## DCPI 122/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 122 OF 2014

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##### BETWEEN

NG YEE PING Plaintiff

### and

THE INCORPORATED OWNERS 1st Defendant

OF NO 4 KAI CHIU ROAD

WAH ON ENGINEERING LIMITED 2nd Defendant

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Before : Master J Chow in Chambers (Open to public)

Dates of Hearing : 2 October 2015

Date of Decision : 14 October 2015

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DECISION

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*INTRODUCTION*

1. The plaintiff seeks leave to discontinue her claim against the 1st defendant. This is a decision on costs.

*THE FACTS AND CHRONOLOGY*

1. An accident occurred on 26June 2013 when the plaintiff was walking along Kai Chiu Road in Causeway Bay, Hong Kong. She was hit by a bamboo pole fell from height and had suffered physical injury. The bamboo pole fell onto an area at No 2 Kai Chiu Road. At the material time, scaffolding works were carried out at No 2 Kai Chiu Road. The person responsible for the said scaffolding works was subsequently convicted and fined.
2. As a matter of background, two adjoining buildings were erected on No 2 and No 4 of Kai Chiu Road. Both buildings were built in 1954 sharing a common staircase.
3. On 26September 2013 and 11 November 2013, the plaintiff’s solicitors sent two pre action letters to the 1st defendant but not the owner of No 2 Kai Chiu Road. The plaintiff’s solicitors received no reply from the 1st defendant.
4. The plaintiff’s solicitors commenced the action against the 1st and 2nd defendants on 17 January 2014. The 2nd defendant was the contractor of the scaffolding works. On 26 February 2014, the 1st defendant, denied liability in their defence. The 1st defendant pleaded there were no scaffolding works carried out at No. 4 Kai Chiu Road and it has no contractual relationship with the 2nd defendant. In other words, the proper defendant should be the owner of No 2 Kai Chiu Road, not the 1st defendant.
5. On 11 March 2014, the plaintiff’s solicitors sent a without prejudice letter to the 1st defendant offering a stay of proceedings pending recovery of damages from the 2nd defendant. The plaintiff’s solicitors indicated they will discontinue her claim against the 1st defendant thereafter. On the same day, the 1st defendant’s solicitors declined the offer and stated the plaintiff should discontinue the claim against the 1st defendant with costs or an application to strike out the plaintiff’s claim will be imminent.
6. On 29 August 2014, the plaintiff’s solicitors verbally proposed to discontinue the action.
7. On 25September 2014, the 1st defendant counter proposed on application for leave to discontinuance with two conditions: (i) the 1st defendant to pay the costs of the 1st and 2nd defendants, to be taxed if not agreed; and (ii) the 1st defendant be discharged and removed from this action and both the plaintiff and the 2nd defendant shall not claim against the 1st defendant for any dispute arising from the matters in this action (“the additional clauses”). The plaintiff’s solicitors disagreed.
8. On 26 September 2014, the plaintiff’s solicitors replied with disagreement to the 2nd additional clause because the 2nd defendant should be excluded. They reiterated the settlement offer of discontinuing the plaintiff’s claim against the 1st defendant with costs.
9. On 24 October 2014, a settlement was reached between the plaintiff and the 2nd defendant. The plaintiff’s solicitors refused to discontinue her claim against the 1st defendant with costs.
10. The plaintiff’s solicitors took out the present application by way of summons on 3 August 2015. The plaintiff seeks costs against the 1st defendant for two periods: (i) from commencement of the plaintiff’s claim until filing of the defence; (ii) from 29August 2014 (where the verbal offer of discontinuance was made) until leave to discontinue be granted. The plaintiff agrees to pay costs to the 1st defendant from the filing of the defence until 29August 2014.

*THE ISSUES*

1. Parties agreed, as a general rule, a defendant is entitled to costs when an action is discontinued (See paragraphs 21/5/12 of the *Hong Kong Civil Procedure 2016*). The 1st defendant submitted it should be entitled to costs, without liable to any costs of the plaintiff. The issue herein is whether the court shall depart from the general rule by exercising discretion in the manner as stated in the 1st defendant’s summons.

*DISCUSSION*

*Pre defence stage*

1. The plaintiff’s application is premised on the failure of the 1st defendant to respond to the two pre action letters and accede to the proposal of stay of proceedings after the filing of the 1st defendant’s defence.
2. Albeit this court is not a proper forum to assess evidence and determine liability, I see from the fact that the location of the accident was unequivocally stated in the Brief Facts as No 2 Kai Chiu Road, the owner of No 2 Kai Chiu Road is expected to be a proper defendant. As pleaded in the 1st defendant’s defence, where scaffolding works were carried out in No. 2 Kai Chiu Road and a denial of contractual relationship with the 2nd defendant, the plaintiff then proposed a stay of proceedings. The plaintiff’s solicitors’ acts tally with the saying that the wrong defendant might have been sued, or else, it would be unnecessary for the plaintiff to offer a stay of proceedings. Nevertheless, the plaintiff’s solicitors still maintain the 1st defendant should be sued after being alerted to the fact that the 1st defendant might not be a correct defendant. In both letters by the plaintiff’s solicitors dated 21 March 2014 and 8 July 2014, the plaintiff’s solicitors stated the 1st defendant, as an occupier, failed to ensure no object should fall from the rooftop of No 4 Kai Chiu Road.
3. The plaintiff’s solicitors explained in the affirmations of Tsui Tze Kin Ernest, no successful search could be found when he enter the search word “No 2 Kai Chiu Road” on the IRIS online service, only the land search of No 4 Kai Chiu Road was found. He had relied on the plan attached to the 1st assignment of both No 2 and No 4 of Kai Chiu Road where it shown it was one lot of land. Upon further site inspection, where Mr Tsui found the two buildings were adjoined together sharing a common staircase, he concluded both No 2 and No 4 of Kai Chiu Road was one lot of land, he chose to sue the 1st defendant because the land search of the 1st defendant could be located.
4. Ironically, the 1st defendant’s solicitors submitted the land search of No 2 Kai Chiu Road in the affirmation in opposition of Wong Charn Hung Andrew. Mr Wong rebutted, the description of No 2 Kai Chiu Road was stated as “sub-section 11 of section Q of Inland Lot No 29”; whereas the description of No 4 Kai Chiu Road was “the Remaining Portion of section Q of Inland Lot No 29”. The two adjacent lots of land (be it an adjoining building with common staircase) belonged to different owners. No 2 Kai Chiu Road was owned by one single owner. Mr Wong submitted, the plaintiff should have sued the owners of No. 2 Kai Chiu Road.
5. Land search is a public document, Mr Tsui’s explanation of his failure to locate the land search of No 2 Kai Chiu Road is unpersuasive. In event when no result be found from the search word of “No 2 Kai Chiu Road” on the IRIS online service, I take judicial notice that Mr Tsui could have made enquires to the Land Registry through the enquiry hotline or in writing.
6. Secondly, the description of No 4 Kai Chiu Road was named as the “remaining portion of section Q of Inland Lot 29”, he should have alerted to the fact that two separate lots of land existed. The buildings on two lots of land were erected more than 60 years ago, it is not surprising that two buildings were built in an old fashioned manner with a common staircase. Furthermore, the 1st assignment was dated 26 April 1954, the the date of assignment of No 2 and No 4 Kai Chiu Road was 25 June 1954 and 30 September 1954 as recorded on the land search, which means, the two lots of land were then conveyed to different owners subsequent to the 1st assignment. Solely relying on the plan of the 1st assignment of No 4 Kai Chiu Road is inadequate.
7. A person who commenced an action has a duty to ascertain the correct defendant. I can say no further that the duty to ascertain a proper defendant falls on the plaintiff. The plaintiff’s solicitors could not shift the burden to the 1st defendant by complaining the absence of reply to their pre action letters. The 1st defendant has no duty to inform the plaintiff’s solicitors of the ownership of its lot when land searches are self-evident. Such allegation of failure to reply to both pre action letters plays no part in commencing the action against the 1st defendant. The pre action protocol contained in Practice Directions 18.1 is not applicable to the 1st defendant if it is not a proper person to be sued. It is also reasonable for the 1st defendant to reject the proposal of a stay of proceedings by the plaintiff’s solicitors.
8. On this part, the plaintiff’s application to deny costs of the 1st defendant up to filing of the 1st defendant’s defence is unfounded.

*Costs after proposal of discontinuance on 29 August 2014*

1. This is a non-starter. The plaintiff’s solicitors have only proposed to the 1st defendant verbally on 29 August 2014 to discontinue of the plaintiff’s claim. No agreement has been reached between the plaintiff and the 1st defendant on terms of settlement as at 29 August 2014.
2. In the without prejudice letter dated 26 September 2014, the plaintiff’s solicitors opposed to the additional clause but agreed to discontinue the plaintiff’s claim against the 1st defendant with costs. The letter ended by “*we [the plaintiff’s solicitors] shall draft the Consent Summons should the aforesaid proposal is acceptable to your client [the 1st defendant]*”. The plaintiff’s solicitors did not say the offer is subject to any time constraint nor did they reserve their rights to seek costs should it be refused. The plaintiff’s solicitors were simply and no more than seeking the 1st defendant’s view on whether the proposal is acceptable.
3. I am not persuaded the plaintiff has grounds to deny costs of the 1st defendant from 29 August 2014 onwards until the order of discontinuance.

*CONCLUSION*

1. By reasons of the foregoing reasons, no circumstance shall lead to the exercise of discretion to order costs otherwise when leave be granted to the plaintiff to discontinue her claim against the 1st defendant.
2. Both the plaintiff and the 1st defendant agreed costs should follow the event.
3. I make the following order:
4. Leave be granted for the plaintiff to discontinue her claim against the 1st defendant.
5. The plaintiff do pay the costs of the 1st defendant in this action up to the date of order hereof, including the plaintiff’s summons filed on 3 August 2015, to be taxed if not agreed.

( J Chow )

Master

Mr Chan Chun Sang, instructed by T K Tsui & Co, for the plaintiff

Mr Andrew Wong, of Huen & Partners, for the 1st defendant.