## DCPI 832/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 832 OF 2007

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| BETWEEN | CHAN NGAN FA | Plaintiff |
|  | and |  |
|  | CUI YOU JUN (崔幼君) and YAN ZHAO JIA, Robert (嚴兆葭) both formerly trading as china venture international | 1st Defendant |
|  | CVI MODERN TECHNOLOGY DEVELOPMENT LIMITED | 2nd Defendant |

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Coram : Her Honour Judge Mimmie Chan in Chambers (open to public)

Date of hearing : 9 January 2009

Date of handing down Decision : 2 March 2009

# DECISION

**Background**

1. The Plaintiff ("**Madam Chan**") was a lift operator employed at the How Ming Factory Building in Kowloon ("**Building**"). She claims that she was injured in an accident on 23 June 2004, when she was operating the lift and a person identified as "**Ah Keung**" negligently caused some cargo which had been placed in the lift to hit Madam Chan, causing injury to her shoulder, arm and wrist. On 23 April 2007, Madam Chan commenced legal proceedings against the Defendants, claiming that they were the tenants or licensees of Flats A & B on the 5th floor of the Building ("**Premises**"), and the employer of Ah Keung. Madam Chan claims that the Defendants are vicariously liable for the negligent acts of their employee, servant or agent, Ah Keung.
2. On 31 October 2007, a Defence was filed and served on behalf of the Defendants. They deny that they had any employee, servant or agent known as Ah Keung.
3. On 27 August 2008, Madam Chan applied to the Court for leave to join The Hong Kong Polymer Science Ltd. ("**Polymer**") as the 3rd Defendant in this action, and for a direction pursuant to s.30 of the Limitation Ordinance ("**Ordinance**"), that the provisions of s.27 of the Ordinance do not apply to the action against Polymer. Such application is opposed by the Defendants and by Polymer.
4. At the commencement of the hearing before me on 9 January 2009, Counsel for Madam Chan clarified that no concession was made that Madam Chan's cause of action against Polymer is time-barred such that a declaration under s.30 of the Ordinance is required. Counsel sought to rely on the fact that Madam Chan only acquired knowledge of the identity of Polymer as the tenant of the Premises and the employer of Ah Keung on 6 May 2008, and accordingly the 3 year limitation under s.27 of the Ordinance only commenced to run from May 2008. If this is accepted by the Court, a declaration under s.30 of the Ordinance is not required.
5. The issue therefore turns on whether Madam Chan's claim against Polymer is time-barred under s. 27 of the Ordinance. This in turn raises the issue of the date on which Madam Chan first had knowledge of the fact of the identity of Polymer, the proposed 3rd Defendant, within the meaning of s.27(6) of the Ordinance, and whether she might reasonably have been expected to acquire knowledge of the fact of the identity of the proposed 3rd Defendant from facts ascertainable by her before May 2008, within the meaning of s.27(8)(a) of the Ordinance, so as to render her claim time-barred.
6. If Madam Chan's claim against Polymer is time barred, then she pursues her application under s.30 of the Ordinance for a direction that the provisions of s.27 be disapplied.

**Date on which Madam Chan first had knowledge of the fact of the identity of the proposed 3rd Defendant**

1. According to the evidence of Madam Chan, she knew at the time of the accident that Ah Keung worked for a company located on the 2nd, 5th and 10th floors of the Building. She knew that these floors were used and occupied by a company known as "華誼" in Chinese. After the accident, she was informed by the manager of the Incorporated Owners of the Building ("**Incorporated Owners**") that the tenant of the 2nd and 5th floors was the 2nd Defendant, the Chinese name of which is華誼科技發展有限公司. Madam Chan was able to find out that the receipts issued by the Incorporated Owners for management fees of the Premises were issued to the 2nd Defendant. She obtained a copy of a business name card of the project manager of the 2nd Defendant, which showed that China Venture International (the business named as 1st Defendant in these proceedings, and the Chinese name of which is 華誼公司) and the 2nd Defendant were in the same group of companies, which did not include Polymer. According to Madam Chan's evidence, the named partners of the 1st Defendant were also the directors of the 2nd Defendant.
2. Before the issue of the Writ in these proceedings in April 2007, Madam Chan's solicitors issued letters to the Defendants, asking them to disclose the identity of any third party claimed by them to be responsible for Madam Chan's accident, but there was no response from the Defendants. Madam Chan's solicitors also wrote to the registered owner of the Premises, Ligotrade Company Ltd. ("**Owner**"), on 2 January 2007. They asked the Owner to provide the identity of the tenants of the Premises, and to confirm whether Ah Keung was employed by the Owner, or by the Defendants, to enable Madam Chan to commence legal proceedings for compensation. There was no reply from the Owner before Madam Chan's commencement of proceedings in April 2007.
3. After the service of the Defence in October 2007, Madam Chan wrote first to the Incorporated Owners, and then to the Owner again on 30 April 2008 for information on the identity of the tenant or licensee of the Premises, indicating that discovery proceedings may be instituted against the Owner unless such information is provided. A reply was finally received from the Owner on 6 May 2008, when they wrote to Madam Chan's solicitors to confirm that the 5th floor of the Building was leased to Polymer.
4. On the evidence, therefore, Madam Chan did not have knowledge of the identity of the tenant of the Premises, which identity she was seeking for the purpose of pursuing her claim against the employer of Ah Keung, until 6 May 2008.

**Whether Madam Chan might reasonably have been expected to acquire knowledge of the fact of the identity of the proposed 3rd Defendant**

1. Counsel for the Defendants and for Polymer argued that the identity of the tenant of the Premises could have been ascertained before the issue of the Writ in April 2007, or before the 3 year limitation expired in June 2007, if Madam Chan or her solicitors had written to the Owner earlier, or again after the first letter of 2 January 2007, to press for the information subsequently supplied in May 2008.
2. Under s.27(8)(a) of the Ordinance, a person's knowledge includes knowledge which he might ***reasonably have been expected to acquire*** from ***facts observable or ascertainable*** by him.
3. S. 27(8)(b) goes on to provide that a person's knowledge includes knowledge which he might reasonably have been expected to acquire from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek, so long as he has taken all reasonable steps to obtain and, where appropriate, to act on that advice.
4. I do not accept that Madam Chan required expert advice before she can acquire the necessary knowledge of the identity of the employer of Ah Keung. As apparent from the judgment of Russell L.J. in *Halford v. Brookes* [1991] 1 WLR 428, doubts have been expressed on the proposition that a party’s solicitor is an expert within s.27(8) of the Ordinance. On the facts of this case, even without the help of lawyers, Madam Chan had been able to obtain information from the Incorporated Owners as to the identity of the parties occupying the Premises, which she regarded as relevant to the commencement of litigation for the purpose of pursuing her claim for damages.
5. There is no doubt that knowledge for the purposes of s.27 is extended to include constructive or imputed knowledge. However, s.27 refers only to knowledge which a person "*might reasonably have been expected to acquire*" from facts "*ascertainable by him*". Facts can be ascertainable after substantial time, effort and expenses have been spent. Under s. 27, the court only expects a person to take reasonable steps to acquire knowledge from facts reasonably ascertainable.
6. On the facts of this case, Madam Chan and her solicitors were attempting to identify the employer of Ah Keung. “Identity” is more elusive, and not readily ascertainable from the facts observable or ascertainable by Madam Chan. On the facts of this case, Madam Chan had to identify the employer of the person whose act had caused her to suffer injury. The case is different to that of an employee seeking to identify his/her own employer for the purpose of seeking employees compensation. It is also different to that of a tenant seeking to identify his/her landlord for the purpose of recovering damages under a tenancy agreement. The identity of the defendant in such examples can more easily and readily be ascertained, from the contract of employment, the tenancy agreement, the wages record or from the rental receipts.
7. On the evidence, Madam Chan and her solicitors had taken reasonable steps to ascertain the identity of the employer of Ah Keung. They only knew that Ah Keung worked for the occupiers of the Premises. They made a land search, and obtained information concerning the Owner of the Premises. They wrote to the Owner on 2 January 2007 to ascertain the identity of the tenant of the Premises. They approached the Incorporated Owners to ascertain the identity of the tenant of the Premises. They made company searches and B.R. searches against the 2nd Defendant and the company by the name of "華誼" which they were able to obtain. From the information which Madam Chan and her solicitors ***were*** able to acquire before April 2007 when the Writ was issued and by June 2007 when the 3 year limitation from the date of the accident expired, Madam Chan reasonably believed Ah Keung's employer to be either, or both, of the Defendants. The only criticism made of them is that, not having received a response from the Owner to their letter of 2 January 2007, Madam Chan's solicitors should have written again to press for a reply or to take other action.
8. As I have explained in paragraph 15 above, the court only expects a person to take reasonable action to acquire knowledge from facts reasonably ascertainable by him. It is reasonable to expect that the action to be taken by a person intending to commence litigation would be proportionate. As Counsel for the Defendants rightly pointed out, defendants or prospective defendants cannot be expected to readily assist a prospective plaintiff in pursuing his/her claim, and to volunteer information or evidence. On the evidence adduced in this case, I am satisfied that Madam Chan and her lawyers had acted reasonably in the steps which they had taken before 23 June 2007 to ascertain the identity of Ah Keung's employer, and that they could not reasonably have been expected to acquire the knowledge of the identity of Polymer as the employer before.
9. I am therefore satisfied by Madam Chan's evidence that she only acquired knowledge of the identity of Polymer as defendant on 6 May 2008, and that her claim against Polymer is within the 3 years period of limitation.

**Whether it would be equitable to allow Madam Chan's action to proceed under s.30**

1. If I am wrong on the effect of s.27, then a balancing exercise has to be performed under s.30 of the Ordinance, to decide whether it would be equitable for the Court to allow Madam Chan's claim against Polymer to proceed, having regard to the degree to which Madam Chan, the Defendants and Polymer may be prejudiced.
2. There is no doubt that Madam Chan will suffer prejudice, if her claim is barred by virtue of s.27. She will not be able to pursue her claim of damages in the excess of $130,000.00 against Polymer, and her claim against the Defendants will fail if it transpires that Polymer is the true employer of Ah Keung. For the reasons cogently set out in the Judgment of Rhind, J in the case of *Tam Oi Kau v. Tacksen Shui Hing Godown Co. Ltd.* HCA 8735/1984, 14 August 1985, I do not accept the argument that the cause of Madam Chan's prejudice lies in the negligence of her own solicitors, and not the time bar.
3. I do not see any prejudice that may be sustained by the Defendants, if Madam Chan should be permitted to pursue her claim against Polymer. If it is established at trial that Madam Chan does not have any valid claim against the Defendants, then Madam Chan's action against the Defendants will be dismissed, and the Defendants will have their remedy in costs.
4. Polymer argues that it will lose the benefit of a time-bar defence if Madam Chan's claim is permitted to be pursued. The gist of the submissions made by Counsel for Madam Chan, in answer to this, is that Polymer's prospective loss of a windfall accrual of a limitation defence should be regarded as either no prejudice at all, or only a slight decree of prejudice. I will consider the question of whether Polymer will suffer any real or "forensic" prejudice in paragraphs 25 and 26 below.
5. The length of the delay between the expiry of the limitation period and the application for amendment and joinder is 14 months. The reasons given by Madam Chan and her solicitors are essentially the initial difficulties they had encountered in ascertaining the identity of the employer of Ah Keung, and the reluctance on the Defendants' part to provide information concerning the tenants or licensees of the Premises and the employer of Ah Keung. Interrogatories had been served in April and May 2008, which were not fully answered by the Defendants. It was not until 30 April 2008 that Madam Chan's solicitors wrote again to the Owner for the identity of the tenant of the Premises, and the Owner gave the information sought on 6 May 2008. There was no delay after 6 May 2008, and Madam Chan applied to join Polymer on 27 August 2008.
6. The period of 14 months is not insubstantial. However, there is no evidence as to how the Defendants and Polymer can be prejudiced by reason of this period of delay in their conduct or preparation of their defence. The Defendants had been preparing for their defence since the service of the Statement of Claim in September 2007. Despite Polymer being a separate legal entity, the evidence clearly shows that there is a close connection between Polymer and the Defendants. They share the same office at 910-911, 9th floor, Lu Plaza, 2 Wing Yip Street in Kwun Tong. The 2 partners of the business named as 1st Defendant are Cui You Jun ("**Cui**") and Robert Yan ("**Yan**"). They are both directors of the 2nd Defendant. Cui is a director of Polymer, and a shareholder of both the 2nd Defendant and Polymer. Yan made an affirmation in opposition to Madam Chan's application for amendment and joinder, on behalf of both the Defendants and Polymer. Obviously, Yan has the benefit of the necessary information and particulars concerning these proceedings which can be used for Polymer in its defence, and there is no other evidence before me to suggest that Polymer will be in a worse position to defend the claim after August 2008 than they would have had, had the claim against Polymer been made before June 2007. Again, if it transpires that Madam Chan has no valid claim against Polymer, Polymer will be vindicated at trial.
7. There is no indication that the evidence likely to be adduced may be less cogent than if the action had been brought within time against Polymer. Nor is there any suggestion from the evidence that witnesses would have any difficulty remembering the event or the details by reason of the lapse of time since the cause of action accrued, or that there would have been other witnesses who were present at the material time, but because of the delay, they could not be called to testify for either the Defendants or Polymer.
8. After considering all the relevant factors outlined in s.30(3) of the Ordinance, I am satisfied that it would be equitable to allow Madam Chan's claim against Polymer to proceed.
9. I will make an order in terms of paragraphs 2 to 5 of the Summons issued on 27 August 2008. The costs of and occasioned by the amendment to the Writ and the Statement of Claim, and any consequential amendment to the Defendants’ pleadings, should be borne by Madam Chan. Madam Chan’s costs of the hearings on 9 January 2009 and 2 September 2008, which are opposed by the Defendants, are to be borne by the Defendants in any event, with Certificate for Counsel. Polymer’s costs of the hearing on 9January 2009 are to be costs in the cause.

(Mimmie Chan)

District Judge

*Mr. Kenny Lin, instructed by Messrs. B. Mak & Co., for the Plaintiff*

*Miss Rita So, instructed by Messrs. Henry Fok & Co., for the 1st, 2nd and intended 3rd Defendants*