# DCPI 1116/2018

[2021] HKDC 18

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 1116 OF 2018

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BETWEEN

CHAN SUWANNA Plaintiff

and

SYNERGIS MANAGEMENT

SERVICES LIMITED 1st Defendant

KAI SHING MANAGEMENT

SERVICES LIMITED 2nd Defendant

CLARE ENVIRONMENTAL

SERVICES LIMITED Third Party

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 21 October 2020

Date of Decision: 21 October 2020

Date of handing down Reasons for Decision: 7 January 2021

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REASONS FOR DECISION

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*INTRODUCTION*

1. This is the third party’s appeal against the decision made by Master Matthew Leung (“the Master”) on 20 August 2020 in which the Master dismissed the third party’s summons dated 19 May 2020 (“the Summons).
2. On 25 September 2019, the 2nd defendant took out an ex-parte application for the issue of a third party notice under Order 16, rule 1(a) of the Rules of the District Court (“the RDC”) for a claim against the third party who was not a party to “the action” for contribution or indemnity in respect of the alleged third party’s negligence or contributory negligence: (see §§3, 4 & 6 of the third party notice).
3. Under Order 16, rule 4(5) of the RDC, the third party applied to rescind that order and/or to set aside the third party notice by way of the Summons.
4. At the hearing on 21 October 2020 before me, I dismissed the third party’s appeal with costs in favour of the 2nd defendant with certificate for counsel.
5. I said I would give the reasons for my decision in due course. Here are the reasons.

*BACKGROUND*

1. By a writ of summons issued on 24 May 2018, the plaintiff brought the present action against the 1st and 2nd defendants for damages for personal injuries sustained in the course of the employment with the 1st defendant arising out of an accident on 28 May 2015 near the guard kiosk at the carpark of Hong Tin Court, Lam Tin.
2. The 2nd defendant was the property manager of Hong Tin Court while the third party was the cleaning contractor responsible for the cleaning work of Hong Tin Court.
3. The statement of claim and statement of damages were both filed by the plaintiff on 12 March 2019. According to the 2nd defendant, the writ together with the statement of claim and other documents were also served on them on 12 March 2019. The defence of the 1st defendant and the 2nd defendant were respectively filed on 7 May 2019 and 26 April 2019.
4. By an ex-parte summons taken out by the 2nd defendant on 25 September 2019, the 2nd defendant sought leave to issue a third party notice against the third party for indemnity and/or contribution against the plaintiff’s claim and costs of the action, on the ground that the accident was caused and/or contributed to by the negligence of the third party.
5. On 2 October 2019, Master Raymund Chow granted leave to the 2nd defendant to issue the third party notice.
6. In short, the third party’s argument against the third party proceedings is that the 2nd defendant’s application for leave was made when the limitation period under section 27 of the Limitation Ordinance, Cap 347 (“the LO”) has already expired.

*DISCUSSION*

1. Section 27(1) of the LO “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.” Sub-section 3 stipulates that, subject to section 30, an action shall not be brought after the expiration of the period 3 years from (a) the date on which the cause of action accrued; or (b) the date (if later) of the plaintiff’s knowledge.
2. The third party basically argues that the words “any other person” in section 27(1) should include the 2nd defendant, and therefore, the right to seek contribution and indemnity should be subject to the limitation as set out in section 27. As the 2nd defendant’s claim was commenced after 3 years of the plaintiff’s alleged accident, the third party argues that its claim against the third party has become time-barred.
3. I have no hesitation in rejecting the third party’s argument.
4. §16/1/5 of the *Hong Kong Civil Procedure 2021, (“HKCP”), Vol 1* stated *inter alia* that, for the purposes of the LO, third party proceedings constitute a *new* claim made in the course of the action and such new claim is deemed to be a separate action and to have been commenced on the date on which those proceedings were commenced: (see section 35(1)(a) of the LO); and a special time limit for claiming contribution is provided under section 6 of the LO.
5. In my judgment, there is no doubt that the third party proceedings constitute a new claim against the third party.
6. A special time limit for claiming contribution is provided under section 6(1) of the LO, which states that where under section 3 of the Civil Liability (Contribution) Ordinance (Cap 377) (“the CLCO”) any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall (subject to sections 22 and 26) be brought after the end of the period of 2 years from the date on which that right accrued.
7. Sub-section 2 provides that the date on which a right to recover contribution in respect of any damage accrues to any person (in this subsection referred to as the relevant date) shall be ascertained as follows:
8. if the person in question is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;
9. if, in any case not falling within §(a), the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made,

and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

1. Further, I agree with Mr Jonathan Tai, counsel for the 2nd defendant, that a contribution is not based upon a breach of obligation, whether tortious or otherwise, owed to the claimant in the contribution suit by the respondent in that suit: (see *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398 CA at 407A-C). It is clear that CLCO creates a cause of action for contribution in its own right: (see *HKCP, Vol 1* at §16/1/2 and *HKCP, Vol 2* at §F1/35/8).
2. It is significant to note that in the prayers of the 2nd defendant’s statement of claim against the third party, the 2nd defendant is claiming indemnity or contribution from the third party and not for damages suffered by the 2nd defendant as a result of the third party’s breach. As such, I agree with Mr Tai that the third party notice is not an action where damages was claimed by the 2nd defendant against the third party. Hence, it does not fall under the phrase *“where the damages claimed by the plaintiff”* in section 27 of the LO.

1. Having taken into account the above, I am of the view that the Master was absolutely correct in rejecting the third party’s submissions that the time limit for the 2nd defendant’s third party proceedings should be subject to section 27 of the LO. If the third party’s argument were correct, the limitation period for the third party proceedings would have been expired well before the service of the writ of summons against the 2nd defendant in this action. It would create a most absurd scenario and could not be right.
2. Hence, the third party’s argument that the words “any other person” as referred to in section 27 of the LO includes the 2nd defendant has been totally misconceived. In my judgment, those words should not be interpreted to include any person claiming for contribution and indemnity. section 27 of the LO deals with personal injuries claims, not claims under the CLCO.
3. In my view, the third party proceedings should be subject to section 6 of the LO. It is clear that the 2nd defendant’s third party proceedings against the third party is not time-barred as alleged by the third party.

*Was the third party proceedings premature?*

1. Mr Alexander Cheung for the third party in his written submissions went into great length to argue that the 2nd defendant’s third party proceedings against his client was premature because it has not yet established his liability against the third party: (see §§12, 14, 16 & 18.4 of the third party’s skeleton submissions).
2. With respect, I think Mr Cheung is completely wrong on this and I have no hesitation in rejecting his argument on this.
3. In this regard, I agree with Mr Tai for the 2nd defendant’s submissions that the third party was wrong for the following reasons.
4. First, none of the authorities cited by the third party says that a defendant cannot start third party proceedings before judgment is entered into by a plaintiff against a defendant. To the contrary, *Ronex Properties Ltd,* *supra* confirmed that Order 16 of the Rules of the Supreme Court in the UK permitted the defendant to start third party proceedings while the main action between the defendant and the plaintiff was still pending: (see *The Law Reform Commission of Hong Kong’s Report on the law relating to contribution between wrongdoers*, 1983, at §3.11).
5. Second, Order 16, rule 1(1) of the RDC provides that a defendant may issue a third party notice in Form No. 20 or 21 in Appendix A. Both forms provide that if the third party fails to file acknowledgement of service, the third party will be bound by any judgment or decision given in the action. Thus, Form Nos. 20 and 21 envisage that as at the issuance of Form No. 20 or 21, there is no judgment or decision given in the action yet.
6. Third, the third party’s alleged interpretation is against the purpose of Order 16. The purpose of Order 16 is two-fold: (1) to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action, and (2) to prevent the same question being tried twice with possibly different results: (see *HKCP, Vol 1*, at §16/0/2 and *Barclays Bank v Tom* [1923] 1 KB 221 at 224). If third party proceedings can only be started after main action has been concluded, these 2 purposes cannot be served.
7. Fourth, by way of examples, in *Kam Man Ling v Chan Pui Shan Patsy & Anor* [1998] 4 HKC 695 and *Li Shiu To v Cheung Pik Ng* [2014] 2 HKLRD 508, both defendants claimed against the third parties under CLCO. The third party notices were properly issued even when the main actions were still pending.
8. Last but not the least, there is no contradiction between Order 16 and section 3 of CLCO, as alleged by the third party. RDC concerns civil procedure, while CLCO concerns substantive right. As the learned authors of *HKCP* note: in procedure terms, a right to recover contribution for damages for which the defendant is liable to the plaintiff is granted by Order 16, rule 1(1)(a); in substantive terms, the right arises under section 3 of CLCO: (see *HKCP, Vol 2*, at §F1/35/8).

*CONCLUSION*

1. In conclusion, for the above reasons, I consider that the third party’s application to try to set aside the third party notice issued by the 2nd defendant pursuant to the leave order of Master Raymund Chow dated 2 October 2019 has been totally misconceived and therefore the Order made by the Master on 20 August 2020 must be correct and should be upheld.
2. I therefore dismissed the appeal brought by the third party with costs in favour of the 2nd defendant, with certificate for counsel, on a party and party basis. I further ordered the costs of the Summons before the Master as well as the appeal would be summarily assessed by me by way of paper disposal.
3. For that purpose, the 2nd defendant was directed to lodge its statement of costs for both applications made by the third party, ie including the Summons before the Master and the appeal before me, with the clerk of this court within 7 days from the date of the hearing with copies served on the third party. The third party was directed to lodge its list of objection, if any, for both applications, with the clerk of this court within 7 days thereafter, with copies served on the 2nd defendant.

*Summary assessment on costs*

1. Having studied the statement of costs lodged by the 2nd defendant on 22 October 2020 and the list of objection lodged by the third party on 29 October 2020, I assess the 2nd defendant’s costs of the Summons and the appeal before me at a total sum of HK$85,000, such costs to be paid by the third party to the 2nd defendant forthwith.

( Andrew SY Li )

District Judge

Mr Jonathan Tai, instructed by Messrs Woo Kwan Lee & Lo, for the 2nd defendant

Mr Alexander Cheung, instructed by Messrs S Y Fung Solicitors, for the third party