DCPI 1041/2018

[2021] HKDC 299

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES 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: Master Matthew Leung in Chambers (Open to Public)

Date of Hearing: 3 March 2021

Date of Decision: 19 March 2021

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| DECISION |

1. This is the 2nd Defendant’s application by Summons dated 13 March 2020 (“**the Summons**”) for an order that the Plaintiff’s Statement of Claim against the 2nd Defendant be struck out on the grounds that it disclosed no reasonable cause of action, scandalous, frivolous or vexatious, or it is an abuse of process of the Court.
2. The 2nd Defendant’s main contention is that the Plaintiff’s claim against the 2nd Defendant has been time-barred.

**Background of the proceedings**

1. The Plaintiff commenced the Action against the 1st Defendant (then the only Defendant) on 15 May 2018. The Plaintiff joined the 2nd and 3rd Defendant as parties by amending the Writ of Summons on 15 April 2019 pursuant to Order 20 rule 1 of the Rules of the District Court.
2. As pleaded in the Statement of Claim, the Plaintiff was an air-conditioner maintenance worker under the employment of the 1st Defendant. The 1st Defendant was the sub-contractor of the 2nd Defendant for the air-conditioner modus and air ducts work at the customer service centre of an insurance company in Wing On Centre (“**the Work Place**”). The 3rd Defendant was the principal contractor of the air-condition system cleaning work.
3. On 16 May 2015, when the Plaintiff was asked to work in pair with 德叔to replace parts of an air-conditioner installed in the Work Place, he climbed onto a ladder (“**the Ladder**”) with a cutter intending to cut off the ventilation ducts. Suddenly the Ladder shook, and the Plaintiff first held onto a hanging box connecting to the ventilation ducts, and hung up in the air. Eventually the Plaintiff fell down and fainted (“**the Accident**”). He was sent to hospital for treatment and was diagnosed with left distal radius and traumatic closed fracture of left wrist.
4. In the Defence of the 2nd Defendant filed on 26 August 2019, the 2nd Defendant pleaded *inter alia* that:
5. So far as the 2nd Defendant was aware, the Plaintiff was the nephew of the 1st Defendant and would assist the 1st Defendant on a casual basis to perform some odd jobs. The Plaintiff did not attend any work site of the 2nd Defendant on a regular basis.
6. The 2nd Defendant had no knowledge as to whether the Plaintiff was at the Work Place on 16 May 2015.
7. The 2nd Defendant had never engaged or directed the 1st Defendant to conduct any work at the Work Place on 16 May 2015.
8. The Plaintiff commenced the proceedings against the 2nd Defendant outside the time allowed under Section 27 of the Limitation Ordinance.
9. In paragraph 8 of the Reply to the Defence, the Plaintiff pleaded that he had actual knowledge that the 1st Defendant was the sub-contractor to the 2nd Defendant on 11 February 2019, and hence, the limitation period of 3 years began to run from 11 February 2019 only.

**The facts of the case**

1. The Plaintiff began to work with the 1st Defendant in around 2012. During his approximately 3 years of employment with the 1st Defendant, the Plaintiff 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 inform the Plaintiff of the same and would ask the Plaintiff to attend the 2nd Defendant’s warehouse to collect equipment for use. The Plaintiff received work instructions from the 1st Defendant direct and would not be involved in any negotiation with the 1st Defendant’s contractors.
2. On the date of the Accident, the 1st Defendant did not tell the Plaintiff from whom the sub-contract was made, nor did he ask the Plaintiff to collect any equipment from the 2nd Defendant. The Plaintiff recognized that some of the workers of the 2nd Defendant were working at the Work Place, and some of the equipment at the Work Place, including the Ladder, bore the logo of the 2nd Defendant.
3. The Plaintiff filed a Notification of Accident with the Labour Department on 21 January 2016 (“**the 1st Notification**”) in which he named the 1st Defendant as the employer but Section C of the Notification concerning the main contractor was left blank[[1]](#footnote-1).
4. In about late August or early September 2016, the Plaintiff first knew that he had the right to instruct solicitors to assist him to claim against the 1st Defendant in relation to the accident. He then instructed Messrs Day & Chan (“**Day & Chan**”) for the matter. Day & Chan issued a letter to the Labour Department dated 9 September 2016 asking for copies of the relevant documents, including Form 2, witness statements and photographs.
5. On 21 December 2016, the Plaintiff had a meeting with Day & Chan, during which, the Plaintiff was advised to file another Notification of Accident to the Labour Department to name all the relevant parties. Accordingly, another Notification of Accident was filed with the Labour Department on 21 December 2016 (“**the 2nd Notification**”) in which the 2nd Defendant was named as the “main contractor” under Section C thereof[[2]](#footnote-2). Notwithstanding that, Day & Chan would carry out investigation to confirm whether the 1st Defendant subcontracted the work from the 2nd Defendant at the material time.
6. The 1st Defendant filed the Form 2 on 14 February 2017 (“**the Original Form 2**”) in which the 2nd Defendant was listed as the main contractor under Section C thereof[[3]](#footnote-3). However, the 1st Defendant subsequently filed the Amended Form 2 on 22 February 2017 (“**the Amended Form 2**”) crossing out the name of the 2nd Defendant[[4]](#footnote-4).
7. Later, the Plaintiff was informed that the business of Day & Chan would be closed and the case would be transferred to Messrs John Wong & Co.
8. The Plaintiff subsequently changed to engage the present solicitors firm, i.e. Messrs V Hau & Chow (“**VHC**”) for the matter. On 26 July 2018, the Plaintiff had a first meeting with VHC. In a meeting on 7 August 2018, the Plaintiff was shown copies of the Original Form 2 and the Amended Form 2. The Plaintiff claimed that that was the first time when the Plaintiff was shown the two documents. However, the copies of the Form 2 were redacted such that the particulars of the person filling the forms were concealed.
9. By letter dated 17 August 2018, VHC wrote to the 2nd Defendant asking *inter alia* whether at the material time the 2nd Defendant were the principal contractor for the Plaintiff’s work[[5]](#footnote-5). On 24 September 2018, Messrs Vivian Chan Law Office (“**Vivian Chan**”), solicitors for the 2nd Defendant, provided VHC with a copy of the EC policy, but stated *inter alia* that they had no information on whether the Plaintiff was employed by the 1st Defendant[[6]](#footnote-6).
10. In view of the fact that some information stated in Form 2 had been redacted, VHC wrote to the Labour Department on 14 November 2018 asking for the unedited versions[[7]](#footnote-7). By a letter dated 20 November 2018, the unedited versions were provided by the Labour Department to VHC[[8]](#footnote-8).
11. On 21 December 2018, the Plaintiff was advised by VHC that from the EC insurance policy it could be inferred that the 2nd Defendant might be the principal contractor. Since the directions hearing for the employees’ compensation case would be forthcoming (i.e. on 4 January 2019), VHC advised the Plaintiff to make application to join the 2nd Defendant in the EC Case. For the PI action, since the Plaintiff could amend the Writ once without leave pursuant to Order 20 rule 1 of the Rules of the District Court, no application to join the 2nd Defendant was recommended at that stage until the exact relationship between the 1st and 2nd Defendants was confirmed.
12. By a letter dated 11 February 2019[[9]](#footnote-9), Vivian Chan confirmed *inter alia* that the 2nd Defendant had subcontracted the removal and reinstallation of the air conditioner modus and air ducts at the Work Place to the 1st Defendant at the material time. They also confirmed that the 3rd Defendant was the principal contractor.
13. In relation to the related EC case which commenced on 13 April 2017, the Plaintiff applied to join the 2nd Defendant on 24 December 2018. The application was dismissed by the Order made by Her Honour Judge Levy dated 24 September 2019[[10]](#footnote-10). The learned Judge held that there was no reasonable excuse for the Plaintiff to have a delay of 19 months to pursue the matter against the 2nd Defendant.

**Legal principles**

1. Section 27(4) of the Limitation Ordinance (“**the Ordinance**”) provides two limitation periods for the institution of a personal injury claim. Sub-section (4) of that section provides as follows: -

“(4) Except where subsection (5) applied, 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. Sub-section (6) of the Ordinance states as follows: -

“(6) 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 omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is relevant.”

1. As to what constitutes "knowledge" in the context of the Ordinance, Ms Tjia, counsel for the Plaintiff, drew my attention to the principles as set out in ***Nash v Elli Lilly & Co*** [1993] 1 WLR 782 which were summarized in §F1/29/5, Hong Kong Civil Procedure 2021.
2. In fact, in ***Lam Siu Ping v Secretary for Justice***, HCPI 345/2010 (unreported, 19 October 2011), Master M Ng (as she then was) has summarized the approach as follows:-

“[58] Knowledge means to hold a reasonably firm belief or to know with sufficient confidence to warrant the taking of preliminary steps for making a claim, such as submitting a claim to the proposed defendant, taking legal and other advice, and collecting evidence (see Cheung Yin Heung at pp.86-88). But the plaintiff need not be certain, and he may even have the requisite knowledge before he has absolute certainty in relation to the facts. "[It] is the knowledge of possibilities that matters; a claimant needs only enough knowledge for it to be reasonable to expect him to set about investigation. He can have knowledge even though there is no helpful evidence yet available to him" (see ***Ministry of Defence v AB & ors*** [2010] EWCA Civ 1317 (22 November 2010) at para.85). However, suspicion, particularly if it is vague and unsupported, will not be enough"

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[60] Lord Hoffmann said in ***Broadley v Guy Clapham & ors*** [1994] 4 All ER 439, 448 that the court "…… should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based".

1. As to the test on actual knowledge, the learned Master said that:

“[61] Sections 27(4)(b) and 27(6) refer to actual knowledge on the part of a plaintiff of the specified matters as to the damage and other relevant facts to make it reasonable for him to investigate whether or not there is a claim against a particular potential defendant (see paragraph 57 above).  The test for actual knowledge is subjective, and the burden is on the plaintiff to show the date of actual knowledge was within three years preceding the issue of the writ of summons, but if the defendant wants to rely on a date prior to such period the burden is on him to prove that the plaintiff had or ought to have had knowledge by that date (see ***Cheung Yin Heung*** at p.83).”

1. For constructive knowledge, the following paragraphs are relevant:

“[62] Section 27(8) brings in the concept of “constructive” or “imputed” knowledge by providing that a plaintiff’s knowledge includes knowledge that 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 he shall not be fixed 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.

[63] In respect of an injury on duty with allegations of default on the part of the employer, even though the employee plaintiff may not have sufficient actual knowledge, he may know sufficient to make it reasonable for him (by himself or with advice) to acquire further knowledge of the link between his injury and his working conditions.  The burden is on the defendant to show constructive knowledge on the part of the plaintiff by a date earlier than the three-year period prior to the issue of the writ of summons (ie on or before 9 July 2007 for the 1st Accident Claim in the present action), and the relevant test is an objective one that requires the court to consider the objective situation in which the plaintiff finds himself in, including the effects of his injury but excluding the personal characteristics individual to him (see ***Cheung Yin Heung*** at pp.84-86 and ***London Strategic Health Authority v Whiston*** [2010] 3 All ER 452, 468).

[64] The effect of section 27(8) is that the plaintiff cannot simply close his mind and wilfully or even unintentionally ignore the commonsense reality of his position.  He must act reasonably in using information he had or could ascertain to establish knowledge of the significance of his injury, the attribution to the act or omission by the defendant, and the identity of the defendant.  The plaintiff is required to be both mentally active in comprehending the facts of his accident and injury, and also physically active in obtaining expert and other advice and opinion (see Nelson-Jones, Burton and Roy, Personal Injury Limitation Law 2nd ed p.59).”

**Discussions**

1. There is no dispute that at the time when the Plaintiff joined the 2nd Defendant as a party by amending the Writ of Summons on 15 April 2019, the primary limitation period had lapsed.
2. The Plaintiff argues that the date of actual knowledge of the 2nd Defendant’s involvement should be 11 February 2019, or alternatively, as a fall-back position, the Plaintiff only knew the 2nd Defendant’s role by the time of the 2nd Notification on 21 December 2016.
3. The 2nd Defendant’s arguments can be summarized as follows:
4. As at the date of the 2nd Notification (21 December 2016), the Plaintiff must have had knowledge about the 2nd Defendant being the “principal contractor” since, firstly, the name of the 2nd Defendant was put on the 2nd Notification, and secondly, the Plaintiff was aware of the presence of the workers of the 2nd Defendant and the presence of the 2nd Defendant’s logo on the Ladder at the material time.
5. The 2nd Defendant then went further to invite the Court to infer that the state of mind of the Plaintiff as at the 2nd Notification and the date of accident was identical, and therefore, the Plaintiff should have sufficient knowledge at the time of the Accident.

**The state of mind of the Plaintiff at the time of the Accident**

1. Mr Tsui, counsel for the 2nd Defendant, submits that there was no evidence to suggest that the information about the 2nd Defendant being the main contractor as stated in the 2nd Notification was a result of any investigation carried out by the Plaintiff subsequent to the Accident. Mr Tsui argues that the Plaintiff did have knowledge about the role of the 2nd Defendant at the time of the Accident.
2. In this regard, the onus is on the 2nd Defendant to prove that the Plaintiff had or ought to have had knowledge by that date. In my view, Mr Tsui’s argument ignored the important fact that the Plaintiff submitted the 1st Notification on 21 January 2016 without mentioning the 2nd Defendant at all. I accept the submissions of Ms Tjia, counsel for the Plaintiff, that should the Plaintiff actually have known that the 2nd Defendant sub-contracted the work to the 1st Defendant on the date of the Accident, it would be extremely unreasonable for the Plaintiff not to sue the 2nd Defendant at the time of the Writ of Summons first issued on 15 May 2018. By the same token, should the Plaintiff have known that the 2nd Defendant was the sub-contractor or the principal contractor, one would expect that the Plaintiff would have named the 2nd Defendant in the 1st Notification. Accordingly, I do not accept that the 1st Notification made by the Plaintiff was a self-serving piece of evidence. It would not be reasonable to draw any inference that the state of mind of the Plaintiff as at the time of the Accident must be identical to that at the time of the 2nd Notification. Hence, I do not accept the 2nd Defendant’s submission that based on the state of mind of the Plaintiff as at the time of the 2nd Notification, the Plaintiff must have knowledge at the time of the Accident that the injury should be attributable to the 2nd Defendant’s omission as alleged.

**The state of mind of the Plaintiff as at the time of the 2nd Notification**

1. Mr Tsui argues that the Plaintiff should have sufficient knowledge at the time of the 2nd Notification on the ground that:
2. The Plaintiff knew that the 2nd Defendant was one of the subcontractors of the 1st Defendant;
3. At the time of the Accident, workers of the 2nd Defendant did appear at the Work Place and the Ladder bore the 2nd Defendant’s logo; and
4. The Plaintiff named the 2nd Defendant as the principal contractor on the 2nd Notification.
5. In my view, the alleged knowledge of the Plaintiff at the time of the 2nd Notification is not sufficient for the present purpose. As mentioned in the case of ***Lam Siu Ping***, knowledge means to hold a reasonably firm belief or to know with sufficient confidence to warrant the taking of preliminary steps for making a claim, such as submitting a claim to the proposed defendant, taking legal and other advice, and collecting evidence. Further, as decided in the case of ***Nash v Eli Lilly & Co.***, a firm belief is required, but in respect of which the plaintiff thought it necessary to obtain reassurance or confirmation from experts, medical, legal or others, that would not be regarded as knowledge until the result of his inquiries was known to him, subject to whether the plaintiff was acting in reasonable time without delay.
6. On the facts of the case, the Plaintiff had, on 21 December 2016, instructed Day & Chan to carry out investigation to ascertain the relationship between the 1st and 2nd Defendant. As I see it, the purpose of the investigation was not only to obtain reassurance or confirmation, but more importantly, to obtain sufficient evidence to determine whether the 1st Defendant was a subcontractor of the 2nd Defendant. I do not consider that the Plaintiff had the relevant knowledge for the purpose of section 27 of the Limitation Ordinance at any time before the said meeting.
7. Mr Tsui invites me to follow the reasoning of the Judgment of Her Honour Judge Levy in the related EC Case (DCEC 832/2017) decided on 24 September 2019[[11]](#footnote-11). In particular, para.31 of the Judgment stated that since the 1st Notification only contained very little information limited to the name of the Employer and his contact mobile number, the learned Judge accepted that the Plaintiff had very little information about the principal contractor at that stage. In para. 32, the learned Judge however considered that the Plaintiff should have sufficient evidence at the time of the 2nd Notification to issue the EC Application against the 2nd Defendant. I consider that the Judgment was decided on the basis of Section 14(1) of the Employees’ Compensation Ordinance which prescribed a time limit of 24 months for the commencement of the EC application unless the Court is satisfied that there was reasonable excuse for the failure to make such an application. The legal framework of the present application is different. The issue of whether the Plaintiff should have sufficient actual or constructive knowledge is fact sensitive and I am not prepared to accept the 2nd Defendant’s submissions in this regard.

**Constructive knowledge**

1. The next question is whether, prior to 21 December 2016, the Plaintiff might reasonably have been expected to acquire knowledge from the facts observable or ascertainable by him or from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek. In this regard, my considerations are as follows:
2. While there is no doubt that the Plaintiff knew the existence of the 2nd Defendant, if the Plaintiff did not know all the essential facts necessary to constitute the claim under s.27(6) of the Ordinance, limitation period did not begin to run.
3. If the Plaintiff did not know that the work he was performing for the 1st Defendant was part of the sub-contracted work from the 2nd Defendant, the Plaintiff might not be able to know that the injury could be regarded as attributable to the 2nd Defendant in whole or in part.
4. While the Plaintiff knew that the 1st Defendant subcontracted various works from the 2nd Defendant, the 1st Defendant did not ask the Plaintiff to attend the 2nd Defendant’s warehouse to collect equipment for use at the Work Place on the date of the Accident. It would be reasonable for the Plaintiff not to make further inquiry as to whether the 2nd Defendant had sub-contracted the work to the 1st Defendant at the material time.
5. The Plaintiff admitted that some workers of the 2nd Defendant were present at the time of the accident and the Ladder bore the logo of the 2nd Defendant. In my judgment, those evidence is not sufficient to make it reasonable for the Plaintiff to acquire further knowledge of the link between his injury and the role of the 2nd Defendant.
6. An employee usually does not have a direct employment relationship with a principal contractor. Hence, it is not uncommon that an employee does not know whether a principal contractor is involved or if there is, the principal contractor's identity. The Court would only expect a person to take reasonable action to acquire knowledge from facts reasonably ascertainable by him. It is reasonable to expect that the action to be taken by a person intending to commence litigation would be proportionate: see ***Chan Ngan Fa v Cui You Jun,*** DCPI 832/2007 (unreported, 2 March 2009). In the present case, I am of the view that the Plaintiff could not reasonably have been expected to acquire the knowledge of the 2nd Defendant being the contractor at the time of the Accident, and at any time before the 2nd Notification.
7. Further, even if the Plaintiff knew enough for it to be reasonable to begin investigating further at an earlier stage (which I disagree), it does not mean that the Plaintiff could be fixed with knowledge of the 2nd Defendant at such point in time.  Given that the Form 2 had been amended by the 1st Defendant, there is no reasonable probability that the 1st Defendant could have informed the Plaintiff of the position of the 2nd Defendant with certainty.

**Date on which the Plaintiff first had knowledge**

1. As mentioned before, the Court would only expect a person to take reasonable action to acquire knowledge from facts reasonably ascertainable by him. The intended defendant would not be expected to assist a plaintiff to pursue his claim. On the evidence adduced in this case, the Plaintiff and/or his solicitors received two versions of the Form 2, and time had been spent to ask the Labour Department to disclose the unedited versions of the Form 2. VHC had also written various letters to the 2nd Defendant and their solicitors to clarify the relationship. Against this background, I am satisfied that the Plaintiff only acquired the knowledge within the meaning of Section 27(4) of the Ordinance on 11 February 2019, i.e. the date on which Vivian Chan confirmed that the 2nd Defendant subcontracted the work to the 1st Defendant at the material time.
2. Even if I am wrong on that, I consider that the Plaintiff only acquired the knowledge on 21 December 2016, i.e. the date of the 2nd Notification.
3. Based on the foregoing, in my judgment, the Plaintiff’s amendment of the Writ of Summons to join the 2nd Defendant on 15 April 2019 was made within the 3-year limitation period.

**Discretion under Section 30 of the Ordinance**

1. If I am wrong on the effect of Section 27 of the Ordinance, then a balancing exercise has to be made under Section 30 of the Ordinance to decide whether it would be equitable for the Court to allow the Plaintiff’s claim against the 2nd Defendant to proceed.
2. As summarized in ***Mok Lai Fong v Ng Po Sui*** [2011] 3 HKLRD 67, the court would perform a balancing exercise by looking at (a) the balance of prejudice to each party; (b) the six specific but non-exhaustive factors contained in s.30(3) of the Ordinance; and (c) all the circumstances of the case to see whether it would be "equitable" to disapply the limitation period. Ultimately, the crucial question was whether, on the facts and circumstances of each case, it was fair and just to expect the defendant to meet the plaintiff's claim on the merits notwithstanding the delay.
3. The primary limitation period expired on 16 May 2018 while the amendment to join the 2nd Defendant as a party was made on 15 April 2019. The length of the delay of 11 months is in my view not particularly substantial. Once the Plaintiff has instructed VHC to carry out investigation on the relationship between the 1st and 2nd Defendant, I consider that the Plaintiff and VHC had acted promptly and reasonably.
4. Mr Tsui submits that the 2nd Defendant’s ability to conduct the defence has been prejudiced by the Plaintiff’s delay. In particular, the 2nd Defendant no longer retained any contemporaneous records relating to the Work and the complaint of the injury[[12]](#footnote-12).
5. In the 1st Affirmation of Lee Ying Siu filed on behalf of the 2nd Defendant, it was affirmed that the 2nd Defendant would have a practice of keeping written records of the workers on site for one year. As a result of the passage of time, the 2nd Defendant did not have any contemporaneous internal records showing that the Plaintiff had attended the Work Place[[13]](#footnote-13). Other than the alleged loss of contemporaneous records, the 2nd Defendant did not mention any other prejudice to their conduct of the defence.
6. As I see it, if the 2nd Defendant’s practice was to keep the records for one year only, the record would have been destroyed in any case, even if the action was commenced one year after the accident notwithstanding that it was within the 3-year limitation period. I consider that the so-called prejudice, if any, would be caused by the 2nd Defendant’s own record keeping practice rather than the expiry of the limitation period.
7. As a matter of fact, the 2nd Defendant filed a Defence on 26 August 2019, list of documents on 21 October 2019, and witness statements on 20 January 2020. Given that the 2nd Defendant would be able to file the Defence and other court documents in compliance with the Checklist Review directions, I fail to see how the 2nd Defendant’s ability to conduct the defence has been prejudiced by the Plaintiff’s alleged delay.
8. As pointed out by Ms Tjia, the real issue in this Action is whether the 1st, 2nd or 3rd Defendants had provided a safe and proper working platform for the Plaintiff to carry out his work at height: see para. 5 of the Statement of Claim. In the Witness Statement of Lee Ying Siu filed on behalf of the 2nd Defendant, Mr Lee’s evidence was that it was not the practice of the 2nd Defendant to provide any tools or equipment to its subcontractors. The Ladder bearing the 2nd Defendant’s logo was not intended to be used by other people[[14]](#footnote-14). Again, I fail to see how the 2nd Defendant’s ability to conduct the defence has been prejudiced by the Plaintiff’s alleged delay.
9. The Summons was taken out by the 2nd Defendant on 13 March 2020 while the amendment to include the 2nd Defendant in this Action was made on 15 April 2019. The 2nd Defendant took steps to file the Defence and other documents without taking any striking out application until 13 March 2020. If the 2nd Defendant has really suffered any prejudice in defending the Action, one would expect that the Summons should have been taken out at a much earlier time.
10. On the other hand, the Plaintiff will certainly suffer prejudice if it transpires at the end of the day that the Accident was attributable in whole or in part to the act or omission of the 2nd Defendant with regard to the Ladder.
11. Mr Tsui argues that the only factual allegations against the 2nd Defendant in the Statement of Claim was that the Ladder was provided by the 2nd Defendant. There was no pleading as to the relationship between the Plaintiff, the 1st and 2nd Defendant, no pleading as to the role of the 2nd Defendant to the Work. I do not accept the argument. I agree with Ms Tjia’s submission that para. 1 of the Statement of Claim set out the Plaintiff’s case on the relationship between the parties, including the 1st and 2nd Defendants, and para. 5 provided the particulars of negligence of the 1st, 2nd and 3rd Defendants. The 2nd Defendant’s allegation was not supported by the pleadings. The 2nd Defendant’s application to strike out on the basis that there was no reasonable cause of action against the 2nd Defendant should not be allowed.
12. In all the circumstances, I am of the view that I should exercise discretion under Section 30 of the Ordinance to disapply the time limit under Section 27.

**Conclusion**

1. The following order is hereby made:
2. The 2nd Defendant’s Summons dated 13 March 2020 (“the Summons”) is dismissed.
3. There be a costs order *nisi* that the costs of the Summons and the costs of the hearing on 3 March 2021 be borne by the 2nd Defendant to the Plaintiff in any event to be taxed if not agreed with Certificate for Counsel.
4. The Checklist Review hearing be adjourned to 6 May 2021 at 9:30 a.m. at Court No. 17 for further case management directions and/or leave to set down.
5. The parties do file and serve up-to-date P.I. questionnaires at least 14 days prior to the adjourned hearing, and any consent summons seeking agreed directions at least 7 days prior to the adjourned hearing.
6. Subject to paragraph (2) above, the costs of the Checklist Review be costs in the cause.
7. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Matthew Leung)

Master of the District Court

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

Mr Brian Tsui, instructed by Vivian Chan Law Office, for the 2nd Defendant

1. [B341] [↑](#footnote-ref-1)
2. [B4] [↑](#footnote-ref-2)
3. [B7] [↑](#footnote-ref-3)
4. [B230] [↑](#footnote-ref-4)
5. [B237] [↑](#footnote-ref-5)
6. [B240] [↑](#footnote-ref-6)
7. [B244] [↑](#footnote-ref-7)
8. [B247] [↑](#footnote-ref-8)
9. [B255] [↑](#footnote-ref-9)
10. [B171] [↑](#footnote-ref-10)
11. [B171] [↑](#footnote-ref-11)
12. Para. 47 of the Skeleton Submissions of the 2nd Defendant [↑](#footnote-ref-12)
13. Para. 32-33, 1st Affirmation of Lee Ying Siu [A207] [↑](#footnote-ref-13)
14. Para. 19 of the Witness Statement of Lee Ying Siu [A139] [↑](#footnote-ref-14)