## DCPI 2740/2009

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2740 OF 2009

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BETWEEN

HUNG MEI YUNG Plaintiff

and

HO KA KEUNG trading as Defendant

LUEN FAT CLEANING COMPANY

HUNG FAT CLEANING Intended

TRANSPORTATION CO. LTD 2nd Defendant

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Coram: Before Deputy District Judge R. Yu in Chambers (open to public)

Date of Hearing: 21 February 2011

Date of Handing Down Decision: 31 March 2011

DECISION

###### **BACKGROUND**

1. According to the Plaintiff, she was employed by the Defendant as a cleaning worker. On 19 January 2007, she was assigned by the Defendant to do cleaning work at Ko Shing House, Ko Yuen House and Ko Chi House, Ko Yee Estate, Yau Tong, Kowloon, Hong Kong. She had to load the garbage collected from the garbage room into the rear part of the garbage truck.
2. The garbage truck was equipped with a mechanically rotating pressing plate at the rear part to compress the waste loaded into it. It is the case of the Plaintiff that when she was moving a big rectangular wooden plank into the garbage truck, someone operated the pressing plank of the garbage truck negligently and caused the shovel to rotate, and injured her left hand causing a fracture of her middle phalanx of left ring finger.
3. After the accident, the Plaintiff attended the United Christian Hospital for emergency treatment. In total, she was granted 136 days of sick leave from 24 January 2007 to 14 June 2007.
4. Mr. Lin, counsel for the Plaintiff said the Plaintiff had applied for Employees’ Compensation from the Defendant. On 28 December 2009, her solicitors issued a pre-action letter to the Defendant and his insurer, claiming that the injury of the Plaintiff was caused by the negligent act of the Defendant in failing to maintain a safe system of work. In the alternative, the Plaintiff claims that the injury was caused by the negligent act of the Defendant’s employee or servant or agent who operated the pressing plate of the truck. As it is getting close to the limitation period, a protective writ was issued on 31 December 2009.
5. On 7 January 2010, Defendant’s solicitors Messrs. JSM (“JSM”) wrote to the Plaintiff’s solicitors asking for time to investigate the accident. And on 3 February 2010, JSM wrote to the Plaintiff stating that the person who was operating the pressing plate of the garbage truck was not the Defendant’s employee or servant. He was a staff of the Food and Environmental Hygiene Department (“FEH Department”), and the truck also belonged to the FEH Department.
6. There are further correspondence between the Plaintiff’s solicitors and JSM. In or about July 2010, the Plaintiff issued a summons against the Department of Justice seeking to join the FEH Department as a defendant.
7. By a letter dated 17 August 2010, Department of Justice informed the Plaintiff that the garbage truck in question was owned by an independent contractor Hung Fat Cleaning Transportation Company Limited (“Intended D2”) and it was operated by its employee. On 19 August 2010, the Department of Justice produced the relevant part of the contract with the Intended D2. There were further correspondence between the Plaintiff and the Department of Justice who suggested to the Plaintiff’s solicitors that they should only claim against the Intended D2.
8. On 10 September 2010, the Plaintiff took out the summons to join the Intended D2 as a defendant in this action. The Intended D2 opposed the application.

**Matters before this Court**

1. Before I come to the summons, there are 2 ancillary matters. First, on 26 January 2011, when the parties appears before me on an application by the Intended D2 to cross-examine the Plaintiff on her affirmation, and having consulted the legal representatives of the parties, I directed that the Plaintiff do lodge and serve the written opening on or before 11 February 2011. Mr. Lin, who did not appear on that occasion could not comply with my direction and only served the opening on 15 February 2011. He sought leave to extend the time, which Mr. Lam, counsel for the Intended D2 raised no objection. I grant an order in terms of the time summons.
2. There is another application by the Plaintiff for a late filing of another affirmation of the Plaintiff. Mr. Lam objected on the ground that parties have exchanged a number of affidavits and there is no reason why the Plaintiff should be allowed to file and use an affirmation at this late stage. Mr. Lin submits that the contents of the affirmation are not really controversial and it is a minor touch up of the evidence to be relied on by the Plaintiff.
3. One of purpose of the Civil Justice Reform is to ensure that the parties would sufficient prepare their evidence for trial well in advance in order that each party could be aware of their case to meet. The burden rests on the Plaintiff to show that the late filing of additional evidence is justified. I am not satisfied on the reason for taking out the application late. I agree with Mr. Lam that parties have been given full opportunity to serve and exchange evidence. The Plaintiff has full opportunity to put the information in one of her affirmation filed herein earlier. I therefore refuse the application.

#### ISSUES

1. I now proceed to deal with the Plaintiff’s application for leave to join the Intended D2. As the accident took place on 19 January 2007, by the time when the Plaintiff issues the summons herein against the Intended D2, it is more than 3 years from the date of the accident. Initially, the Plaintiff applies to disapply the limitation period. Subsequently, the Plaintiff amended its summons to claim that the Plaintiff is not aware of the identity of the Intended D2 until some time in August 2010, on being informed by the Department of Justice. Hence the limitation period should not start to run until August 2010 and she is well within time to join the Intended D2. In the alternative, she retains her application that this Court should exercise the discretion to disapply the limitation period and join the Intended D2 as a defendant (“the Amended Summons”).
2. Section 27(3) & (4) of the Limitation Ordinance provides that subject to section 30, an action for personal injuries claim should not be brought after the period of 3 years from –
3. The date on which the cause of action accrued; or
4. The date (if later) of the plaintiff’s knowledge.
5. It is not disputed that when the Amended Summons was taken out, 3 years has lapsed from the date of the accident. What the Plaintiff is arguing is that she only knew of the identity of the Intended D2 in August 2010. And on knowledge, it is provided in the Limitation Ordinance that it refers to actual knowledge of the Plaintiff of the identity of the Intended D2 (section 27(6)) and constructive knowledge. Section 27(8) provides –

*(8) For the purposes of this section and section 28 a person's knowledge includes knowledge which he might reasonably have been expected to acquire-*

* + 1. *from facts observable or ascertainable by him; or*
    2. *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.*

1. The relevant issues in relation to the Amended Summons are as follows:
   1. whether the Plaintiff has actual knowledge of the identity of the Intended D2 on or about 19 January 2007 or on any date 3 years before the Amended Summons was first taken out;
   2. whether the Plaintiff has constructive notice of the identity of the Intended D2 on or about 19 January 2007 or on any date 3 years before the Amended Summons was first taken out;
   3. if the Plaintiff has actual or constructive notice resulting in the limitation periods having expired, whether the court should disapply section 27 pursuant to section 30.

**Onus of proof for actual knowledge**

1. It is not disputed that the Plaintiff has the burden to prove that she did not acquire the knowledge on the identity of the Intended D2 until a point in time within the 3 years period immediately preceding the Amended Summons was first taken out. But if the Intended D2 wishes to rely on a date prior to such period the onus is on him to prove that the claimant had or ought to have had knowledge by that date(*Nash v Eli Lilly & Co* [1993] 4 All ER 383.)
2. And the relevant knowledge is the identity of the Intended D2. In ***Ng Keung Lung v. the Personal Representative and/or executor and/or administrator of the estate of Lam Chik Suen (Deceased)***HCPI 512 of 2004*,* Mr. Justice To explained :-

*“Identity” is a difficult concept because a person’s identity can be established in different ways. A person may be identified by sight or by a description. But in the context of a litigation, the defendant has to be identified by a name. Thus, there is a distinction between knowing a person and being able to describe the identity of that person by name or to recall that name for the purpose of naming him as a defendant on a writ.*

1. I first deal with the point if the Plaintiff has the actual or constructive knowledge of the identity of the Intended D2.
2. In the Affirmation of the Plaintiff dated 8 November 2010, the Plaintiff confirmed that on the date of accident, she did not know that the operator of the garbage truck was different to her employer. She was not aware of any employee of the Intended D2 wearing the uniform with a vest showing the name of the Intended D2. She was not aware of the name of the Intended D2 appearing on the garbage truck. And she did not know the registration number of the garbage truck. She did not know that the operator of the garbage truck was different to her employer.
3. It is the evidence of one Mr. Lau Wai Hung, a director of the Intended D2 that their cleaners are required to wear a vest with the name of the Intended D2 printed in the front, and at the back of the vest, it was written “食物環境衞生署” and “潔淨服務承辦商”. Mr. Lau also explained that they are contractor of the FEH Department and the Defendant was the contractor of the Housing Department. It is the duty of the Defendant to collect refuse and put them in buckets for collection by the Intended D2. Therefore, there was no arrangement between the Defendant and the Intended D2 for collection of refuse.
4. One Lee Wai Ming also filed an Affirmation for the Intended D2. He was the cleaner of the Intended D2 on the day of the accident. He and the driver worked as a team. He would not assist in collecting refuse for the workers of the Defendant and vice versa and in reality no worker of the contractor of the Housing Department have assisted them in putting refuse in the truck. He also claims that he was not aware of the accident.
5. Mr. Lee also confirmed that he wore the vest mentioned above and he submitted that there could be no excuse for the Plaintiff to allege that she did not know the Intended D2.
6. The House of Lords in ***A v Hoare*** [2008] 1 AC 844, 867 held that the test for actual knowledge is subjective. I am prepared to adopt the same approach.
7. Mr. Lam reminds me of the judgment of Mr. Justice Woo (as he then was) in ***Wong Kam Lee v. Shimizu Corp & Others***[1997] 1 HKC 61 when His Lordship ruled that in some cases, the evidence of the knowledge could not be resolved without viva voce evidence, the matter should be left to the trial judge. I do recall that on refusing the application to allow the Intended D2 to cross-examine the Plaintiff on her affirmation, I adopted the able judgment of Mr. Justice Woo. But I have stated in my ruling that I do not rule on the Amended Summons as I have then not heard the full argument as to whether some issues herein cannot be resolved without viva voce evidence. Is this a case when via voce evidence has to be considered?
8. What is the conflicting evidence in this case as to the knowledge of the Plaintiff? We have the evidence of the Plaintiff. The Intended D2 has not adduced any evidence to suggest that the Plaintiff has actual knowledge. The best of their evidence is that there are labels on the truck and their workers wear a vest with the name of the Defendant printed thereon. There is no evidence that the Plaintiff knew about these labels, or even some other people working at the location knew about it. The best of the Defendant’s evidence may be that the Plaintiff have constructive notice which I shall deal with later. I see no evidence to challenge the evidence of the Plaintiff that she did not know the identity of the Defendant and I do not consider this is a case where viva voce evidence is necessary for the issue be left to the trial judge.
9. On the evidence before me, I am satisfied that the Plaintiff do not have actual knowledge of the identity of the Intended D2 at the material time.
10. I shall now move on to consider if the Plaintiff has constructive notice.

**CONSTRUCTIVE KNOWLEDGE**

1. Master M. Ng has analysed the cases on this issue in her judgment given in ***Cheung Yin Heung v. Hang Lung Real Estate Agency Limited and Another*** HCPI 421 of 2009. I would adopt her view that -

*“In my view, the test for constructive knowledge is objective. This will require the court to consider the objective situation in which the plaintiff finds himself in, including the effects of the injury itself but excluding the personal characteristics individual to the plaintiff, and then go on to consider when a person in such circumstances with comparable level of injury/disability might reasonably be expected to investigate (if necessary with expert help) and acquire knowledge of the matters set out in section 27(6) including, say, the identity of the defendant/tortfeasor.”*

1. Master Ng also commented that –

“…. there is still room for argument that personal characteristics that can be said to affect the plaintiff’s ability to acquire information are relevant to the issue of knowledge; and there is no definitive list of reliable acid test for which characteristics will come into that category. “

1. The burden to prove when the Plaintiff has constructive knowledge should rest with the Intended D2. It is the argument of the Defendant that the name of the Defendant’s company was printed on the side of the truck. To assist me, the Defendant had produced a photograph of the truck. The Defendant also showed me photographs of the vest which Mr. Lee had to put on when working at the garbage truck. Mr. Lam submits that by reason therefore, the identity of the Intended D2 should be fully known to the Plaintiff from the start.
2. The mere fact that the truck carried the name of the Intended D2 and that the workers wear the vest does not follow that any passerby should know the identity of the Intended D2, unless there is evidence of actual knowledge. The Plaintiff in her affirmation denied having knowledge or read the name of the Intended D2. Mr. Lin in his submission agrees that the person’s knowledge includes knowledge which he might reasonably have and expect to acquire from facts ascertainable by him with the help of medical or other appropriate expert advice which is reasonable for him to seek, so long as he has taken all reasonable steps to obtain and, where appropriate, to act on that advance. He also refers me to the case of ***Chan Ngan Fa v. Cui You Jun*** DCPI 83 of 2007 and submits that the Court only expects a person to take reasonable steps to acquire knowledge from facts reasonably ascertainable.
3. Further, I note that in the earlier correspondence between the Plaintiff and the Defendant, even the Defendant claims that the truck has been owned and operated by FEH Department. It shows that the identity of the Intended D2 is not obvious to passerby. Taking the age and the education level of the Plaintiff into issue, one cannot expect her to make the necessary enquiry on the identity of the Intended D2.
4. It is indeed that the evidence of Mr. Lau that since the Intended D2 and the Defendant worked for different department of the Government, there was no arrangement between the Defendant and the Intended D2 for collection of refuse. Mr. Lee also said in his affirmation that he would not assist in collecting refuse for the workers of the Defendant, which must include the Plaintiff, and the workers of the Defendant would not assist them. In such circumstances, given there is no contact between the 2 teams of workers, it would not be surprising that the Plaintiff or a worker in her similar position would not be aware that there is another contractor working at the location. It would not put upon her the duty to investigate if there is another contractor working at the location.
5. And it is not disputed that after the accident, the Intended D2 and its staffs were not even aware of the accident. I can understand that if there were investigation by Police or the Labour Department, it may be argued that the Plaintiff should investigate further on the operator of the truck. I am confirmed by counsel that no investigation had been carried out. The mere fact that there is a label on the side of the truck and that Mr. Lee wears the vest with the Defendant’s name would not put the workers of the Defendant (including the Plaintiff) on constructive notice that the truck was operated by a contractor other than the Defendant, or the identity of the Intended D2.
6. In light of the above, I conclude that the Defendant failed to prove that the Plaintiff had constructive notice of the identity at the time of the accident.
7. For the reason above, I conclude that the Plaintiff only knowledge the identity of the Intended D2 by the time when they were informed of the identity of the Intended D2 by the Department of Justice.

**WHETHER THE COURT SHOULD DISAPPLY SECTION 27 PURSUANT TO SECTION 30**

1. If I am wrong and the Plaintiff had either actual knowledge or constructive knowledge of the identity of the Intended D2, I would proceed to consider whether it would be equitable for the Court to allow the Plaintiff’s claim against the Intended D2 to proceed. It would be a balancing exercise having regard to the degree of the prejudice to the Plaintiff and the Intended D2. Section 30 of the Limitation Ordinance 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 provision of section 27 or 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 plaintiff may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”*

1. The onus is on the Plaintiff to show that in the particular circumstances of this case, it would be equitable to allow the claim to proceed having regard to the respective prejudice likely to be suffered by each parties. While the primary onus rests on the Plaintiff, the Defendant thus has to prove the prejudice he said he would suffer. The Court would perform a balancing exercise. And the six specific factors have been set out in section 30 (3).
2. The 1st factor to be considered is the length of and the reason for the delay on the part of the Plaintiff. The delay in this action from the last day of limitation is about 8 months which is not a particular long period. The reason given by the Plaintiff is that she had no knowledge of the Intended D2.
3. Mr. Lam submits that the pre-action letter against the Defendant was only issued on 28 December 2009 and when the Plaintiff’s solicitors were informed by the Defendant’s solicitors on or about 3 February 2010 that it was a staff of the FEH Department who operated the compressor, the Plaintiff’s solicitors did not take further action until 29 June 2010 and did not attempt to join the FEH Department until July 2010. He submits that the Plaintiff failed to prove there are good reasons for the delay.
4. I accept that there is 2 to 3 months delay on the part of the Plaintiff’s solicitors which cannot be account for. But in the end, it is a short delay.
5. On prejudice, Mr. Lam submits that the Defendant would have the disadvantage of not being able to call the driver of the garbage truck who has left the employment of the Intended D2 who could not be found. And secondly, Mr. Lam submits that the insurer of the Intended D2 had declined to provide coverage. I shall take these 2 matters one by one.
6. According to the evidence of Mr. Lau, the driver of the material garbage truck was one Mr. Lui Yee Yung. He joined the Intended D2 on 1 July 2006 and left employment on 16 November 2007. He had moved to Inland China and could not be located. Mr. Lau claims that if he were aware of the accident earlier, it might be possible to find Mr. Lui by visiting his flat at Kwun Tong.
7. However it is the case of the Intended D2 that they are not aware of the accident at all. Both Mr. Lui and Mr. Lee have not reported to the Intended D2 that someone was injured while the garbage truck was in operation. I fail to see the relevance of calling Mr. Lui if he is only to tell this Court that the accident had not happened.
8. Further, Mr. Lui left in November 2007, about 10 months after the accident. I am not convinced that the Intended D2 had a better chance of locating Mr. Lui if they were informed of the accident earlier, or such loss of an opportunity was caused by the delay on the part of the Plaintiff.
9. On the second factor of prejudice, I was told by Mr. Lam that the insurance company refused to indemnify the Intended D2. A copy of the letter from QBE Hong Kong and Shanghai Insurance Limited dated 19 August 2010 is produced. By this letter, the insurance company refers to 2 clauses in the policy. Condition 4 provides that the Intended D2 shall give written notice to the insurance company of any accident or loss or claim or proceedings immediately the same should have come to the knowledge of the insured or his representative. While the accident took place in 2007, the Intended D2 only had knowledge in 2010 when the Plaintiff issued their letter of demand. The insurance company could not rely on this condition to repudiate liability.
10. I discuss the point with both counsels and I am afraid Mr. Lam could not give me a satisfactory answer. What I notice is there is a second matter raised in the said letter. The insurance company refers to exclusion No. 6 which provides that they would not cover liability in respect of body injury caused by or arising out of the ownership possession or used by on behalf of the Intended D2 of any vehicle which is covered by policy of motor insurance. Since the garbage truck is a vehicle, the policy may not apply. If that is the reason, this is not a prejudice created by the delay in taking action. Further, it would mean that the Intended D2 could seek indemnity from the third party motor insurance policy. Accordingly, I am not convinced this is a prejudice at all.
11. The other factors mentioned under section 30(3) are not really helpful. Final point taken by the 1st Defendant is the prospect of success. Mr. Lam submits that the Plaintiff’s case is unclear on how she got injured. Her injury is doubtful. Accordingly, the Plaintiff’s claim is weak.
12. I do not agree with Mr. Lam that it is a doubtful accident. There is medical evidence as to injury and we have the evidence of the Plaintiff. Anyway, it is not necessary for me to determine the merits at this stage and I should only have an overall view of the Plaintiff’s case.
13. In ***Dale v British Coal Corp*** [1992] PIQR 373, 380, Stuart-Smith LJ said :

*“Plainly, it is more prejudicial to a plaintiff to be deprived of a cause of action when it is almost bound to succeed …… than one that looks highly speculative. 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 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. In ***Yeung Mo Shing v Chung Fai Engineering Company Limited & anor*** HCPI301/2002, Recorder E Chan, SC referred to what Parker LJ said in ***Hartley v. Birmingham City District Council*** [1992] 2 All ER 212 and said that “[thus] it is usually not necessary to consider the relative strength of the plaintiff’s and the defendant’s case”.
2. Taking all the above matters into consideration, I am satisfied that it would be equitable to allow the Plaintiff’s claim against the Intended D2 to proceed by disapplying the limitation period.

**FINDING**

1. I make an order that the Intended D2 be joined as the 2nd Defendant herein and there be order in terms of paragraphs 3 and 4 of the Amended Summons. There be order nisi that the 1st Defendant should have costs of and occasioned by this application and the amendment be paid by the Plaintiff, and as between the Plaintiff and the 2nd Defendant, costs of this application be costs in the cause save that the 2nd Defendant shall pay the costs of the hearing on 21 February 2011with certificate for counsel to the Plaintiff.
2. I notice that the Plaintiff had not filed the statement of claim and statement of damages. The parties are required to liaise on the agreed timetable for exchange of pleadings within 7 days failing which the Plaintiff shall set a checklist review before the PI Master for directions.

( R. Yu )

Deputy District Judge

Mr Kenny Lin, instructed by Messrs. B. Mak & Co., for the Plaintiff

Mr Simon K. C. Lam, instructed by Messrs. Fung Wong Ng & Lam, for the Intended 2nd Defendant