

HCA 1993/2018
[2022] HKCFI 3821

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NO. 1993 OF 2018

BETWEEN

LEUNG CHUN-YING (梁振英) Plaintiff

and

CHUNG KIM-WAH (鍾劍華) 1st Defendant

BEST PENCIL (HONG KONG) LIMITED,
operating as STAND NEWS 立場新聞 2nd Defendant

Before: Hon Au-Yeung J in Chambers (On paper disposal)

Closing Date for Written Submissions: 11 October 2022

Date of Decision: 23 December 2022

DECISION

A. INTRODUCTION

1. The Plaintiff sues the Defendants in defamation. The Defendants raise various defences including justification, honest comment,

qualified privilege and/or public interest privilege and no lowering of the Plaintiff's reputation.

2. On 8 November 2019, by consent of all the parties, Registrar Kwang ordered that the action be tried with a jury ("**the Consent Order**").

3. On 25 January 2021, the Plaintiff applied to set the case down for trial and filed a notification of setting down. The trial has been fixed to commence on 7 August 2023 with 15 days reserved.

4. By virtue of section 15(1) of the Jury Ordinance, Cap 3, the party applying for a trial by jury order should pay a deposit into Court to cover expenses of the jury ("**the deposit**") within 7 days after the action is set down. Those 7 days expired on 1 February 2021 without any party paying the deposit.

5. This is D1's application by summons dated 7 July 2022 for extension of time for him to pay the jury deposit into Court. There has been a lapse of about 17 months since expiry of the time for payment. D1's summons is grounded on Order 3, rule 5 of the Rules of the High Court ("**RHC**"). His grounds in support are that:

- (1) The failure to pay the deposit was due to the inadvertence of D1's solicitor, Baldwin Ho.
- (2) The Court should not set aside the Consent Order save for exceptional circumstances.
- (3) There is no prejudice to any party to extend time for payment.

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6. The Plaintiff opposes the summons on the grounds that:
- (1) The summons should not have been taken out under Order 3, rule 5 RHC, which is inapplicable.
 - (2) When D1 failed to pay the deposit, he has already lost his right to jury trial. The action is reverted to the position of a trial without a jury.
 - (3) If D1 wishes to seek a jury trial, he should make another application to invite the Court to exercise the discretion afresh.
 - (4) Despite the Consent Order, the action is no longer suitable for trial by jury in the light of its features.
 - (5) There have been changes of circumstances since the making of the Consent Order 3 years ago because:
 - (a) D2 is no longer legally represented.
 - (b) D1 is not in Hong Kong; if he is absent at the trial, the jury trial will be a waste of resources.
 - (c) The Hong Kong National Security Law (“NSL”) has been introduced. The article published by D1 criticized the conduct of the Plaintiff who is the Vice-Chairman of the National Committee of the Chinese People’s Political Consultative Conference. In the course of the trial, any criticism of the conduct of the Plaintiff may be in breach of the NSL. The trial judge may have to intervene to avoid any possible criminal acts that contravene NSL and the jury may interpret the judge’s intervention as evidence of bias.

7. I shall classify all these grounds into 3 issues:

- (1) Whether inadvertence of solicitor is a sufficient explanation;
- (2) Whether there is reason to set aside the Consent Order; and
- (3) Whether there should be fresh exercise of discretion to order a jury trial.

B. LEGAL PRINCIPLES

8. Section 15 of the Jury Ordinance provides as follows:

“(1) Where the court or a judge orders that a cause shall be heard before a jury, the party applying for such order shall, within 7 days after the cause is set down in the general hearing list or within such further period as the court or judge may allow, deposit with the Registrar a sum sufficient to cover the expenses of the jury.

(2) Notwithstanding anything contained in the Rules of the High Court, if such deposit be not made within the time prescribed in subsection (1) the cause shall be heard by the court without a jury.”

9. On a true interpretation of section 15(1),

(1) If an order for a jury trial is made, the party applying for the order has either 7 days after the cause is set down, or a further period as the court or judge may allow, to pay the jury deposit.

(2) If the jury deposit is not made within the above timeframe, the trial *shall* be heard without a jury, by virtue of the mandatory provision of section 15(2). The qualified right for a trial with jury under section 33A(1) of the High Court Ordinance, Cap 4, is lost once the right has not been exercised in time:

International Social Service (Hong Kong Branch) v Vision First Ltd [2017] 2 HLRD 310, §16.

10. When a party’s right to trial with a jury is lost,

(1) An application for a jury trial becomes a matter for the Court’s discretion: *ISS v Vision First Ltd*, §17.

(2) Any application for extension of time to pay the deposit should be sought under section 15(1) of the Jury Ordinance and the court in the exercise of its discretion may allow a further period for payment.

11. D1 relies on Order 3, rule 5, RHC for extension of time. That rule provides as follows:

“(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.”

12. The reliance on Order 3, rule 5, is wrong, as section 15(2) of the Jury Ordinance expressly provides “notwithstanding anything contained in the RHC”. The rule cited cannot override a provision in the Ordinance.

13. Moreover, Order 3, rule 5 only applies to a period within which a person is required or authorized by “these rules, or by any judgment, order or direction”, to do any act in any proceedings. It does not apply to the present case where it is a statutory provision which requires

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B the payment of the deposit. See *Francis Ngo v Commissioner of Inland*
C *Revenue* [2018] HKCFI 2516, §§11-12, L Chan J.

D C. *WHETHER INADVERTENCE OF SOLICITOR IS A SUFFICIENT*
E *EXPLANATION*

F 14. D1's explanation for the failure to pay the deposit was the
G admitted inadvertence of Mr Baldwin Ho, which had nothing to do with
H D1 personally. There was an unusually long lapse of time between the
I Consent Order and the actual setting down of the action on 25 January 2021
J (more than 14 months). Shortly after the setting down, the handling partner
K of D1's solicitors, Mr Albert Ho, was involved as a defendant in 2 criminal
L cases. The trial of one case was heard between 16 February and 1 March
M 2021 and he was given a suspended sentence on 16 April 2021. In the other
N criminal case, he pleaded guilty and was sentenced to 18 months'
O imprisonment on 28 May 2021. He has remained in custody since then.
P D1 took out the present summons upon review of the working files and
Q discovered of the default.

R 15. With respect, I do not find that to be a satisfactory explanation.
S Mr Baldwin Ho has care and conduct of D1's action. There is no indication
T that Mr Baldwin Ho was involved in Mr Albert Ho's trials. As it was
U Mr Baldwin Ho's inadvertence, references to Mr Albert Ho are irrelevant.
V The delay of another 14 months since Mr Albert Ho's imprisonment before
the summons was issued has not been explained. In any case, a solicitor
has a duty to comply with timetables. His inadvertence is not sufficient, in
itself, to persuade the Court to extend time to pay or to grant a fresh order
for trial by jury.

D. ANY REASON TO SET ASIDE THE CONSENT ORDER

16. D1 identifies the Plaintiff's opposition as an attempt to set aside the Consent Order. Unconscionable conduct on the part of the party seeking to enforce the Consent Order must be shown, such as unfair advantage taken of the other party, leading him to a manifestly disadvantageous transaction, before the Court will set it aside: *Tsang Iu Hung v Tsang Tak Wah* [1993] 2 HKC 471, 474H, Godfrey J. D1 contends that there are no such exceptional circumstances.

17. With respect, that is an erroneous approach. It was by operation of law and not by a party's revocation of consent that the right to jury trial was lost upon failure to pay the deposit. To say that once there had been consent from the other party to a jury trial, D1 could take his time to pay the deposit and obtain a time extension even on the flimsiest excuse would render the section 15 statutory scheme nugatory.

18. The Plaintiff refers to Registrar Kwang's query to show that the Consent Order was subject to potential revocation, including by the trial judge, should the matter be regarded as not fit for trial by jury.

19. I do not agree with the Plaintiff's view. The Court is not bound to order a jury trial despite all parties' consent. What Registrar Kwang did, properly in my view, was to raise requisitions on various matters which may cast doubt on the propriety of a jury trial and, having satisfied that it was fit to do so, grant the Consent Order.

20. I do not regard this issue as a correct issue.

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B *E. FRESH EXERCISE OF DISCRETION TO ORDER JURY TRIAL* B

C *E1. Legal principles* C

D 21. Although D1's summons is wrongly premised as an D
E application for extension of time, there is no dispute that the Court has E
F power to order a jury trial afresh: *Thornton v Telegraph Media Group Ltd* F
G [2011] EMLR 29, §16. G

H 22. The starting point is section 33A(1) of the High Court H
I Ordinance, Cap 4, which provides that where on the application of any I
J party to an action, the Court is satisfied that there is in issue a claim of J
K slander, the action *shall be* tried with a jury, unless the Court is of the K
L opinion that the trial requires any prolonged examination of documents L

M 23. However, the right to a jury trial is not absolute and the matter M
N falls within the Court's discretion. Factors relevant to the Court's exercise N
O of discretion have been recently set out in the case of *Ho Kwan Yiu v Kwok* O
P *Wing Hang Dennis* [2022] 2 HKLRD 137, at §§3-10 and summarized by P
Q Ms Lau in her written submission: Q

R (1) The modern trend is against having a jury in defamation cases, R
S especially since introduction of the Civil Justice Reform. S

T (2) Factors militating against jury trials include: T

U (a) The efficient administration of justice, including U
V avoiding the prolonged examination of documents, V
inconvenience (which includes physical bulk of trial
documents, the need for details and minute examination

of documents, cross-references to different documents, examination in chief has to be verbal), additional length and costs of jury trial, and trials involving areas of law which have recently been changed or have possible room for development or change, such as the qualified privilege defence and defence of fair (or honest) comment;

(b) The ability of a single judge to ask questions as and when needed and to read documents before trial and after trial hours (and the jury's inability to do so);

(c) The risk of excessive jury awards constituting an interference with freedom of speech; and

(d) The availability of a reasoned judgment from a single judge.

(3) Factors favouring jury trials include prominent figures in public life, questions of national interest, actions involving issues of credibility and a party's honour and integrity, and the wish of one or more parties to have a jury trial. However, these factors are now given lesser weight.

E2. Consent of the parties

24. Consent of the parties is but one factor to take into account when an application is subsequently made by one party to vary the mode of trial to trial by a single judge. Consent of the parties is a weighty factor in this case. There is public interest in this case to justify a jury trial, especially having regard to the political position of the Plaintiff.

E3. Lack of Prejudice

25. There will be no prejudice caused to any party if the Court grants the application in the sense that the milestone date (being a trial) will not be affected. With full knowledge that there would be a trial by jury, the Plaintiff and D2 would not have prepared the action in any different way than if the action was tried by a judge alone.

E4. Features making jury trial unsuitable

26. Ms Lau submits that there are factors pointing against a jury trial:

- (1) Prolonged examination of documents: parties have listed around 261 documents in their respective lists of documents and supplemental lists of documents.
- (2) It is beneficial to have a reasoned judgment.
- (3) The defense of qualified privilege and public interest privilege are particularly unsuitable for jury trial due to a confused division of functions of judge and jury: *Ho Kwan Yiu*, §§7-8; *Pui Kwan Kay v Ming Pao Holdings Ltd* [2016] 2 HKC 518, §§89-93, including difficulties as to the exact questions put to the jury and lack of a reasoned verdict from the jury when such reasoning lay at the heart of the running of the defence. The balancing operation inherent in the defence is better carried out by a reasoned judgment than by a jury.
- (4) There are complexities inherent in the mixed questions of law and fact concerning the issue of malice. Again, there may be

confusion between the role of a judge and a jury:
Jonathan Lee v Paul Chan Mo Po [2018] 21 HKCFAR 94,
§§37-40, 44.

27. With respect, the defences of D1 and D2 have never been amended. The factors highlighted by Ms Lau are those that the parties should and would have taken into account when they first consented to have the matter tried by jury. Subject to section E5 below, those factors are not sufficient in themselves to deny a jury trial.

E5. D2 no longer legally represented

28. D2 used to be represented by senior counsel since the defence was first filed. However, D2's solicitors have ceased to act since 1 June 2022. Till now, D2 has not had a firm of solicitors or (with leave of a Master) a director to represent it. I regard this as a significant change of circumstances.

29. A jury trial with counsel experienced in defamation cases is of great assistance to the Court and the jury. One can understand why the parties considered it fit to have a jury trial back in November 2019.

30. However, even though the pleaded issues remain the same, it is not clear how familiar D2 is with the procedural and substantive law. Paragraph 26(3) and (4) above may pose difficulties for D2 in conducting cross-examination, addressing the jury or arguing the case. Experience shows that giving necessary guidance to a litigant in person by the Court during a trial is unavoidable and may give rise to challenges for conduct of the trial in a defamation case with multi-issues of fact and law.

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31. D1 contends that there is nothing to prevent D2 from instructing legal representatives to represent it at the trial. However, that is speculative in my view. The Court decides the summons on the present state of affairs.

32. I find D2's lack of legal representation to be sufficient to persuade me not to order a jury trial.

E6. D1's potential absence at the trial

33. D1 has made public his departure from Hong Kong and his intention to reside in another country. He has not, in his affirmation, made a commitment of returning to Hong Kong for trial. If he does not turn up, there may not be a competing version of facts to be placed before the jury and that is another reason not to order a jury trial. Nevertheless, I shall not, at this stage, rely on this reason. After all, the Court has not, before this Decision, required D1 to commit himself. The lack of legal representation by D2 is sufficient to dismiss the summons.

E7. NSL now in force

34. The Plaintiff also makes a point about NSL being introduced to Hong Kong since late June 2020. It is said that the Plaintiff is one of the national leaders of China by virtue of his position as Vice Chairman of the National Committee of the Chinese People's Political Consultative Conference. The possible allegations and questions from the Defendants implicating the Plaintiff may amount to criminal act and breach of the NSL.

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B If the trial judge has to intervene during the trial to avoid possible criminal
C acts, the jurors could construe the judge's intervention as evidence of bias.

D 35. With respect, the logic is hard to follow. The alleged
E defamation occurred in 2018, 2 years before NSL came into force. I do not
F see how NSL would have impact on any part of the case. Any
G cross-examination not related to the issues will not be allowed. A party
H will also be warned against incriminating himself, if necessary. A trial
I judge's intervention is always based on legal principles and it cannot be
J assumed that jurors, properly directed, will not take a proper view of the
K judge's intervention.

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M *F. CONCLUSION*

N 36. Inadvertence of D1's solicitor in the failure to pay the deposit
O is not a sufficient explanation and the delay is excessive. Setting aside the
P Consent Order is not a correct issue. There is no good reason for the Court
Q to exercise its discretion afresh to order a jury trial since D2 no longer has
R legal representation. I therefore dismiss D1's summons.

S 37. On a *nisi* basis, D1 shall pay costs to the Plaintiff. The
T Plaintiff shall lodge and serve a costs statement by 6 January 2022. D1
U may lodge and serve his grounds in opposition by 20 January 2022. The
V Court shall dispose of the issue of costs on paper without the need for
attendance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

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Written submission by Ms Queenie Lau, instructed by Sit, Fung, Kwong & Shum, for the Plaintiff

Written submission by Mr Erik Shum and Ms Christy Wong, instructed by Ho, Tse, Wai & Partners, for the 1st Defendant

No written submission was lodged by the 2nd Defendant

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