



29 June 2021

Ref : Chans advice/242

To: Transport Industry Operators

**3-year Time bar**

The Hong Kong District Court issued a Decision on 30 April 2021 dealing with a personal injury case in relation to a container terminal. [DCPI 110/2020] [2021 HKDC 463]

Background

The Plaintiff Mr Chu was employed by the Defendant YN Logistics as a container truck driver since 1 March 2017 and was instructed to work at the designated parking area of YN Logistics at Area 2 (“**the Area**”) of the River Trade Terminal (“**River Trade**”). Mr Chu believed that the Area was exclusively used by YN Logistics. On 24 March 2017, Mr Chu was instructed to clean the interior of a container trunk parked at the Area after goods were unloaded. When Mr Chu stepped down from the Container and was still in the Area, he was tripped by some rubbish left on the ground and lost balance (“**the Accident**”).

Mr Chu’s solicitors issued a letter before action dated 12 March 2019 asking YN Logistics, *inter alia*, that if they would contend that somebody else was at fault, they had to reply with particulars of the parties and the reason why such party was at fault.

YN Logistics was sued as the sole defendant in the Writ of Summons issued by Mr Chu on 13 January 2020. In the Statement of Claim filed on 13 January 2020, YN Logistics was sued as the employer of Mr Chu and the occupier of the Area, and YN Logistics was alleged to have failed to provide a reasonably safe place of work.

In the Defence filed on 27 March 2020, YN Logistics denied that it was the occupier of the Area, and claimed that they were a customer of River Trade which provided to YN Logistics area in the terminal to store containers and cargos.

By a letter dated 24 June 2020, YN Logistics’ Solicitors attached the draft Amended Defence in which YN Logistics pleaded that the Area was a common area and Bentat Logistics (“**Bentat**”) was a contractor engaged by River Trade to manage the Area.

Application

Mr Chu made an application for leave to join River Trade and Bentat as the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants respectively.

River Trade opposed the application on the grounds that, first, River Trade had properly discharged its duty to provide a reasonably safe environment, and therefore, there should be no cause of action against River Trade, and secondly, Mr Chu’s claim was time-barred.

Bentat did not file any affirmation in opposition, nor did they appear at the substantive hearing.

### The law

Section 27(3) & (4) of the Limitation Ordinance (“**the Ordinance**”) 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.

Section 27(8) of the Ordinance 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, 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.

### Any cause of action against River Trade

River Trade argued that it had discharged its duty by providing a reasonably safe environment at the terminal and should not be sued. River Trade submitted that Bentat, being River Trade’s independent contractor, was required to rectify the danger in the terminal, such as to clean and remove any rubbish, and that there was no evidence to suggest that River Trade did not act reasonably in entrusting the cleaning work to Bentat. River Trade had issued a letter to Bentat on 12 November 2015 to remind them of its obligation to ensure a reasonably safe environment at the terminal. Apart from that, River Trade would arrange frequent patrolling at the terminal.

Whether River Trade had taken reasonable steps to supervise the work of Bentat and whether they had discharged their duty to provide a reasonably safe place was a question of facts. The Court considered that this issue should be decided at the trial, and it would not be appropriate to make a decision at the interlocutory stage.

The Court was not satisfied that this was a plain and obvious case that Mr Chu’s claim against River Trade should be dismissed for want of cause of action.

### Actual knowledge

Mr Chu’s case was that he did not have actual knowledge about the involvement of River Trade in the cleaning of the Area. River Trade did not take issue in light of the test being subjective in nature.

Having considered the evidence, the Court agreed that Mr Chu did not have actual knowledge on the involvement of River Trade.

### Constructive knowledge

Section 27(8) of the Ordinance deals with constructive knowledge, i.e. knowledge imputed to a plaintiff by the court where on the facts he should have made certain enquiries and had he done so would have discovered and become aware of the relevant facts. The burden of proving constructive knowledge is on the intended defendant, and the test is objective.

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.

River Trade submitted that Mr Chu should have constructive knowledge by relying on the following facts:

- a) River Trade’s logos and names were displayed at the three entrance gates of the terminal,

- b) River Trade's name was visible on the signage containing the terms and warnings at each entrance gate,
- c) Vehicles of River Trade with its' logos printed on their bodies would patrol the terminal,
- d) River Trade's logos were printed on the side of the terminal office building and on the cranes used to transport containers within the terminal.

River Trade submitted that the fact that names and logos of River Trade were all over the terminal warranted Mr Chu taking steps to investigate the claim. YN Logistics also argued that the circumstances were apparent and overwhelming that, even if they did not specifically point to a particular entity to be responsible for the cleaning of the Area, it was objectively clear and reasonable that there was a possibility that River Trade could be involved in the management of the Area. YN Logistics further said, which was agreed and adopted by River Trade, that a simple search in the Land Registry would reveal that the terminal was owned by River Trade.

The main argument was whether Mr Chu should have sufficient knowledge or information that would alert him to conduct investigation. In this regard, the Court had the following observations:

- a) While River Trade's logos and/or names were displayed at the entrance gates and the terminal building, there was no evidence of any signage bearing River Trade's logos and/or names placed in the Area.
- b) From the photo showing the Area, River Trade's logo did appear at the top of the crane which was used to transport containers within the terminal. While one might suspect that the crane itself was owned or operated by the company with that logo, Mr Chu could not be expected to investigate whether the crane owner or operator would also be the occupier of the Area.
- c) The layout plan and the photos could show that the Area was a large area in which containers were stacked in a number of columns. One would expect that the distance of the entrance gates and the terminal building on the one hand, and the Area on the other hand would not be close. The mere fact that the names and the logos of River Trade appeared in the building and the entrance gates would not enable Mr Chu to form a belief that warranted him to take steps to investigate the claim against River Trade.

In the Court's judgment, the mere fact that the names and the logos of River Trade appeared in the building, the entrance gate, the crane and the vehicles patrolling there would not put the workers of YN Logistics (including Mr Chu) on constructive notice that the Area was occupied by somebody other than YN Logistics.

River Trade and YN Logistics both argued that Mr Chu should have conducted a land search which could reveal that the terminal was owned by River Trade. In this regard, the Court agreed with the judgment of Seagroatt J in the case of *Lau Yan Chor v Hang Lung (Administration) Limited*, HCPI355/199 (unreported, 19 September 2000) as follows:

"It is relevant to recall that this accident happened at about 6:30 am in a flooded basement when [the plaintiff] was acting in the course of his employment. His automatic, logical and in my view entirely reasonable reaction was to pursue his remedy against his employers, as employers and occupiers of the premises. It may well be that there are more than two or three occupiers of the premises but he commenced his action against the prime or principal occupiers. It would not be logical for him to consider that [the third party] (even if he knew its identity) might be responsible for the flooding of the basement or the circumstances in which he sustained this accident whilst trying to carry out his duty. I take this view as the appropriate one, however long he had been employed in that capacity as attendant. It is also clear to me that until he saw the Third Party Statement of Claim he would be in no position to frame a case against [the third party]. Accordingly, and sensibly, he has adopted the Defendants' allegations against [the third party] in his re-Amended Statement of Claim."

Having considered the judgment and the facts of the case in question, it would be reasonable for Mr Chu to pursue his remedy against his employer being the employer and occupier of the premises.

Even if a land search was obtained by Mr Chu, the information would not be sufficient for the purpose of section 27(6) of the Ordinance.

The Court must assess the evidence according to the information obtained by Mr Chu there and then, and consider as a matter of fact whether he comprehended such information. Mr Chu said that the Area was exclusively used by YN Logistics. He had never seen any truck other than YN Logistics' parking in the Area. There was one cleaner responsible for the cleaning of the Area and Mr Chu believed that the cleaner was engaged by YN Logistics to perform the cleaning work. It was not a situation where Mr Chu had been working in the Area for a considerable period of time. Mr Chu only started working there on 1 March 2017 when the Accident happened on 24 March 2017. There was no evidence that Mr Chu had any previous communication or any dealing with the staff of River Trade direct. He could not be expected to speculate if the Area was an area occupied by somebody other than YN Logistics.

The Court was of the view that Mr Chu could not have been expected to acquire knowledge of the identity and involvement of River Trade prior to the expiry of the primary limitation period. Mr Chu's claim against River Trade was made within time.

#### Discretion under s.30 of the Ordinance

If the Court was wrong on the above analysis, the Court had to consider whether to exercise its discretion to allow such time barred claim to proceed under section 30(1) of the Ordinance.

The Court would perform a balancing exercise by looking at (a) the prejudice to each party, (b) the 6 specific but non-exhaustive factors contained in section 30(3) of the Ordinance, and (c) all the circumstances of the case.

The post-expiry delay was about 5 months. In any view, it was not a particularly long period of delay, and the Court found such period of delay to be acceptable.

River Trade criticised that Mr Chu had failed to act promptly after the Defence was filed on 27 March 2020 because it was specifically pleaded that YN Logistics was a customer of River Trade which provided area in the terminal to store containers and cargoes. Mr Chu submitted that it was not until YN Logistics' Solicitors' letter dated 24 June 2020 attaching a copy of the draft Amended Defence that full particulars had been provided.

It appeared that no substantive steps were taken by Mr Chu between 27 March 2020 and 24 June 2020. Nevertheless, in any case, the primary limitation period had expired at the time when the Defence was filed on 27 March 2020. Since Bentat had been de-registered, application was made on 22 July 2020 to restore the company. The Order was granted by the Court of First Instance on 6 August 2020. The application in question was taken out on 12 August 2020. The Court considered that Mr Chu had acted promptly and reasonably in the circumstances.

In the application in question, River Trade argued that they had acted reasonably in selecting the subcontractor and had supervised the work of Bentat reasonably. Copies of the Agreement with Bentat and the guidelines issued to Bentat had been produced. There was no evidence that River Trade's ability to investigate the Accident and to conduct its defence was impaired. Nor was it suggested that the lapse of time had any effect on the quality of the evidence. There was no suggestion on the part of River Trade that previously available witnesses or documents were lost, or available witnesses had increased difficulty in remembering the event as a result of that period of delay.

River Trade argued that prejudice had been suffered by River Trade since Bentat had been de-registered and they could not retrieve the relevant cleaning record and the staff record. No mention

of this kind of prejudice was made in its affirmation in opposition. It was not until the substantive hearing that River Trade made an oral application to file a supplemental affirmation to cover this issue. Having heard the arguments of all parties, the Court rejected the application. First, that was a late application. If River Trade wished to file a further affirmation to elaborate on the issue of prejudice, they should have done so at a much earlier stage. More importantly, if River Trade's defence was that they had reasonably entrusted Bentat to perform the cleaning work and had properly supervised the work, whether Bentat could retrieve the relevant cleaning record and the staff record was neither here nor there.

River Trade argued that they would suffer prejudice if they were deprived of the complete defence under the Limitation Ordinance. Mr Chu drew the Court's attention to para. 109 of the judgment of *Pang Kwok Lam v Schneider Electric Asia Pacific Limited*, HCPI 90/2010 (5 January 2011, unreported) which referred to an English case of *Cain v. Francis; McKay v Hamrani & anor* [2009] 2 All ER 579. Basically, if loss of the limitation defence was the only prejudice the defendant would suffer, that must be contrasted with the case where forensic prejudice was suffered by a defendant who had not for many years been notified of a claim in any detail to enable him to investigate it. In this regard, the Court agreed that it should ascertain whether, and to what extent, a defendant suffered any forensic disadvantage in investigating a claim or collating evidence in support of the defence. In the situation in question, there was insufficient evidence to show that River Trade had suffered any forensic prejudice.

Balancing all the factors, the Court considered that this was an appropriate case to exercise its discretion in favour of Mr Chu. In case the Court was wrong on the issue of secondary limitation period, the Court was prepared to uplift the time bar to allow Mr Chu to claim the relief against River Trade and Bentat.

### Conclusion

In the circumstances, leave was granted to Mr Chu to join River Trade and Bentat as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in the proceedings in question.

Please feel free to contact us if you have any questions or you would like to have a copy of the Decision.

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