## DCPI 377/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 377 OF 2015

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##### BETWEEN

LAU SIU MING Applicant

and

HUNG FAT CLEANING

TRANSPORTAION COMPANY LIMITED 1st Defendant

DHL AVIATION (HONG KONG) LIMITED 2nd Defendant

DHL EXPRESS (HONG KONG) LIMITED 3rd Defendant

DHL GLOBAL FORWARDING

(HONG KONG) LIMITED 4th Defendant

HO KA CHUN Intended 5th Defendant

A & S (HK) LOGISTICS LIMITED Intended 6th Defendant

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Before: Deputy District Judge Kam K L Cheung in Chambers (open to public)

Date of Hearing: 31 May 2016

Date of Decision: 17 June 2016

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DECISION

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1. This is an application by the Plaintiff for leave to join Ho Ka Chun (“the Intended 5th Defendant) and A & S (HK) Logistics Limited (“the Intended 6th Defendant) as the 5th Defendant and 6th Defendant in these proceedings.
2. The Plaintiff’s claim is for damages for personal injury sustained by her in the course of her work on 14 February 2012. There being more than 3 years between the date of the accident and the Plaintiff’s application to join the Intended 5th and 6th Defendants, two questions have arisen from her application, namely: -

(1) whether the Plaintiff’s claim against the Intended 5th and 6th Defendants has been time-barred;

(2) if the Plaintiff’s action against the 5th and 6th Defendants has been time-barred, whether an order should be made under s 30 of the Ordinance to disapply the time bar.

*The background*

1. The 1st Defendant was a cleaning services provider. The Plaintiff was one of its employees. On 14 February 2012, while working at the DHL warehouse at the Airport Freight Forward Centre, the Plaintiff was hit by a reversing forklift truck and injured as a result.
2. On 1 March 2012, the 1st Defendant submitted a Form 2 to the Labour Department. In the Form 2, the 1st Defendant confirmed that it was the employer of the Plaintiff at the time of the accident. The form did not mention any contractor or subcontractor.
3. Towards the very end of the 3-year limitation period, on 12February 2012 the Plaintiff issued a writ of summons against the 1st to 4th Defendants. The writ, being a so-called “protective” writ, does not contain details of the Plaintiff’s claim.
4. According to the Plaintiff’s solicitors, the identity of the operator of the truck was not known to the Plaintiff or them at the time when the writ was issued. Believing that the forklift truck belonged to DHL and that the warehouse was under DHL’s occupational control, out of caution the Plaintiff’s solicitors joined the 2nd to 4th Defendants, whose names all start with DHL, as parties.

1. Pre-action letters were sent to the 1st to 4th Defendants on 11 February 2015. The letters triggered a chain of communications between the Plaintiff’s solicitors and the respective solicitors for the 1st Defendant and the 2nd to 4th Defendants. On 1September 2015, the solicitors for the 2nd to 4th Defendants informed the Plaintiff’s solicitors that the Intended 5th Defendant, an employee of the Intended 6th Defendant, was the operator of the forklift truck at the time of the accident.
2. On 9December 2015, the Plaintiff’s solicitors took out a summons to join the Intended 5th and 6th Defendants as additional Defendants.

*The Plaintiff’s case*

1. The Plaintiff’s primary case is that it was not until 1September 2015 that she became aware of the identities of the Intended 5th and 6th Defendants. Therefore, time did not start to run against her until then.
2. Alternatively, the Plaintiff prays in aid section 30 of Limitation Ordinance (“the Ordinance”) and seeks an order to disapply the time-bar.

*The Intended 5th and 6th Defendants’ case*

1. In so far as knowledge is concerned, the 5th and 6th Defendants argue that “*the burden of proof is also on the Plaintiff to show to the Court that, in all circumstances, she should have no constructive knowledge of the identities [of the 5th and 6th Defendants] if she had done her investigation properly*.”[[1]](#footnote-1)
2. The Intended 5th and 6th Defendants further argue that it would not be equitable to allow the claim to proceed against them.

*Primary limitation period*

1. The primary limitation period under s 27(4)(a) of the Ordinance is three years from the date on which the cause of action accrued. In this case, there is no dispute that cause of action accrued on the date of the accident, ie 14 February 2012. Thus, the primary limitation period expired on 13 February 2015.

*Secondary limitation period*

1. Section 27(4)(b), which provides for a secondary limitation period, reads:-

“(4) Except where subsection (5) applies, the said period of 3 years from –

(a) ...

(b) the date (if later) of the Plaintiff’s knowledge.”

1. Section 27(6) provides that:-

“(6) … references to a person’s date of knowledge are references to the date on which he first had knowledge of the following facts -

…

(c) the identity of the Defendant; …”

1. Section 27(8) further provides:-

“(8) … a person’s knowledge include knowledge which he might reasonably have been expected to acquire -

1. from facts observable or ascertainable by him; or
2. from facts ascertainable by him with the help of medical or other appropriate expert advice which 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.”

1. Thus, the relevant knowledge that sets the time running for the purpose of the secondary limitation period under section 27 consists both of actual knowledge and constructive knowledge.

*Burden of proof*

1. The burden of proving that the action is commenced within 3 years from the date of actual knowledge is on the plaintiff; but in relation to establishing an earlier date of constructive knowledge, the burden falls on the defendant: *Cheung Yin Heung v Hang Lung Real Estate Agency Ltd* [2013] 3 HKLRD 67 at §45, 49 & 50.

*Actual Knowledge*

1. The test for actual knowledge is subjective. What matters is the knowledge actually possessed by the plaintiff: *A v Hoare* [2008] 1 AC 844, at 867 E-G; *Cheung Yin Heung* (above), at §46.
2. It is the case of the Plaintiff that she used to believe that the forklift truck was operated by an employee of DHL and that she was not aware of the identities of the Intended 5th and 6th Defendants until 1September 2015 (the date of the letter from the 2nd to 4th Defendants’ solicitors).
3. Mr Wong, counsel for the Intended 5th and 6th Defendants, submits that the Plaintiff should be disbelieved because there is evidence that she actually knew that the truck was operated by a subcontractor of DHL.
4. The only evidence that Mr Wong seeks to rely on is an updated interview record (“the Interview Record”). The crucial part of which reads:-

“面談記錄

面談員工 : 劉小茗 - 鴻發駐工地(機場空運中心DH L倉) 清潔服務科文

面談事項 : 鴻發員工劉小茗從回憶中描述在工作期間發生的意外事故

事故發生日期 : 二零一二年二月十四日

事故發生時間 : 上午約十時四十分

事故發生地點 : 赤臘角(AFFC) 機場空運中心DHL 倉內通道

發生事故員工 : 劉小茗 - 鴻發駐工地清潔服務科文

事故 - 有人受傷 : 鴻發員工劉小茗本人被一部由DHL擁有的鏟車(Fork-lift Truck) 撞擊而令員工劉小茗本人的左腳第三趾受傷、 並出現有骨折狀況。

2.2 鏟車及鏟車工作人員

2.2.1 據瞭解，鏟車是DHL的器械。

2.2.2 **據瞭解**，鏟車操作人員是**DHL的承辦商的員工**。”

(emphasis added)

1. There is no evidence as to when the interview took place and when the Interview Record was made available to the Plaintiff. Mr Wong submits that in the normal course of events the interview was likely to be conducted right after the accident. By telling the interviewer that the forklift truck was operated by a subcontractor of DHL, Mr Wong submits, the Plaintiff must have known that there was a subcontractor of DHL at the warehouse.
2. Leaving aside the question whether knowledge of the existence of a subcontractor of DHL is equal to knowledge of the identities of the Intended 5th and 6th Defendants, there does not seem to me to be any solid ground for the suggestion that the relevant piece of information was originated from the Plaintiff. There were three persons present at the interview, namely, the Plaintiff, Mr Au-Yeung, a manager of the 1st Defendnat, and Mr Lo, the safety officer who was referred to as an interviewee (面談人). Granted that it is recorded that “據瞭解，鏟車操作人員是DHL的承辦商的員工” (it is understood that the operator of the forklift truck is an employee of a DHL subcontractor), it is not clear whose understanding (瞭解) it was. In the absence of other evidence, there does not exist any basis for the suggestion that it must be the Plaintiff who told the maker of the Interview Record that forklift truck was operated by an employee of a subcontractor of DHL. That piece of information was equally likely to have originated from Mr Lo or Mr Au-Yeung himself. Moreover, I notice that when the Plaintiff spoke of the accident, she spoke in first person. For example, she said: -

“At p.1 … 劉小茗本人被一部由DHL擁有的鏟車(Fork-lift Truck) 撞擊

1.1.4.4 看見這鏟車，因**我**是靠近通道貨堆邊行…

1.1.6.5 當時看見**我**被撞擊的位置…

1.2.4.1 發生事故後，通道上有**我**和這部鏟車的操作人員。

1.2.6 … 腳部被輾後，才知道**自己**被撞擊…”

(emphasis added)

1. If the Plaintiff was the one who told the interviewer that the operator of the truck was an employee of a DHL subcontractor, I would have expected the interviewer to jot down something like “據劉小茗瞭解，鏟車操作人員是DHL的承辦商的員工”. In my view, the relevant part of the Interview Record is not clear enough to cast doubt on the evidence of the Plaintiff.
2. Mr Wong further submits that the Plaintiff has failed to adduce evidence to show that she had no actual knowledge of the identities of the Intended 5th and 6th Defendants[[2]](#footnote-2). With respect, Mr Wong is asking the Plaintiff to fulfil an unusually challenging if not impossible task, namely, to prove a negative. I am unable to accept Mr Wong’s submission that the Plaintiff should be disbelieved simply because she has adduced no positive evidence of absence of knowledge.
3. On the materials before me, I accept the Plaintiff’s evidence that she did not have actual knowledge of the truck operator until 1September 2015.

*Constructive knowledge*

1. Section 27(8) deals with constructive knowledge, ie 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 earlier constructive date knowledge is on the Defendant: *Cheung Yin Heung* (above), at § 50.
2. Hence, if a Defendant seeks to argue that time should have started to run from an earlier date because the Plaintiff had constructive knowledge of the relevant facts by that date, it is incumbent upon the Defendant to specify that certain date and identify those matters that fix the Plaintiff with knowledge of the relevant facts.
3. In the present case, Mr Wong does not put his finger on the calendar and refer to any particular date as the date of the Plaintiff’s constructive knowledge of the identities of the driver and his employer. Instead, he complains that Mr Cheung, counsel for the Plaintiff, has got the burden of proof wrong and argues that “*the burden of proof is also on the Plaintiff to show to the Court that, in all the circumstances, she should have no constructive knowledge of the identities [of the Intended 5th and 6th Defendants] if she had done her investigation.*  With respect, I am afraid that Mr Wong has got the burden of proof wrong. The law is clear that the burden of proving constructive knowledge is on the Defendant. The question to ask is whether it has been shown by the Intended 5th and 6th Defendants that the Plaintiff might reasonably have been expected to acquire knowledge of their identities from facts observable or ascertainable by her (if necessary with expert help) more than three years prior to 9 December 2015 (the date on which the summons to join the Intended 5th and 6th Defendants was issued.
4. Mr Wong, relying on the same passage in the Interview Record (para 2.2.2 of the Interview Record), argues that had the Plaintiff carried out proper investigation, she would have discovered the identities of the 5th and 6th Defendants much earlier.
5. The date that is crucial for the determination of the issue of constructive knowledge is 10 December 2012 (3 years before the joinder summons was issued). To succeed in their arguments that the Plaintiff’s claim has been time-barred, the Intended 5th and 6th Defendants have to satisfy the court that the Plaintiff had constructive knowledge of their identities on or before that date.
6. Thus, the Intended 5th and 6th must show that the interview did take place before 10 December 2012 and that the Plaintiff was fixed with knowledge of the information disclosed in the Interview Record by, say, having been given a copy of the Interview Record before 10 December 2012. In this application, it is not clear when the interview took place. Nor is it known when the Interview Record was made available to the Plaintiff or her solicitors. On the evidence, I am not satisfied that the Plaintiff had acquired constructive knowledge of the identities the Intended 5th and 6th Defendants prior to 10 December 2012.
7. For these reasons, I take the view that the Plaintiff’s claim against the Intended 5th and 6th Defendant was commenced within time.

*Section 30 – discretionary extension*

1. In case I am wrong and the Plaintiff’s claim against the Intended 5th and 6th Defendants has been time-barred, I shall proceed to consider whether I should exercise my discretion to allow the Plaintiff’s claim to proceed.
2. The discretion to disapply the limitation period is unfettered: *A v Hoare* [2008] 1 AC 844, at 863 and 871. The onus is on the Plaintiff to show that in the particular circumstances of the case it would be equitable to allow the claim to proceed: *Thompson v Brown* [1981] 1 WLR 744, 750 and 752. The question is not whether the claim itself is equitable, but whether, having regard to the prejudice to the parties and the prescribed matters, it is equitable to allow the claim to proceed. The word “equitable” means fair and just. In fairness and justice, the Defendant only deserves to have the obligation to pay the damages due removed if the passage of time has significantly diminished his opportunity to defend himself. Financial prejudice which the Defendant would suffer as a result of the loss of the limitation defence upon the exercise of the court’s discretion under section 30 is not in itself a relevant consideration in deciding whether that discretion should be exercised: *Cain v Francis* [2009] QB 754, §63, 69-70, 75 & 78).

1. 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. Although each case turns on its own facts, it has been suggested in recent decisions of the courts that there should be a more generous and liberal exercise of discretion under section 30: *A v Hoare* [2008] 1 AC 844, §60; *Cheung Yin Heung* (above), §86.
2. Further, insofar as prejudice is concerned, although the onus is on the Plaintiff to prove that it would be equitable to allow his claim to proceed, the Defendant has to prove any prejudice that he says he will suffer. It is not enough to assert prejudice without evidence to support it: *Cheung Yin Heung* (above), §85.
3. In this case, there is no suggestion that the Intended 5th and 6th Defendants have suffered any forensic prejudice. The only prejudice that has been suggested on behalf of the intended Defendants is the loss of the limitation defence, which is, as Lord Hoffmann said in *Horton v Sadler* [2007] 1 AC 307 at 327 (adopted by Tang VP (as he then was) in *Chuck Wai Man v Asia Television Ltd* CACV 29/2008), nothing but loss of a windfall.
4. I shall now deal with the six non-exhaustive factors set out under section 30(3).
5. (i) *Length of delay and the reasons for delay* – The primary limitation period expired on 13 February 2015. There was therefore a delay of 10 months. Although it cannot be said to be a short delay, it is not a particularly long delay. The Plaintiff’s explanation is that the identities of the Intended 5th and 6th Defendants were not known until 1 September 2015. As noted in the earlier part of this Decision, I see no reason not to believe the Plaintiff. In any event, even though the explanation offered by the Plaintiff is not entirely satisfactory, the length of delay itself is not a decisive factor (see *Cain* (above), §57 and 73).
6. (ii) *Cogency of Evidence* – There is no suggestion that the Intended 5th and 6th Defendants’ ability to investigate the accident and conduct their defence is impaired. Nor is it suggested that the lapse of time has any effect on the quality of the evidence.
7. (iii) *Conduct of the Intended Defendants* – The conduct of the Intended 5th and 6th Defendants is not in issue.
8. (iv) *Duration of Disability* – In seeking an extension, the Plaintiff does not rely on any disability arising after the date of the accrual of the cause of action.
9. (v)(vi) *Conduct of the Plaintiff / Obtaining of advice* – These two factors can be dealt with together. There is no evidence as to what steps the Plaintiff had taken to obtain medical, legal or other expert advice prior to the expiry of the primary limitation period. Mr Cheung, counsel for the Plaintiff does not seek to argue that the Plaintiff has acted most promptly. On the other hand, apart from making some general remarks that the Plaintiff could have acted more promptly, Mr Wong does not draws my attention to any specific unreasonable conduct on the part of the Plaintiff. I consider that the two factors are rather neutral in the exercise of the court’s discretion.

*Conclusion*

1. Taking all the factors into account, I am satisfied that it would be equitable to allow the Plaintiff’s claim against the Intended 5th and 6th Defendants to proceed.
2. I therefore order and direct that:-
3. The Plaintiff do have leave to join the Intended 5th and 6th Defendants as the 5th Defendant and 6th Defendant in these proceedings;
4. Pursuant to section 30 of the Limitation Ordinance, Cap 347, the time limit for the Plaintiff to commence the present action against the 5th and 6th Defendants be disapplied;
5. Leave be granted to the Plaintiff to amend the Writ of Summons dated 12 February 2015 by adding the 5th and 6th Defendants as additional Defendants;
6. Leave be granted to the Plaintiff to file and serve the Amended Writ of Summons on the 5th and 6th Defendants within 28 days of this order.
7. Given my primary ruling that the Plaintiff’s claim against the 5th and 6th Defendants was brought within the secondary limitation period and my decision on section 30, I am inclined that the Plaintiff is entitled to the costs of the application. However, as the Plaintiff has conceded in her summons and amended summons that the costs of the application should be in the cause of the action, I make an order nisi that the costs of the application including the costs of the hearing on 31May 2016 (with certificate for counsel) be in the cause of the action. The order nisi will become absolute after 14 days in the absence of an application for variation.
8. I thank both counsel for their able assistance.

( Kam K L Cheung )

Deputy District Judge

Mr Lincoln Cheung, instructed by B Mak & Co, for the Plaintiff

Wong Chi Kwong, instructed by Chan & Chan, for the Intended 5th & 6th Defendants

1. Para.8 of Further Skeleton Submission of Mr Wong Chi Kwong, Counsel for the Intended 5th and 6th Defendants. [↑](#footnote-ref-1)
2. Para.7 of Further Skeleton Submission of Mr Wong Chi Kwong, Counsel for the Intended 5th and 6th Defendants. [↑](#footnote-ref-2)