#### DCPI2623/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2623 OF 2008

BETWEEN

WONG HIU CHING Plaintiff

and

LAM PUI LING Defendant

##### Before: H H Judge Chow in Chambers (Open to the public)

Date of Hearing: 23 July 2009

Date of Decision: 23 July 2009

## D E C I S I O N

1. This is the Defendant’s application to vary the costs order I made on 12 June 2009.
2. The Defendant argued that it is reasonable for them to come to court to argue the Plaintiff’s application, namely, an application to apply for leave to continue the Plaintiff’s case against the Defendant, when there was a time bar for the application. The Plaintiff’s application was made under section 30 of the Limitation Ordinance.
3. The Defendant referred to the Hong Kong case of *Ng Keung Lung v Lam Chik Suen (Deceased)* HCPI512/2004. Amongst other things, the court in that case said that the Plaintiff’s solicitors are probably liable to the Plaintiff in negligence. The availability of an alternative remedy against his own solicitors is also a factor which is against the Plaintiff when I come to consider where the equity lies.
4. The Defendant also referred to a case decided in England by the House of Lords. The written submission of the Defendant during the hearing of this application on 29 May 2009 says that:

“Therefore, while Lord Diplock in *Thompson v Brown Construction Limited* (supra) thought that the availability of a claim against his solicitors may still cause some prejudice against the Plaintiff, his Lordship in a subsequent case *Deerness v John R Keeble & Son (Brantham) Limited* [1983] 2 Lloyds Report 260 said at 264: ‘The Plaintiff herself will not suffer. The solicitors’ insurers will have to pay out for a risk that they insured and for which they charge a premium.’ So they have suffered no injustice.”

1. The Plaintiff’s former solicitor was negligent in the handling of this case so that the case, the Plaintiff’s claim, became time barred. There was common ground between the parties.
2. Now, I have to consider the significance of an alternative remedy being available or open to the Plaintiff or has any effect on this application. In my view, it carries little or no weight because under section 30, what the court has to consider are all the circumstances of this case and, in particular, to the following elements set out in section 30 of the Limitation Ordinance. Now, that is under subsection (3). There are six factors which the court has to pay particular attention to. These six factors do not include any element relating to alternative remedy. So, unless the element or factor of alternative remedy would carry a very significant role or weight in the application under section 30, otherwise I simply should ignore it. The effect of not including the factor of alternative remedy under subsection (3) reflects that this is not a factor which the court should pay any special attention to, for the very simple reason the insurer behind the solicitor who is negligent, or alleged to be negligent, may be wound up at the material time, or subsequently, or the solicitor in question may have failed to purchase insurance to cover liability committed by him.
3. So it is obvious that unless you have clear evidence that the solicitors, or solicitor in question, have purchased insurance to cover his liability or that the insurance company has not gone into litigation, then you could consider alternative remedy. If there is no such evidence, the court cannot do anything. So it may be that for this reason, alternative remedy is not included under section 30(3).
4. Now, the Hong Kong situation is that in the case of *Chuck Wai Man v Asia Television Limited* CACV29/2008, the Court of Appeal laid down the correct approach to be followed by junior courts. It says:

“The correct approach is well settled. As Lord Hoffman said in *Horton v Sadler*, ‘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’ and that ‘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.’”

Now, that is the correct approach laid down by the Court of Appeal.

1. So this is binding upon me. I am duty bound to follow that approach, which I did. That approach is followed. The Defendant is bound to lose the case. Even if I did not follow this case, I considered the matter of alternative remedy. I cannot give much weight to it according to section 30. I must bear in mind that there is no evidence to the effect the solicitor in question in this case did take out insurance or that the insurance company is still operating now. I have no idea, no evidence about these matters. If the insurance company was no longer operating at the material time, then the Plaintiff cannot obtain alternative remedy. And if the solicitor in question did not take out any insurance cover covering his liability, then no point to consider that issue.
2. Now, all this is unknown. I cannot make any assumption that one way or the other about whether the solicitor did take out insurance, etc. But the matter of alternative remedy in light of *Chuck Wai Man* and in light of section 30 carries little weight at all. So, once you consider that it is apparent that the Defendant is bound to lose in the argument, so I cannot see any reason why I should change the order I made on the last occasion. So I dismiss the Defendant’s application.

(Discussion re costs)

1. The Defendant do pay costs of this application to be taxed, if not agreed, with certificate for counsel.

# (Chow)

# District Court Judge

Mr Ernest Koo, instructed by Messrs Cheung & Liu, for the Plaintiff

Mr Gary Lam, instructed by Messrs Chu & Lau, for the Defendant