#### DCPI 832/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 832 OF 2007

BETWEEN

CHAN NGAN FA Plaintiff

and

CUI YOU JUN（崔幼君）and 1st Defendant

YAN ZHAU JIA, ROBERT（嚴兆葭）

both formerly trading as CHINA

VENTURE INTERNATIONAL

CVI MODERN TECHNOLOGY 2nd Defendant

DEVELOPMENT LIMITED

THE HONG KONG 3rd Defendant

POLYMER SCIENCE

LIMITED

##### Coram: His Honour Judge Lok in Chambers

Date of Hearing: 11 September 2009

Date of Judgment: 11 September 2009

## J U D G M E N T

1. On 12 May 2009, leave had already been granted for the Plaintiff to discontinue the claim against the 1st and 2nd Defendants, however the parties cannot agree on the issue of the costs of the action between them and so I have to decide on this particular issue after the completion of the assessment of damages proceedings against the 3rd Defendant.
2. This action arose out of an accident on 23 June 2004. The Plaintiff was a lift operator employed at one How Ming Factory Building in Kowloon. On that day, she was operating the lift when a person identified as “Ah Keung” negligently caused some cargo which had been placed in the lift to hit the Plaintiff causing injury to the Plaintiff’s shoulder. On 23 April 2007, the Plaintiff commenced legal proceedings against the 1st and 2nd Defendants claiming that they were the tenants or licensees of Flats A and B on the 5th floor of the Building (“the Premises”) and the employers of Ah Keung. The Plaintiff claims that the 1st and 2nd Defendants are vicariously liable for the negligent act of the employee servant or agent, namely “Ah Keung”. On 31 October 2007, a Defence was filed and served on behalf of the 1st and 2nd Defendants. They denied that they had employed or engaged any servant or agent known as “Ah Keung”.
3. According to the evidence of the Plaintiff, she knew that, at the time of the accident, “Ah Keung” worked for a company located on the 2nd, 5th and 10th Floor of the Building. She knew that these floors were used and occupied by a company known as “華誼”. After the accident, she was informed by the manager of the Incorporated Owners of the Building that the tenant of the 2nd and 5th Floors was the 2nd Defendant, the Chinese name of which is “華誼科技發展有限公司”. The Plaintiff was able to find out that the receipts for management fees of the Premises were issued by the Incorporated Owners to the 2nd Defendant. She also obtained a copy of a business name card of the project manager of the 2nd Defendant, which shows that China Venture International (the business name of the 1st Defendant and the Chinese name of which is “華誼公司”) and the 2nd Defendant were in the same group of companies which did not include the 3rd Defendant.
4. In April 2007 before the issuance of the writ in these proceedings, the Plaintiff’s solicitors issued a letter to the 1st and 2nd Defendants asking them to disclose the identity of any third party claimed by them to be responsible for the Plaintiff’s accident, but there was no response from the 1st and 2nd Defendants. The Plaintiff’s solicitors also wrote to the registered owner of the Premises, one Ligotrade Company Limited (“the Owner”), on 2 January 2007. They asked the Owner to provide the identity of the tenant of the Premises and to confirm whether “Ah Keung” was employed by the Owner or by the 1st and 2nd Defendants to enable the Plaintiff to commence legal proceedings for compensation. There was no reply from the Owner before the Plaintiff commenced the proceedings in April 2007.
5. After the service of the writ in October 2007, the Plaintiff’s solicitors wrote first to the Incorporated Owners and then to Owner again on 30 April 2008 for information on the identity of the tenant or licensee of the Premises. The Plaintiff’s solicitors also indicated that discovery proceedings might be instituted against the Owner unless such information was provided. A reply was finally received from the Owner on 6 May 2008, and it confirmed that the 5th Floor of the Building was leased to the 3rd Defendant. On 28 August 2008, the Plaintiff applied to the court for leave to join the 3rd Defendant in this action.
6. It is also common ground that: (a) all three Defendants shared the same office at 910 to 911, 9th Floor, Liu Plaza, 2 Wing Yip Street, Kwun Tong; (b) one Cui You Jun and Robert Yan were partners of the 1st Defendant and they were also the directors and shareholders of the 2nd and 3rd Defendants.
7. According to the submission of Mr So, counsel for Defendants, the general rule is that a party withdrawing a claim should pay for the costs of the opposite party. There was simply no obligation on the part of the 1st and the 2nd Defendants to offer any assistance to the Plaintiff in ascertaining the proper defendant to be sued and so the Plaintiff should take the consequences of suing the wrong party. Further, according to Mr So, the Plaintiff should have pressed the Owner of the Premises to disclose the identity of the registered tenant of the Premises before commencing the proceedings. As the Plaintiff had failed to do so before suing the 1st and the 2nd Defendants, the Plaintiff should bear the burden of paying the legal costs of the latter.
8. I agree with the general rule submitted by Mr So. However, Order 21, r.3(1) of the Rules of the District Court, Cap 336, gives the court complete discretion in dealing with the issue of costs in discontinued proceedings and to do justice between the parties, and so such rule allows the Court to depart from the general principles of costs if appropriate.
9. In the present case, it was very difficult for the Plaintiff to find out who was the employer of “Ah Keung” at the time of the accident. In fact, as all the three Defendants were related business entities, only they themselves would know who was the true employer of “Ah Keung” at the time of the accident. Although I agree that the 1st and the 2nd Defendants had no general duty to volunteer information to assist the Plaintiff in ascertaining the proper defendant to be sued, one cannot ignore the fact that the 1st and the 2nd Defendants are partly to blame for the unnecessary legal proceedings against them. In particular, they are the only parties who know the true identity of the employer of “Ah Keung” at the relevant time.
10. Obviously, the Plaintiff’s solicitors could have pressed the Owner of the Premises to disclose the identity of the tenant of the Premises before commencing the proceedings. However, given the close relationship between all three Defendants, does it mean that the registered tenant would automatically be the employer of the Plaintiff? It might not be the case. In my judgment, the 1st and the 2nd Defendants are at least partly to blame for the unnecessary legal proceedings against them, and I agree with Miss Tsui, counsel for the Plaintiff, that the proper costs order should be one of no order as to costs.

(David Lok)

##### District Judge

Miss Mabel Tsui, instructed by Messrs B Mak & Co., for the Plaintiff

Mr Steven So, instructed by Messrs Henry Fok & Co., for the 1st, 2nd and 3rd Defendants