## DCPI 688/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 688 OF 2008

### BETWEEN

NG WAI LIN Plaintiff

v

### LAU SAI KEE 1st Defendant

KING SON MOTORS CO. LTD 2nd Defendant

### Date of hearing: 24 April 2009

Date of handing down decision: 4 May 2009

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###### REASONS FOR DECISION

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#### *The Issue*

1. The Plaintiff fell and injured herself as she was alighting from the public light bus driven by the 1st Defendant. Apart from suing the 1st Defendant for negligence, she also sued the 2nd Defendant, who was the owner on the basis of vicarious liability for the 1st Defendant’s negligence. The Plaintiff settled the case with the 1st Defendant and then applied to discontinue her case against the 2nd Defendant. The issue as between the Plaintiff and the 2nd Defendant is: Whether the 2nd Defendant shall get costs upon the Plaintiff’s discontinuance of the action.

2. The Plaintiff says that as soon as the hiring relationship had been sufficiently proved by the 2nd Defendant, she applied for discontinuance of the action. The 2nd Defendant says that the Plaintiff ought to have realised it much earlier.

The law

Evidence on vicarious liability of owner

3. In *Chan Tim v Kwok Tai Chee* [1981] HKC 424, the son was driving the father’s car when a traffic accident occurred. The issue was whether the father could be held vicariously liable for the son’s negligence. Sakrani DJ cited the Privy Council decision of *Rambarran v Gurrcharran* [1970] 1 WLR where Lord Donovan said, at 559:

Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A, it can be said that A’s ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service of agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence.

4. This principle was applied in *Kung Kit Shing v Star Synthetic Flower Factory* (1987) 2 HKC 523 and *Cheng Wai Chuen v So Ka Ho* HCPI 1409/2003.

Costs on discontinuance of action

5. The general rule is that a defendant shall have costs when an action is discontinued. While recognizing this, Keith J in *Trend Publishing v Vivien Chan & Co (a firm)* [1996] 2 HKLR 227, 229 – 230, said:

It is well-settled that the general rule is that a defendant is entitled to the costs of the action if the action is discontinued……. But that is not an absolute rule. The rules recognise that there may be circumstances in which a plaintiff should be permitted to discontinue an action without having to pay the defendant's costs.

6. In *Terkild Johan Terkildsen v Barber Asia Limited* HCA 1963/2003, in Saunders J said:

18. In my view it would be quite wrong to refuse [the defendant] his costs. To do so would be tantamount to permitting a plaintiff to issue a writ on the flimsiest of bases, and then, upon mature reflection, to escape by discontinuance, without any penalty as to costs. In the present case the discontinuance is nothing more and nothing less than a plain acknowledgment by the plaintiffs of likely defeat. The fact that the plaintiffs may have believed at the time they issued a writ that they were justified in suing [the defendant] is irrelevant. As a consequence of that belief, a belief that is now completely abandoned, [the defendant] has been put to expense and should be compensated. (underlined for emphasis)

*The Plaintiff’s argument*

7. The Plaintiff sued the 2nd Defendant (the owner) on the basis of vicarious liability for the negligence of the 1st Defendant (the driver). This was in line with the authorities since *Rambarran v Gurrcharran* (supra). The cautioned statement given by the 1st Defendant did not mention any hiring agreement with the 2nd Defendant [A138 – 142]. The Hiring Agreement bore the date of “25th July 2003” instead of a date nearer to the accident. The 2nd Defendant did not volunteer to explain further to the Plaintiff.

8. It was only until 6th February 2009 when the 2nd Defendant’s witness statement was served on the Plaintiff that it became clear to the Plaintiff that the 2nd Defendant had hired the vehicle to the 1st Defendant at all material times. On 12 February 2009, the Plaintiff wrote to notify the 2nd Defendant of the discontinuance of the action [A103].

*The Defendant’s argument*

9. The 2nd Defendant says that its position has been expressly consistent from the beginning to the end as follows:

1. On 15th May 2008 the Defence was filed. Paragraph (3) of thereof alleged that the 2nd Defendant had hired the vehicle to the 1st Defendant [A22];
2. On 9th October 2008 the List of Documents was filed. Schedule 1 Part 1 thereof [A63] included (a) the 1st Defendant’s Statement to the Police dated 20th December 2006 [A138 – 142] which did not contain any questions on the relationship between the 1st and the 2nd Defendants, and (b) the Hiring Agreement dated 25th July 2003 between the 1st and the 2nd Defendants [A101];
3. On 6 February 2009 the 2nd Defendant’s witness statement dated 18th December 2008 was served on the Plaintiff [B20 – 21].

*My findings*

10. Both the Plaintiff and the 2nd Defendant have prepared full written submissions. The Plaintiff’s counsel, Mr. Luk, has also made oral supplemental submissions.

11. Mr. Luk submits that the 2nd Defendant ought to have volunteered to explain to the Plaintiff, upon or after service of the List of Documents, as to why the Hiring Agreement was dated “25th July 2003” instead of a date nearer to the accident. I ask for the legal basis of any such duty on the part of the 2nd Defendant. Mr. Luk accepts that there is no such duty.

12. I ask Mr. Luk as to why, in view of the ambiguity felt by the Plaintiff, the Plaintiff did not write to request the 2nd Defendant to explain the date in the Hiring Agreement or take out Interrogatories to that effect. Mr. Luk submits that with the benefit of hindsight either of these ought to have been done.

13. There were no questions asked by the police in the 1st Defendant’s cautioned statement as to the relationship between the 1st and the 2nd Defendants. The police focus was on how the accident happened, not on any such relationship. The Plaintiff cannot rely on the cautioned statement as evidence either to dispel the defence of a hiring agreement.

14. As a matter of general principle, I ask Mr. Luk of a scenario where there was an oral hiring agreement. A plaintiff will only know of the evidence on the hiring agreement at a rather late stage of the action, usually when a defendant’s witness statement is served. Does it mean that whenever a defendant alleges a defence based on oral evidence to be borne out subsequently in a witness statement, a plaintiff can get its costs, upon discontinuance of action, up to the juncture of the service of the witness statement? Mr. Luk has no ready answer. I find it absurd if this is to be the case.

My decision

15. At the outset and based on the line of authorities since *Rambarran v Gurrcharran* (supra), it might well be justified in considering a joinder of the 2nd Defendant on the basis of vicarious liability. However, it would be prudent for the Plaintiff to make some pre-action inquiry of the 2nd Defendant’s precise relationship with the 1st Defendant before the issue of the writ. I am not told that there was any such pre-action inquiry. If the Plaintiff simply took it for granted and framed her case on this basis in the writ, there could be no reason to deprive the 2nd Defendant of its costs when the Plaintiff only made the inquiry in earnest at a later juncture and decided to discontinue the action.

16. There can be no other interpretation of the Plaintiff’s discontinuance than “a plain acknowledgment of likely defeat” according to the term used in *Terkild Johan Terkildsen v Barber Asia Limited* (supra). This is a belated acknowledgment brought about by the Plaintiff’s own lack of pro-activity to clarify the relationship in the action against the 2nd Defendant.

17. I order that the Plaintiff to pay the 2nd Defendant’s costs up to the discontinuance. I also make an order *nisi* for the Plaintiff to pay the 2nd Defendant’s costs of this summons, to be made absolute after 14 days from today.

EDDIE YIP

DEPUTY DISTRICT JUDGE

Present:

### Mr. Victor Luk instructed by M/S Li, Chow & Company, for Plaintiff

Mr. H.L. Cheng of M/S Kenneth C.C. Man & Co., for the 2nd Defendant