## DCPI 1041/2018

[2021] HKDC 1631

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURY ACTION NO 1041 OF 2018

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BETWEEN

LUI CHO YIN Plaintiff

and

雷健邦 1st Defendant

HONG KONG FACILITY SOLUTIONS 2nd Defendant

COMPANY LIMITED

DAH FUNG HONG (HOLDINGS) 3rd Defendant

COMPANY LIMITED trading as

DAH FUNG SERVICE

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Before: Deputy District Judge Liza Jane Cruden in Chambers

Date of Hearing: 25 August 2021

Date of Decision: 30 December 2021

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DECISION

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*A. Introduction*

1. By Notice of Appeal dated 1 April 2021 Hong Kong Facility Solutions Company Limited (“2nd defendant”) appeals against the Decision of the Master dated 19.3.2021 (“Master’s Decision”), in which the Master dismissed the 2nd defendant’s application by Summons dated 13 March 2020 (“Strike Out Summons”) for an order that Lui Cho Yin’s (“plaintiff”) Statement of Claim (“SoC”) against the 2nd defendant be struck out and the action against the 2nd defendant be dismissed.
2. The plaintiff’s claim in this personal injury action is for common law damages in respect of loss suffered as a result of falling off a ladder while carrying out air-conditioning maintenance work at the Customer Service Centre of FTLife Insurance Company Limited at 27/F, Wing On Centre, 111 Connaught Road Central, Sheung Wan, Hong Kong (“Work Place”), while in the course of his employment with雷建邦 (Lui Kin Bong, “1st defendant”) on 16 May 2015 (“Accident”).
3. It is the plaintiff’s case that Dah Fung Hong (Holdings) Company Limited (“3rd defendant”) was the principal contractor, the 2nd defendant was the subcontractor, and the 1st defendant was the sub-sub-contractor of the relevant work. The causes of action the plaintiff pleads to establish liability are negligence against all three defendants and breach of statutory duty and implied terms of his employment contract against the 1st defendant only.
4. The Strike Out Summons sought to strike out the plaintiff’s claim against the 2nd defendant pursuant to Order 18, rule 19, Rules of the District Court (Cap 336H) (“RDC”) on the grounds that:
5. it discloses no reasonable cause of action;
6. it is scandalous, frivolous or vexatious; or
7. it is an abuse of process of the court.
8. The 2nd defendant seeks to strike out the claim on 2 bases:
9. The plaintiff’s pleaded facts do not establish any duty of care owed by the 2nd defendant to the plaintiff;
10. in any event, the plaintiff’s claim against the 2nd defendant is time-barred.
11. The plaintiff submitted that both grounds were argued before the Master and the Master’s Decision gives cogent reasons why both grounds must fail.
12. The 2nd defendant filed one affirmation by its director, Lee Ying Siu dated 26 July 2019 (“Lee’s Affirmation”) in support of the application. Lee’s Affirmation addresses facts in relation to the 2nd defendant’s position that:
13. The plaintiff’s claim is time-barred;
14. The plaintiff’s claim lacks merit since (i) the 2nd defendant has no records showing that the plaintiff or the 1st defendant had worked at the work place on the date of the accident; (ii) no ladder had ever been provided by the 2nd defendant; and (iii) the plaintiff fails to identify the scope of duties owed by the 2nd defendant.
15. The plaintiff filed two affirmations in opposition, one by his solicitor Mr Hau Wing Ping Gary (“Hau’s Affirmation”), partner of Messrs V Hau & Chow (“VHC”) and the other his own (“Plaintiff’s Affirmation”), both dated 11August 2020.
16. The parties agreed a Chronology of the events that have occurred since the Accident.

*B. Legal principles on a strike out application*

1. The parties relied upon the principles on a strike out application summarised in *Hong Kong Civil Procedure 2021*, Vol 1, §18/19/4-9 including that:
2. It is only in plain and obvious cases that the court should strike out a pleading.
3. There should be no trial upon affidavit. Disputed facts are to be taken in favour of the party sought to be struck out. Nor should the court decide difficult points of law in striking out proceedings.
4. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out.
5. If the court does not think the matter to be clear beyond doubt or if it fails to be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious, then there should be no striking out.
6. It is for the party seeking to strike out to demonstrate that the case is a plain and obvious one in which the other party’s claim is bound to fail.
7. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. Where the legal viability of a cause of action is sensitive to the facts, an order to strike out should not be made.
8. Order 18, rule 19(2), RDC excludes evidence on an application under Order 18, rule 19(1)(a), RDC. The court is obliged to look at the pleading without extrinsic evidence and decide whether on the assumption that the facts as pleaded are true the pleading discloses a cause of action. Whereas on an application invoking any other ground in the rule evidence may be relied upon.
9. In a negligence claim, if the court is satisfied that the facts pleaded by the plaintiff fail to establish a relevant duty of care, the court may strike out the statement of claim on the basis that it discloses no reasonable cause of action: *Yue Xiu Finance Co Ltd v Dermot Agnew* [1995] 2 HKLR 186 *per* Cheung J (as Cheung JA then was) at p 203; *Wong Rocky Lok Kun v Wu Kwong Sum* [2018] HKDC 70 *per* HH Judge Winnie Tsui at §§87, 93. The test is whether “*the court can be persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts, the claim is bound to fail for want of a cause of action*”: *Yue Xiu Finance* at p 198 (line 20); *Wong Rocky Lok Kun* at §105(3).
10. The court may also strike out a statement of claim on the basis of a limitation defence if that defence is “*manifestly and immediately destructive of the Plaintiff’s claim*”; once a limitation defence is raised, the onus is on the plaintiff to prove that the cause of action relied upon accrued within the limitation period: *Kensland Realty Ltd v Tai, Tang & Chong* (2008) 11 HKCFAR 237*per* McHugh NPJ at §153d.
11. Where it is clear that a defendant relied on a limitation defence and the plaintiff could not overcome such plea, the court could strike out the claim on the basis that it was frivolous, vexatious and an abuse of the process of the court: *Kanson Crane Service Co Ltd v Bank of China Group Insurance Co Ltd*, HCA 4246/2002 (Deputy Judge Lam, 1 August 2003) at §13. The key is whether the case is indeed such a clear one, where it is manifest that there could be no answer to a claim that the period of limitation had expired: *Chiu Ming Sun v Ma Wing Michael* [1986] HKC 217 at 228G.
12. Where limitation is in issue, the matter can be tried as a preliminary issue, be left to the trial judge, or a defendant can apply to strike out the claim. The last option should only be resorted to if the defendant has a very strong case on limitation so as to bar the plaintiff’s case *in limine*, based only on affidavit evidence: *Wong Kam Lee v Shimizu Corp & Ors* [1996] HKLR 996, HCPI 467/1995 (Woo J, 9 December 1996) at §29.

*C. Parties’ respective cases*

*The plaintiff’s pleaded case*

1. The plaintiff’s pleaded case may be summarised as follows:
2. On the morning of 16 May 2015, the plaintiff was instructed by the 1st defendant, his employer and uncle, to carry out air-conditioning maintenance work at the Work Place on the 27/F of Wing On Centre.
3. The work at Wing On Centre had been sub-contracted to the 1st defendant by the 2nd defendant, who in turn had sub-contracted the work from the 3rd defendant, the principal contractor.
4. As the plaintiff’s employer, the 1st defendant owed the plaintiff a duty, *inter alia*, to take all reasonable precautions to ensure the plaintiff’s safety while carrying out his duties.
5. In the course of the work, the plaintiff had to climb up a ladder provided by the 2nd defendant in order to reach an air-conditioner situated at the ceiling of the room. While the plaintiff was on top of the ladder it began to shake and he held onto a hanging box of the air-conditioner and hung up in the air; eventually the plaintiff fell, fainted and sustained injuries as a result.
6. The plaintiff’s accident was caused by negligence on the part of the 1st defendant, the 2nd defendant and/or the 3rd defendant and/or their servants, employees, agents and/or contractors for whom they were vicariously liable, *inter alia*, by failing to maintain a safe working system, failing to provide sufficient assistance and supervision to the plaintiff, and exposing the plaintiff to a risk of injury which the 1st defendant knew or ought to have known (see SoC §5(a)-(j) for particulars).
7. The plaintiff also claims against the 1st defendant for breach of statutory duty and breach of implied terms of employment contract. These are not material on the present appeal which concerns the plaintiff and the 2nd defendant only.

*The 2nd defendant’s pleaded case*

1. Material averments of the 2nd defendant’s Defence are:
2. From April to May 2015 the 2nd defendant engaged the 1st defendant to carry out air-conditioning maintenance work at various floors of Wing On Centre.
3. Having sub-contracted the work at Wing On Centre to the 1st defendant, the 2nd defendant had no duty to and did not monitor the work of the 1st defendant.
4. In any event, the plaintiff’s claim against the 2nd defendant is time-barred by reason of section 27 of the Limitation Ordinance (Cap 347) (“LO”):
5. For the purpose of section 27 of the LO, the plaintiff gained the relevant knowledge on or shortly after 15 May 2015 (the accident date was 16 May 2015);
6. However, the plaintiff only added the 2nd defendant as a party to the present proceedings by amending the writ on 15 April 2019, more than 3 years after 16 May 2015. Therefore, the limitation period under section 27 of the LO has expired.
7. The 2nd defendant’s Defence §13(b)actually pleads the date of the plaintiff’s knowledge as “*on or shortly after 15 May 2015*”, but the key date should be 16 May 2015, being the day of the Accident. This is affirmed in Lee’s Affirmation and is still in accordance with the plea “*shortly after*” 15 May 2015.
8. The 2nd defendant has pleaded other defences, including that the Accident was caused by the plaintiff’s own negligence. These are not material on the present appeal.

*D. Whether the plaintiff’s pleaded facts support a relevant duty of care*

1. Mr Benny Lo for the 2nd defendant submitted that the plaintiff’s pleaded case fails to establish any negligence on the part of the 2nd defendant. On the plaintiff’s pleaded case, the 2nd defendant’s whole involvement in the Accident is limited to the following:
2. SoC §1: the work had been sub-contracted by the 2nd defendant to the 1st defendant;
3. SoC §4: the ladder the plaintiff fell from was provided by the 2nd defendant;
4. SoC §5: the 2nd defendant failed to take steps to ensure the plaintiff’s safety at the time; alternatively, the plaintiff’s accident was caused by the negligence of the 2nd defendant’s servants, employees, agents and/or sub-contractors for which the 2nd defendant was vicariously liable.
5. The leading case is *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2011) 14 HKCFAR 14, in which the Court of Final Appeal established, *inter alia*, the following principles:
6. A person is not vicariously liable for his independent contractor’s torts (§20).
7. However, a person who engages an independent contractor may be liable for his own negligence (§20).
8. In determining whether a duty of care is owed by the defendant to the plaintiff, the court will adopt the “*Caparo* approach” and will take a holistic view of the foreseeability of the harm, the proximity of the parties and whether it is fair, just and reasonable to impose a duty of care (§§27, 30, 37).
9. A person will owe a duty of care to the employee of his independent contractor if: (1) he lends the independent contractor equipment; (2) as he knew or ought reasonably to have known would happen, the independent contractor uses that equipment to do the work by a method which is unsafe; and (3) the employee is injured as a result (§§2, 47).

1. Applying the above principles to the present case, the 2nd defendant’s first point is that the plaintiff’s claim on the basis of vicarious liability for “*contractors*” is simply wrongin law. A person is not vicariously liable for his independent contractor’s torts.
2. On the plaintiff’s own case, the 1st defendant is merely a sub-contractor, not an employee, of the 2nd defendant: SoC §1. Apart from the 1st defendant, no other servant, employee, agent or sub-contractor of the 2nd defendant is mentioned in the SoC, let alone one who would owe the plaintiff duties to take positive steps to ensure the plaintiff’s safety. Accordingly, the plaintiff’s claim on the basis of vicarious liability is bound to fail in any event.
3. Ms Josephine Tjia counsel for the plaintiff says the 2nd defendant’s “vicarious liability” argument is misconceived. The proper reading of paragraph 5 of the SoC is that the 1st and/or 2nd and/or 3rd defendant(s) are vicariously liable for the negligence of their respective servants/employees. For instance, the 2nd defendant would be vicariously liable for the negligence of its servants/employees who arranged and provided the unsuitable/unsafe tool and ladder to the workers at the Work Place.
4. It was suggested by Ms Tjia that Uncle Tak, who was to hold the ladder for the plaintiff, may have been an employee of the 2nd defendant but on the plaintiff’s own evidence that is not so. The plaintiff states in his Witness Statement that *“At that time I and another employee of the 1st Defendant namely, ‘Uncle Tak’ (“Uncle Tak”) were assigned to work together for the Assigned Work. As far as I know, Uncle Tak had been employed by the 1st Defendant for many years… on the Date of the Accident, Uncle Tak was temporarily assigned to the Place of the Accident by the 1st Defendant for assistance. … In order to reach the Box I found a ladder that bore the name of the 2nd Defendant… Before I climbed the ladder, I had checked whether the Ladder was intact and had made sure that the Ladder was placed on the ground and would not shake. I had briefed Uncle Tak that his role was to assist me to perform my work at height, when I climbed up the Ladder, Uncle Tak had to hold onto the Ladder and if Uncle Tak had to leave the Room he had to first notify me”.* Uncle Tak was engaged by the 1st defendant. There is no question of the 2nd defendant being vicariously liable for employees or torts of the 1st defendant.
5. I find that any vicarious liability claim against the 2nd defendant for the acts of the 1st defendant’s employees is bound to fail, but the plaintiff does not really contend otherwise. The real issue is whether, on the pleaded facts, the plaintiff can establish any relevant duty of care owed directly by the 2nd defendant to the plaintiff.
6. Mr Lo contends that nowhere in the SoC has the plaintiff identified the facts upon which the supposed duty on the part of the 2nd defendant can arise. All the plaintiff has pleaded against the 2nd defendant is that: (i) the 1st defendant was the 2nd defendant’s sub-contractor; and (ii) the ladder the plaintiff fell from was provided by the 2nd defendant. Neither (i) nor (ii), individually or combined, establishes a relevant duty of care on the part of the 2nd defendant.

*Further authorities*

1. A principal contractor does not *per se* owe any duty to take care of his independent contractor’s employees. Something more is needed. Authority includes the following cases:
2. *Ferguson v Welsh* [1987] 1 WLR 1553,where the House of Lords held that an occupier who engages a contractor has no duty “*to supervise the contractor’s activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work*”: *per* Lord Keith of Kinkel at p 1560H; on the other hand, where he knows or has reason to suspect that the contractor is using an unsafe system of work, it might be reasonable for the occupier to take steps to see that the system was made safe. Lord Goff of Chieveley held at p 1564B “*I wish to add that I do not, with respect, subscribe to the opinion that the mere fact that an occupier may know or have reason to suspect that the contractor carrying out the work on his building may be using an unsafe system of work can of itself be enough to impose upon him a liability under the Occupier’s Liability Act 1957, or indeed in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using that unsafe system is to render the premises unsafe and thereby to cause the injury to the employee*”.
3. *Willmott Dixon Construction Ltd v Robert West Consulting Ltd* [2016] EWHC 3291 (TCC), Coulson J (as Coulson LJ then was) held at §19 that a main contractor has no duty to “*procur[e] the careful performance of work delegated to independent sub-contractors*”. One exception to the general rule that a main contractor is not liable for the negligence of its independent sub-contractor depends on the main contractor’s actual knowledge that the work is being done in a foreseeably dangerous way, and the condoning of it, rather than vicarious liability.
4. *Gauchan Som Prasad v Hin Wah Construction Co Ltd* (unrep, DCPI 2398/2009, 26.7.2011), HH Judge Lok (as Lok J then was) held that a principal contractor will owe a duty of care to employees of his sub-contractor in respect of injuries caused by a defective system of work if (1) he knew or should have known of the defective system of work and (2) had control or supervision over such defective system of work (§§31, 35-37). The 2nd defendant was liable with the 1st defendant as joint tortfeasors for the accident. The 2nd defendant was not just simply engaging the 1st defendant to carry out the construction works at the site. It had assumed responsibility for the safety of the workers working at the site and control over the 1st defendant’s system of work.
5. *Rai Gehendra Raj v Yick Hing Construction Co Ltd* (unrep, HCPI 48/2012, 31.8.2017), Lisa Wong J at §§51-55 distinguished *Gauchan* and held that the principal contractor owed no duty of care in respect of the employee’s injury, on the basis, *inter alia*, that there was no evidence that the principal contractor knew of the defective system of work.
6. Despite such authorities, the plaintiff has not, anywhere in the SoC, averred that:
7. the 2nd defendant was an occupier of the premises; or
8. the ladder provided by the 2nd defendant was defective; or
9. the 2nd defendant provided the ladder knowing that it would be used in an unsafe way; or
10. the 2nd defendant knew that the 1st defendant used a defective system of work; or
11. the 2nd defendant had any amount of control or supervision over the 1st defendant’s system of work.
12. Mr Lo submitted that absent any of these, it is impossible to see how the facts as pleaded by the plaintiff give rise to any duty of care on the part of the 2nd defendant. The plaintiff’s SoC against the 2nd defendant should therefore be struck out as disclosing no reasonable cause of action.

*Luen Hing Fat*

1. The starting point is that the 2nd defendant is not vicariously liable for its independent contractor’s torts. In *Luen Hing Fat*, the CFA unanimously held that a person will owe his independent contractor’s employee a duty of care in specific circumstances, namely if the principal contractor lent the sub-contractor equipment *and* he knew or ought to have known that the sub-contractor would use that equipment to do the work by a method which is unsafe: see §§2 and 47 *per* Bokhary PJ.
2. Bokhary PJ set out that broadly speaking, the essential elements of a successful claim in the tort of negligence are (a) a duty of care owed by the defendant to the plaintiff, (b) breach of that duty, (c) damage suffered by the plaintiff as a result and (d) such damage not being too remote. The appeal turned on whether the first element, namely a duty of care is present: see §§ 21, 30 *per* Bokhary PJ.
3. In *Luen Hing Fat* the harm in question was foreseeable. Important facts in determining whether it was fair, just and reasonable to hold that a duty of care was owed by the factory operator to the worker were that the factory operator had loaned the independent contractor the jacks and trolleys *and* knew or ought to have known that they would be used to do the work by an unsafe method. The common law does not impose liability for pure omission but the case was not one of pure omission. The supervisor employed by the factory operator had recognised before the accident that the operation was extremely unsafe but never took steps to stop or even warn against it. The factory operator had taken a positive part, thus assuming a positive role, in the creation of the danger, by lending the equipment which it knew or ought reasonably to have known would be used to do the work by an unsafe method. Such participation, too, goes to it being fair, just and reasonable to hold the factory operator owed the worker a duty of care in that case. In the present case there is no pleading of knowledge of an unsafe method or facts that could amount to participation in a known unsafe operation on the part of the 2nd defendant.

*No reasonable cause of action – the plaintiff’s case*

1. The plaintiff says that the 2nd defendant’s no reasonable cause of action ground to strike out the plaintiff’s claim can be easily disposed of. The case is a common work accident claim, with the 2nd defendant in the position of a middle contractor. The plaintiff referred to the evidence of the 2nd defendant that it has no records of the plaintiff’s attendance, and that no ladder had been provided by the 2nd defendant, but Mr Lo does not rely on those facts for this ground. The parties are agreed that disputed facts are to be taken in favour of the party sought to be struck out. Factual disputes do not assist the 2nd defendant to show the plaintiff has no reasonable cause of action.
2. The plaintiff fails to see how the 2nd defendant can argue that its scope of duties is not made clear and that the plaintiff fails to identify the scope of duties owed by the 2nd defendant so there is no reasonable cause of action. The plaintiff has averred that the 2nd defendant was the subcontractor, and that it provided the ladder from which the plaintiff fell. The plaintiff relies on paragraph 5 of the SoC as pleading allegations of negligence against the 2nd defendant clearly with full particulars of how the 2nd defendant was negligent. Further, these are all disputed facts that ought to be tried at trial.
3. Ms Tjia says that the plaintiff’s case against the 2nd defendant is that the plaintiff was provided with unsafe and unsuitable equipment to work at height, and such equipment was provided by the 2nd defendant. In the particulars of negligence it is pleaded, *inter alia*, that the 2nd defendant as a subcontractor of the Work Place:
4. failed to provide proper training and information to the plaintiff as to how to work at height;
5. failed to provide adequate and competent manpower and manual assistance to the plaintiff to perform the work safely; and
6. failed to provide safe and proper working platform for the plaintiff to carry out his work at height.
7. Taking the elements of the tort of negligence as essentially duty, breach, causation and damage, it is only the first element, duty that is in issue: whether or not the plaintiff has pleaded a relevant duty. The particulars at paragraph 5 of the SoC that the plaintiff relies upon are particulars of breach. If the plaintiff has not pleaded the relevant duty owed by the 2nd defendant to the plaintiff a necessary averment is missing. Pleading breach would not save the pleading of negligence.
8. The plaintiff infers from the pleadings and witness statements filed, that there are disputes between the 2nd defendant and the 3rd defendant as to whether the failure to provide a safe and proper working platform to the workers at the Work Place was caused by the 2nd defendant or the 3rd defendant.
9. The plaintiff also refers to the 3rd defendant’s Defence that pleads, *inter alia*, that the 2nd defendant was under a contractual duty to (1) ensure all workers at site had proper training to work at height; and (2) provide safe equipment for carrying out the work at height safely. The plaintiff says that from the pleadings, there is no question but that all parties in the proceedings clearly understand the plaintiff’s case against each and every one of them. The plaintiff refutes the case that no pleaded facts can support the 2nd defendant owed him a duty of care.
10. On an application to strike out a claim for no reasonable cause of action against a particular party it is essential that the pleading sought to be struck out is considered. The plaintiff must distinguish between what he has actually pleaded against the 2nd defendant and the averments of other parties against each other. The 2nd defendant seeks to strike out the plaintiff’s claim against the 2nd defendant pleaded in the SoC. It does not assist the plaintiff to point to any cause of action or averment of another party against the 2nd defendant.
11. The plaintiff contends that the case cannot satisfy the high threshold for striking out. The plaintiff relies upon the Master’s Decision that all the facts required to support a reasonable cause of action against the 2nd defendant are already pleaded. The Master’s Decision refers to paragraph 1 of the SoC, pleading the relationship of the parties and paragraph 5 of the SoC, particulars of negligence or breach. The Master’s Decision records that the 2nd defendant’s main contention was that the plaintiff’s claim against the 2nd defendant has been time-barred. Whereas on this appeal the 2nd defendant has submitted that the claim against it should be struck out principally on the ground that the SoC discloses no reasonable cause of action against the 2nd defendant. There has been a change of focus and other authorities produced by Mr Lo who now appears for the 2nd defendant.
12. I take all disputed facts in favour of the plaintiff. Having considered the averments in the SoC, in my view nowhere in the SoC has the plaintiff identified the facts upon which a duty on the part of the 2nd defendant owed to the plaintiff can arise. What the plaintiff has pleaded against the 2nd defendant is that: (i) the 1st defendant was the 2nd defendant’s sub-contractor; and (ii) the ladder the plaintiff fell from was provided by the 2nd defendant. The authorities make it clear that neither (i) nor (ii), individually or combined, establishes a relevant duty of care on the part of the 2nd defendant. Something more is required. The facts pleaded by the plaintiff fail to establish a relevant duty of care. Therefore I hold that the SoC discloses no reasonable cause of action against the 2nd defendant. It is plain and obvious that the claim against the 2nd defendant ought to be struck out.

*E. Whether the plaintiff’s claim is in any event time-barred*

*Section 27 of the LO*

1. Section 27 of the Limitation Ordinance, Cap 347 provides:

“27. Time limit for personal injuries

* + - * 1. This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an Ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
        2. Section 4 shall not apply to an action to which this section applies.
        3. Subject to section 30, an action to which this section applies shall not be brought after the expiration of the period specified in subsections (4) and (5).
        4. Except where subsection (5) applies, the said period is 3 years from—

(a) the date on which the cause of action accrued; or

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

* + - * 1. …
        2. In this section, and in section 28, references to a person’s date of knowledge are references to the date on which he first had knowledge of the following facts—

(a) that the injury in question was significant; and

(b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

* + - * 1. For the purposes of this section an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
        2. For the purposes of this section and section 28 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.”

*Limitation in personal injuries cases*

1. Applying the LO here, section 27(3) of the LO provides that, subject to section 30 of the LO, an action for damages in respect of a personal injury shall not be brought after the expiration of the period specified. Section 27(4) of the LO provides that for an action for personal injuries the period is 3 years from:
2. the date on which the cause of action accrued (“primary limitation period”); or
3. the date (if later) of the plaintiff’s knowledge (“secondary limitation period”).
4. Under section 27(6) of the LO, the plaintiff’s “*knowledge*” is defined as the date on which he first had knowledge of the following facts:
5. “*that the injury in question was significant*”; and
6. “*that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty*”; and
7. “*the identity of the defendant*”; and
8. “*if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant*”.
9. Section 27(6) of the LO continues that “*knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant*”. In other words, only *factual*—not *legal*—knowledge is relevant.
10. The meaning of “*knowledge*” for the purposes of section 27 of the LO has recently been considered in depth by the Court of Appeal in *Momin Lok v Hospital Authority* [2021] HKCA 1075. The Court of Appeal confirmed, *inter alia*,the following principles (emphases added):
11. “*Knowledge*” means knowing “*with sufficient confidence to justify embarking on the* ***preliminaries*** *to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence*” (§56);
12. In other words, the “*plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to* ***begin to investigate whether or not she has a case against the defendant***” (§61);
13. “*Reasonable belief*” (cf. “reasoned belief”) will normally suffice, that is the belief must be “*held with a degree of confidence (rather than to be little more than a suspicion)*” and “*carry a degree of substance (rather than to be the product of caprice)*” (§§56, 62);
14. A reasonable belief does **not** have to be supported or justified by evidence before it can amount to knowledge under section 27 of the LO (§§62-63, 78);
15. Knowledge in the context of section 27 of the LO includes both actual knowledge and constructive or imputed knowledge (i.e. knowledge which the plaintiff “*might reasonably have been expected to acquire […] from facts observable or ascertainable by him*”: section 27(8) of the LO (§55);
16. “*Attributable*” in the context of section 27(6)(b) of the LO “*means* ***capable*** *of being attributed to; it refers to a real possibility and not a fanciful one; it signifies knowledge that the act or omission is a* ***possible*** *cause of the damage as opposed to a probable one*” (§55);
17. It suffices for the plaintiff to know the “***essence***” of the act or omission alleged to constitute negligence, i.e. if he can identify it “***in broad terms***” (§§61, 66).

1. An instructive authority on the application of the principles is *Kensland Realty*. Ribeiro PJ at paragraph 89 addressed when time starts to run (citing Sir Thomas Bingham MR, as Lord Bingham then was, in *Dobbie v Medway Health Authority* [1994] 1 WLR 1234 at 1240):

“*Time starts to run against the claimant when he knows that the personal injury on which he founds his claim is capable of being attributed to something done or not done by the defendant whom he wishes to sue. This condition is not satisfied where a man knows that he has a disabling cough or shortness of breath but does not know that his injured condition has anything to do with his working conditions. It is satisfied when he knows that his injured condition is capable of being attributed to his working conditions, even though he has no inkling that his employer may have been at fault.*”

1. In determining whether a plaintiff has the requisite knowledge, the plaintiff relies on *Nash v Eli Lilly & Co.* [1993] 1 WLR 782 at 796, and the following principles from *Hong Kong Civil Procedure 2021* at F1/29/5:
2. The test for actual knowledge is subjective. What matters is the knowledge actually possessed by the plaintiff.
3. Constructive knowledge includes knowledge reasonably expected to be acquired. The extent of reasonable inquiry will depend on the factual context of the case.
4. A firm belief by a plaintiff that the injury was attributable to the act or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical, legal or others, would not be regarded as knowledge until the result of his inquiries was known to him or, if he delayed the inquiries or getting the result of them, until the time at which it was reasonable for him to get the result.
5. However, if the plaintiff held a firm belief which was of sufficient certainty to justify the taking of the preliminary steps for proceedings by obtaining advice about making a claim for compensation, then such belief is knowledge and the limitation period would begin to run.
6. If negative advice is obtained by the plaintiff, that fact must be taken into account in conjunction with all other relevant facts, in determining when, if ever, the plaintiff had knowledge.
7. If no inquiries were made, then, if it were reasonable for such inquiries to have been made, and if the failure to make them is not explained, constructive knowledge must be considered.
8. The onus of proof is on the plaintiff, in cases where the writ is not issued until after three years from the date of accrual of the cause of action, to plead and prove a date for first acquiring knowledge within three years preceding the issue of the writ.
9. If the defendant wishes to rely on a date for knowledge prior to the three years preceding the issue of the writ, the onus is on him to plead and prove that the plaintiff had or ought to have had knowledge by that date.
10. The plaintiff relied upon *Nash*. At the hearing Mr Lo submitted that in so far as there is any difference between *Nash* and *Momin Lok* the proper authority to follow is *Momin Lok*. Ms Tjia did not dispute the authority of *Momin Lok*.

*Facts*

1. Ms Tjia set out the facts as follows. The plaintiff was an air-conditioner maintenance worker under the employment of the 1st defendant at the time of the Accident. The 1st defendant was a sub-contractor of the 2nd defendant, while the 2nd defendant was a sub-contractor of the 3rd defendant, the principal contractor at the Work Place. As a mere maintenance worker, the plaintiff had no actual knowledge of the chain of sub-contractors. He knew that the 2nd defendant’s uniformed workers were also working at the Work Place and that the ladder bore the 2nd defendant’s logo.
2. After the Accident, the plaintiff was driven by the 1st defendant to the hospital. The 1st defendant claims that he was not at the Work Place at the time of the Accident but was notified by Mr Tam of the 2nd defendant.
3. None of the defendants filed any Form 2 after the Accident. The plaintiff was unaware of his right to receive periodic payments under the Employees’ Compensation Ordinance, Cap 282 (“ECO”) until he was told by a patient at the hospital in January 2016. He filed his own Notification of Accident on 21 January 2016, naming the 1st defendant as his employer, but providing no information about the principal contractor, as he had no knowledge on the matter (“1st NOA”). The 1st defendant still failed to file any Form 2.
4. The plaintiff instructed Messrs Day & Chan (“D&C”) to act in August or September 2016. The plaintiff told D&C of his observation about the 2nd defendant at the Work Place. D&C advised the plaintiff to file another Notification of Accident naming the 2nd defendant, so as to notify the Labour Department of the parties present. D&C assured the plaintiff that they would conduct investigation to confirm whether the 1st defendant sub-contracted the work from the 2nd defendant, and advised the plaintiff not to sue the 2nd defendant should they fail to gather enough evidence that the 2nd defendant was involved. A second Notification of Accident was filed on 23 December 2016 naming the 2nd defendant as the principal contractor (“2nd NOA”). The 2nd defendant received the 2nd NOA on or about 5 January 2017, but appears to have taken no action.
5. Subsequently, the 1st defendant filed a Form 2 dated 14February 2017, naming the 2nd defendant as the principal contractor (“Original Form 2”). However a week later, on 22 February 2017, the 1st defendant filed an amended Form 2 (“Amended Form 2”) crossing out the 2nd defendant as the principal contractor, without naming anyone else in its place. Ms Tjia says it is unclear from the defendants’ evidence whether the 1st defendant and the 2nd defendant had any communication between the original filing and amendment of the Form 2, but asserts that the 1st defendant is a long-term business partner of the 2nd defendant and they should have good channel of communication.
6. Having received the Original and Amended Form 2 from the Labour Department by letter dated 24 February 2017, D&C took out an Employees’ Compensation Application on behalf of the plaintiff on 13April 2017, naming only the 1st defendant as the Respondent (“EC Application”).
7. Subsequently D&C closed down, and the plaintiff’s case was transferred to Messrs John W Wong & Co (“J Wong”). On 15 May 2018 J Wong issued the Writ of Summons against the 1st defendant only.
8. On 26 July 2018 the plaintiff instructed his present solicitors VHC. The plaintiff was advised to apply for Legal Aid. Upon receiving the plaintiff’s instructions VHC corresponded with the 2nd defendant seeking its confirmation as to whether it was the principal contractor at the Work Place at the time of the Accident. By letter dated 24 September 2018 the 2nd defendant gave a holding reply. The letter did provide the insurance policy. From reading that document VHC were able to come to a view and advise the plaintiff.
9. On 24December 2018 an application to join the 2nd defendant as a respondent in the EC Application was made. VHC says this was in view of the lack of meaningful response from the 2nd defendant and the expiration of the limitation period.
10. On 11 February 2019 the 2nd defendant gave a substantive response by letter stating, *inter alia*, that:
11. The 1st defendant is a long-standing business partner of the 2nd defendant.
12. In or around March 2015 the 2nd defendant was engaged by the 3rd defendant to carry out air duct cleaning and replacement at the Work Place. The 2nd defendant sub-contracted part of the work to the 1st defendant.
13. The 2nd defendant was unaware of the Accident until end of 2017 when it was notified by the 1st defendant.
14. In March 2019 VHC was assigned by the Legal Aid Department to act for the plaintiff. VHC then amended the Writ of Summons by adding the 2nd defendant and the 3rd defendant on 15 April 2019. The 3rd defendant was also added as a respondent in the EC Application.
15. The 2nd defendant opposed being joined as a respondent in the EC Application. By decision dated 24September 2019 HH Judge Levy refused to grant leave to join the 2nd defendant in the EC Application (“EC Joinder Decision”). The plaintiff relies on findings in the EC Joinder Decision, including that:
16. HH Judge Levy accepted that the plaintiff had very little information about the principal contractor at the time of the filing of the 1st NOA;
17. However, by the time the 2nd NOA was submitted on 21 December 2016, HH Judge Levy believed that the plaintiff or D&C had sufficient evidence to issue the EC Application against the 2nd defendant;
18. The plaintiff had thus failed to provide a reasonable excuse for the failure to make an application within time, as required under section 14(4) of the ECO as the condition to extend the time limit.
19. Section 14(1) of the ECO prescribes a time limit of 24 months for bringing of proceedings to recover employees’ compensation unless a court, pursuant to section 14(4) of the ECO, is satisfied that there was a reasonable excuse for the failure to make an application, It must be appreciated that the EC Joinder Decision determined a different application, under a different Ordinance, requiring application of different tests to those applicable to the limitation issues in this common law claim. The finding relied upon by Ms Tjia that since the 1st NOA only contained very little information “*I’d be inclined to accept that*” the plaintiff at that stage, had very little information about the principal contractor, must be read in context. HH Judge Levy held that by the stage when the 2nd NOA was submitted on 21 December 2016, in which information of the 2nd defendant as the principal contractor was stated, the plaintiff or his former solicitors had sufficient evidence to issue the EC Application against the 2nd defendant as the employers’ contractor.
20. Mr Lo points out that there is no evidence that the plaintiff gained any additional information between submitting the 1st NOA and the 2nd NOA. As set out below, the Plaintiff’s Affirmation makes it clear that the information he provided to D&C comprised the facts and matters that he had known since the Accident, which he knew when he personally filled out the 1st NOA and that was also sufficient to cause them to submit the 2nd NOA.
21. The plaintiff’s present solicitors wrote to the 2nd defendant for information but that information was not needed to issue the EC joinder application. HH Judge Levy rejected the excuse that delay in the EC proceedings was on account of the 2nd defendant’s delay. Mr Lo reminds the court that there is no question of being bound by factual findings in other interlocutory proceedings. Although, my own view of many of the facts accords with the EC Joinder Decision, save as set out and that it is the application of provisions of the LO to the facts that is in issue.
22. On 13 March 2020, the 2nd defendant took out the Strike Out Summons.

*The plaintiff’s evidence of knowledge*

1. I shall set out what the plaintiff himself actually says that he knew, and when, according to his own Affirmation:
2. Although he is the nephew of the 1st defendant his relationship with the 1st defendant was and is loose. Except when working with the 1st defendant, he seldom met or talked with the 1st defendant. He only met with the 1st defendant during festival celebration dinners with his other relatives.
3. *“… the hours of works would depend on what jobs the 1st Defendant could sub-contract*”.
4. “*… the 1st Defendant would directly assign work orders to me and I would not be involved in any negotiation with the head contractors*”.
5. After the accident the plaintiff did not know he was entitled to receive periodic payments when on sick leave and in order to earn a living he continued to work for the 1st defendant.
6. In January 2016 he was told by another patient of his entitlement to receive periodic payments from his employer and to report the accident to the Labour Department so it would follow up and assist him to seek employees’ compensation.
7. “*I did not discuss my intention to report the subject accident to the Labour Department or ask the 1st Defendant to take the initiative to report the same… I attended the Labour Department and filed my 1st Notification of Accident on 21st January 2016.”*
8. When the plaintiff filed the 1st NOA he did not know and the Labour Department did not advise him that he had the right to issue proceedings against the 1st defendant for compensation.
9. “*I verily believed that since I had filed the 1st Notice, the Labour Department would follow up on my subject accident and assist me to seek employees’ compensation and therefore, I did not ask the 1st Defendant about the role of the 2nd Defendant and the exact relationship between them*”.
10. In August or September 2016 another patient advised him to instruct solicitors to claim compensation. “*That was the first time I knew that I had the rights to instruct solicitors to assist me in claiming against the 1st Defendant in relation to the subject accident*”. He instructed D&C.
11. To the best of his recollection, before signing the 2nd NOA, he had a meeting with Mr Chow of D&C, who asked him to recall who was present at the accident scene and what he saw before the accident. He told Mr Chow that except for the 1st defendant, who arrived after the accident, and Uncle Tak who was instructed by the 1st defendant to work as a pair with the plaintiff “*I recognised some of the workers of the 2nd Defendant were working at … [the Work Place] and some of the equipment at the Work Place bore the logo of the 2nd Defendant*”.
12. On 21 December he was advised by D&C (“Meeting”) that it was his responsibility to inform the Labour Department of “*all the parties that might be involved in the subject accident as soon as possible after the accident. I reconfirmed with Day & Chan that except the presence of the 1st Defendant and [Uncle Tak] … I recognised some of the workers of the 2nd Defendant were working at the Work Place and some of the equipment at the work place bore the logo of the 2nd Defendant… the reason why I recognised the name and the logo of the Company was because during my approximately 3 years of employment with the 1st Defendant, I knew that the 1st Defendant subcontracted various works from the 2nd Defendant. If the works were subcontracted from the 2nd Defendant, the 1st Defendant would sometimes tell me so and instructed me to attend the 2nd Defendant’s warehouse at Fast Industrial Building, 658 Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong to collect equipment for use. However for the job at Work Place at the time of the subject accident, the 1st Defendant had not told me who he had subcontracted the work from, nor asked me to collect any equipment from the 2nd Defendant*”.
13. “*Because of the aforesaid, Day & Chan advised me to file another Notification of Accident to the Labour Department to name all parties present (including the 2nd Defendant) in the work place at the material time. Day & Chan further told me that they would conduct investigation to confirm whether the 1st Defendant sub[con]tracted the work from the 2nd Defendant at the material time of the subject accident and advised me not to sue the 2nd Defendant if they eventually could not gather sufficient evidence to prove that the 2nd Defendant was involved in the subject accident. Therefor the Notice was signed on 21 December 2016 with the 2nd Defendant named as the principal contractor, and was filed in the Labour Department by Day & Chan on 23rd December 2016*”.
14. The plaintiff’s relationship with the 1st defendant got worse after filing of the 1st NOA. Although he was still under the employment of the 1st defendant until July or August 2017, he seldom talked to the plaintiff when working together. Because of his sour relationship with the 1st defendant, the plaintiff did not discuss the details of the Accident with the 1st defendant.
15. “*Before the Meeting with Day & Chan, I did not know that I had the right to issue proceedings against, inter alia, the 2nd Defendant if the 1st Defendant subcontracted the work from the 2nd Defendant. Therefore I did not know I had to make any inquiry to the 2nd Defendant to ascertain its role. Nor did I make any enquiries with the 1st Defendant on his relationship with the 2nd Defendant at the material time of the subject accident*”
16. “*After the Meeting with Day & Chan, since Day & Chan told me that they would conduct investigation to confirm whether the 1st Defendant sub[con]tracted the works from the 2nd Defendant at the material time of the subject accident, I relied on them to make the relevant enquiries.”*
17. On 7 August 2018 at the plaintiff’s second meeting with Mr Hau of VCH, the plaintiff confirmed that he did not know the exact role of the 2nd defendant or the exact relationship between the 1st defendant and the 2nd defendant at the time of the accident.
18. The plaintiff also told Mr Hau what he had told and reconfirmed to Mr Chow, essentially that: (1) he was aware workers at the work place wore the uniform of the 2nd defendant and some equipment bore the logo of the 2nd defendant at the time of the Accident; (2) during his 3 years of employment with the 1st defendant, he knew that the 1st defendant subcontracted works from the 2nd defendant and had gone to the 2nd defendant’s warehouse to collect equipment for use on work sub-contracted from the 2nd defendant; (3) the 1st defendant did not tell him that the works he had to perform at the time of the Accident were sub-contracted from the 2nd defendant and he was not instructed to go to the 2nd defendant’s warehouse to collect equipment for use before he attended the Work Place.
19. Mr Hau showed the plaintiff the Writ of Summons. He says “*this was the first time I realised my former solicitors had commenced the subject Action and that the 1st Defendant was named as a party in the Writ of Summons but not also the 2nd Defendant*”. Mr Hau advised him, *inter alia*, that he might have to join the 2nd defendant as one of the defendants in the Action.
20. Mr Hau informed the plaintiff of the letter from Vivian Chan dated 24 September 2018, and at a 21 December 2018 meeting advised the plaintiff that on reading the schedule to the EC insurance policy attached to the letter, it could be inferred but not confirmed that the 2nd defendant may be the principal contractor at the time of the accident.
21. At a meeting on 21 December 2018 the plaintiff was told VHC was still obtaining and collating evidence, including on liability of the 2nd defendant. “*Since the 2nd Defendant had not yet confirmed*” with VHC the exact role of the 2nd defendant or the exact relationship between the 1st defendant and the 2nd defendant at the time of the Accident, it would be risky and have costs implications against the plaintiff to name the 2nd defendant as one of the defendants in the Action. The plaintiff instructed VHC to withhold serving the Writ on the 1st defendant and amending the Writ “*pending the confirmation from the 2nd Defendant as to its role and the relationship with the 1st Defendant at the material time*” and the grant of Legal Aid.
22. “*I could only confirm the role of the 2nd Defendant and the relationship between the 1st Defendant and the 2nd Defendant*” at the time of the Accident when shown 2 letters from Vivian Chan to VHC dated 11 February 2019 and 28 February 2019. The plaintiff instructed VHC to amend the Writ by naming the 2nd defendant as one of the defendants on 2 April 2019. The Writ was amended to join the 2nd defendant on 15 April 2019.
23. The plaintiff affirms that the date he had actual knowledge that the 1st defendant was the sub-contractor of the 2nd defendant and thus his injury was attributable in whole or part to the act or omission of the 2nd defendant was on 11 February 2019.

*Limitation – the plaintiff’s case*

1. The plaintiff’s opposition to the limitation basis to strike out is as follows:
   1. In the context of a striking out application, the court has to ask whether it is manifest that there could be no answer to a claim that the period of limitation had expired: *Chiu Ming Sun v Ma Wing Michael* [1986] HKC 217 at 228.
   2. While the primary limitation period had passed, there are credible disputes over whether the secondary limitation period had also expired.
   3. The date the plaintiff had actual knowledge that the 1st defendant was the sub-contractor to the 2nd defendant, and thus the plaintiff’s injury was attributable in whole or in part to the act or omission of the 2nd defendant, was on 11 February 2019.
   4. The 2nd defendant’s defence avers that the date of the plaintiff’s knowledge was on or shortly after 15 May 2015. However, the 2nd defendant has not pleaded a case of constructive knowledge, nor identified the matters that may fix the plaintiff with knowledge of the relevant facts.
2. The amendment to add the 2nd defendant to the Writ of Summons was made on 15 April 2019. The date for considering whether the plaintiff had the relevant knowledge is 16 April 2016, about 11 months after the Accident. If the plaintiff only acquired the relevant knowledge after that date, no issue of limitation arises.
3. The plaintiff’s case on actual knowledge is that he simply had no concrete information of the role of the 2nd defendant until the 2nd defendant confirmed that it was the middle contractor by letter dated 11February 2019. Nor did the 2nd defendant aver that it had notified the plaintiff of its role at any earlier date.
4. It is entirely reasonable that the plaintiff, as a mere maintenance worker employed by a sub-sub-contractor, did not have any information about the chain of sub-contractors at the time of the Accident. In the EC Joinder Decision, HH Judge Levy also accepted that the plaintiff had very little information about the principal contractor at the time of the 1st NOA, 21 January 2016.
5. The 2nd defendant has not explained the basis on which it alleges that the plaintiff had knowledge by 15May 2015, which is a date before the Accident had even occurred. The 2nd defendant has not averred any matter that may fix the plaintiff with actual knowledge between 21 January 2016 and 16 April 2016. If the plaintiff actually knew that the 2nd defendant contracted the work to the 1st defendant on the day of the Accident, it would be extremely odd and unreasonable that the plaintiff would elect not to sue the 2nd defendant when he issued the Writ against the 1st defendant.
6. The state of the plaintiff’s knowledge is said to be corroborated by the action taken by VHC when the plaintiff changed solicitors. Evidently, information then provided to VHC was insufficient for them to issue proceedings against the 2nd defendant, and hence the protracted correspondence with the 2nd defendant. Had the plaintiff actually known that the 2nd defendant was the upper contractor of the 1st defendant, he would have simply told VHC.
7. Ms Tjia considers that the only piece of evidence that may suggest that the plaintiff knew of the role of the 2nd defendant is the 2nd NOA, dated 21 December 2016. The information in the 2nd NOA is described as “*but an educated guess*” that did not reflect the actual state of the plaintiff’s knowledge. The plaintiff had no knowledge that the 2nd defendant was the actual upper contractor of the 1st defendant at the time of the Accident or at the time of the 2nd NOA.
8. Further, the 1st defendant’s filing of the Amended Form 2, in crossing out the 2nd defendant as the principal contractor, is an act of rebutting the plaintiff’s guess in the 2nd NOA. This should be taken into account in determining whether the plaintiff did have actual knowledge at any stage. While the 1st defendant was late in giving notice of the Accident, HH Judge Levy rejected the plaintiff’s attribution of his delay to the 1st defendant, finding that had the former solicitors been more prudent, they should have taken steps to carry out their own inquiries in order to find out whether the deletion of the 2nd defendant amendment to the Amended Form 2 could be relied upon. I too find that there is no evidence that the former solicitors were misled by the deletion.
9. Ms Tjia continues the 2nd NOA is dated within three years before the amendment of the Writ so raises no issue of limitation. In Lee’s Affirmation, Lee conceded that “*the Plaintiff knew of the identity of the 2nd Defendant as a contractor contracting work to the 1st Defendant at the time of the alleged incident and/or as early as 21st December 2016*”. If the plaintiff only knew of the 2nd defendant’s identity on 21 December 2016, the limitation period has not expired. Lee’s opinion on when the plaintiff knew any matter does not assist in the application of the proper legal test. Mr Lo does not rely on the 2nd NOA as the first date that the plaintiff had the requisite knowledge.
10. The plaintiff says there is no evidence that the plaintiff had actual knowledge of the 2nd defendant’s role on or before 16 April 2016. The 2nd defendant has the burden of proving that the plaintiff had knowledge by its pleaded date and the 2nd defendant’s case that the plaintiff had actual knowledge on or shortly after 15 May 2015 must fail. Ms Tjia refers to the 2nd defendant making a bare assertion that the plaintiff must have known the 2nd defendant’s role on the day of the Accident unsupported by any evidence and in fact contradicted by documentary evidence. Even as at the date of the 2nd NOA, the plaintiff did not know the 2nd defendant’s role as a subcontractor but mistakenly thought it was a principal contractor. Also, the Master’s Decision found that:

“*In my view, [the 2nd defendant’s] argument ignored the important fact that the Plaintiff submitted the 1st Notification on 21 January 2016 without mentioning the 2nd Defendant at all. … should the Plaintiff have known that the 2nd Defendant was the sub-contractor or the principal contractor, one would expect the Plaintiff would have named the 2nd Defendant in the 1st Notification*.”

1. The plaintiff maintained that the 2nd defendant’s argument on actual knowledge must fail. It is important that on this Strike Out Summons disputed fact be taken in favour of the plaintiff.

*Date of the plaintiff’s “knowledge” under section 27 of the LO*

1. The 2nd defendant accepts that it needs to show that it is plain and obvious that the plaintiff had acquired the relevant “*knowledge*” under section 27 of the LO by 14 April 2016. The 2nd defendant’s case is that this is shown for the following reasons.
2. There is no dispute that, for the purpose of section 27(6)(a) of the LO, the plaintiff knew, on or shortly after 16 May 2015, that his injury was significant.
3. It is also indisputable that, for the purpose of section 27(6)(b) of the LO, the plaintiff knew that his injury “*was attributable in whole or in part to the acts and omissions alleged to constitute negligence*”:
   1. This sub-section is satisfied once the plaintiff could identify “*in broad terms*” the cause of his injury.
   2. In broad terms, the act or omission alleged to constitute negligence in the present case is the plaintiff’s allegedly unsafe working conditions: *see* SoC §5.
   3. Hence, for the purpose of section 27(6)(b) of the LO, the plaintiff gained knowledge of attributability when “*he [knew] that his injured condition [was] capable of being attributed to his working conditions*”.
4. Section 27(6)(d) of the LO deals with vicarious liability. This is inapplicable here: if the plaintiff is to succeed at all, it must be on the basis of a duty owed by the 2nd defendant directly to the plaintiff but not vicariously. In any event, there can be no dispute that the plaintiff all along knew the identity of the 1st defendant.
5. Therefore, the only remaining issue is when the plaintiff first had knowledge of the identity of the 2nd defendant for the purpose of section 27(6)(c) of the LO.
6. What this means is that the 2nd defendant was the “*proper defendant*”: *Ng Keung Lung v Lam Chik Suen (decd)* (unrep, HCPI 512/2004, 25.11.2005) *per* DHCJ To at §§16, 18. Since the final part of section 27(6) of the LO states that knowledge of the law is irrelevant, this means that the plaintiff must know the facts that make the 2nd defendant the proper defendant.
7. I find that on the plaintiff’s own admission in his Affirmation and confirmed by Hau’s Affirmation:
   1. During his approximately 3 years of employment with the 1st defendant, the plaintiff knew that the 1st defendant sub-contracted various works from the 2nd defendant and that the 1st defendant would borrow the 2nd defendant’s equipment when carrying out the 2nd defendant’s work;
   2. The plaintiff recognised some of the 2nd defendant’s workers at the premises where the Accident occurred;
   3. The plaintiff recognised that some of the equipment at the premises bore the logo of the 2nd defendant;
   4. In particular, the plaintiff saw that the very ladder he fell from during the Accident bore the logo of the 2nd defendant;
   5. On 21 December 2016, on the basis of the above knowledge, D&C, the plaintiff’s solicitors at the time, filed a 2nd NOA with the Labour Department naming the 2nd defendant as the principal contractor.
8. Mr Lo submits that without a doubt, all this knowledge set out at (1) to (4) above would and must have been available to the plaintiff from the time of the Accident, as the plaintiff himself has affirmed. I accept that submission.
9. However, the Master held that this did not amount to knowledge of the 2nd defendant’s identity for the purpose of section 27 of the LO. The Master accepted the plaintiff’s case that he only acquired such knowledge “*on 11 February 2019, i.e. the date on which Vivian Chan confirmed that [the 2nd defendant] subcontracted the work to the [D1] at the material time*”: Master’s Decision §39.
10. Mr Lo submitted that this is a plain error in approach. As confirmed by G Lam JA in *Momin Lok*at paragraph 78, the courts have rejected the view that “*time does not run until the plaintiff’s belief in attributability is capable of being supported or justified by evidence*”.
11. The *Momin Lok* decision, upon which Mr Lo heavily relies, was delivered after the hearing and the Master’s Decision. I hold that it was unnecessary for the plaintiff to know the “*exact role*” of the 2nd defendant and the “*exact relationship*” between the 2nd defendant and the 1st defendant for time to begin to run. The exact role and relationship did not have to be “*confirmed*” by the 2nd defendant before time began to run.
12. In *Momin Lok* G Lam JA held, *inter alia*, that:

*“55.  Knowledge for the purpose of section 27 means both actual knowledge and constructive or imputed knowledge: section 27(8). The focus in this case is actual knowledge in terms of section 27(6)(b).**[[7]](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=137434&QS=%26%2340%3BMomin%2BLok%26%2341%3B&TP=JU" \l "_ftn7" \o ")  The authorities have established that the word “attributable” in that provision means capable of being attributed to; it refers to a real possibility and not a fanciful one; it signifies knowledge that the act or omission is a possible cause of the damage as opposed to a probable one: Halford v Brookes [1991] 1 WLR 428, 433-434; Nash v Eli Lilly & Co [1993] 1 WLR 782, 797‑798; Haward v Fawcetts [2006] 1 WLR 682, §11; Kensland, §§17 & 95.  The final part of section 27(6) makes it clear that the inquiry is not concerned with any knowledge that the act or omission involved negligence or breach of duty: see Kensland, §§86-89.*

*56.  As to the requisite degree of certainty of the plaintiff’s knowledge, the plaintiff does not have to know for certain and beyond possibility of contradiction.  It means knowing “with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence”.  “Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice”: Halford v Brookes, p 443; Haward v Fawcetts, §9; Kensland, §§16, 94‑98.  In AB & others v Ministry of Defence [2013] 1 AC 78, Lord Wilson said he would have preferred the phrase “reasoned belief”;**[[8]](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=137434&QS=%26%2340%3BMomin%2BLok%26%2341%3B&TP=JU" \l "_ftn8" \o ") see §62 below.*

*57.  In Kensland, McHugh NPJ criticised this approach of defining the requisite degree of knowledge by reference to the knowledge that warrants further investigation, suggesting that this stemmed from a confusion between the concept of actual knowledge and constructive knowledge as defined in section 31(7) (the equivalent of section 27(8) in non‑personal injury cases).**[[9]](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=137434&QS=%26%2340%3BMomin%2BLok%26%2341%3B&TP=JU" \l "_ftn9" \o ") However, as Ribeiro PJ said in the same case,**[[10]](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=137434&QS=%26%2340%3BMomin%2BLok%26%2341%3B&TP=JU" \l "_ftn10" \o ") the answer given in the cases was a pragmatic one: the plaintiff’s knowledge is to be treated as sufficient to set time running from the moment when a reasonable person would have regarded it as certain enough “to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice”.  This seems to us to be consistent with the purpose of section 27(6), which is to determine the starting point of a period of time within which a plaintiff can be required to institute proceedings.  From that point, he or she has three years to conduct further investigation and bring it to a stage when a writ can be issued.”*

1. *Momin Lok* fully considered the question of the depth of detail a plaintiff needs to know. It is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim. Where the complaint is that an employee was exposed to dangerous working conditions and his employer failed to take reasonable and proper steps to protect him it may well be sufficient to set time running if the claimant has ‘*broad knowledge*’ of these matters.
2. The time is for the plaintiff to begin to investigate whether he has a case against the defendant having regard to the knowledge of attributability already possessed, not to begin to investigate the question of attributability. The investigation envisaged may well also embrace a search for evidence relevant to causation. In a case that raises complex and difficult issues, three years may not be enough for the plaintiff to complete his investigation and issue a writ, but the remedy for such cases lies in the discretionary power in section 30 of the LO to override time limit, rather than in characterising the plaintiff as not having the requisite knowledge to start time running. Lord Walker considered that the evidence to support a claim was not part of the knowledge required: see §62 *Momin Lok* citing *AB v Ministry of Defence*.
3. I hold that the correct approach is to ask whether the plaintiff knew that there was a “*real possibility*” that his injury was attributable to an act or omission of the 2nd defendant, so as to justify embarking on the preliminaries to the issue of a writ against the 2nd defendant and to make it reasonable for the plaintiff to begin to investigate whether or not he had a case against the 2nd defendant.
4. In my view on the facts, what the plaintiff knew at the time of the Accident was more than sufficient to make it reasonable for him to begin to investigate whether he had a case against the 2nd defendant. The plaintiff knew that the 1st defendant sub-contracted work from others and, in particular, from the 2nd defendant. He clearly knew that the 2nd defendant was present at the Work Place, seeing its employees and equipment. Crucially, it is the plaintiff’s own evidence that he saw the 2nd defendant’s logo on the very ladder he used and from which he fell. On the plaintiffs own evidence and his own case there was clearly a “*real possibility*” that the plaintiff’s accident was attributable to the 2nd defendant’s act or omission.
5. After the plaintiff informed his former solicitors D&C of those matters that he already knew, they told him that they would conduct investigation to confirm whether the 1st defendant sub-contracted the work from the 2nd defendant at the time of the Accident. The plaintiff’s own solicitors considered that his knowledge was sufficient to justify embarking on the preliminaries to the issue of a writ.
6. The Master relied on the fact that the 1st NOA filed by the plaintiff did not name the 2nd defendant as the main contractor: Master’s Decision §31. However, on the plaintiff’s own evidence, at that time he did not know that he had any right to issue proceedings against the 2nd defendant at all. It is unsurprising that he did not name the 2nd defendant as the principal contractor. Further, the standard form refers to “*Principal Contractor*”. The plaintiff’s pleaded case is that the 3rd defendant was the principal contractor. The plaintiff’s lack of knowledge as to his strict legalrights is not relevant. What is relevant is the plaintiff’s knowledge of the facts that affixed him with the requisite degree of knowledge under section 27(6) of the LO.
7. *Momin Lok*, citing Ribeiro PJ in *Kensland*, also held that *“the plaintiff’s knowledge is to be treated as sufficient to set time running from the moment when a reasonable person would have regarded it as certain enough ‘to justify embarking upon the preliminaries to the making of a claim’”*. I find that all that was known to the plaintiff at the time of the Accident, as set out by him and above, was certainly enough to justify embarking upon the preliminaries to making a claim against the 2nd defendant, such as taking legal advice and beginning to investigate whether he has a case against the 2nd defendant.
8. The purpose of section 27 of the LO is to determine the starting point of a period of time within which a plaintiff can be required to institute proceedings. From that point, the plaintiff had three years to conduct further investigation and bring it to a stage when a writ could be issued. I hold that the plaintiff’s knowledge at the time of the Accident and on or about 16 May 2015 was sufficient to set time running in terms of section 27(6) of the LO. Therefor the limitation period had expired when the Writ was issued against the 2nd defendant.

*Constructive knowledge section 27(8) of the LO*

1. Should I be wrong on section 27(6) of the LO, actual knowledge, I will also consider constructive knowledge under section 27(8) of the LO.
2. The plaintiff submits that to argue time should have started to run from an earlier date because the plaintiff had constructive knowledge of the relevant facts by that date the defendant must specify that date and identify the matters that fix the plaintiff with knowledge: *Lau Siu Ming v Hung Fat Cleaning Transportation Co Ltd*, DCPI 377/2015 (Deputy Judge Kam KL Cheung, 17 June 2016) at §§29-30. The burden of proving constructive knowledge is on the 2nd defendant. The 2nd defendant must specify the date when the plaintiff should have constructive knowledge, and identify those matters that fix the plaintiff with such knowledge.
3. The plaintiff continues that the 2nd defendant has not actually pleaded constructive knowledge. From Lee’s Affirmation, the 2nd defendant appears to only assert that the plaintiff had actual knowledge before the Accident, but does not rely on constructive knowledge. Given the 2nd defendant’s stance, and that it had not specified any date for constructive knowledge at all, nor identified the matter that may fix the plaintiff with constructive knowledge, it is not necessary nor appropriate for the court to speculate and to consider the issue of constructive knowledge. The parties argued constructive knowledge before the Master, who considered and decided the issue of constructive knowledge. The 2nd defendant relies upon the same date and facts to establish actual knowledge and constructive knowledge. I will also consider constructive knowledge.
4. The plaintiff submits that:
5. The defendants failed to comply with their duties under the ECO, including making periodic payment and filing of the Form 2. This deprived the plaintiff of knowledge of the head contractor.
6. According to the 1st defendant, he was notified of the Accident by staff of the 2nd defendant. The 2nd defendant was thus aware of the Accident from the very beginning. Yet it took no action to report the Accident or to compensate the plaintiff.
7. Having received the 2nd NOA from the Labour Department on 5 January 2017, the 2nd defendant still took no action to report the Accident, or to reach out to the plaintiff to investigate the matter.
8. When the Form 2 was filed and amended by the 1st defendant, 21 months after the Accident, the identity of the principal contractor was still concealed. The 2nd defendant’s involvement was effectively denied by the Amended Form 2.
9. The 2nd defendant deliberately delayed the matter by taking nearly 5 months to give a substantive reply to VHC on the question of whether it was the principal contractor.
10. The plaintiff first instructed solicitors in August or September 2016, after being enlightened of his rights by another patient.
11. Being a person of limited means, the plaintiff had to apply for Legal Aid, which took time to process and be approved.
12. The plaintiff maintains that the 2nd defendant took an evasive attitude and was not responsive even when notified or asked about the Accident. Further, the defendants obstructively concealed information which they should by law provide actively, thereby hindering the plaintiff from seeking redress for the Accident. Whether the 2nd defendant was actually the middle contractor was only known by the defendants. If the defendants are not forthcoming about the 2nd defendant’s role, and instead evade their legal obligation to inform the plaintiff, he would have little alternative avenue to obtain such knowledge. These circumstances should be taken into account in assessing whether the plaintiff could have had constructive knowledge prior to 16April 2016.
13. The plaintiff relies on subsequent pleadings and witness statements that show the 2nd defendant and the 3rd defendant are disputing which of them should take the blame for not taking out insurance for the workers present. The absence of insurance coverage for the plaintiff’s injuries is suggested to be the real reason behind the 2nd defendant’s evasive behaviour.
14. Ms Tjia submitted that the 2nd defendant fails to show that this is a plain and obvious case for striking out on account of limitation. The 2nd defendant has given no actual evidence of the plaintiff’s knowledge prior to the material date, relying on bare assertion that the plaintiff must have known. This is insufficient to satisfy the high threshold of a striking out application. Reliance is also placed upon the Master’s Decision which thoroughly considered and rejected the 2nd defendant’s argument with cogent reasoning. Therefore the 2nd defendant’s arguments on this appeal should be rejected.
15. The 2nd defendant’s case on constructive knowledge under section 27(8) of the LO is that based on the knowledge the plaintiff already had at the time of the Accident, it is plain that the plaintiff might reasonably have been expected to confirm with the 1st defendant whether the 2nd defendant had sub-contracted the work to the 1st defendant. The plaintiff had a right to request the 1st defendant to supply him with the name and address of the main contractor under section 24(3) of the ECO, as set out at §38 of the EC Joinder Decision.
16. The plaintiff has relied on various excuses to explain why he took so long to ascertain the 2nd defendant’s role:
17. Initially, he blames his poor relationship with and fear of his uncle: Plaintiff’s Affirmation§§6-15;
18. He then relied upon his ignorance of his legal rights: Plaintiff’s Affirmation§§12, 14, 16, 25;
19. After saying he left it to the Labour Department, finally he then effectively blames his former solicitors for the delay, stating “*I relied on them to make the relevant enquiries*”: Plaintiff’s Affirmation §26.
20. Mr Lo submits that none of this is relevant. The test for constructive knowledge under section 27(8) of the LO is an objective one: *Kensland Realty* at §§81-82 (discussing the equivalent provision in section 31 of the LO). Insofar as he seeks to rely on the proviso to section 27(8) of the LO, that “*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*”, the comments of Bracewell J in *Henderson v Temple Pier Co Ltd* [1998] 1 WLR 1540 (English Court of Appeal) at 1545D are apposite:

“*Having given her solicitors general responsibility for the conduct of her claim, actions are taken and knowledge is acquired on behalf of the plaintiff. If solicitors fail to take the appropriate steps to discover the person against whom her action should be brought, she cannot take refuge under [the equivalent of s.27(6)(c)] […] The proviso is not intended to give an extended period of limitation to a person whose solicitor acts dilatorily in acquiring information which is obtainable without particular expertise.*”

1. Constructive or imputed knowledge in the context of section 27 of the LO is knowledge which the plaintiff “*might reasonably have been expected to acquire […] from facts observable or ascertainable by him*”: section 27(8) of the LO.
2. The plaintiff knew the identity of the 2nd defendant. He had the company name. He also knew the warehouse address, where he had been to collect tools. What he did not know for certain was whether on this occasion the 1st defendant had sub-contracted the work from the 2nd defendant. The plaintiff or his legal representatives simply needed to ask the 1st defendant one question: did you sub-contract the work from the 2nd defendant? The 1st defendant is the plaintiff’s uncle. The plaintiff chose not to ask. Each firm of solicitors had particulars of the 1st defendant. It does not assist the plaintiff to say the 1st defendant may not have answered. The first step was to ask the 1st defendant. There are further steps that could easily have been taken had the 1st defendant failed to respond. The 1st defendant was never asked. In addition, the 2nd defendant could have been asked whether it sub-contracted the work to the 1st defendant well within the primary limitation period. The evidence shows it took approximately five months for the 2nd defendant to give confirmation of the roles. The plaintiff should not have waited for “*confirmation of exact*” roles. However, had the question been put earlier that confirmation may have come within the primary limitation period. This is not a case where there is a complex set of facts, unknown or unnamed entities or that required onerous or forensic investigation. There is no material fact ascertainable only with the help of expert advice. There is no question of requiring expert assistance.
3. I find that the knowledge which the plaintiff might reasonably have been expected to acquire from facts observable or ascertainable by him included that the 2nd defendant had sub-contracted the work to the 1st defendant.
4. In view of the above, I hold that it is plain and obvious that, for the purpose of section 27(7), and in any event, section 27(8) of the LO, the plaintiff had knowledge of the identity of the 2nd defendant on or shortly after 16 May 2015, which was when the limitation period of 3 years under section 27 of the LO began to run. Therefore, the plaintiff’s claim against the 2nd defendant, who was joined as a defendant on 15 April 2019, is time-barred under section 27 of the LO. That is, unless the court exercises the discretion under section 30 of the LO.

*Discretion under section 30 of the LO*

1. Where the court finds that the limitation period under section 27 of the LO has passed, it has a discretion under section 30 of the LOto disapply the limitation period if it would nevertheless be equitable to allow the action to proceed. The burden is on the plaintiff to show that it would be equitable. The plaintiff asks that the limitation period be disapplied under section 30 of the LO.
2. The court’s discretion is wide and unfettered: *Horton v Sadler* [2007] 1 AC 307 at §44. The courts’ settled approach has been “*regularly to exercise the discretion in favour of the plaintiff in all cases in which the defendant cannot show that he has been prejudiced by the delay*: *Momin Lok* at §84. Although each case turns on its own facts, the court has suggested that there should be a more generous and liberal exercise of discretion under section 30 of the LO: *Cheung Yin Heung v Hang Lung Real Estate Agency Ltd* [2010] 3 HKLRD 67 §86.
3. Section 30(3) of the LO sets out six non-exhaustive factors which the court may have regard to in the exercise of this discretion:
4. the length of, and the reasons for, the delay on the part of the plaintiff;
5. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed;
6. the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff’s cause of action against the defendant;
7. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
8. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
9. the steps, if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
10. 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.
11. 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 of the LO 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.
12. 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 it says it will suffer. It is not enough to assert prejudice without evidence to support it: *Cheung Yin Heung* (supra) at §85. The mere loss of the limitation defence is but the loss of a windfall: *Horton v Sadler* at §44.
13. 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 LO, and (c) all the circumstances of the case.

*Discretion to disapply the limitation period*

1. The plaintiff reminds the court that the consideration under the LO is different from the ECO. In exercising the discretion under section 30 of the LO, the key question is not whether the plaintiff can provide a reasonable excuse, but whether given the delay, the judge can fairly try the claim: *Mok Lai Fong v Ng Po Sui* [2011] 3 HKLRD 67 at §47.

*Prejudice to each party*

1. The plaintiff considers that he would be seriously prejudiced if denied redress against the 2nd defendant. The recalcitrant attitude of the 1st defendant and that he is a sole proprietor, make it doubtful whether the 1st defendant would be able to meet the claim. The relevant EC insurance policy is held by the 2nd defendant. The 3rd defendant has the defence that it had taken all reasonable care in entrusting the work to the 2nd defendant so there is a risk that the 3rd defendant may not be held liable. The plaintiff may not be able to recover any or any adequate damages if the 2nd defendant is removed from the proceedings.
2. Whereas the 2nd defendant submits that the prejudice to the plaintiff is relatively small compared to if the 2nd defendant were the only defendant. The plaintiff is also claiming against the 1st defendant and the 3rd defendant. The plaintiff may also make a claim against his former solicitors to mitigate any prejudice from inability to recover adequate damages upon the 2nd defendant’s removal from these proceedings.
3. On the other hand, the 2nd defendant says that it will suffer prejudice if the limitation period is disapplied. The length of delay is 11 months, which is not insubstantial. As Lord Oliver stated in *Donovan v Gwentoys Ltd* [1990] 1 WLR 472 at 479H:

“*A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses’ memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost.*”

1. The plaintiff disputes that the 2nd defendant is prejudice and doubts its practice of destroying records of the workers on site within a year, including “*record of complaint or injury*”, but if that is true, the 2nd defendant would have suffered the same prejudice even if the plaintiff sued within the limitation period of 3 years. In any event, this practice is not reasonable.
2. In fact, the 2nd defendant is able to produce records of its sub-contracting arrangements with the 1st defendant and the 3rd defendant, including invoices, purchase order, EC insurance policy and log book. This shows that the 2nd defendant must have kept some records from the time of the Accident. If it chose to selectively destroy key documents despite knowledge of the Accident and the potential legal dispute, this should not be blamed on the plaintiff. If the 2nd defendant did indeed have a record of complaint or injury, but chose to destroy such records and conceal the Accident by not reporting it, any prejudice thus caused would be a result of its own wrongdoings. Further, any prejudice caused by the missing records may be compensated by records kept by the 1st defendant and the 3rd defendant.
3. The 2nd defendant received the 2nd NOA within the limitation period in January 2017. It should have begun to investigate and preserve evidence from then. Therefore, the plaintiff’s amendment of the Writ could have caused no prejudicial effect to the 2nd defendant. As Smith LJ held in *Cain v Francis* [2009] QB 754 at §74:

*“Although the delay referred to in s.33(3) [the English equivalent of s.30(3) of the Limitation Ordinance] is the delay after the expiry of the primary limitation period, it will always be relevant to consider when the defendant knew that a claim was to be made against him and also the opportunities he has had to investigate the claim and collect evidence: see Donovan v Gwentoys Ltd [1990] 1 WLR 472. If, as here, a defendant has had early notification of a claim and every possible opportunity to investigate and to collect evidence, some delay after the expiry of three years will have had no prejudicial effect.”*

1. Mr Lo submits that the plaintiff has failed to discharge its burden of showing that it would be equitable to allow the action to proceed. Balancing the prejudice to both sides I do not find that the 2nd defendant would suffer any identified prejudice by reason of the delay. Comparing the position of the parties the prejudice that would be suffered by the plaintiff is greater.

*The six factors under section 30(3) of the LO*

*i. Length of delay and the reason for delay*

1. The 2nd defendant says the length of delay is 11 months, which is not insubstantial. Whereas the plaintiff contends that this is not a particularly long delay. It is only eleven months from expiration of the primary limitation period. While it is recognised that a defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim, the 2nd defendant has not identified any witness who is no longer available or of whom it could be said memories fade. Any destruction of records was of its own doing within the primary limitation period.
2. The plaintiff says that given the confusing information in the Amended Form 2, VHC had considered it necessary to obtain confirmation from the 2nd defendant about its role in the Accident. This was reasonable and prudent when considering the possible costs implication. The plaintiff also needed time to apply for Legal Aid. I do not accept that it is reasonable or prudent for a plaintiff to await confirmation from the proposed defendant of its role, which may never be forthcoming, in the face of an expiring or expired limitation period.
3. I do accept that the period of delay is not particularly long.

*ii. Cogency of evidence*

1. The cogency of any evidence is not a significant factor. The only issue is absence of documentary or other evidence. The plaintiff repeats that any prejudice caused is a result of the 2nd defendant’s destroying records within a year, not a result of the delay. The cogency of evidence would have been no different even if the proceedings were issue within the limitation period. The cogency of the available evidence has not been much affected. I accept that in so far as the 2nd defendant destroyed any record that may be relevant within one year, which results its evidence being less cogent, the difficulty is of its own making. It is not the result of any delay on the part of the plaintiff. There is no complaint that the available evidence would be less cogent by reason of the delay.

*iii. Conduct of the 2nd defendant*

1. Ms Tjia says even if the 2nd defendant disputes knowledge of the Accident when it happened, it cannot deny that it had received notification from the Labour Department about the Accident in January 2017. Even so, the 2nd defendant took no action to investigate or report the matter. Ms Tjia asserts that the 1st defendant’s sudden decision to amend the Form 2 to cross out the 2nd defendant also casts suspicion on what was exchanged between the 1st defendant and the 2nd defendant at that time. However, Ms Tjia has also relied on the fact that the principal contractor was the 3rd defendant, not the 2nd defendant. While I am not prepared to speculate about what may or may not have passed between the 1st defendant and the 2nd defendant and why the 1st defendant amended the document, I do take the 2nd defendant’s own conduct and inaction as a factor weighing against it and in favour of the plaintiff.
2. Ms Tjia continued that the 2nd defendant’s correspondence with the plaintiff in February 2019, attempted to conceal its knowledge of the Accident, falsely asserting that it only knew about the Accident at the end of 2017. Further, when VHC wrote to the 2nd defendant to request information, the 2nd defendant dragged its feet and did not give any meaningful response for 5 months, which further delayed the proceedings. To allow the 2nd defendant to remove itself from the claim in such circumstances is said to reward unscrupulous employers and contractors for concealing information when a work accident occurs. This goes entirely against the spirit of legislation to protect the health and safety of employees. I find that the 2nd defendant’s conduct after the cause of action arose, in particular the manner in which it responded to proper and reasonable requests by VHC for information to ascertain facts which were relevant to the plaintiff’s claim against the 2nd defendant, was dilatory and uninformative. This is a factor to be taken against the 2nd defendant in favour of the plaintiff.

*iv. Duration of disability*

1. The plaintiff does not rely on any disability.

*v. Conduct of the plaintiff*

1. Ms Tjia says there is no untoward act alleged against the plaintiff, apart from the delay itself. Under this factor the plaintiff did not act promptly and failed to take reasonable steps once he knew that the act of the 2nd defendant might be capable of giving rise to an action for damages.

*vi. Obtaining of advice*

1. Ms Tjia points out that the plaintiff’s solicitors have consistently advised against initiating action against the 2nd defendant until the letter dated 11 February 2019 and that the advice given to the plaintiff should be taken into account in exercising the discretion. Mr Hau of VHC explained the rationale of not adding the 2nd defendant as a party prior to receiving confirmation from the 2nd defendant, setting out the uncertainties and the costs implication. The advice was never that the plaintiff should not bring a claim against the 2nd defendant. Rather, that confirmation was required before doing so and that there would be adverse costs consequences if it turned out that the 2nd defendant was wrongly joined. In any event this factor requires consideration of the steps, if any taken, by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received. This case did not require expert advice of that nature.

*Other circumstances of the case*

1. The plaintiff asserts that if the 2nd defendant is removed from the proceedings, it would create an “*odd gap*” in the evidence. The case would have to proceed to trial without having any evidence or submissions from the middle contractor, who was the only link between the 1st defendant and the 3rd defendant. This would not be conducive to a fair trial. Mr Lo replies that any difficulty in respect of the link is overstated Still less relevant is the plaintiff’s alleged prejudice of “*an odd gap in the evidence*” linking the 1st defendant and the 3rd defendant. The 1st defendant has admitted the chain of sub-contracting amongst defendants, and the 3rd defendant has admitted sub-contracting the relevant work to the 2nd defendant. Hence, no evidence in this regard would be necessary from the 2nd defendant. Further, as the sub-contractor, the 2nd defendant would have little, if any, evidence on how the sub-sub-contractor, the 1st defendant or the principal contractor, the 3rd defendant failed to discharge their duty owed to the plaintiff. In any event, the plaintiff is entitled to subpoena witnesses or seek discovery from the 2nd defendant should he consider that necessary. As such, the 2nd defendant’s removal from these proceedings would cause no evidential loss for the plaintiff’s claim against the 1st defendant and the 3rd defendant. I reject the assertion that there would be an odd gap or that as a basis to exercise the discretion in the plaintiff’s favour.
2. The plaintiff also relies on the 3rd defendant having made claims of negligence and for indemnity against the 2nd defendant. Thus, even if the 2nd defendant succeeds in striking out the plaintiff’s claim, it would still be unlikely to remove itself from the litigation. Practically speaking, striking out would only complicate the matters by dividing the evidence and issues into two separate proceedings. The fact that the 3rd defendant may have a claim against the 2nd defendant is not a factor that should entitle the plaintiff to proceed against the 2nd defendant.
3. The court must perform the balancing exercise by looking at (a) the prejudice to each party, (b) the 6 factors contained in section 30(3) of the LO, and (c) all the circumstances of the case. The plaintiff contends that the passage of time has not diminished the 2nd defendant’s opportunity to defend itself in any significant manner. On that basis it would not be equitable to remove the 2nd defendant from its obligation to pay damages in the these circumstances: see *Cain v Francis* [2009] QB 754 at §69.
4. On balance, considering the lack of identifiable prejudice to the 2nd defendant, the 6 factors, including the relatively short delay and the position of the plaintiff and taking all the circumstances of the case, it is fair just and reasonable that I exercise the discretion under section 30 of the LO to disapply the limitation period. In my view, if the plaintiff had a properly pleaded reasonable cause of action against the 2nd defendant, this would not be an appropriate case to strike out on account of limitation.

*F. Conclusion*

1. I remind myself that striking out is only appropriate in plain and obvious cases. In my view this is such a case. For the reasons given above, I would allow the appeal and strike out the plaintiff’s claim against the 2nd defendant with costs, on the ground that the SoC discloses no reasonable cause of action against the 2nd defendant. I also hold that the plaintiff’s claim against the 2nd defendant was time-barred at the date of issue of the Writ against the 2nd defendant. However, I would have exercised the discretion under section 30 of the LO to disapply the limitation period.
2. Mr Lo applied to amend the orders sought in the Notice of Appeal by adding (1) below. I allow the appeal and make the following orders:
3. The Decision of Master Leung dated 19 March 2021 be set aside;
4. The plaintiff’s Statement of Claim against the 2nd defendant be struck out on the ground that it discloses no reasonable cause of action;
5. The plaintiff’s action against the 2nd defendant be dismissed.
6. I make a costs order *nisi* that the costs of the action against the 2nd defendant, including the costs of and occasioned by the Summons dated 13 March 2020 with certificate for counsel for the hearing on 3 March 2021 and the hearing of this appeal, be paid by the plaintiff to the 2nd defendant to be taxed if not agreed.

( Liza Jane Cruden )

Deputy District Judge

Ms Josephine Tjia instructed by V Hau & Chow, assigned by the Director of Legal Aid, for the plaintiff

The 1st defendant acting in person, being absent

Mr Benny Lo and Mr Clark Yan instructed by Vivian Chan Law Office, for the 2nd defendant

The 3rd defendant acting in person, being absent