal Tribunal, and the 2nd defendant has "on the face of it made a deliberate decision not to rely on the limitation defence". Further, the 2nd defendant had not complied with the order of the Master in the 1st CMC to take out all necessary interlocutory applications by 7 November 2012.

18. Master Pang accepted Mr Chain's submissions. He refused leave to amend the pleading. When the Master came to consider the fixing of trial dates, Mr Lo informed the Court that he had taken instructions and would appeal against the order refusing leave to amend the pleading. Taking into account there would be an appeal before a district judge, the trial dates of 27 and 28 May 2013 were then fixed.

19. The appeal against the Master's order was heard by HH Judge Chow on 14 February 2013 and judgment was given on 6 March 2013 dismissing the 2nd defendant's appeal.

20. The Judge affirmed the Master's decision refusing leave to amend for these reasons:

(1) He referred to the ruling of the Buildings Appeal Tribunal and noted this showed that as early as the hearing before the Tribunal on 14 February 2012, the 2nd defendant already had the evidence in support of an allegation of adverse possession, and so could have raised this as a defence in the District Court action. He pointed out that the 2nd defendant had made no explanation: (a) why he did not raise adverse possession when he amended his defence and counterclaim in May 2012; (b) why he did not seek to re-amend his defence to raise adverse possession after the Tribunal gave its ruling on 26 September 2012; and (c) why he only indicated he would seek leave to amend the pleading when he filed the listing questionnaire on 27 December 2012. The Judge came to the view there was "deliberate delay" on his part in seeking the amendment.

(2) The draft re-amended pleading is to delete in entirety the 2nd defendant's homemade amended defence and counterclaim. This would include deletion of an averment that the pipes for fresh water and for fire services on the 5th floor were installed with the consent of "owner". In the re-amended pleading, it is pleaded that the 2nd defendant arranged for the complete replacement of the dilapidated fresh water pipes to the hut structure, but without any mention if this was done with the

consent of any owner. The Judge took the view that the averment of the consent of "owner" was deleted after mature deliberation in order to support a defence of adverse possession and was not a *bona fide* amendment.

(3) In the draft re-amended pleading, it is averred that the 2nd defendant purchased the hut structure on the roof in 1988. The Judge took the view this averment reflected that the 2nd defendant did not have the intention to possess another's property unlawfully and could not have established adverse possession of the hut.

This appeal

21. Four grounds were raised in the notice of appeal. The first ground relates to the Judge's general approach in refusing an application to amend pleadings. The other three grounds are in relation to the specific reasons given by the Judge in refusing leave as summarised above.

22. Mr McCoy did not seek to defend the Judge's reasons summarised in (2) (the amendment was not *bona fide*) and (3) above (the requisite intention for adverse possession could not be established). The Judge was clearly wrong on those two matters. We will just deal with them succinctly.

23. The Judge wrongly relied on the deletion of the consent of the "owner" to the replacement of water pipes to rule effectively on the substantive merits of the defence of adverse possession when it is not plain and obvious that the defence of adverse possession should be disallowed as useless and was bound to fail (*Chan Sing Chuk v Innovisions Ltd* [1991] 2 HKC 305 at 309C, 309I–310A and 314I–315A). On the contrary, the plaintiff's counsel had accepted in his skeleton argument before the Judge that there is "a serious issue to be tried". Besides, it is unclear from the 2nd defendant's homemade pleading who was the "owner" referred to and whether that was the true legal owner at the time. There was no evidence before the Judge as to the circumstances in which such consent was allegedly given to the 2nd defendant, whether initially or subsequently, whatever representation might have been made by the 2nd defendant regarding this in the appeal to the Buildings Appeal Tribunal. This averment was also contrary to the assertion in a witness statement served by the plaintiff that the water pipes were connected unlawfully. It was simply wrong for the Judge to conclude on this material that the proposed amendment was not *bona fide*.

24. The Judge was wrong in law to hold that the 2nd defendant did not have the requisite intention for adverse possession since it is his case that he had purchased the hut from another. An intention

to possess is necessary, but not an intention to dispossess. A squatter may still validly establish a claim of adverse possession even though he had acted in the honest but mistaken belief that the subject property was in fact his, see *Adverse Possession* by Jourdan and Radley-Gardner, (2nd ed., 2011), paras.9-39 to 9-43 and the cases there cited.

25. That leaves the first reason of the Judge, namely, that there was no explanation from the 2nd defendant to explain what appeared to be "deliberate delay" on his part in seeking the amendment.

26. Mr McCoy maintained Mr Chain's argument before the Judge it could be inferred that the 2nd defendant made a "deliberate and strategic choice" not to apply for the amendments earlier. He submitted that in the post-CJR regime, after a CMC has been held and when non-milestone dates are set, when there is intention to set down the action for hearing in the next CMC, a party seeking leave to amend his pleading must file evidence to explain the reason for the amendment, so as to satisfy O.25 r.1B(5) and (6) of the Rules of the High Court (Cap.4A, Sub.Leg.) (the equivalent provision in the Rules of the District Court is O.25 r.3(5) and (6)) he has "sufficient grounds" to alter the non-milestone dates ordered in the earlier CMC. He contended this should make no difference in the situation where a litigant is acting in person.

27. We do not agree with his submissions, essentially for the reasons as submitted by Ms Eu.

28. The 2nd defendant was not legally represented until late November 2012. In his homemade defence and the further and better particulars he supplied, he made factual averments that he purchased the hut structure in 1988, renovated the structure, applied for utility services to the hut and permitted his brother to live there until the latter was forced to move out in 2008 when the water supply was cut off. The material facts in support of a plea for adverse possession were pleaded in the homemade defence and disclosed in the documents he was ordered to file, being his witness statement and the list of issues, as shown in a table annexed to the notice of appeal. All that was missing is the pleading of the point of law of adverse possession and limitation.

29. The Judge assumed that the 2nd defendant, as a litigant in person, would or should have the knowledge and skill to plead this point of law, pointing to the determination of the Buildings Appeal Tribunal. We disagree. As pointed out by Ms Eu, this is contradicted by the fact that in the proceedings before the Tribunal, the 2nd defendant mistakenly thought he could claim adverse possession "against the government".

30. Looking at the matter in the round with common sense, that the factual basis in support of a claim of adverse possession had been pleaded and disclosed, and that the 2nd defendant was all

along acting in person, we would have thought that should constitute "sufficient grounds" under the rules for variation of non-milestone dates and the Judge should be prepared to show some leniency to this litigant in person and give him an opportunity to get his pleading right so that the substantive disputes between the parties may be properly determined.

31. The Judge however placed great weight on the absence of explanation from the 2nd defendant why he had only applied for leave to amend in December 2012.

32. Even in the absence of explanation from the 2nd defendant, and looking at the relevant circumstances with common sense, we think the Judge was plainly in error to draw the inference that there was "deliberate delay" on the part of the 2nd defendant in seeking an amendment. The conclusion he reached that the 2nd defendant had acted with "deliberate delay" carries with it an implicit finding of bad faith. A finding of this kind is not to be lightly made (*Honey Bee Electronic International Ltd v Golden Lucky Co Ltd* [2007] 3 HKLRD 524 at [18]; *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 at 362F–G).

33. Mr McCoy sought to rely on *Tang Shun Hay v Jetline Co Ltd* [2000] 1 HKC 417. We do not think the situation in that case was analogous to ours. As Cheung JA pointed out in *Honey Bee Electronic International Ltd* at [16], the facts in *Tang Shun Hay* are unusual in that the limitation issue had been argued in an earlier hearing when the plaintiff successfully joined the defendant as a party after the limitation period and the defendant chose not to raise the limitation issue in the defence filed and did not explain why it did not when he later sought leave to amend to plead limitation. It was in those circumstances that the Judge refused leave and his decision was upheld by the appeal court. In the present case, there is simply insufficient material for the inference to be drawn that the failure to raise adverse possession and limitation in the defence was not just negligence on the 2nd defendant's part but was a deliberate decision to delay matters.

34. Further as Cheung JA had noted, Godfrey JA held in *Tang Shun Hay* (at 423I–424B) that delay on its own is not sufficient to justify a refusal of grant of leave to amend, there must also be prejudice to the opposing party. The Court in *Tang Shun Hay* found on the facts that prejudice would be caused to the plaintiff if leave were granted (at 421D–F, 424B). Cheung JA rightly remarked that this case cannot be treated to be of general application to other situations. There, it was not merely a matter of disruption to the proceedings and putting off the trial. The court took into account that the accident happened more than six years and for one reason or other the proceedings in personal injuries had been extended,

that there were many defendants involved and the allegations in negligence against each were very different in nature.

35. Out of abundance of caution, Ms Eu sought leave to file an affirmation of the 2nd defendant in this appeal giving an explanation why he had not applied for leave to amend earlier. This affirmation merely spelt out in detail what would have been obvious, namely, that he was acting in person all along and had no legal understanding of pleadings and the concept of adverse possession, and that he had no legal representation until November 2012. As we have already mentioned, we do not think this affirmation is necessary. Nor do we think Mr McCoy's criticism of the 2nd defendant's solicitors in their conduct of the defence in the one-month period after they took over is justified.

36. We reject Mr McCoy's submission that material prejudice was occasioned to the plaintiff by the amendment. We have referred to the only stated concern as to costs in the letter of the plaintiff's solicitors in December 2012 and the fact that the trial dates had not been fixed when the application for amendment was made, very different from the cases cited by him when the application was made shortly before the trial was due to start. The amendment of pleading the legal issue of adverse possession has not made any material change to the factual basis of the 2nd defendant's case, and should not have required any significant change to the plaintiff's preparation on the factual side of the case that it would have to meet. Mr McCoy submitted that the trial dates which are two weeks away would have to be put off. Even if that were so, it would only be a delay of a few months for new trial dates to be given.

37. Mr McCoy made the point that at the 2nd CMC on 2 January 2013, Master Pang was correct to set the case down for trial pursuant to O.25 r.2(2)(b) of the RDC, thereby setting a milestone date. But the case management power must be exercised with regard to the prevailing circumstances, and should not be applied rigidly as if the timetable laid down in an earlier CMC were set in stone. Had the Master granted leave to amend the pleading, it is unlikely that he would have set down the case for trial there and then. Insofar as "sufficient grounds" are required for the variation of non-milestone dates under O.25 r.3(5) and (6), we do not agree with Mr McCoy there is an inflexible requirement there must be an affidavit from the applicant providing an explanation. It all depends on the circumstances. In the present case, we think the position should be sufficiently clear to the Court without an affidavit from the 2nd defendant that there are "sufficient grounds" for the amendment of the pleading and the consequential variation of the non-milestone dates.

38. The Judge had exercised his discretion on a misunderstanding of the law and a misapprehension of the facts and

was in disregard of principle. His exercise of discretion was plainly wrong and must be set aside. This Court is entitled to exercise its discretion afresh on the application for leave to amend.

39. The principles in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 212F–H on the exercise of discretion to allow or refuse an amendment of pleadings remain good law after the CJR, see *Li Shiu To v Li Shiu Tsang* (unrep., HCA 416/2003, [2012] HKEC 1153) (14 August 2012), Deputy Judge Lok, [14]–[16]. Having said that, in the exercise of discretion, the Court must of course have regard to the underlying objectives in O.1A of the RHC or of the RDC, so it cannot be assumed that once the principles in *Ketteman* are satisfied, the amendment would be allowed. The Court would need to balance all relevant factors to decide how its discretion should be exercised, if the application is made in circumstances offending one or more of the underlying objectives. In this particular case, a pertinent consideration in giving effect to the underlying objectives is that the Court "shall always recognise that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties" (O.1A r.2(2) of the RDC).

40. Balancing all relevant factors in this case, that the factual basis for raising the plea of adverse possession had been raised in the homemade defence and disclosed in the documents filed in court, that the 2nd defendant was acting in person until a month before the application was made, that the application was made before the trial date was fixed, and there was no evidence of deliberate delay or bad faith, the discretion should clearly be exercised in favour of allowing the amendment to raise the legal point of adverse possession, to secure the just resolution of the disputes between the parties.

41. Mr McCoy submitted that if the 2nd defendant is allowed to amend his pleading, this should be granted on the terms that he should pay not just the costs of and occasioned by the amendments, but all the costs up to date, citing *Beoco v Alfa Laval Co Ltd* [1995] QB 137 and *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340. We agree with Ms Eu that Mr McCoy's reliance on these cases is misplaced, as they are very different from the present fact situation. We see no reason to depart from the usual order made in this kind of situation, which is that the 2nd defendant should pay the costs of and occasioned by the amendments, including the costs thrown away, to be taxed if not agreed (*Lessy SARL v Pacific Star Development Ltd* [1996] 2 HKLR 1 at 2C). The costs of the contested application before the Master and the Judge should be considered separately from the costs of the amendments.

42. We declined to vary the costs order of the hearing before the Master, which were awarded to the plaintiff, as the draft

summons with the proposed amendments were served on the plaintiff very late. We varied the Judge's costs order of the appeal before him and awarded costs to the 2nd defendant.

43. The appeal is therefore allowed for the reasons given, with costs of the application for leave to appeal and of the appeal awarded to the 2nd defendant.

Reported by Shin Su Wen

HCCL 28/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMMERCIAL ACTION NO 28 OF 2008

BETWEEN

SHINE GRACE INVESTMENT LTD. Plaintiff

and

CITIBANK, N.A. 1st Defendant
HAILEY AMY SEEN KWAN MAK 2nd Defendant

Before : Hon Ng J in Chambers
Date of Hearing : 11 October 2017
Date of Judgment : 20 October 2017

J U D G M E N T

Introduction

1. At the PTR held on 11 October 2017, three actions were before the Court viz HCCL 28/2008, HCCL 28/2013 and HCCL 29/2013. The three actions had been ordered to be tried at the same time. The trial will commence on 13 November 2017, with 5 weeks reserved.

2. By summons dated 20 September 2017 issued in HCCL 28/2008, the Plaintiff ("**Shine Grace**") applies for leave to *inter alia* amend the Re-Amended Reply filed herein on 27 June 2013. The application is opposed by the Defendants.

Material Background

3. All three actions arose out of the alleged mis-selling of 9 equity accumulator contracts ("**Disputed Contracts**") on 15 and 16 October 2007 by the 1st Defendant ("**Citibank**") to Shine Grace. These were set out in Schedule 1 to the Amended Statement of Claim filed on 16 April 2013. The same were listed as the 274th to 282nd equity accumulator contracts between Shine Grace and Citibank in Schedule 3 to the Re-Amended Defence filed on 28 May 2013. These 282 accumulator contracts covered a period of almost 4 years — from 2 January 2004 to 16 October 2007.

4. Shine Grace was wholly-owned, controlled and operated by the late Mrs Anita Chan Lai Ling ("**Mrs Chan**"), a wealthy businesswoman and philanthropist. In March 2003, Shine Grace opened an account with Citi Private Bank ("**Account**"). The 2nd Defendant ("**Hailey Mak**") was the relationship manager of Mrs Chan and Shine Grace.

5. The Plaintiffs in HCCL 28/2013 and HCCL 29/2013 ("**Shinning**" and "**BSI**" respectively), which are connected with Mrs Chan, entered into several guarantees ("**Shinning Guarantees**" and

"**BSI Guarantees**") with Citibank in 2004 and 2006 to support Shine Grace's trading activities.

6. Mrs Chan died on 17 October 2007 due to an overdose of fentanyl patches. According to the medical experts, the critical overdosing with fentanyl very likely ensued in the afternoon or evening of the day before ie 16 October 2007. After Mrs Chan's death, her children were appointed directors of Shine Grace. Shine Grace ceased trading on the Account and disclaimed the Disputed Contracts. Citibank's margin calls were not met. Eventually, in January 2008, Citibank decided to close out and unwind all of Shine Grace's actual open accumulator contracts as well as the Disputed Contracts and recoup the costs ("**Unwinding Costs**") from Shine Grace. When Shine Grace's assets with Citibank were insufficient to cover the Unwinding Costs, Citibank turned to Shine Grace's guarantors and transferred funds from Shinning's and BSI's accounts with it to satisfy the outstanding Unwinding Costs.

7. In HCCL 28/2008, Shine Grace seeks a declaration that it has not contracted with Citibank in respect of the 9 Disputed Contracts, alternatively, a declaration that the 9 Disputed Contracts are unenforceable; a declaration that all purported margin call notices were invalid and of no legal effect. Shine Grace also seeks an Order that Citibank account for and return all securities and/or monies held on trust for Shine Grace or due to Shine Grace as well as damages or restitutionary relief against both Defendants.

8. In HCCL 28/2013 and HCCL 29/2013, Shinning and BSI seek repayment from Citibank of sums transferred out of their bank accounts to pay for the Unwinding Costs on the ground that, since the Disputed Contracts were either void or rescinded, Citibank had no right to call on the Guarantees. BSI also claims the BSI Guarantees had been terminated by written notice in July 2007 and Citibank was not entitled to call on the BSI Guarantees.

The proposed amendments

9. Shine Grace's proposed amendments to the Re-Amended Reply are concerned with two main aspects: (1) Shine Grace's reliance on the Unconscionable Contracts Ordinance ("**UCO**"), Cap 458 and the Control of Exemption Clauses Ordinance ("**CECO**"), Cap 71 and (2) mitigation of loss.

UCO and CECO

10. At paragraph 21BA, Shine Grace seeks relief under s 5 of UCO in relation to the contractual provisions pleaded at paragraphs 12 and 29 of the Re-Amended Defence in order to preclude Citibank and Hailey Mak from relying on those provisions to avoid liability. After this court's clarification with Mr Pao at the hearing, it now seems that Shine Grace is *not* seeking relief in relation to the Suitability Confirmation Letters pleaded at paragraph 12(b) of the Re-Amended Defence[1]. Shine Grace avers that "such contractual provisions were unconscionable in the circumstances relating to the contract at the time it was made, having

[1] Which, this court was told, were not contractual documents

regard to all the relevant facts and matters at the material time". Shine Grace then goes on to particularize such "facts and matters" in 11 sub-paragraphs.

11. At paragraph 21BB, Shine Grace relies on the CECO and contends that the same contractual provisions pleaded at paragraphs 12 and 29 of the Re-Amended Defence were "not fair or reasonable in all the circumstances" to the extent that they served to exclude or restrict liability on the part of Citibank and/or Hailey Mak. The same particulars pleaded in paragraph 21BA are referred to.

12. Both paragraphs 21BA and 21BB are directed at the Defendants' argument of contractual estoppel pleaded at paragraph 64B of the Re-Amended Defence[2] which is in these terms:

> "...by reason of the provisions in the agreements between the 1st Defendant and SGIL as pleaded in paragraphs 12 and 29 above, SGIL is contractually precluded and estopped from: (i) alleging that the Defendants are in breach of the duties alleged; and (ii) asserting that it entered into the transactions in question relying on the alleged misrepresentation."

13. Mr Dawes SC, for the Defendants, opposes the amendments at paragraphs 21BA and 21BB on the ground that they are new pleas which will open up vast new areas of evidential inquiry at an extremely late stage — the trial is only a month away, Shine Grace's opening submissions are due in two weeks' time and the Defendants' are due one week thereafter. Even if Shine Grace chooses not to do so, the proposed amendments will necessitate the obtaining and filing of

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[2] Before the proposed amendments, Shine Grace's pleaded case in response to paragraph 64B is one of bare denial: see paragraph 21B of the Re-Amended Reply

extensive evidence by the Defendants. Implicit in the opposition is that it is highly likely the trial date will be jeopardized if the amendments are allowed.

14. In order to appreciate how extensive the Defendants' evidential inquiry is likely to be in order to deal with paragraphs 21BA and 21BB, it is imperative to consider:

(1) what contractual provisions are being challenged as falling foul of the UCO and CECO,

(2) the relevant provisions of the UCO and CECO,

(3) what are the "relevant facts and matters" that Shine Grace relies upon in support of the challenge, and

(4) what additional "facts and matters" the Defendants may wish to raise for the court's consideration in response.

15. In relation to 14(1), as can be seen from paragraph 12 of the Re-Amended Defence, the contractual documents which contain provisions under "challenge" are these:

(1) The Terms and Conditions for Derivative Transactions signed by Mrs Chan on 12 March 2003.

(2) The Terms and Conditions for Credit Services signed by Mrs Chan on 31 March 2003.

(3) The Master Derivative Agreement signed on 12 March 2003.

(4) The TIP[3] sheets sent to Shine Grace in respect of each

[3] Tailored Investment Proposal

accumulator contract entered into by Shine Grace [4]. Presumably, Shine Grace is only challenging the TIP sheets in respect of the 9 Disputed Contracts entered into on 15 and 16 October 2007 (rather than the 282 accumulator contracts) although the proposed amendments are not entirely clear on this.

(5) The Risk Disclosure Statement and Terms and Conditions for Derivative Transaction of Citibank provided to Shine Grace on 12 March 2003.

16. In relation to 14(2), s 5(1) of the UCO provides that if, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable *in the circumstances relating to the contract at the time it was made*, the court may (a) refuse to enforce the contract; (b) enforce the remainder of the contract without the unconscionable part; (c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.

17. S 6(1) of the UCO gives a non-exhaustive list of the factors to be considered by the court as follows:

> "(1) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to (among other things) -
>
> (a) the relative strengths of the bargaining positions of the consumer and the other party;
>
> (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with

[4] The TIP sheets are also pleaded in 29 of the Re-Amended Defence.

> conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
>
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party."

18. The expression "among other things" makes it clear that the list is non-exhaustive. Indeed, the Court of Appeal recently held that "Whilst the court must have regard to the non-exhaustive list of factors in the statute, it should also consider all other relevant matters and circumstances reasonably foreseeable at the time of making the contract in determining if there is any unconscionability in the terms of the contract": *Chang Pui Yin v Bank of Singapore*, unrep, CACV 194/2016, 20 July 2017 at [66]. Further, the expression "unconscionable in the circumstances relating to the contract at the time it was made" requires the court to look into the relevant circumstances in relation to each contract under challenge at the time it was made. Hence, if the matters in dispute between the parties involve more than one contract, as in the present case, the court must consider the relevant circumstances at the time when each such contract was made.

19. As for CECO, the test of reasonableness is also fairly wide. S 3(1) provides:

> "(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Ordinance and section 4 of the Misrepresentation Ordinance (Cap. 284) is satisfied only if the court or arbitrator determines that the term was a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

20. In relation to 14(3), as stated above, Shine Grace has pleaded 11 sub-paragraphs as particulars of such "facts and matters at the material time" as rendering the contractual provisions unconscionable. Mr Dawes SC's point is that the factual matters particularized under paragraph 21BA are far from undisputed and hence the need on the part of the Defendants to file evidence in response. A number of examples were given in his written submissions. For illustration purposes, suffice it for this court to refer to the following two.

21. First, the averment in paragraph 21BA(1) that "The relevant terms were part of Citibank's standard terms and conditions and there was no scope for negotiation on the part of [Shine Grace]".

22. With regard to this averment, Mr Dawes SC points out that at the time of opening the Account in 2003, Mrs Chan and her group of companies had already been "mega wealth" clients of Citibank for over 19 years. Given Mrs Chan's longstanding relationship with Citibank, her status as a mega wealth client, the amount of business she brought to Citibank and the fact that other banks in Hong Kong were also actively vying for her business, the assertion that there was no scope for negotiation between Shine Grace and Citibank must be open to question. Fairness dictates that Citibank should be given the opportunity to make

inquiries of all its previous negotiations with Mrs Chan / Shine Grace and to lead evidence on the same if so advised.

23. This court would add that the "material time" for the present purpose is not just when Shine Grace opened the Account in March 2003. The contractual documents under challenge include the TIP sheets. Even if Shine Grace is confining itself to the 9 Disputed Contracts, the circumstances prevailing in 2007 must also be looked into. By the end of 2006, Shine Grace had entered into over 160 accumulator contracts with Citibank. In 2007, Shine Grace was trading even more actively. In this regard, Mr Dawes SC refers in his written submissions to an incident in which Mrs Chan successfully negotiated reductions of Citibank's normal requirements for initial margin requirements and the amount of "loanable value" to be deposited with it and an internal email dated 26 March 2007 which recorded the reason for approving the reductions.

24. Second, the averment pleaded in 21BA(3) that "The Defendants had no legitimate interest to protect in avoiding liabilities by relying on the terms they pleaded on the facts pleaded in this case".

25. Mr Dawes SC submits that this plea also opens up an extremely broad field of inquiry. This is because in determining whether it is reasonable or legitimate for a defendant to limit the scope of its liability, the court will look into all the circumstances including the nature of the business, the difficulty of the task, the amount of money at stake, the availability of alternative means of protection eg by insurance and whether others in the market are offering similar terms. These are all matters in relation to which the Defendants may wish to adduce detailed

evidence in response to the averment. For example, the Defendants may adduce evidence on the likely additional financial burden which would be borne by Citibank if its contractual provisions were struck down as unreasonable or unconscionable, on the availability or otherwise of insurance coverage, on how prevalent the contractual provisions in question were in the market and the rationale behind it.

26. In relation to 14(4), given that court must have regard to the non-exhaustive list of factors in s 6 of the UCO as well as all other matters and circumstances reasonably foreseeable at the time of making the contract, it is open to the Defendants to raise a host of factors for the court's consideration, even though Shine Grace only relies on a few. One prominent example given in Mr Dawes SC's written submissions is the fact that Mrs Chan had previously engaged the services of other banks in Hong Kong and executed a fair number (50) of accumulator contracts with the Bank of East Asia. The fact that Shine Grace had entered into accumulator contracts with the Bank of East Asia is a potentially relevant factor under s 6(1)(e) of the UCO, depending on whether the terms of those contracts were sufficiently "identical or equivalent" with those offered by Citibank. Mr Dawes SC also suggests that Citibank would wish to explore and rely upon Bank of East Asia's role in the management of Mrs Chan's finances and the advice which was provided to her.

27. In light of the above analysis, this court is in no doubt that the proposed amendments will necessitate a wide range of evidential inquiry on the part of the Defendants and raise the distinct prospect of their having to file extensive evidence to deal with the new pleas. Given

the imminence of the trial, this court is also in no doubt that it is wholly unfair to the Defendants to have to carry out this exercise at this late stage, almost 10 years after the commencement of proceedings and less than a month before the trial. If the amendments are allowed, it is more than likely that the trial date will be derailed.

28. RHC O 20 r 5(1) provides that the Court may at any stage of the proceedings allow any party to amend his pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct.

29. In urging this court to allow the proposed amendments, Mr Pao refers to the oft-cited passage in the speech of Lord Brandon in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 212F–H:

> "With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to R.S.C., Ord. 20, r. 5, in *The Supreme Court Practice 1982* and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs."

30. For completeness, this court should mention another passage of Lord Griffiths' speech at 220D–G which set out a number of factors which have become highly pertinent after the Civil Justice Reform:

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. …
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age…"

31. The statement of principles summarised by Lord Brandon continues to be applied by the Courts in Hong Kong after the CJR but that is subject to the underlying objectives set out in RHC O 1A and the importance of not disturbing a milestone date.

32. In *Li Shiu To v Li Shiu Tsang*, unrep, HCA 416/2003, 14 August 2012, Deputy Judge Lok (as he then was) observed at [16]–[17] that:

> "16. …First, the new O 1A of the RHC makes it clear that the court shall give effect to the underlying objectives when it exercises its power or interprets the RHC, including increasing cost-effectiveness of litigation, ensuring that a case is dealt with as expeditiously as is reasonably practicable, promoting a sense of reasonable proportion and procedural economy in the

> conduct of proceedings, facilitating the settlement of disputes and ensuring that the resources of the court are distributed fairly. If the amendment application is made in circumstances offending these underlying objectives, the court may have to balance all the factors in the case in determining whether to grant the application.
>
> 17. Second, there is a heightened concern to guard against late applications after the implementation of the CJR. For case management purposes, there are now certain milestone dates in the course of litigation, and one of which would be the trial date. If a party makes a late application to amend the pleading with the effect that the trial date may have to be adjourned, the court would be very reluctant in allowing the application unless there are exceptional circumstances. Indeed, adjournment of the trial is now considered as a serious prejudice to the parties involved in litigations. Hence, one should not assume that, once the *Ketteman* principles are satisfied, the court would automatically grant an application for amendment of pleading in particular at a very late stage of the proceedings."

33. Similarly, in *Topwell Corporation Ltd v Kwan Kam Kee* [2014] 5 HKLRD 1 at [39], Kwan JA said:

> "…in the exercise of discretion, the court must of course have regard to the underlying objectives in Order 1A of the RHC or of the RDC, so it cannot be assumed that once the principles in *Ketteman* are satisfied, the amendment would be allowed. The court would need to balance all relevant factors to decide how its discretion should be exercised, if the application is made in circumstances offending one or more of the underlying objectives."

34. In this particular case, it seems to this court that allowing the amendments would offend almost all the underlying objectives set out in RHC O 1A. Importantly, allowing the amendments at this late stage would likely derail the trial date and for that very reason would cause serious prejudice to the Defendants, especially the personal Defendant Hailey Mak. This piece of litigation has been hanging over her head for almost 10 years and she has, to quote from Lord Griffiths, a "legitimate

expectation" that the trial scheduled to commence very shortly will determine the presently pleaded issues one way or the other. As for Citibank, this court cannot assume that, just because it is a big financial corporation with enormous resources, the evidential inquiry suggested by Mr Dawes SC would necessarily bear fruit. After all, the inquiry is into events dating back to 2003 — the possibility of the bank not being able to locate relevant documents or witnesses can hardly be dismissed as fanciful.

35. Furthermore, there is no explanation as to why leave to amend was not applied for much earlier — bearing in mind that the case was set down for trial in August 2015 — and certainly no exceptional circumstances have been shown to exist which might possibly justify the grant of leave at this late stage. The suggestion that the proposed amendments were prompted by the recent decision of *Chang Pui Yin v Bank of Singapore* is in this court's view a flimsy excuse. Reliance on UCO in disputes involving accumulator contracts is nothing new: see eg *DBS Bank v Sit Pan Jit*, unrep, HCA 382/2009, 6 February 2014. In fact, Shine Grace has pleaded ss 5 and 6 UCO at paragraph 10(3) of the Reply by way of (red) amendment in May 2010.

36. This court has borne in mind that it "shall always recognise that the primary aim in exercising the powers of the Court is to secure the *just* resolution of disputes in accordance with the substantive rights of the parties". In the circumstances of this case, it is unjust and unfair to the Defendants for this court to allow the proposed amendments.

Mitigation of loss

37. At paragraph 22(1) of the Re-Amended Reply, Shine Grace has pleaded a denial that it was under a duty to mitigate its loss. By the proposed amendment at paragraph 22(3), Shine Grace now wishes to rely on an incident which took place on or about 28 November 2007. The proposed amendment reads:

> "…on or about 28 November 2007, SGIL requested that Citibank assist SGIL to obtain stock loans in the shares underlying the disputed ACs to enable SGIL to short sell the shares and thus most effectively hedge against the open AC positions. This option was referred to as "borrow stock & sell short at or near current spot" in a detailed written note provided by SGIL to Citibank at a meeting on 28 November 2007. However, Citibank unreasonably failed and/or refused to allow SGIL to perform such hedging in such a manner which would have been most effective in limiting financial exposure on the open AC positions."

38. The incident was referred to in Mr Anson Chan's Witness Statement dated 2 October 2015 at paragraph 57 in which he said:

> "…I also suggested that Citibank (through its affiliate Salomon Smith Barney) help us obtain stock loans in the shares underlying the disputed ACs; this would enable us to short sell the underlying shares which would have been an effective hedge against the open AC positions. Citibank refused to allow Shine Grace to do this hedging".

39. According to Mr Pao, the purpose of this amendment is simply to ensure that the pleadings on mitigation of loss tallies with the witness' evidence and hence there should be no valid objection from the Defendants.

40. On the face of it, the proposed amendment is short and simple. So is the explanation of its purpose. It also appears easy enough for the Defendants to admit or deny the incident *as such*.

41. However, in order to understand the relevance of the incident to Shine Grace's financial loss, one needs to know *inter alia* (1) the commercial mechanism of borrowing stock and selling short, (2) the stock market condition at or around 28 November 2007 including, in particular, the movements of the price of the stocks underlying the 9 Disputed Contracts viz Petrochina, Sinopec, China Shenhua Energy, and China Life Insurance, (3) the terms of the proposal put forward by Shine Grace to Citibank[5], (4) in what way(s) and to what extent Shine Grace's proposal would have been effective in limiting its financial exposure on its open accumulator contract positions, (5) Citibank's reason(s) for refusing Shine Grace's proposal, (6) the basis for the averment that such refusal was unreasonable, and, last but not least, (7) the calculation of the amount of Shine Grace's financial loss which could have been reduced if Citibank had accepted the proposal.

42. Seeing it in that light, the proposed amendment is deceptively simple but in fact seriously complicated and would require factual and expert evidence from Shine Grace to explain the plea that "Citibank unreasonably failed and/or refused to allow SGIL to perform such hedging". Without such explanation from Shine Grace, the plea is just a bare assertion[6] and in that sense a futile one. If so, leave to amend should not be granted. Furthermore, if this court were to give leave to

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[5] At the hearing, not even the so-called "detailed written note" is available.

[6] So is paragraph 57 of Mr Anson Chan's Witness Statement

amend, Citibank would naturally and quite reasonably wish to put in evidence to rebut the plea. Mr Dawes SC has already indicated in his submissions that his client intends to do so. In fairness to Citibank, this court will be compelled to grant permission to it to file additional evidence. If so, the trial date would again be in serious jeopardy. In that scenario, the reasons given in paragraphs 34 to 36 above in refusing leave to amend paragraphs 21BA and 21BB would apply *mutatis mutandis* here.

43. On any view of the matter, leave to amend paragraph 22(3) should be refused.

Disposition and costs order nisi

44. Shine Grace's application to amend paragraphs 21BA, 21BB and 22(3) of the Re-Amended Reply is hereby dismissed.

45. There be an order *nisi* that costs of and occasioned by the application to amend be to the Defendants in any event, save that costs of the PTR hearing on 11 October 2017 be in the cause.

(Peter Ng)
Judge of the Court of First Instance
High Court

Mr Jin Pao, instructed by Reed Smith Richards Butler, for the Plaintiff

Mr Victor Dawes SC and Mr Joshua Chan, instructed by Clifford Chance, for the 1st and 2nd Defendants

HCMP 409/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

MISCELLLANEOUS PROCEEDINGS NO. 409 OF 2016
(ON AN INTENDED APPEAL FROM HCMP 1505 OF 2014)

BETWEEN

TSANG WAI FAN Plaintiff

and

HUI SIU KWONG Defendant

Before: Hon Chu and Poon JJA in Court
Date of written submissions: 29 February, 8 and 21 March 2016
Date of Judgment: 12 April 2016

JUDGMENT

Hon Chu JA (giving the judgment of the Court):

Introduction

1. This is the defendant's application for extension of time to apply for leave to appeal to the Court of Appeal against the order of Deputy High Court Judge Yee ("the Judge") made on 26 January 2016

refusing leave to the defendant to file a second affirmation ("the 2nd Affirmation").

2. The action below is an application for an order for sale under section 6 of the Partition Ordinance, Cap. 352 in respect of a property situated at Flat B, 11th Floor, Block 5, Locwood Court, Kingswood Villas, New Territories ("the Property").

Background facts

3. The Property was initially owned by Mr Lau Yee Pang ("YP Lau"). On 24 March 1994, he transferred the Property to Madam Lau Sau Man ("SM Lau") and the defendant to hold as joint tenants. It is common ground between the plaintiff and the defendant that this was a gift from YP Lau.

4. YP Lau, SM Lau, the plaintiff's husband and the defendant's mother are siblings. The defendant is therefore the nephew of the plaintiff, YP Lau and SM Lau. YP Lau passed away on 31 March 1994, a few days after he transferred the Property to SM Lau and the defendant. SM Lau is now in her eighties and resides in Seattle, USA.

5. It is the defendant's case that he has since about October 1998 been occupying the Property.

6. On 22 August 2012, SM Lau served a notice of severance dated 21 August 2012 on the defendant to sever the joint tenancy they held over several properties, including the Property. As a result, SM Lau and the defendant held the Property as tenants in common in equal shares.

7. By a provisional sale and purchase agreement and an assignment both dated 20 February 2013 (respectively "SPA" and "Assignment"), SM Lau assigned her 50% interest in the Property to the plaintiff at a consideration of $1.5 million. The SPA and the Assignment were executed on behalf of SM Lau by the plaintiff's husband, who held a general power of attorney ("POA") given by SM Lau. The SPA, the Assignment and the POA were all registered in the Lands Registry.

8. On 17 September 2012, the plaintiff gave notice to the defendant of her co-ownership of the Property. It is the plaintiff's case that she cannot gain access to the Property, and that despite her proposal to sell the Property and to divide the proceeds of sale equally, no agreement can be reached with the defendant.

HCMP1505/2014

9. On 19 June 2914, the plaintiff issued the originating summons in the action below, applying for an order to sell the Property, and filed her supporting affirmation. The defendant filed an affirmation on 19 September 2014 to oppose the application. The plaintiff filed an affirmation in reply on 31 March 2015.

10. On 9 November 2015, the plaintiff issued the Notice of application to hear the originating summons. On 20 November 2015, the defendant filed a counter notice applying to continue the proceedings as if the action was begun by writ. On 27 November 2015, the plaintiff's application for summary disposal of the originating summons and the defendant's counter notice were adjourned for substantive argument, which was fixed for 26 January 2016 before the Judge.

11. On 19 January 2016, one week before the hearing, the defendant issued a summons seeking leave to adduce the defendant's 2nd affirmation ("the 2nd Affirmation") as further evidence. At the hearing, the Judge refused the application and gave oral reasons for his decision. The Judge acceded to the plaintiff's application for summary disposal of the originating summons, and made an order for sale of the Property together with consequential directions.

The present application

12. Within the 28-day period for appealing against the order for sale, the defendant served and filed a notice of appeal to appeal against the order for sale. The defendant, however, did not seek to appeal against the order refusing leave to adduce the 2nd Affirmation.

13. Then on 23 February 2016, the defendant issued the summons in the present proceedings, enclosing a draft notice of appeal, to apply for: (1) extension of time to serve the Notice of Appeal against the Judge's refusal of leave to adduce the 2nd Affirmation; (2) stay of execution of the order for sale and consequential directions; and (3) general leave to amend the prayer in the appeal.

14. Despite the ambiguity in the summons, it became clear from the affirmation leading the application (at §8) that in respect of (1), the defendant is seeking extension of time to apply for leave to appeal pursuant to Order 59, rule 2B(4) of The Rules of the High Court, Cap. 4A.

15. The plaintiff opposed the application. Both parties had lodged written submissions.

Applicable legal principles

16. The defendant accepts that the Order was an exercise of the Judge's discretion and a case management decision.

17. As the time for applying to the court below for leave to appeal against the Order has expired, the present application is a composite application for an extension of time and also for leave to appeal to be granted under Order 59, rule 2B(4) RHC.

18. In considering whether to extend time, the court usually has regard to: (1) the length of the delay, (2) the reason for the delay, (3) the merits of the intended appeal, and (4) the degree of prejudice to the other party if time is extended.

19. Normally, leave to appeal will not be granted unless it is shown that the intended appeal has a reasonable prospect of success, or there is some other reason in the interest of justice that the appeal should be heard: section 14AA(4) of the High Court Ordinance, Cap. 4.

20. Where the delay is inexcusable although insubstantial, the party applying for an extension of time will have to show a real prospect of success on the merits. Hence, a party guilty of inexcusable delay in seeking leave to appeal will have to show that the intended appeal has a real prospect of success instead of a reasonable prospect of success: see *KNM v. HTF*, unreported, HCMP 288/2011, 7 September 2011 at §§19-20.

21. In the case of an intended appeal against a case management decision, it is trite that the applying party faces a very high hurdle. He has to show that the judge was plainly wrong, or made orders that clearly involved an injustice or an inability for the trial court to carry out its tasks,

or had erred in principle, or that the order was irrational: *Wong Kar Gee Mimi v. Severn Villa Ltd* [2012] 1 HKLRD 887 at §31.

22. Further, the court always retains a discretion whether to grant leave even if the threshold test is satisfied since it is rare for an appellate court to intervene in case management decision save in exceptional circumstances: *厦門新景地集團有限公司 v. Eton Properties Limited*, unreported, HCMP13/2012, 14 February 2012, [2012] HKEC 216 at §9; see also the decision of this Court (differently constituted) in *Li Xiao Yun v. China Gas Holdings Ltd*, unreported, HCMP466/2013, [2013] HKEC 353, refusing leave to appeal against the decision of a trial judge refusing an application to admit further expert evidence made less than three weeks before the trial was scheduled to commence.

Delay

23. The defendant's application for leave to appeal is late by 14 days. It is not an insubstantial delay. The reasons given for the delay are oversight of the legal representatives, change of counsel and the intervening Chinese New Year holidays.[1] None of them constitutes good reason excusing the delay. It had been pointed out in *KNM v. HTF* at §18 that the fault of the legal representative is not a reason excusing delay.

24. The defendant's delay in applying for leave to appeal is therefore inexcusable. He will have to demonstrate that his intended appeal against the Judge's case management decision has a real prospect of success.

[1] Affirmation of Wai Chung Kiu Rainbow, §5.

Intended grounds of appeal

25. The defendant's intended grounds of appeal, as appeared by the draft notice of appeal and the written submissions, are twofold:

(1) Although the application to adduce the 2nd Affirmation was made late, the Judge should have considered there was no prejudice to the plaintiff and costs would be an adequate compensation for the plaintiff.

(2) The 2nd Affirmation was relevant, highly material to the defendant's case and necessary for the fair disposal of the matter.

The parties' case

26. Before considering the Judge’s decision and the merits of the intended appeal, it is necessary to consider the parties’ respective case below and the issues before the Judge.

27. For the plaintiff, her case was straightforward. She has acquired from her sister-in-law a half interest in the Property. Her co-owner, the defendant, refused her access to the Property and has been occupying it to her exclusion. She therefore sought an order for sale to rid herself of the shackles of co-ownership.

28. The defendant did not contend that partition was a viable alternative or that a sale would cause serious hardship. Instead, his challenge is directed at the plaintiff's co-owner status and her entitlement to apply for an order for sale.

29. In his first affirmation, the defendant stated that: (1) on his suggestion, SP Lau added SM Lau as a co-owner of the Property so that she could stay in it when she visited Hong Kong, and that after SM Lau's death, "the Property could be owned by [him] fully" (at §13); (2) SM Lau's act of severing the joint tenancy was contrary to the wishes of YP Lau (at §25); and (3) SM Lau never stayed in the Property and he has been occupying the whole of the Property to her exclusion. He has therefore dispossessed SM Lau and acquired an adverse title over her interest in the Property before she served the notice of severance on him (at §26).

30. In the 2nd Affirmation, the defendant sought to raise two matters. First, he claimed to have visited SM Lau in Seattle, USA on 9 January 2016, during which SM Lau said (i) she could recognize the signature on the notice of severance, but she had no recollection of what the document was about, and she would not sign such a document; (ii) she never agreed to sell her title in the Property to the plaintiff, and had not received any money from the plaintiff; and (iii) she was agreeable to the defendant continuing to have exclusive possession of the Property as he has done in the past. It was also said that SM Lau refused to give or sign a written statement to confirm what she told the defendant, and further declined to be involved in the dispute and litigation. Second, the defendant exhibited some correspondence exchanged between his solicitors and the Inland Revenue Department in the mid-1990s in connection with the estate of YP Lau. The defendant said the correspondence demonstrated that he had always been a 100% beneficial owner of the Property.

31. At the hearing before the Judge, counsel for the defendant abandoned the plea on adverse possession. The case was argued on the

basis that: (1) SM Lau was a bare trustee holding the interest in the Property on trust for the defendant and could not have transferred any interest in the Property to the plaintiff ("the trust issue"); and (2) the plaintiff's husband was in beach of his fiduciary duties as the donee under the POA in that he might arguably obtain secret profits out of the assignment to his wife ("the POA issue"). Hence, it was argued, the plaintiff's husband should be made a party to the proceedings and be cross-examined on whether the execution of the Assignment was a breach of the terms of the POA or his fiduciary duties owed to SM Lau.

The Judge's decision

32. The Judge refused to admit the 2nd Affirmation as evidence and gave oral reasons for the decision, the gist of which was set out in paragraph 16 of the Judgment:

> "I heard the application this morning and I refused it with my reasons given orally. In gist, I do not accept that there is any good explanation for the lateness of the application. I am further of the view that, as a matter of fairness, I cannot allow the affirmation to be adduced as it contained, apart from a number of irrelevant matters, serious allegations raised (including forgery) on the basis of hearsay evidence without any corroborative documentary evidence at the eleventh hour."

33. It is also relevant to note what the Judge said in §§38 and 39 of the Judgment:

> "38. There is simply no evidence that Madam SM Lau did not know and/or did not accept the conveyance to Madam Tsang. Madam SM Lau refuses to give evidence. I cannot accept Mr Lai's submission that then it gives rise to a triable issue warranting a trial wherein Madam SM Lau should be compelled to testify about her knowledge and acceptance or the lack of them. This court requires an arguable defence supported by

> credible evidence in the first place. Mere speculation cannot suffice.
>
> 39. The POA and the Assignment were executed and registered long before the commencement of these proceedings. Mr Hui should be alive to the fact that it was Mr YF Lau who executed the Assignment on behalf of Madam SM Lau to his wife. Again Mr Hui should have investigated into any suspected breach of trust much earlier on and come back with cogent evidence of such breach. He did not even mention about his suspicion in his first affirmation. This court is not convinced that there is any merit in this POA issue."

34. The Judge, for reasons given in the Judgment, rejected the defendant's arguments on the trust issue and the POA issue. He considered there was no proper basis to refuse the plaintiff's application, and made the order for sale sought in the originating summons.

Discussions

35. As the history of the litigation shows,[2] and as the Judge had observed, the application to adduce the 2nd Affirmation was a very later application. The proceedings below had been on foot since June 2014. The defendant was legally represented throughout. It is obvious, and the defendant must be aware right from the beginning, that the plaintiff's application was premised on her having acquired a half interest in the Property from SM Lau. The SPA and the Assignment were exhibited to the plaintiff's first supporting affirmation. It is therefore plain that they were executed by the plaintiff's husband on behalf of SM Lau pursuant to the POA.

36. The only reason advanced for the very late application was that a new counsel was retained and he advised the defendant to speak to

[2] See §§ 9 to 11 above.

SM Lau.[3] This is hardly a satisfactory reason, not only because change in legal representation or legal advice hardly excuses delay, but also because it is not a matter that requires legal advice. Given that the defendant was throughout disputing the plaintiff's interest in the Property and her entitlement to bring the proceedings, it is only natural and reasonable for him to immediately seek clarification with SM Lau. The defendant has not suggested that SM Lau is not contactable or has not been on speaking terms with him.

37. The defendant's submission suggests that it was because the plaintiff had secretly taped her conversation with the defendant that the defendant was forced to investigate whether she had acquired the interest in the Property, and further complains that the Judge failed to consider this aspect.[4] There is no merit in this argument. Firstly, the defendant did not in his affirmation give this as a reason for the delay. Secondly, the recording and the transcript were disclosed as early as March 2015 in the plaintiff's second affirmation, but it was more than nine months later in January 2016 that the defendant made his visit to SM Lau.

38. Furthermore, the reasons given in the affirmation and by way of submission cannot explain the lateness in exhibiting the correspondence with the Inland Revenue Department. They were not new materials or information, and there is no suggestion that they were hitherto unavailable to the defendant. They should have been disclosed at the very first opportunity when the defendant made his first affirmation, if they are, as the defendant now contends, so pertinent to his case.

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[3] The 2nd Affirmation, §3.
[4] Reply submission dated 21 March 2016, §4.

39. We agree entirely with the Judge that there is no good reason for the very late application, and that this should weigh heavily in the exercise of the Judge's discretion.

40. The defendant's intended grounds of appeal really boil down to this. The application and the 2nd Affirmation, *albeit* very late, should be admitted in the interests of doing justice on the merits because the plaintiff suffered no prejudice since she could be given time to respond to the 2nd Affirmation and be compensated in costs for any adjournment of the substantive hearing. In our view, these grounds are unarguable.

41. Firstly, the argument that costs could adequately compensate the plaintiff wholly ignores the duties of parties and their legal representatives under Order 1A rule 3 RHC to assist the court to further the underlying objectives of the Rules, which include to increase the costs-effectiveness of any practice and procedure, to ensure that cases are dealt with as expeditiously as is reasonably practicable, and to ensure that the resources of the court are distributed fairly (Order 1A rule 1(a),(b) and (f) RHC).

42. In this post-CJR era, there is no room for the notion that delay, even though inordinate and unexplained, will be forgiven as long as there is no prejudice and costs are paid. In the light of Order 1A rules 1 and 3, late applications for admission of further evidence cannot be determined solely by reference to whether the opposing party could be compensated by costs. It should be recognized, and the court should take into account, that even with a compensatory costs order, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Further, the vacation or adjournment of a hearing occasioned by last minute applications will mean the loss of a hearing day

which could have benefitted other litigants, and inefficiencies in the use of court time, which is a public resource.

43. Secondly, while we accept that the ultimate concern of the court is to achieve a just resolution of the case, it does not mean that a party should be permitted to raise any arguable case at any point in the proceedings, on payment of costs. If a party has been afforded a reasonable opportunity to advance its case, the just resolution of the case does not require that he should be allowed a further opportunity in spite of his own inordinate and inexcusable delay. Accordingly, even if the defendant is correct that the 2nd Affirmation is material to his case (which we have doubts)[5], it does not follow that the Judge erred in the exercise his discretion in refusing to admit it. Any unfairness to the defendant by reason of the non-admission of the 2nd Affirmation is self-induced, having regard to the long and inexcusable delay on his part.

44. Thirdly, the Judge, in exercising his discretion, was entitled to consider that the part of the 2nd Affirmation recounting what SM Lau had said is hearsay in nature, especially when SM Lau is refusing to confirm in writing or to testify in the proceedings. The defendant's written submission complains that the Judge wrongly held the evidence to be inadmissible as being hearsay and uncorroborated by documentary evidence. It is said that in the summary disposal of an originating summons, it is permissible to relay on hearsay evidence and there is no requirement that it should be corroborated. We do not accept this criticism, which is a misreading of the Judge's reasoning. What was said at §16 of the Judgment is that as a matter of fairness, the 2nd Affirmation should not be allowed to be adduced because it was put in at the last

[5] See §§46 to 52 below.

minute and raised serious allegations that were hearsay and not supported by documentary evidence.

45. We do not see how the Judge can be said to have erred in his reasoning or his exercise of discretion. Serious allegations of fraud and forgery were raised very late in the day. Yet, whether SM Lau knew, agreed to or had received the consideration for the transfer were matters that the defendant does not have personal knowledge, or has no other means of proving. Given the highly controversial nature of these hearsay allegations, and with SM Lau refusing to testify and being out of jurisdiction, even if they were admitted into evidence and the case were to proceed to trial, it seems to us that no weight could properly be placed on them.

46. We come fourthly to the defendant's contention that the 2nd Affirmation is material to his case and determinative of the dispute. We need deal with this briefly since we have indicated above that even if the defendant is right on this, given the inordinate and inexcusable delay on his part, any unfairness arising from the non-admission of the 2nd Affirmation is self-induced, and it would be within the Judge's discretion to refuse to admit it. We also do not wish to be seen as prejudging the issues in the appeal against the order for sale.

47. It suffices for us to make two points. The first relates to the submission that the correspondence with the Inland Revenue Department supports the defendant's case on the trust point. The defendant placed specific reliance on (i) the solicitors' letter dated 5 February 1996, (ii) an account of YP Lau's estate that he swore on 16 January 1996, which was attached to the solicitors' letter, and (iii) a Chinese receipt given in August 1994 by a Madam Ng for a sum of $800,000.

48. It is submitted that document (i) is "contemporaneous evidence that the intention was for [the defendant] to be 100% beneficial owner". However, as YP Lau died in March 1994, the solicitors' letter written almost two years later on the defendant's behalf cannot possibly be contemporaneous evidence of his intention. In any event, the content of the letter hardly sheds light on the alleged intention of YP Lau.

49. As to document (ii), it is said that it shows the defendant is "the sole donee of the gift of cash for acquiring 100% of the Property". However, the sworn account on the face of it does not bear this out. More importantly, in the schedule of property of the estate enclosed in the Inland Revenue Department's letter dated 15 March 2004, the Property was listed under the heading of gift made by the deceased to the defendant and SM Lau within three years prior to death. It was argued on behalf of the defendant that the schedule of property was only a draft and could be amended, if there was disagreement. But the correspondence disclosed by the defendant did not show he had raised any objection or requested an amendment to this.

50. In the case of document (iii), it is said that it shows the defendant had paid $800,000 to Madam Ng out of his own source and is therefore clear evidence of his 100% ownership of the Property. However, this document clearly referred to the defendant as the personal representative of the estate, and the $800,000 was described as a payment that YP Lau had promised to give to Madam Ng. Although the document mentioned that Madam Ng would move out of the Property, it said nothing about the ownership of the Property, let alone the defendant having a 100% ownership in it.

51. The second point we would make concerns what SM Lau allegedly told the defendant when he visited her. We have already made observation on the weight that could be given to these allegations. We would additionally point out that if SM Lau was a bare trustee for the defendant as alleged, it would be very odd that she should express agreement to the defendant continuing to have exclusive possession of the Property, as he had in the past. Her agreement would not be necessary and it would be out of place for a trustee to say this.

52. In our view, the defendant's contention that the 2nd Affirmation is material to his case and is determinative of the dispute, such that the non-admission of it has caused him prejudice and unfairness is more illusory than real.

53. In short, the intended appeal has no real prospect of success. We refuse the application to extend time to apply for leave to appeal. It follows that there is no proper basis for the stay of execution application and the other relief sought in the defendant's summons. They are also refused.

Disposition

54. For the foregoing reasons, we dismiss the defendant's summons.

55. We are further satisfied that the applications in the summons are totally without merit, and therefore order pursuant to Order 59 rule 2A(8) RHC that no party may request a reconsideration of our determination at an oral hearing.

56. Applying the normal rule of costs follow event, we make an order that the defendant pays the plaintiff the costs of this application.

57. The plaintiff has put in a statement of costs for summary assessment. Section E of it claims a lump sum as fees for two counsel who are said to have 36 and 4 years of experience, with no breakdown. We note that the defendant's statement of costs similarly does not give a breakdown of the fees of the two counsel engaged. We take this opportunity to point out that where more than one counsel is involved, the statement of costs must give a breakdown of each counsel's work and fees. Notwithstanding the reference in the statement of costs to two counsel, the written submission for the plaintiff was signed off by only one counsel. In any event, we do not consider this application justifies engaging two counsel. We therefore make a reduction in the counsel fee and summarily assess the plaintiff's costs in the amount of HK$84,660.

(Carlye Chu)
Justice of Appeal

(Jeremy Poon)
Justice of Appeal

Written submission by Mr Leo Wong, instructed by Y S Lau & Partners, for the Plaintiff

Written submission by Mr Alexander Wong and Mr Earl Deng, instructed by Tsang, Chan & Woo, for the Defendant

Chan Cheung Ming Jacky

and

Siu Sin Man

(Court of Appeal)

(Civil Appeal No 152 of 2014)

Lam V-P and Barma JA

13, 19 August 2014

Civil evidence — subpoena — leave for issue of subpoena — court's approach — approach in family proceedings — approach to late applications — case management considerations to be taken into account

Family law — leave for issue of subpoena — Family Court to adopt, with necessary modifications, approach similar to that in context of general civil litigation — case management considerations to be taken into account

[Rules of the District Court (Cap.336H, Sub.Leg.) O.1A r.4, O.1B, O.38 r.14(5)]

民事證據 — 傳召出庭令 — 發出傳召出庭令的許可 — 法院的做法 — 家事法律程序中的做法 — 有關逾期申請的做法 — 顧及案件管理方面的考慮

家庭法 — 發出傳召出庭令的許可 — 家事法庭在作出必要的變通後，採取近似一般民事訴訟所用的做法 — 顧及案件管理方面的考慮

[《區域法院規則》(第336H章，附屬法例) 第1A號命令第4條、1B號命令及38號命令第14(5)條]

At issue in a trial concerning the maintenance of a child under s.10(2) of the Guardianship of Minors Ordinance (Cap.13), was whether F, the father, had held a sum of $32 million (now transferred from his bank account to that of X, his mother) on trust for X. In April 2014, X was certified as unfit to testify in person (X's Certification). On 11 June 2014, one day before trial, F sought leave to issue a subpoena to call B, a bank officer who years earlier had been told about the trust arrangement, to give evidence on the same (the Application). The Deputy Judge dismissed F's application on paper. On 12 June 2014, F re-applied but was refused because *inter alia*: (a) since Civil Justice Reform (CJR), eleventh-hour applications would unlikely be considered except in very exceptional

circumstances; (b) B had not given a witness statement, and even if she could recall what she had been told, such evidence would not be *prima facie* cogent; and (c) F's experienced lawyers had ample time to seek directions on the evidence of a trust from the Court, but did not do so. F now appealed, explaining that only after X's Certification in April 2014 was B contacted. She agreed to testify, but only a few days before trial, indicated that the bank prohibited her from doing so and a subpoena would be necessary.

Held, allowing the appeal and granting leave to issue the subpoena, that:

(1) Subject to (2) and (3) below, the role of a judge or master in Chambers in hearing applications for authorisation of the issue of a writ of subpoena under O.38 r.14(5) of the Rules of the District Court (Cap.336H, Sub.Leg.) (RDC) was only to provide a preliminary filter to ensure such applications were not an abuse of process, and that they related to a cause or matter in which oral evidence was appropriate. He should not decide issues regarding the relevance of any evidence which might be given and its usefulness (*Li Wai Tat v Li Man York* [1998] 1 HKLRD 121 applied). (See paras.14–17.)

(2) Since CJR, the court in the exercise of the power to grant leave to issue a subpoena, at least for late applications, must also bear in mind its case management duty. This applied equally to family proceedings, notwithstanding the lack of rules, including a formal rule providing for a case management conference, in such proceedings. Judges in the Family Court could, if necessary, resort to the power and provisions in O.25 and Practice Direction 15.12 to fulfil their case management function under O.1A r.4 as buttressed by the powers under O.1B of the RDC. (See paras.21–24, 46.)

(3) The court was in broad agreement with the observations in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* on the practice regarding applications for leave to issue a subpoena in general civil litigation subject to two caveats. First, an opposing party might have only a limited interest in setting aside a subpoena so that the hearing did not expand beyond the trial of the issues pleaded and matters necessarily ancillary thereto. Second, concerning the dismissal of an application on the basis of delay alone, case management powers must be exercised on the facts of the particular case. The court should not follow a mechanical rule invariably refusing an application simply because of serious delay without good explanation, but conduct a balancing exercise. In a late application, the court would examine all relevant circumstances and the significance of the intended evidence was one

consideration. (*Li Wai Tat v Li Man York* [1998] 1 HKLRD 121 applied; *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2010] 2 HKC 356 considered). (See paras.25–28.)

(4) F's explanation for the delay in his application should have been placed before the Deputy Judge. In any event, it could not exonerate F. The question of a trust had been a live issue as early as when F was preparing his Form E, if not before, given his claim the $32 million was transferred from his account. X's health condition had not arisen "out of the blue" and so the possibility of her being unable to testify should have been considered even before X's certification in April 2014. F's solicitors should have alerted the Court and X that he might call another witness at trial and seek directions on B's evidence, instead of seeking leave for a subpoena to be issued on 11 June 2014. (See paras.30, 32, 36.)

(5) Notwithstanding, the overall justice of the case pointed to leave being granted for the subpoena to be issued. The Deputy Judge's refusal of leave was clearly wrong in the circumstances. He erred in effectively making the unexplained delay determinative of the outcome without considering other relevant factors. (See para.38, 43.)

(6) Further, although there was no witness statement from B, the nature of her intended evidence was set out in a letter from F's solicitors to the Deputy Judge's clerk which should suffice as a statement under O.38 r.2A(5) of the RDC. B's proposed evidence was relevant, as the relevant conversations occurred before any dispute arose between the parties. If B could testify as to the true ownership of the $32 million when there had been no reason for F or X to lie about it, such evidence could be regarded as *prima facie* cogent (*Li Wai Tat v Li Man York* [1998] 1 HKLRD 121 applied). (See paras.29, 39.)

(7) The Deputy Judge also failed to consider that, although the trial was fixed for one day, it could not be completed in that time. Hearing an extra witness should not take very long and the grant of leave would not disrupt or unduly prolong the trial. (See para.41.)

(8) (*Obiter*) Parties and their legal representatives owed a positive duty to assist the Family Court in properly carrying out of its case management function. It was high time that those involved in family proceedings take a real look at para.16 of Practice Direction 15.12. (See para.46.)

Appeal

This was an appeal by the applicant-father against the decision of Deputy Judge George Own on 12 June 2014 refusing leave to issue

a subpoena in guardianship proceedings. The facts are set out in the judgment.

Mr Jeremy Chan, instructed by Haldanes, for the applicant.
Mr Kevin Li, instructed by Stevenson Wong & Co and assigned by the Director of Legal Aid, for the respondent.

Legislation mentioned in the judgment
Guardianship of Minors Ordinance (Cap.13) s.10(2)
Rules of the District Court (Cap.336H, Sub.Leg.) O.1A, O.1A rr.1, 2, 2(2), 3, 4, O.1B, O.25, O.25 r.6, O.32 r.10, O.38 rr.2A(5), 14–18, 14(5), 17, O.62 r.5
Rules of the High Court (Cap.4A, Sub.Leg.) O.1A, O.1A rr.1, 2, 2(2), O.1B, O.38 r.2A(5)

Cases cited in the judgment
Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd [2010] 2 HKC 356
FBC Construction Co Ltd v Lee Ben [2014] 2 HKLRD 1054
L v L (unrep., HCMC 1/2003, [2005] HKEC 1851)
Li Wai Tat v Li Man York [1998] 1 HKLRD 121, [1997] 3 HKC 532
Waddington Ltd v Chan Chun Hoo Thomas (unrep., CACV 136/2013, [2013] HKEC 1185)
Wong Kar Gee Mimi v Severn Villa Ltd [2012] 1 HKLRD 887

Other materials mentioned in the judgment
Hong Kong Practice Direction, PD 15.12 (Matrimonial Proceedings and Family Proceedings), paras.8, 16.
Hong Kong Practice Direction, PD 5.2 (Case Management),
Phipson on Evidence (18th ed., 2013) para.8-21

Lam V-P (giving the reasons for judgment of the Court)

1. This is an appeal against the refusal of leave to issue a subpoena by Deputy Judge Own [the Judge] on 12 June 2014. The application for leave was made by the applicant in FCMP 67/2010. The proceedings are brought under the Guardianship of Minors Ordinance (Cap.13) [GMO] concerning the welfare of a child (who is 5½ years old) of the parties. The applicant is the father of the child whilst the respondent is her mother. The trial of the proceedings started on 12 June 2014 and it is still ongoing, having been adjourned part-heard. The main issue at the trial is the maintenance for the child under s.10(2) of the Ordinance.

2. As it is provided under s.10(2), the court may order the specified provisions for the maintenance of a child "as the court thinks reasonable having regard to the means of [the paying parent]".

In the present case, the respondent is seeking such provisions from the applicant. Thus, the court must have regard to the means of the applicant in determining what is reasonable.

3. One of the important issues regarding the means of the applicant is whether a sum of $32 million (once kept in his bank account, now transferred to his mother's bank account) had been held by him on trust for his mother. Due to her old age and infirmities, the mother was certified by a doctor as not being fit to testify in person. The applicant wishes to call a bank officer (who had been told about the trust arrangement before there was any dispute between the parties) to give evidence on the same in order to support his case of a trust.

4. Though the respondent does not positively challenge the case of a trust, she puts the applicant to strict proof as to its existence.

5. The mother of the applicant had made an affirmation about the trust arrangement. On 14 July 2014, the Judge granted leave to the applicant to file the affirmation and ordered that she need not attend the trial for cross-examination. As the Judge observed in his judgment of 14 July, notwithstanding the admission of the evidence of the mother the weight to be attached to it without any cross-examination would still be a matter for submissions at the trial.

6. Thus, it cannot be said at this stage that the mother's evidence is determinative on the trust issue.

7. Actually, at the time when the applicant applied for leave to issue the subpoena in question, there had not been any application before the Court for the filing of the mother's evidence. That application came later.

8. Though the trial had originally been fixed for one day only, it had taken up much more time. After hearing some evidence on 12 June, it was adjourned part-heard to 11 July and then to 27 and 28 August. It is expected that the cross-examination of the respondent would be completed by 27 August and the trial would then continue with the cross-examination of the applicant. We were told at the hearing that the parties have to attend a school interview with the child on 28 August and that date would have to be vacated. The Family Court is seeking dates in December 2014 or January 2015 to complete the trial.

9. The Judge was critical of the lateness of the application for leave to issue the subpoena (it was made on 11 June, one day before the trial started, and refused on paper by the Judge without stating any reason on the same date.)[1] According to the transcript of the hearing of 12 June, he gave four reasons for refusing leave:

[1] On 12 June, counsel for the respondent renewed the application before the Judge on an *inter partes* basis. Counsel for the applicant took a neutral stance. The Judge refused the application a second time.

(a) The importance of giving priority to children's matter (as compared with ancillary relief between divorced parties) and, since CJR, eleventh-hour applications would unlikely be considered unless in very exceptional circumstances;
(b) As the bank officer did not give a witness statement, there is no certainty that she could give evidence about what she was told many years ago. Even if she could give such evidence, it would only be evidence of what she had been told. The evidence is not *prima facie* cogent;
(c) There was no application for leave to file the mother's affirmation; and
(d) The applicant was represented by reputable and experienced lawyers who had ample time to seek directions from the Court on the evidence on trust in good time. But they had not done so.

10. The Judge also refused leave to appeal on 12 June.

11. The applicant applied to the Court of Appeal for leave to appeal. Leave was granted on 23 July 2014 with directions to facilitate the appeal to be heard before the trial resumed on 27 August 2014.

12. Before us, Mr Li (counsel for the respondent) again took a neutral stance though he referred us to some cases on the principles and considerations applicable to an application for leave to issue subpoena after Civil Justice Reform. He also referred to the absence of explanation by the respondent as to the lateness of the application and the applicable principle in an appeal against a case management decision as set out in *Wong Kar Gee Mimi v Severn Villa Ltd* [2012] 1 HKLRD 887 at [31].

13. Mr Chan focused his submissions on the Judge's exercise of discretion being vitiated by taking irrelevant consideration into account and not taking relevant consideration into account.

The relevant principles

14. The relevant rules for the issue of subpoena in the Family Court are O.38 rr.14 to 18 of the Rules of the District Court (Cap.336H, Sub.Leg.). The requirement for leave of the court stems from r.14(5) which provides as follows:

> Before a writ of subpoena is issued a praecipe for the issue of the writ must be filed in the Registry *together with a note from a judge or the master authorizing the issue of such writ* … (our emphasis)

15. Since the proceedings are held in Chambers, O.32 r.10 containing a similar requirement is also relevant.

16. These requirements were examined by the Court of Appeal in *Li Wai Tat v Li Man York* [1998] 1 HKLRD 121. In that case, Mortimer V-P identified at 123D–F the role of the judge or master in giving the requisite authorisation as follows:

> But it is only a filter process. He will ask himself such questions as: are the proceedings of such a nature as one would expect evidence to be called? Is this a cause or matter being heard in chambers in which oral evidence is appropriate? Is the application for a subpoena an abuse of process? Provided the answers to such questions are in favour of the applicant, he should give his note and grant leave. That filter process is one in which the judge should not and cannot take it upon himself to decide issues relating to the relevance of any evidence that may be given and its usefulness.

17. On the facts of the case, the first instance judge had gone beyond that and went into the merits of the evidence. That was held to be a wrong approach. At 121F, Mortimer V-P said:

> What he should have done was to approach the matter as I have indicated, considering his role as simply to provide a preliminary filter to ensure that these applications are not an abuse of process, and that they relate to a cause or matter in which oral evidence is appropriate.

18. It should also be noted that under O.38 r.17, a writ of subpoena must be served within 12 weeks after the date of its issue and not less than 4 days before the day on which attendance before the court is required. Thus, it is possible to issue and serve a writ of subpoena soon after a trial date has been fixed.

19. Since 1997, the role of the court in case management has assumed a greater prominence in our administration of civil justice. Even before CJR, in *L v L* (unrep., HCMC 1/2003, [2005] HKEC 1851) (20 April 2005), the court considered the application for leave to issue subpoena from a case management angle when such application was made after the evidence had been closed. In that case, the court conducted a balancing exercise before allowing the case to be reopened and granted leave for the issue of subpoena. Various factors were considered: the potential disruption to the trial, the prejudice that the other party may suffer, the explanation for the late application, the significance of the new evidence, the overall justice of the matter.

20. Under CJR, O.1A and 1B were added to our rules (both the Rules of the High Court (Cap.4A) as well as the Rules of the District Court). Order 1A r.2 provides that whenever the court exercises its power under the rules (and that would include the power to grant leave to issue a subpoena), it must seek to give effect

to the underlying objectives set out in r.1. Order 1A r.2(2) is also important:

> In giving effect to the underlying objectives of these Rules, the Court shall always recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

21. Since the introduction of CJR, the power to grant leave for the issue of subpoena in a case management context has been considered in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2010] 2 HKC 356 (Jeremy Poon J); upheld on appeal in *FBC Construction Co Ltd v Lee Ben* [2014] 2 HKLRD 1054 at [223] and *Waddington Ltd v Chan Chun Hoo Thomas* (unrep., CACV 136/2013, [2013] HKEC 1185) (19 July 2013). Those were cases decided in the context of ordinary civil trials and the courts emphasised that the proper stage to deal with questions relating to the issue of subpoena for witnesses is at the case management conference.

22. By now, it should be recognised that in the exercise of the power to grant leave to issue a subpoena, at least in respect of late applications, in addition to the matters Mortimer V-P alluded to in *Li Wai Tat v Li Man York* [1998] 1 HKLRD 121, the court must also bear in mind its case management duty.

23. We understand that in family proceedings, including those brought under the GMO, there is as yet no formal rule providing for the holding of case management conference. There is also no rule in such proceedings for the filing of a statement of nature of evidence intended to be adduced (for a witness who is not willing to give a witness statement and may have to be subpoenaed to give evidence) as provided under O.38 r.2A(5) of the Rules of the High Court. But the absence of such rules does not mean that judges in the Family Court do not need to be concerned with case management. Orders 1A and 1B are equally applicable to family proceedings, see Practice Direction 15.12 para.8. Further, para.16 of PD 15.12 provides:

> In order to provide better case management to Matrimonial Proceedings and Family Proceedings, the Court may, where applicable, apply some of the concepts and provisions contained in Order 25 of the RHC / RDC and any Practice Direction issued in relation to Case Management in Matrimonial Proceedings / Family Proceedings, with necessary modifications.

24. Thus, if necessary, judges in the Family Court can resort to the powers and provisions in O.25 and PD 5.2 to fulfil their case management function prescribed by O.1A r.4 as buttressed by the powers set out in O.1B.

25. Subject to two caveats, we are in broad agreement with the observations of Poon J in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2010] 2 HKC 356, [2] to [6] on the practice regarding applications for leave to issue subpoena in the context of general civil litigation. As we said above, judges and practitioners in the Family Court should adopt a similar approach, with necessary modifications having regard to the procedures in the family proceedings.

26. The first caveat we have is about the scope in which the other party to the litigation may apply for the setting aside of a subpoena. We do not intend to delve into the topic at length in this judgment (as it is not necessary to do so in light of the neutral stance of Mr Li). We would only invite attention to the following comments of *Phipson on Evidence* (18th ed., 2010) para.8-21 and [4] of the judgment of Poon J should be read in that light:

> It is not necessarily the case that the other party to the litigation has a right to apply to set aside a witness summons, although the authorities indicate that in specific instances he may object. It has been recognised that an opposing party in litigation may have a limited interest in setting aside a witness summons or subpoena, namely an interest that the hearing should not be allowed to expand beyond the trial of the issues raised by the pleadings and matters necessarily ancillary thereto. If a general right were recognised in an opposing party to raise objections to the witness summons, this may encourage ancillary litigation. An opposing party may object to the production and admissibility of the documents when the witness summons is complied with in court.

27. The second caveat we have is about the comment of Poon J at [6] of his judgment on the possibility of an application being dismissed on the basis of delay alone. Whilst we would not rule out this possibility entirely, one must always bear in mind O.1A r.2(2). As with the exercise of other kinds of discretion, the exercise of case management power must be with reference to the facts and circumstances of the case before the court. There is no place for the application of a mechanical rule that the court will invariably refuse an application simply because a party is guilty of serious delay without any good explanation. The court must conduct an overall balancing exercise.

28. Further, we need to emphasise this: case management by the court does not mean that the judge will dictate the evidence to be adduced. Even in the context of family proceedings, our system is still primarily operated on an adversarial basis. In general, subject to the questions of admissibility and relevance, each party in the proceedings is at liberty to call whatever evidence he or she considers necessary provided that procedural requirements are

complied with. Thus, in respect of an application for leave to issue a subpoena made in good time, the approach of Mortimer V-P should prevail. However, in respect of a late application, the court will have to examine all the relevant circumstances and the significance of the intended evidence to be adduced is one factor to be taken into account.

Application to the present case

29. In the present case, though there is no witness statement from the bank officer, the gist of the intended evidence was set out in a letter dated 11 June 2014 from the solicitors for the applicant to the clerk of the Judge. That should be sufficient to serve the same purpose as a statement under O.38 r.2A(5). We are satisfied that the proposed evidence from the bank officer is relevant. As the Judge recognised in his judgment of 14 July 2014, the weight to be attached to the affirmation of the mother is subject to submissions to be made at the trial. At this stage, even though the intended evidence of the bank officer is based on what she had been told, we do not think one can say it adds nothing to the evidence of the applicant and his mother when the relevant conversations took place prior to any disputes having arisen between the parties. We accept that in the present instance the test laid down in *Li Wai Tat v Li Man York* [1998] 1 HKLRD 121 is satisfied.

30. But that is not the end of the matter. Beyond dispute, the application by the applicant was made at a very late stage and Mr Chan has not put before us any explanation which could exonerate the applicant for the delay. The trial date was fixed in early 2014 and the application was only made on 11 June 2014, one day before the trial commenced. Before us, in addition to what had been set out at para.27 of the Affirmation of the applicant filed in HCMP 1572/2014, Mr Chan supplemented by telling us that initially it was expected that the mother of the applicant would give evidence on the trust. It was only after the doctor certified on 26 April that she would not be fit to give evidence that the bank officer was contacted. At the beginning, the bank officer was quite cooperative and it was expected that she would give evidence voluntarily. It was only a couple of days before the trial that she indicated that the policy of the bank prohibits that and a subpoena would be necessary.

31. We note that this account of developments leading to the late application for subpoena was not placed before the Judge. Though we appreciated that in a usual application for leave to issue a subpoena such explanation is not necessary, we think the situation is quite different in respect of a late application. As explained above, case management considerations come into play and a party making a late application should furnish the court with the relevant

information accounting for the lateness in the application. This is particularly so when the Judge had refused the application on paper on 11 June and the applicant asked the Judge to reconsider the matter on 12 June.

32. Further, even taking account of the explanation offered by Mr Chan, we are of the view that it could not exonerate the applicant in respect of the delay. The issue of trust had been a live issue since the filing of Form E. Actually, it could be said that the applicant should have been aware of the issue even before that since it was his own case that the $32 million had been transferred out of his account. Thus, he should have considered with his lawyers the evidence supporting the case of the trust soon after the respondent issued her summons, at any rate when he prepared his Form E. The health condition of his mother was not something arising out of the blue and the possibility of her not being able to testify in court should be something on the radar even before the certificate of the doctor in April 2014.

33. On Mr Chan's own submission, the applicant's team envisaged the calling of the bank officer in late April 2014. Yet no step has been taken to notify the Court or the other side of such possibility until the question of subpoena was issued on 11 June.

34. As we have observed in the course of the hearing, proper case management requires cooperation from the parties and their lawyers. Thus, O.1A r.3 requires them to assist the court in the furtherance of the underlying objectives in O.1A r.1. Any failure to observe such a duty may be taken into account in respect of costs, see O.62 r.5.

35. The court depends on the parties providing it with timely and relevant information in order to exercise its case management power in a proper manner. Thus, even though the court had not given any directions for the filing of affirmations or witness statements of third party witnesses in November 2013, the duty to assist under O.1A r.3 requires a party and his legal representatives to supply the court with all the relevant information. As explained above, notwithstanding the lack of provision for case management conference in family proceedings, the spirit with regard to the duty to give relevant information under O.25 r.6 is equally applicable.

36. On the facts of the present case, we are of the view that the applicant's solicitors should have taken steps to alert the Court and the respondent that there is a possibility of another witness being called at the trial and seek directions about the evidence of the bank officer. Leaving that to a late stage and doing so by way of seeking leave for a subpoena to be issued on 11 June is not enough.

37. This Court has repeatedly stated that we will not interfere with case management decision unless the lower court has gone

clearly wrong and made orders which will clearly involve an injustice or an inability for the trial court to carry out its task. In these circumstances, is there any ground for this Court to interfere with the Judge's refusal of leave by way of his exercise of case management power?

38. With respect to the Judge, we are of the view that his refusal of leave is clearly wrong in the circumstances of this case. Of the four reasons he gave, the first and fourth reasons appeared to be the principal reasons and they boil down to the question of delay. Whilst he was entitled to be critical of the delay on the part of the applicant in making this application, he was incorrect in effectively making the unexplained delay as determinative of the outcome without considering other relevant factors. With respect, it is not helpful to start with a premise (as the Judge did) that "eleventh hour application is unlikely to be considered by the court unless in very exceptional circumstances". Such a premise has a tendency of clouding the court's judgment in respect of other relevant considerations.

39. The Judge was of the view that the evidence of the bank officer was not *prima facie* cogent. Since the bank officer had declined to give a witness statement, we agree with the Judge that at this stage it is uncertain whether the officer could recall what she had been told years ago. However, this is inherent in respect of the evidence of many witnesses who refuse to give full cooperation to the party intending to call him or her. The court should not pre-empt an application to have such witnesses called on the basis of such uncertainty. Putting that aside, taking what is set out in the letter of 11 June 2014 at face value (as the Court must at this stage), if the bank officer could testify about what she was told about the true ownership of the fund in question when there was no reason for the applicant or his mother to lie about it, such evidence could be regarded as *prima facie* cogent.

40. The omission in terms of the filing of the mother's affirmation was due to the disagreement between the parties on the condition under which the affirmation could be admissible. The Judge was aware of such disagreement. In such circumstances, it should not have been relevant to his decision. The disagreement was subsequently resolved by the Judge in his judgment of 14 July 2014 in favour of the applicant.

41. More significantly, the Judge failed to take account of the fact that in any event the trial could not have finished on 12 June. Though the trial had only been fixed for one day, counsel seemed to be in agreement that it could not be completed in one day (though counsel for the respondent had expressed a hope that evidence could be completed within one day). Based on the indication given in the letter of 11 June 2014 as to the scope of the

intended evidence, it should not take very long to hear this extra witness. Thus, the grant of leave to issue the subpoena would not have the effect of disrupting the trial or unduly prolong the same. As it turned out, the trial is still adjourned part-heard and it is due to be resumed on 27 August. It seems unlikely that the trial would be completed in August.

42. Not surprisingly, Mr Li did not suggest that the issue of the subpoena would cause any prejudice to his client.

43. In our judgment, the Judge's exercise of discretion was flawed and this Court should intervene. Assessing the position afresh, we are of the view that in this instance the overall justice of the matter points to leave being granted for the subpoena to be issued.

44. For these reasons, we allowed the appeal, set aside the Judge's order and granted leave for the subpoena to be issued.

45. As for costs, we take the view that but for the delay on the part of the applicant in making the application, the court would have readily granted leave. In the circumstances, substantial costs have been incurred owing to such delay. We shall therefore order the applicant to bear the costs of the respondent in the Court below in respect of the renewed application for leave and the application for leave to appeal, such costs are to be taxed if not agreed. In respect of the costs of HCMP 1572/2014 and the costs of the appeal, we shall order each party to pay his or her own costs. The respondent's own costs are to be taxed according to Legal Aid Regulations.

46. Before we end this judgment, we wish to express some concerns about case management in family proceedings. We understand that a review of the family procedure rules is ongoing. We also understand that there is a heavy caseload in the Family Court. However, even before the implementation of any further changes as a result of the review, as we have tried to explain above, under the existing framework active case management is equally applicable to family proceedings as in other civil proceedings. And we must stress again, at the risk of repetition, parties and their legal representatives owe a positive duty to assist the court in the proper carrying out of its case management function. It is high time that those involved in family proceedings should take a real look at para.16 of PD 15.12.

47. It is unsatisfactory that open proposals setting out the parties' respective positions were only exchanged a few days before trial. It is also unsatisfactory that the trial of this matter has to take place in a piecemeal manner, with the evidence being heard on four different dates with substantial time gaps in between. With the benefit of hindsight, it would have been much better if the parties had put their heads together to come up with a realistic timetable for trial before fixing dates for trial. Mr Chan told us that those

representing the applicant had tried to reschedule the trial (fixed for 1 day pursuant to a direction given even before the Form Es had been filed) to a date with 3 days reserved. That request had been rejected by the respondent and the Court. But one can hardly blame the Judge. From the correspondence placed before us, apart from stating that counsel intended to cross-examine the respondent, limited information was presented to the Court to explain why 3 days are necessary. The Judge was not even told about what issues were in dispute and how much time would be required for the evidence of each witness. It is hoped that lessons are being learnt and a more effective case management regime (involving active cooperation from the parties and their legal representatives) will be in place to deal with all family proceedings.

Reported by Shin Su Wen

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

NOTE: Please ignore ALL of the facts and information contained in the Instructions for the Interim Application for the purposes of the Mini-Trial.

The following background facts are undisputed:

1. The Plaintiff Mr Adam Smith ("**Mr Smith**") signed up for a tandem skydiving trip (the "**Course**") with the 2nd Defendant Adventure World Limited ("**AWL**"). Tandem skydiving is when the student skydiver skydives together with the instructor connected to him.

2. The Course consisted of 2 parts. According to AWL's internal practice manual:

   (1) The first part was a tutorial held indoors where the necessary techniques would be verbally explained to the students and some practical exercises would be performed.

   (2) The second part was the skydiving jump, where the students would embark on the tandem skydive with their instructors.

3. On 10 January 2015, Mr Smith attended the tutorial (the "**Tutorial**"). He was the only student in attendance. The Tutorial was conducted by the 1st Defendant Mr George Wong.

4. On 12 January 2015, Mr Smith went to AWL's centre for the jump (the "**Jump**"). He went with his friend Ms Alexandra Chow ("**Ms Chow**"), who had earlier attended another tutorial herself separately from Mr Smith, which had also been also conducted by Mr Wong.

5. During the Jump, which Mr Smith conducted with Mr Wong as the accompanying instructor, Mr Smith broke his legs when they landed.

In his Statement of Claim, Mr Smith claims that:

1. During both the Tutorial and the Jump, Mr Wong had negligently failed to inform Mr Smith that, during the Jump, Mr Smith should keep his legs up during landing.

2. Due to Mr Wong's negligence, Mr Smith's legs hit the ground first (instead of Mr Wong's). Mr Smith was not trained how to land, so he broke his legs.

3. AWL was vicariously liable for Mr Wong's negligence.

In Mr Wong's and AWL's Defences, which are materially similar, they say that:

1. Mr Wong told Mr Smith to keep his legs up when landing, during both the Tutorial and the Jump.

2. AWL had conducted extensive instructor training to ensure that their instructors told their students to keep their legs up when landing.

For the purpose of the exercise, please assume that:

1. The Defendants have disclosed the following documents:

    (1) A copy of the internal practice manual referred to in paragraph 2 of the background facts above. In addition, the internal practice manual provides that:

        (a) During the tutorial, the instructors must inform their students that they should keep their legs up before landing so that the students do not injure their legs.

        (b) During the jump, the instructors must remind their students before landing that they should keep their legs up.

    (2) A copy of presentation slides for the tutorial (in Chinese only) which, relevantly, has the following remark: "*Note: You must keep your legs up before landing, otherwise you may injure your legs.*"

(3) A copy of a pamphlet for students (in Chinese only) (the "**Chinese Pamphlet**") which, relevantly, has the following contents:

(a) "*Note: You must keep your legs up before landing, otherwise you may injure your legs.*"

(b) A place for the students to sign the pamphlet, stating that they understand the contents of the pamphlet.

(4) A copy of a pamphlet for students with the same exact contents of the Chinese Pamphlet, save in English.

(5) A copy of:

(a) The Chinese Pamphlet signed by Mr Smith; and

(b) The Chinese Pamphlet signed by Ms Chow.

2. The Plaintiff has not disclosed any materially relevant documents.

3. Mr Smith's does not allege that the Defendants are liable because they failed to train him how to land.

4. AWL accepts that they would be vicariously liable for Mr Wong's negligence, if any.

5. The trial is on liability only.

6. The agreed factual issue is whether, during the Tutorial or the Jump, Mr Wong informed Mr Smith to keep his legs up when landing.

Witnesses

The witnesses for the Plaintiff and the Defendants are described below. The Defendants are conducting their case together.

You will be informed which two witnesses (one witness for the plaintiff and one witness for the defendants) will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Mr Adam Smith.

2. Ms Alexandra Chow.

You can assume:

(i) the witnesses will give evidence at trial in the order listed above; and

(ii) the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendants' witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defendants:

1. Mr George Wong.

2. Ms Edith Siu.

You can assume:

(i) the witnesses will give evidence at trial in the order listed above; and

(ii) the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

DURING the Mini-Trial

You will be required to:

- Make an opening speech (max 5 minutes).
- Examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that their statement does not stand as evidence in chief.
- Cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief.
- Deal with any interventions made by the advocate representing the opposing party.
- Make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party.
- Deal with any Judicial interventions/questions as and when they arise.