# DCPI 2005/2020

[2022] HKDC 1285

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2005 OF 2020

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BETWEEN

LAM SHUI KING Plaintiff

and

POLLUTION & PROTECTION SERVICES

LIMITED Defendant

CATHAY PACIFIC CATERING

SERVICES (H.K.) LIMITED Intended 2nd Defendant

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Coram: Master Louise Chan in Chambers (Paper Disposal)

Dates of Plaintiff’s Skeleton Submissions: 2 & 29 September 2022

Date of Intended 2nd Defendant’s Skeleton Submission: 13 September 2022

Date of Decision: 7 November 2022

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DECISION

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1. A summons dated 29 April 2022 (“the Joinder Summons”) was taken out by the Plaintiff Lam Shui King (“the Plaintiff”) for leave (1) to join Cathay Pacific Catering Services (HK) Limited (“CPCS”) as the 2nd Defendant to this action; (2) to amend the Amended Writ of Summons as shown in the draft annexed to the Joinder Summons; and (3) to amend the Statement of Claim for further consequential relief.
2. By way of a consent summons filed by the parties on 24 May 2022, I gave directions for this application with a timetable for exchange and filing of affidavits and written submissions. The substantive hearing was scheduled to be heard on 9 September 2022 but upon the parties’ joint application dated 22 August 2022, I allowed this application to be dealt with by way of paper disposal.

*BACKGROUND*

1. The Plaintiff started working for the Defendant as a Service Attendant since April 2015 with her main duties being the replenishment of blankets and headphones on the Cathay Pacific aircrafts. The Plaintiff in her witness statement averred that minibuses were arranged by her employer to pick her and other staff up after they finished clearing an aircraft. It is the Plaintiff’s case that owing to the negligent driving of the minibus driver (“the Driver”) who picked her up at around 10:00 pm on 3 July 2017, she suffered personal injuries on the minibus (“the Minibus”) when the Driver allegedly made a sharp and speedy turn before she was seated. According to the Plaintiff, she fell onto one of the seats with the left side of her back hitting against it (“the Accident”).
2. It is not disputed that the Plaintiff was in the course of her employment with the Defendant at the time of the Accident, and as matters transpired, the Minibus was owned by CPCS and driven by one of their employees.

*CHRONOLOGY OF EVENTS*

1. The Plaintiff’s solicitors (“BMak”) have been instructed by the plaintiff since 11 October 2018 to act on behalf of her in both the EC and common law claim. BMak issued a letter before action dated 26 March 2020 (“Letter before Action”) to the defendant setting out some details of the Accident with reference to the Minibus being operated by Cathay Pacific and the name of the Driver. Three months later, ie on 26 June 2020, BMak issued a protective Writ of Summons against the Defendant, and on 3 July 2020, ie a day after the Plaintiff’s claim was time-barred under the 3-year-rule, the insurer of the Defendant (“Asia Insurance”) wrote to BMak (“the Insurer’s Letter”) stating that the Defendant shall not be liable for the Accident as the Driver was not their employee and the Minibus was operated by Cathay Pacific.
2. Notwithstanding the information disclosed in the Insurer’s Letter, BMak filed and served the Statement of Claims on the Defendant some eight months later, i.e. on 15 March 2021. The solicitors acting for the Defendant (“Deacons”) issued a letter to BMak on 1 April 2021 (“Deacon’s Letter April 2021”) disclosing the owner of the Minibus was CPCS and thus asking the Plaintiff to discontinue her action against the Defendant.
3. In light of the above, as submitted by the Plaintiff, BMak had started a preliminary investigation with a pre-action letter issued to CPCS in January 2022. By way of a letter dated 24 January 2022, BMak also informed the Court that first, a mediation conference with the Defendant was held on 20 January 2022, and secondly the Plaintiff was considering to join CPCS as the 2nd defendant in this case. I thereby made directions, *inter alia*, that the Plaintiff do take out an application for joinder on or before 29 April 2022.
4. Under the circumstances elicited above, the Plaintiff took out the Joinder Summons on 29 April 2022 for leave to join CPCS as the 2nd Defendant.

*THE PLAINTIFF’S GROUNDS OF APPLICATION*

1. The Plaintiff’s grounds for her application are based on first, the limitation period under Section 27 of the Limitation Ordinance (Cap. 347) (“the LO”) had not expired when the Summons was taken out, or alternatively, the Court should exercise its discretion pursuant to s 30 of the LO to disapply the limitation period.
2. For the purpose of this application, the Plaintiff filed two Affirmations which can be summarized as follows:-
3. The Defendant remained silence as to the identity of the owner of the Minibus and employer of the Driver throughout the proceedings;
4. The Plaintiff had no and could not have any actual or imputed knowledge as to the owner and employer of the Minibus and Driver until such information was disclosed in the Deacon’s Letter April 2021;
5. CPCS’s ability to conduct the Defence would not be prejudiced if they are to be joined at this stage;
6. The Plaintiff would suffer more prejudicial effect if she is to be denied adding CPCS.

*CPCS’ GROUNDS OF OBJECTION*

1. It is contended by the CPCS that the Plaintiff ought to have actual or constructive knowledge of the identity of CPCS being the owner and employer of the Minibus and driver right from the time of the Accident. As such the secondary limitation period should not be started to run, as suggested by the Plaintiff, on the date when her solicitors received the Deacon’s Letter April 2021.
2. CPCS also resisted the Plaintiff’s suggestion that the Court could use its discretion to disapply time limits under section 30 of the LO as there could be no credible explanation for the Plaintiff’s delay in joining CPCS and the plaintiff, in any event, does not have any real prospect of success against the CPCS under common law.
3. An affirmation of Edwin Chim (“Mr Chim”) who is the financial controller of the CPCS was filed on 22 June 2022 in support of the CPCS’s opposition. He gave a detailed account of the Plaintiff’s work arrangement at the airport and CPCS building (with photos attached), the operation of all CPCS minibuses that are assigned to pick up plaintiff and other service attendants, as well as some background information of the Driver who was retired in 2019.
4. The credibility and the weight be given to both the Plaintiff and the Defendant’s evidence would be discussed in the forthcoming paragraphs.

*APPLICABLE PRINCIPLES AND LIST OF ISSUES*

1. Section 27(3) & (4) of the LO provides that subject to section 30, an action for personal injuries claim should not be brought after the period of 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. Such ‘date’ of knowledge is defined in section 27(6) and could be date on which the plaintiff first had knowledge of, *inter* alia, the identity of the defendant. As to the ‘knowledge’ of the plaintiff, section 27(8) provides that 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.
3. In the event that the Court decides that the Plaintiff’s claim been time-barred under both the primary and secondary limitation period in section 27(4), the Court is tasked to consider whether such time-barred claim should be allowed to proceed under section 30(1) of the LO, which provides as follows:-

“If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which: -

* 1. the provisions of section 27 and 28 prejudice the plaintiff or any person whom he represents; and
  2. any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions should not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

1. The discretion to disapply the limitation period is entirely unfettered. 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 having regard to the possible prejudice to be suffered by each party. The court is to perform a balancing exercise by looking into (1) the balance of prejudice to each party; (2) the six specific but non-exhaustive factors contained in section 30(3); and (3) all the circumstances of the case.
2. The six factors set out in section 30(3) are:-
3. the length of, and the reasons for, the delay on the part of the plaintiff;
4. 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 by sections 27 or 28, as the case may be;
5. 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;
6. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
7. 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;
8. 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.

***Issues***

1. It is not disputed that the primary limitation period has expired. The relevant issues are therefore as follows:-
   1. whether the Plaintiff’s claim against CPCS has been time-barred under the secondary limitation period in section 27(4)(b);
   2. if the primary and secondary limitation periods have expired, whether section 27 should be disapplied pursuant to section 30.

*SECONDARY LIMITATION PERIOD*

***Analysis of evidence***

1. The Plaintiff claimed that she only gained knowledge of the identity of CPCS from the Deacon’s Letter April 2021. The burden of proving constructive knowledge is on CPCS, and the test is objective.
2. CPCS submitted that the Plaintiff ought to have constructive, if not actual knowledge of CPCS’ identity at the time of the Accident, or the latest by the time she instructed BMak in or around October 2018. Their argument relies on two types of evidence; the first would be some circumstantial evidence from the Plaintiff’s working arrangement, which demonstrates that the identity of CPCS were either observable or readily ascertainable by the Plaintiff at the time of the Accident. The second type of evidence would be various statements made by the Plaintiff after the Accident (including the Plaintiff’s two affirmations for this application) confirming her actual knowledge of the involvement of Cathay Pacific, and thus constructive knowledge of CPCS at the time of the Accident.
3. CPCS averred and the Plaintiff agreed that she had served Cathay Pacific aircrafts during her 2 years’ employment with the Defendant. Her daily work arrangement revolved around the CPCS building and its operation so much so that she was given a CPCS staff access card for the clock-in-clock-out system, a changing locker inside the CPCS office and was picked up and dropped off by minibuses operated by CPCS outside the building.
4. Mr. Chim also averred that there were signs of “Cathay Pacific Catering Services” displaying at the entrance of the CPCS building and on the minibuses. It is further averred that the uniform for CPCS staff, including the Driver was in red colour whereas the Plaintiff’s uniform was in green as she was an employee of the Defendant, as such the Plaintiff ought to know the Driver was employed by CPCS.
5. In respect of the Plaintiff’s statements, the Court was referred to (1) the Form 2 of the ECC (“Form 2”) and (2) the Incident Report which was prepared by the Defendant and signed by the Plaintiff shortly after the Accident (“the Incident Report”). These two sets of documents invariably show how the Plaintiff referred to the Minibus as國泰巴士/小巴and the driver as國泰司機. The Court was further referred to first, the Letter before Action which the name of the Driver was disclosed therein, and secondly to paragraph 7 of the Plaintiff’s witness statement dated 16 August 2021 where she said:-

“意外前我亦經常乘坐該小巴，除了休息日外，該小巴一直都是由一位姓李的男司機駕駛。而意外當日亦是由該姓李的男司機駕駛該小巴。”

1. It is submitted by CPCS that the Plaintiff must all along been able to identify the Driver and given her actual knowledge that the Minibus was operated by Cathay Pacific, the identity of the owner of the minibus could have revealed if proper enquiries were made by her and/or her lawyers.
2. On the other hand, the Plaintiff maintained her stance in both of her affirmations that she had no knowledge that the Minibus and Driver was owned and employed by CPCS. She referred those minibuses as國泰巴士because she knew the defendant only provided services for Cathay Pacific and those minibuses sent them to Cathay Pacific aircrafts exclusively.
3. The Plaintiff also submitted that she only received education up to primary school in Mainland China and thus unable to understand the sign “Cathay Pacific Catering Service” or “CPCS” as printed on her access card.
4. Mr. Nip, counsel for the Plaintiff, submitted that the plaintiff’s reference to國泰巴士in her Form 2 and Incident Report could not prove her knowledge about who owned or operated the Minibus. He further argued that Cathay Pacific and CPCS are clearly two separate entities.
5. Conversely, the Plaintiff contended that BMak, being the Plaintiff’s solicitors, did ask the defendant in the Letter before Action to provide information if they know there was or were any other party at fault. It is submitted that the defendant, while knowing the identity of CPCS all along, deliberately chose to conceal this piece of information from the Plaintiff, and thus the latter could not be blamed for not taking adequate steps in ascertaining the identity of potential tortfeasors.

***Whether the identity of CPCS is knowledge that the plaintiff ‘might reasonably be expected to acquire’ from facts observable or ascertainable by her?***

1. As held by Purchas LJ in ***Nash v Eli Lilly & Co***[1993] 4 All ER 383, at 392, the required knowledge is a condition of mind that imports a degree of certainty which may reasonably be regarded as sufficient to justify the claimant embarking upon preliminaries to the making of a claim, such as taking legal or other advice. Knowledge does not mean knowing for certain, but may mean a reasonably firmly held belief that warrants a claimant taking steps to investigate the claim. The court must assess the intelligence of the plaintiff in understanding the information obtained and consider as a matter of fact whether he comprehended such information.
2. Whilst accepting the Plaintiff may not understand the words “Cathay Pacific Catering Services/CPCS” and its significance, the intelligence or educational level of the Plaintiff, however, must not be the only factor the Court would have to consider, especially in cases like the present one where the Plaintiff has been legally represented from the start of the ECC proceedings. A vast amount of plaintiffs, especially in personal injuries cases, come from humble backgrounds with limited education; should the Court is to consider merely the personal background of the plaintiffs in isolation of their legal representatives’ involvement, I view this would only encourage lawyers to act less conscientiously than they ought to be as the ignorance of their clients could always act as their shield.
3. Mr. Nip contended that BMak has made reasonable enquiries by asking the Defendant at the pre-action stage to disclose the identity of other potential tortfeasors and the particulars of their alleged wrongdoing. The Court views that this could not be seen as a disclaimer intending to limit the scope of BMak’s obligations to act professionally and reasonably in identifying other apparent tortfeasors.
4. The Defendant in fact has no general duty to assist the plaintiff in identifying potential defendants. In ***Chan Ngan Fa v Cui You Jun and Yan Zhao Jia, Robert both formerly trading as China Venture International & Anor****,* DCPI 832/2002 (unreported, 2 March 2009), HH Judge Mimmie Chan in paragraph 18 of her judgment said *“defendants or prospective defendants cannot be expected to readily assist a prospective plaintiff in pursuing his/her claim, and to volunteer information or evidence.”* That passage was cited in a post-CJR decision of***Cheung Yin Heung v Hang Lung Real Estate Agency Limited****,* HCPI 421/2009 (unreported, 30 April 2010).
5. Mr. Nip in his submissions relied on ***Chu Gregory v. Yick Ngai Logistics (HK) Company Limited and River Trade Terminal Co Ltd and Anor***,DCPI 110/2020 [2021] HKDC 463 where Master Matthew Leung considered the parties’ duties to provide mutual disclosure of information and documents with respect to issues of liability prior to the commencement of proceedings stage under paragraphs 19 and 20 of the Practice Directions 18.1. He further considered Order 1A, rule 1 and 4 of the Rules of District Court which empowers the Court to make orders ensuring, *inter alia*, that the litigation be dealt with expeditiously with a sense of reasonable proportion and procedural economy, and have the parties to co-operate in the conduct of the proceedings.
6. In reconciling the above principles, one should not take a restrictive view that defendants or prospective defendants are obliged to disclose all information to the other side in pursing their claims. It would be an incorrect and impractical expectation on any defendants to volunteer evidence so to assist or advance their opponents’ case. Each case will have to be looked into their own context and the Court is to examine whether the parties’ conducts being reasonable.
7. Indeed, contrary to the plaintiff in *Chu Gregory* who had only worked at the site of the Accident for less than a month, the plaintiff in this present case was employed by the Defendant for more than 2 years at the time of the Accident and she would certainly have more insight of the operation at her work site. Although I accept the possibility that the plaintiff did not understand the words “Cathay Pacific Catering Service”, she conceded that the site she reported to work being part of Cathay Pacific, her employer served Cathay Pacific exclusively and was able to describe the Minibus as a國泰巴士in her Form 2 and Incident Report.
8. It is less than likely for the Plaintiff to appreciate the *legal* significance of Cathay Pacific being the operator of the Minibus as her primary concern at that time would probably be her employees’ compensation claim. Despite the Plaintiff in her 2nd affirmation claimed that BMak did not obtain the Incident Report for the ‘current proceedings’ (ie the Common Law claim) until 11 May 2022, the Court bears in mind that BMak, as the legal representative for the plaintiff’s EC Claim, would have access to both the Form 2 and Incident Report at the time of instruction which would be around October 2018. And even if the Incident Report was “not discoverable” as BMak alleged, the Form 2 nonetheless disclosed the fact that the Accident happened when the Plaintiff was on a Cathay Pacific Staff Bus (國泰地勤巴士). On reading those two statements, I am of the view that there should be reasonable suspicion as to whether any relevant tortfeasor other than the defendant be involved. Despite BMak could not been fixed with knowledge of the involvement of CPCS at such point, it would be reasonable to expect the Plaintiff or her lawyers to embark on the preliminaries to the making of a claim against Cathay Pacific and its affiliates.
9. No evidence before me showing any action in relation to this common law claim was taken by the Plaintiff or BMak until almost 18 months later by way of the Letter before Action, just 3 months away from the end of the limitation period. Asia Insurance wrote back to BMak on 14 April 2020 informing them that they would investigate the plaintiff’s claim and the Insurer’s Letter dated 3 July 2020 rejected her claim based on reasons as follows:-

*“1. On the date of accident, your client was taking a mini bus operated by Cathay Pacific… The subject mini bus was not owned/operated by our Insured;*

*2. The driver of the subject mini bus was not employee of our Insured”*

1. As such one could see that it took a mere 4 months or less for Asia Insurance to conclude the investigation of other potential tortfeasors in this case. The Plaintiff however argued that even if “Cathay Pacific” was alleged to be the operator of the minibus, the real identity would be CPCS which is essentially two separate entities. On this line of argument, I gained the impression that the Plaintiff was expecting the Defendant to spoon feed them with every details of the case to save them from making any reasonable investigations. I am firmly of the view that the defendant or its insurer had provided sufficient and reasonable information to the Plaintiff, with which the Plaintiff could have made further investigations.
2. Judging from the circumstances explained above, I come to the following conclusion:-
3. Although the Plaintiff knew, at the time of the Accident, that the bus was operated by Cathay Pacific, she would not be able to appreciate the significance of the involvement of CPCS from a legal perspective;
4. BMak would have gained access to Form 2 and the Incident Report in or around October 2018 and suspicion should be raised as to Cathay Pacific or CPCS being a relevant tortfeasor involved in the Accident;
5. While such suspicion does not render the Plaintiff or her solicitors would have been fixed with knowledge of the involvement of CPCS, it justifies investigations to identify/verify the factual basis;
6. The Plaintiff, however, did not take any reasonable step to acquire information but waited until three months before the end of the limitation period to issue the Letter before Action to the Defendant. It took less than 4 months for the defendant’s insurer to confirm that the Minibus was operated by Cathay Pacific;
7. As such, I am convinced that earlier enquires by the Plaintiff would have elicited prompt clarification of the identities of CPCS.
8. In such circumstances, I am of the view that the secondary limitation period should start running from the time the plaintiff was legally represented, i.e. 11 October 2018. I would also reject the Plaintiff’s argument that the secondary limitation period only started to run from the date she received the Deacon’s Letter Apr 2021 based on the above reasons. In such premise, the limitation period of 3 years would have been lapsed on 10 October 2021, and the Plaintiff’s intended claim against the CPCS is made outside the limitation period.

*DISCRETION UNDER S.30 OF THE ORDINANCE*

1. Based on the above analysis, I have to consider whether to exercise my discretion in allowing such time barred claim to proceed under section 30(1) of the Ordinance. I shall not repeat the legal principles which are stated in paragraphs 17-19 hereinabove but below will be my analysis.
2. *Length of Delay:* The post-expiry delay was roughly 6 months which is not a particularly long period of delay, and I find it to be acceptable.
3. *Conduct of the Plaintiff:* As discussed, no substantive steps were taken by the Plaintiff between October 2018 and March 2020. While Mr. Nip suggested the commencement of the secondary time limit should be from the date when the Plaintiff’s solicitors received the Deacon’s Letter April 2021, the Court observed that the Plaintiff’s solicitor only sent out a pre-action letter to CPCS 9 months later on 12 January 2022. The Plaintiff in her 2nd affirmation explained that preliminary investigation was conducted over those 9 months and she had promptly instructed her lawyers to issue the pre-action letter.
4. The Court does not accept this explanation and could not comprehend what was left to be investigated when the identity was revealed by the Defendant. The Court must also at this juncture to highlight the fact that despite the Plaintiff having acquired ‘actual knowledge’ of the owner and employer of the Minibus as early as April 2021, a consent summons was signed between the Plaintiff and the Defendant on 7 July 2021 agreeing on joint medical examination together with other case management directions leading to a setting down for trial in late January 2022.
5. Furthermore, a mediation between the Plaintiff and the Defendant was held on 20 January 2022, just one week after the Plaintiff issued her pre-action letter to CPCS. Without surprise, the mediation failed.
6. Under the circumstances elicited in the above paragraphs, I have no hesitation to criticize that the Plaintiff, not only failed to act promptly and reasonably but has wasted costs when knowing that a potential tortfeasor might be joined in this proceedings.
7. *Conduct of the Defendant:* As discussed under paragraphs 39 and 40, I came to a conclusion that the Defendant acted promptly in response to the Plaintiff’s enquiry. Further, the solicitors of CPCS had also acted promptly upon the plaintiff’s pre-action letter.
8. *Effect of any delay on the cogency of the evidence:* The Defendant’s argument could be summarized as follows:-
9. The Driver could not remember the alleged Accident;
10. The Driver was retired in 2019 and the Defendant runs the risk of him not willing to testify in Court;
11. Since the alleged Accident was never reported to CPCS until June 2020. No contemporaneous report of the Accident was ever made and the ability of CPCS to investigate the Accident is substantially impaired;
12. The Minibus in question has been scrapped.
13. The evidential burden is on the CPCS to show that the evidence to be adduced by them is likely to be less cogent because of the delay. The key question is whether the CPCS would be in a worse position for dealing with the factual issues than they would have been if the claim were issued within time. Bearing in mind that Asia Insurance issued their first letter to CPCS seeking EC recovery in March 2020, it is not entirely fair to say the current proceedings is entirely unforeseeable. Further, their position would be not improved even if the writ was issued in time by July 2020 as the Driver was retired in 2019, and witness recollection will be no weaker now than it would have been if the claim against CPCS had been brought in time. As to their worries that the Driver would not be willing to testify, he can always be subpoenaed or asked to give evidence at trial. In terms of documentary evidence, the defendant could not suggest any material evidence that they would rely but lost due to the delay. And from my point of view, the actual existence of the Minibus is of little significance to this case as the alleged negligence is the driving manner of the Driver rather than any mechanical problems of the Minibus itself.
14. *Strength of the Plaintiff’s claim:* CPCS argued that the plaintiff, based on the evidence available, is unmeritorious and has no reasonable prospect of success. In this regard, the Court bears in mind that the judgment of Stuart–Smith LJ in ***Forbes v Wandsworth Health Authority* [1996] 4 All ER 881, 894-895** as follows:-

*“Equally, although it is always prejudicial to a defendant to be deprived of a defence under the Limitation Act, it may be less inequitable or unfair where the plaintiff has a strong case and more unfair where he has a weak one. But where as here the limitation issue is tried and determined before the merits of the claim, the court cannot and should not attempt to determine the merits on affidavit evidence. All that can be done and should be done is for the judge to take an overall view of the prospects of success; a judge who is experienced in this type of litigation should have no difficulty in doing so.”*

1. As such, the court can only take a broad view of the matter at this stage but to go into the details of the evidence and credibility of witnesses. In my view, whilst the Plaintiff may not have an overwhelming or cast-iron case against CPCS, it cannot be said to be a weak case. It is a genuine claim that deserves further investigation in the course of litigation.

*CONCLUSION*

1. Lord Hoffman in ***Horton v Sadler* [2006] PIQR P30** said at p.514 that *“since [Thompson v Brown [1981] 1 WLR 744] the practice of the courts 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 …… the plea of limitation which the statute confers upon the defendant is, in the absence of forensic prejudice, described as a windfall of which he can properly be deprived”.* Such observations were approved by***Tang VP in Chuck Wai Man v Asia Television Ltd* CACV29/2008 (unreported, 9 September 2008)**.Indeed, in***A v Hoare* [2008] 2 All ER 1**, Baroness Hale at p.21 said she fully supported a more generous approach to the exercise of discretion, and Lord Carswell at pp.26-27 said there needed to be a more liberal approach to the exercise of the discretion.
2. In considering all the circumstances in paragraphs 44-53 hereinabove, the Court is of an overall view that a fair trial is still possible and I consider it is an appropriate case to exercise my discretion in favour of the Plaintiff.
3. I therefore order that:-
4. The Plaintiff do have leave to join Cathay Pacific Catering Services (H.K.) Limited as the 2nd Defendant (hereinafter called the 2nd Defendant) in this action and the existing defendant shall be renamed as the 1st Defendant;
5. Leave be granted to the Plaintiff to amend the Writ of Summons in the manner marked in red as per the draft attached to the Joinder Summons;
6. Leave to the Plaintiff to file and serve the Amended Writ of Summons within 14 days from the date hereof;
7. All previous pleadings and court documents already filed with the Court shall be deemed to have been amended to include Cathay Pacific Catering Services (HK) Limited as the 2nd Defendant;
8. The 2nd Defendant do file and serve the Acknowledgment of Service within 14 days from the date of service of the Amended Writ of Summons. The filing and service of the same from the 1st Defendant be dispensed with;
9. The Plaintiff do have leave to amend the Statement of Claim within 28 days subsequent to the service of the Acknowledgement of Service of the 2nd Defendant;
10. The 2nd Defendant shall file and serve its Defence, accompanied by its Statement of Truth within 28 days thereafter;
11. Leave to the 1st Defendant to amend its Defence, if so advised, and have it filed and served within 28 days from paragraph 6;
12. A Checklist Review Hearing be fixed on 25 April 2023 at 10:30 am in Court 13 for further case management directions. Parties do file and serve their PI Questionnaire 14 days prior to the adjourned hearing and Consent Summons, if any, 7 days prior to the adjourned hearing;
13. Liberty to apply.

*COSTS*

1. The Plaintiff asked for costs of and occasioned by this Summons should be borne by the Defendant and/or CPCS. CPCS contended that they have defended the Joinder Summons on reasonable grounds and submitted that costs of and occasioned by this application should be to the CPCS in any event. The Defendant, while in a Joint Letter of the parties dated 22 August 2022 expressed that they took a neutral stance to the Joinder Summons, an affidavit was filed by the Defendant’s solicitors expressing that there is no basis upon which the Defendant should file a Third Party Notice against CPCS and/or its driver. The Defendant asked for costs in the cause in the event that the Joinder Summons is allowed.
2. Although the Court allowed CPCS to join this action, but as explained in paragraphs 41-42, this is a case where I see the Plaintiff’s action was supposedly time barred as no investigation was taken promptly and CPCS has every right to resist the Plaintiff’s application. I agree reference should be made to ***Li Chi Hun v Secretary for Justice & Anor* [2006]** 1 HKLRD 60 where the then Deputy High Court Judge Carlson said that the appropriate rule should be *“he who is late pays”* especially CPCS has defended the Plaintiff’s application on perfectly respectable grounds.
3. I therefore grant a costs order *nisi* that (1) the Plaintiff do pay forthwith CPCS’s costs of and incidental to this joinder application, to be summarily assessed; (2) The Plaintiff do, if so desired, file and serve a succinct summary of objections of not more than 3 pages in respect of the CPCS’s costs statements within 14 days from the date hereof; and (3) the Plaintiff do pay the Defendant’s costs of and occasioned by the amendments of the Writ of Summons and the Statement of Claims and the consequential amendments to the Defendant’s pleadings in any event, to be taxed if not agreed.

( Louise Chan )

Master

Mr. Thomas T. L. Nip, B. Mak & Co., for the Plaintiff

Deacons, for the 1st Defendant

Holman Fenwick Willan, for the intended 2nd Defendant