DCPI 110/2020

[2021] HKDC 463

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 110 OF 2020

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BETWEEN

CHU GREGORY (朱栩嶠) Plaintiff

and

YICK NGAI LOGISTICS (HK) Defendant

COMPANY LIMITED

億毅物流(香港)有限公司

and

RIVER TRADE TERMINAL CO. LTD. 1st Intended Party

BENTAT LOGISTICS 2nd Intended Party

(SHIPPING) LIMITED

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Before: Master Matthew Leung in Chambers (Open to Public)

Date of Hearing: 14 April 2021

Date of Decision: 30 April 2021

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| DECISION |

1. This is the Plaintiff’s application for leave to join River Trade Terminal Co Ltd (“**River Trade**”) and Bentat Logistics (Shipping) Ltd (“**Bentat**”) as the 2nd and the 3rd Defendants respectively. The Plaintiff argues that the costs of and occasioned by the application should be paid by the Defendant.
2. The Defendant raises no objection to the joinder application but argues that the costs of the application should be borne by the Plaintiff, not the Defendant.
3. River Trade opposes the application on the grounds that, first, River Trade had properly discharged its duty to provide a reasonably safe environment, and therefore, there should be no cause of action against River Trade, and secondly, the Plaintiff’s claim is time-barred.
4. Bentat did not file any affirmation in opposition, nor did they appear at the substantive hearing. Having considered the affirmation of service, I was satisfied that notice of the substantive hearing and the relevant documents were served on Bentat, and I proceeded with the hearing in the absence of Bentat.

**Progress of the proceedings**

1. The Plaintiff claims that he was employed by the Defendant as a container truck driver since 1 March 2017 and was instructed to work at the designated parking area of the Defendant at Area 2 (“**the Area**”) of the River Trade Terminal (“**the Terminal**”). The Plaintiff believed that the Area was exclusively used by the Defendant.
2. On 24 March 2017, the Plaintiff was instructed to clean the interior of a container trunk parked at the Area after goods were unloaded. When the Plaintiff stepped down from the Container and was still in the Area, he was tripped by some rubbish left on the ground and lost balance (“**the Accident**”).
3. The Plaintiff’s solicitors issued a letter before action dated 12 March 2019 asking the Defendant, *inter alia*, that if the Defendant would contend that somebody else was at fault, they had to reply with particulars of the parties and the reason why such party was at fault.[[1]](#footnote-1)
4. The Defendant was sued as the sole defendant in the Writ of Summons issued by the Plaintiff on 13 January 2020. In paragraph 1(b) of the Statement of Claim filed on 13 January 2020, the Defendant was sued as the employer of the Plaintiff and the occupier of the Area, and the Defendant was alleged to have failed to provide a reasonably safe place of work.
5. In the Defence filed on 27 March 2020, the Defendant denied that it was the occupier of the Area, and claimed that they were a customer of River Trade which provided to the Defendant area in the River Trade Terminal to store containers and cargos.
6. By a letter dated 24 June 2020, the Defendant’s Solicitors attached a copy of the draft Amended Defence in which the Defendant pleaded that the Area was a common area and Bentat was a contractor engaged by River Trade to manage the Area.
7. For the purpose of this application, the Defendant filed an Affirmation of Cheng Siu Lun on 10 September 2020, saying, *inter alia*, that the Defendant is a logistic company and a customer of River Trade. Usually, River Trade would allocate Zone 2 and Zone 3 of the Terminal to the Defendant for storage of cargoes and containers. The Plaintiff’s duty was to transport containers from the Terminal to various destinations. At the hearing, all parties agreed that Zone 2 and the Area referred to the same place in the Terminal.

**The law**

1. Section 27(3) & (4) of the Limitation Ordinance (“**the Ordinance**”) provides that subject to section 30, an action for personal injuries claim should not be brought after the period of 3 years from (a) the date on which the cause of action accrued; or (b) the date (if later) of the plaintiff’s knowledge.
2. Section 27(8) of the Ordinance provides that a person’s knowledge includes knowledge which he might reasonably have been expected to acquire (a)  from facts observable or ascertainable by him; or (b)  from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek, but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

**Any cause of action against River Trade**

1. Ms Deanna Law, Counsel for River Trade, argues that River Trade has discharged its duty by providing a reasonably safe environment at the Terminal and should not be sued in these proceedings. She submits that Bentat, being River Trade’s independent contractor, was required to rectify the danger in the Terminal, such as to clean and remove any rubbish, and that there is no evidence to suggest that River Trade did not act reasonably in entrusting the cleaning work to Bentat. River Trade had issued a Reminder Letter to Bentat on 12 November 2015 to remind them of its obligation to ensure a reasonably safe environment at the Terminal. Apart from that, River Trade would arrange frequent patrolling at the Terminal.
2. Whether River Trade had taken reasonable steps to supervise the work of Bentat and whether they had discharged their duty to provide a reasonably safe place is a question of facts. I consider that this issue should be decided at the trial, and it would not be appropriate to make a decision at this interlocutory stage.
3. I am not satisfied that this is a plain and obvious case that the Plaintiff’s claim against River Trade should be dismissed for want of cause of action.

**Actual knowledge**

1. The Plaintiff’s case is that he did not have actual knowledge about the involvement of River Trade in the cleaning of the Area. River Trade, as fairly conceded by Ms Law, does not take issue in light of the test being subjective in nature.
2. Having considered the evidence, I agree that the Plaintiff did not have actual knowledge on the involvement of River Trade for the purpose of the present application.

**Constructive knowledge**

1. Section 27(8) of the Ordinance deals with constructive knowledge, i.e. knowledge imputed to a Plaintiff by the court where on the facts he should have made certain enquiries and had he done so would have discovered and become aware of the relevant facts. The burden of proving constructive knowledge is on the Intended Defendant, and the test is objective.
2. As held by Purchas LJ in ***Nash v Eli Lilly & Co*** [1993] 4 All ER 383, at 392, the required knowledge is a condition of mind that imports a degree of certainty which may reasonably be regarded as sufficient to justify the claimant embarking upon preliminaries to the making of a claim, such as taking legal or other advice.  Knowledge does not mean knowing for certain, but may mean a reasonably firmly held belief that warrants a claimant taking steps to investigate the claim.  The court must assess the intelligence of the plaintiff in understanding the information obtained and consider as a matter of fact whether he comprehended such information.
3. River Trade submits that the Plaintiff should have constructive knowledge by relying on the following facts:
4. River Trade’s logos and names were displayed at the three entrance gates of the Terminal,
5. River Trade’s name was visible on the signage containing the terms and warnings at each entrance gate,
6. Vehicles of River Trade with its’ logos printed on their bodies would patrol the Terminal,
7. River Trade’s logos were printed on the side of the Terminal Office Building and on the cranes used to transport containers within the Terminal.
8. Ms Law submits that the fact that names and logos of River Trade were all over the Terminal warranted the Plaintiff taking steps to investigate the claim. Mr Alan To, counsel for the Defendant, also argues that the circumstances were apparent and overwhelming that, even if they did not specifically point to a particular entity to be responsible for the cleaning of the Area, it is objectively clear and reasonable that there was a possibility that River Trade could be involved in the management of the Area. Mr To further says, which is agreed and adopted by Ms Law, that a simple search in the Land Registry would reveal that the Terminal was owned by River Trade.
9. The main argument is whether the Plaintiff should have sufficient knowledge or information that would alert him to conduct investigation.  In this regards, I have the following observations:
10. While River Trade’s logos and/or names were displayed at the entrance gates and the Terminal Building, there is no evidence of any signage bearing River Trade’s logos and/or names placed in the Area.[[2]](#footnote-2) At the hearing, neither the Defendant nor River Trade could provide any evidence to suggest that the name / logo of River Trade was displayed in the Area (subject to the discussion hereinbelow).
11. From the photo showing Street No. 6 of the Area, one may note that River Trade’s logo did appear at the top of the crane which was used to transport containers within the Terminal.[[3]](#footnote-3) While one may suspect that the crane itself was owned or operated by the company with that logo, the Plaintiff could not be expected to investigate whether the crane owner or operator would also be the occupier of the Area.
12. The parties are unable to inform the Court of the approximate size of the Area. However, the Layout Plan and the photos[[4]](#footnote-4) could at least tell us that Street No. 6 of the Area was a large area in which containers were stacked in a number of columns by the sides of the Street. One would expect that the distance of the entrance gates and the Terminal Building on the one hand, and Street No. 6 of the Area on the other hand would not be close. The mere fact that the names and the logos of River Trade appeared in the Building and the entrance gates would not enable the Plaintiff to form a belief that warranted him to take steps to investigate the claim against River Trade.
13. In my judgment, the mere fact that the names and the logos of River Trade appeared in the Building, the entrance gate, the crane and the vehicles patrolling there would not put the workers of the Defendant (including the Plaintiff) on constructive notice that the Area was occupied by somebody other than the Defendant.
14. Ms Law and Mr To both argue that the Plaintiff should have conducted a land search which could reveal that the Terminal was owned by River Trade. In this regard, I agree with the judgment of Seagroatt J in the case of ***Lau Yan Chor v Hang Lung (Administration) Limited***, HCPI355/199 (unreported, 19 September 2000) as follows:

“It is relevant to recall that this accident happened at about 6:30 am in a flooded basement when [the plaintiff] was acting in the course of his employment.  His automatic, logical and in my view entirely reasonable reaction was to pursue his remedy against his employers, as employers and occupiers of the premises.  It may well be that there are more than two or three occupiers of the premises but he commenced his action against the prime or principal occupiers.  It would not be logical for him to consider that [the third party] (even if he knew its identity) might be responsible for the flooding of the basement or the circumstances in which he sustained this accident whilst trying to carry out his duty. I take this view as the appropriate one, however long he had been employed in that capacity as attendant.  It is also clear to me that until he saw the Third Party Statement of Claim he would be in no position to frame a case against [the third party]. Accordingly, and sensibly, he has adopted the Defendants' allegations against [the third party] in his re-Amended Statement of Claim.”

1. Having considered the judgment and the facts of the present case, it would be reasonable for the Plaintiff to pursue his remedy against his employer being the employer and occupier of the premises. Even if a land search was obtained by the Plaintiff, the information would not be sufficient for the purpose of section 27(6) of the Ordinance.
2. The court must assess the evidence according to the information obtained by the Plaintiff there and then, and consider as a matter of fact whether he comprehended such information. The Plaintiff said that the Area was exclusively used by the Defendant. He had never seen any truck other than the Defendant’s parking in the Area.[[5]](#footnote-5) There was one cleaner responsible for the cleaning of the Area and the Plaintiff believed that the cleaner was engaged by the Defendant to perform the cleaning work.[[6]](#footnote-6) It is not a situation where the Plaintiff had been working in the Area for a considerable period of time. The Plaintiff only started working there on 1 March 2017 while the Accident happened on 24 March 2017. There is no evidence that the Plaintiff had any previous communication or any dealing with the staff of River Trade direct. He could not be expected to speculate if the Area was an area occupied by somebody other than the Defendant.
3. I am of the view that the Plaintiff could not have been expected to acquire knowledge of the identity and involvement of River Trade prior to the expiry of the primary limitation period. The Plaintiff’s claim against River Trade is made within time.

**Discretion under s.30 of the Ordinance**

1. If I am wrong on the above analysis, I have to consider whether to exercise my discretion to allow such time barred claim to proceed under section 30(1) of the Ordinance.
2. The court will perform a balancing exercise by looking at (a) the prejudice to each party, (b) the 6 specific but non-exhaustive factors contained in section 30(3) of the Ordinance, and (c) all the circumstances of the case.
3. The post-expiry delay was about 5 months. In any view, it is not a particularly long period of delay, and I find such period of delay to be acceptable.
4. Ms Law criticises that the Plaintiff had failed to act promptly after the Defence was filed on 27 March 2020 because it was specifically pleaded that the Defendant was a customer of River Trade which provided area in the River Trade Terminal to store containers and cargos. Mr Wong submits that it was not until the Defendant’s Solicitors’ letter dated 24 June 2020 attaching a copy of the draft Amended Defence that full particulars have been provided.
5. It appears that no substantive steps were taken by the Plaintiff between 27 March 2020 and 24 June 2020. Nevertheless, in any case, the primary limitation period has expired at the time when the Defence was filed on 27 March 2020. Since Bentat has been de-registered, application was made on 22 July 2020 to restore the company. The Order was granted by the Court of First Instance on 6 August 2020. The present Summons was taken out on 12 August 2020. I consider that the Plaintiff has acted promptly and reasonably in the circumstances.
6. In the present application, River Trade argues that they have acted reasonably in selecting the subcontractor and have supervised the work of Bentat reasonably. Copies of the Agreement with Bentat[[7]](#footnote-7) and the guidelines[[8]](#footnote-8) issued to Bentat have been produced. There is no evidence that River Trade’s ability to investigate the Accident and to conduct its defence is impaired. Nor is it suggested that the lapse of time has any effect on the quality of the evidence. There is no suggestion on the part of River Trade that previously available witnesses or documents were lost, or available witnesses had increased difficulty in remembering the event as a result of that period of delay.
7. Ms Law argues that prejudice has been suffered by River Trade since Bentat has been de-registered and they could not retrieve the relevant cleaning record and the staff record. No mention of this kind of prejudice was made in its affirmation in opposition. It was not until the substantive hearing that Ms Law made an oral application to file a supplemental affirmation to cover this issue. Having heard the arguments of all parties, I rejected the application. First, that was a late application. In fact, Mr Wong, Counsel for the Plaintiff, had already pointed out in his Written Submissions dated 17 March 2021 that there was no evidence to suggest that River Trade would suffer any kind of prejudice. If River Trade wished to file a further affirmation to elaborate on the issue of prejudice, they should have done so at a much earlier stage. More importantly, if River Trade’s defence is that they have reasonably entrusted Bentat to perform the cleaning work and have properly supervised the work, whether Bentat could retrieve the relevant cleaning record and the staff record is neither here nor there. Even if I allow the application to file further affirmation, that would not assist River Trade’s position any further.
8. Ms Law argues that River Trade would suffer prejudice if they were deprived of the complete defence under the Limitation Ordinance. Mr Wong drew my attention to para. 109 of the judgment of ***Pang Kwok Lam v Schneider Electric Asia Pacific Limited***, HCPI 90/2010 (5 January 2011, unreported) which referred to an English case of ***Cain v. Francis; McKay v Hamlani & anor*** [2009] 2 All ER 579. Basically, if loss of the limitation defence was the only prejudice the defendant would suffer, that must be contrasted with the case where forensic prejudice was suffered by a defendant who had not for many years been notified of a claim in any detail to enable him to investigate it. In this regard, I agree that the Court should ascertain whether, and to what extent, a defendant suffered any forensic disadvantage in investigating a claim or collating evidence in support of the defence. In the present situation, there is insufficient evidence to show that River Trade has suffered any forensic prejudice.
9. Balancing all the factors as mentioned in paragraph 30 above, I consider that this is an appropriate case to exercise my discretion in favour of the Plaintiff. In case I am wrong on the issue of secondary limitation period, I am prepared to uplift the time bar to allow the Plaintiff to claim the relief against River Trade and Bentat.

**Costs**

1. Mr Wong argues that the costs of and occasioned by the application should be borne by the Defendant on the ground that the Defendant had failed to inform the Plaintiff of the identity and the role of River Trade notwithstanding the Pre-action Letter.
2. Mr To, on behalf of the Defendant, submits that it has no general duty to assist the Plaintiff in identifying potential defendants. He relies on the case of ***Chan Ngan Fa v Cui You Jun and Yan Zhao Jia, Robert both formerly trading as China Venture International & anor,*** DCPI 832/2007 (unreported, 2 March 2009) in which paragraph 18 of the judgment said *inter alia* that “defendants or prospective defendants cannot be expected to readily assist a prospective plaintiff in pursuing his/her claim, and to volunteer information or evidence.” That passage was cited in a post-CJR decision of ***Cheung Yin Heung v. Hang Lung Real Estate Agency Limited***, HCPI 421/2009 (unreported, 30 April 2010).
3. In ***Chan Ngan Fa***, one of the arguments taken by the intended defendant was that if the plaintiff had written to the owner of a premises earlier and pressed for the information she requested, the identity of the intended defendant could have been ascertained within time. Similar argument was applied by the intended defendant in ***Cheung Yin Heung’s*** case. It is against this background that the court said that prospective defendants cannot be expected to readily assist a prospective plaintiff in pursuing his/her claim. The passage should not be applied in a vacuum devoid of the context.
4. The situation in the present case is very much different. The Plaintiff did issue a pre-action letter dated 12 March 2019, in which the Plaintiff specifically asked the Defendant that “[i]f you contend that somebody else is at fault, then please reply accordingly together with particular of the parties you are alleging fault and the reason why such party is at fault. If you failed to reply accordingly, but allege fault against other person after issue of writ (if necessary) which necessitates a joinder of parties, our client will claim costs occasioned thereto against you.”
5. In this connection, paragraphs 19 and 20 of the Practice Direction 18.1 make it clear as follows:

“19.   The letter of claim should be sent no later than 4 months prior to the commencement of proceedings, and the proposed defendant(s) or insurer(s) concerned should reply constructively thereto within one month.  A simple acknowledgement is not a constructive reply.  If there is no such reply, the claimant will be entitled to commence proceedings forthwith without risk as to costs arising out of non-compliance of this paragraph.  If such reply is received within one month, the parties should over the next 3 months communicate constructively and provide mutual disclosure of information and documents with respect to issues of liability and quantum (including, without limitation, the information and documents identified in Schedules A and B of the specimen letter which have not already been served) as are reasonably required for attempting to settle the claim in whole or in part, instructing medical expert(s) and / or arranging expert medical examination (see paragraph 22 hereof).

20.   If the proposed defendant(s) fail to give a constructive reply or reasonably investigates into the merits of the claim and give a positive reaction, then they will not receive sympathy from the Court after the commencement of proceedings, and the Court may not allow time for them to make up for their omission.”

1. Order 1A, rule 1 of the Rules of the District Court makes it clear that the Court will give effect to the underlying objective when it exercises its power 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. Rule 4 makes it clear that active case management includes encouraging the parties to co-operate with each other in the conduct of the proceedings.
2. At the hearing, the Court raised the issue with Mr To that, if Mr To is correct to say that, even in the post-CJR era, the Defendant still had no general duty to assist the Plaintiff in identifying potential defendants, how his contention can be reconciled with the Practice Direction 18.1 and Order 1A of the Rules of the District Court. Mr To was unable to provide any substantive answer.
3. The Court asked Mr To at the hearing as to whether, as a matter of fact, there was any particular difficulty on the Defendant’s part preventing them to inform the Plaintiff of the identity of the occupier until the filing of the Defence. Likewise, Mr To was unable to provide any substantive answer.
4. I consider that there is no reason why the Defendant should not bear the costs of and occasioned by this application.
5. On the part of River Trade, Ms Law submits that should the Court allow the joinder application, costs of the application should be paid by the Defendant in light of their failure to inform the Plaintiff of the identity of the occupier. As I see it, there is no reason why costs should not follow the event, and it was River Trade’s choice and independent decision as to whether the application should be contested.
6. For the hearing on 14 April 2021, 1/3 of the Plaintiff’s costs should be borne by the 1st Defendant and 2/3 of the costs by the 2nd Defendant.

**Conclusion**

1. In the circumstances, the following directions are hereby made:
2. Leave be granted to the Plaintiff to join River Trade Terminal Co. Ltd and Bentat Logistics (Shipping) Limited as the 2nd and 3rd Defendants respectively in these proceedings, and the existing Defendant shall be renamed as the 1st Defendant;
3. Leave to the Plaintiff to amend the Writ of Summons and the Statement of Claim both filed on 13 January 2020 as per the draft annexed to the Summons filed on 12 August 2020 (“the Summons”), and the Amended Writ of Summons the Amended Statement of Claim shall be filed and served within 7 days from the date hereof. Service of the Amended Writ of Summons and the Amended Statement of Claim on the 1st Defendant be dispensed with;
4. All subsequent pleadings and court documents already filed with the Court shall be deemed to have been amended to include River Trade Terminal Co. Ltd and Bentat Logistics (Shipping) Limited as the 2nd and 3rd Defendants respectively;
5. The 2nd and the 3rd Defendants shall file their respective Acknowledgment of Service within 14 days from the date of service of the Amended Writ of Summons and the Amended Statement of Claim;
6. The 2nd and the 3rd Defendants shall file their respective Defence within 28 days thereafter;
7. Leave to the 1st Defendant to file and serve its Re-Amended Defence, if so advised, within 28 days from the date hereof;
8. Checklist Review Hearing be adjourned to 13 September 2021 at 9:30 a.m. in Court No. 17 for further case management directions;
9. There be costs order *nisi* that:
10. Subject to sub-paragraph (2) below, the costs of the Summons, the costs of and occasioned by the amendment, and 1/3 of the Plaintiff’s costs of the hearing on 14 April 2021 be paid by the Defendant to the Plaintiff to be taxed if not agreed in any event;
11. 2/3 of the Plaintiff’s costs of the hearing on 14 April 2021 be paid by the 2nd Defendant to the Plaintiff to be taxed if not agreed in any event, and
12. There be certificate for counsel;
13. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations; and
14. Liberty to apply.

(Matthew Leung)

Master of the District Court

Mr Damian Wong, instructed by Szwina Pang, Edward Li & Co., assigned by the Director of Legal Aid, for the Plaintiff

Mr Alan C.L. To, instructed by SIU and Company, for the Defendant

Ms Deanna Law, instructed by Kennedys, for the 1st Intended Party

The 2nd Intended Party is not represented and did not appear

1. See page 3 of the Pre-action Letter [91]. [↑](#footnote-ref-1)
2. See the photos of Street No. 6 of the Area in the Terminal [227]. [↑](#footnote-ref-2)
3. See the top photo at [227]. [↑](#footnote-ref-3)
4. See the Layout Plan at [215] and the photos from [217] to [227]. [↑](#footnote-ref-4)
5. Affirmation of Chu Gregory affirmed on 14 August 2020 at §5 [173]. [↑](#footnote-ref-5)
6. Affirmation of Chu Gregory affirmed on 14 August 2020 at §8 [174]. [↑](#footnote-ref-6)
7. See the agreement disclosed by the Defendant and exhibited in the Plaintiff’s affirmation [185]. [↑](#footnote-ref-7)
8. See exhibits TWWK-1 and TWWK-2 at [236] – [371]. [↑](#footnote-ref-8)