DCPI 17/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 17 OF 2013

BETWEEN

RAJWINDER SINGH Plaintiff

and

MAN HUNG KWAN (文洪坤) 1st Defendant

LO WAI MAN trading as WAN LUN 2nd Defendant

FURNITURE & DECORATION

#### Before: Deputy District Judge R Lai

Date of Hearing: 16 April 2013

Date of Decision: 29 April 2013

##### **DECISION**

**Introduction**

1. This is an application by summons of the 2nd defendant for determination of the following question of law under Order 14A rule 1 of the Rules of the District Court (the “Rules”):

“Whether the 2nd defendant as the principal contractor of the 1st defendant is vicariously liable for any negligence of the 1st defendant.”

1. The 2nd defendant seeks an order to dismiss this action against him should the court rule the aforesaid question of law in his favour.
2. Further or alternatively, the 2nd defendant seeks an order under Order 18 rule 19 of the Rules to strike out the plaintiff’s action against the 2nd defendant on the ground that it discloses no reasonable cause of action against the 2nd defendant.

**Background**

1. The plaintiff’s claim herein arises out of an incident during his employment with the 1st defendant.
2. The 2nd defendant was the contractor employed by the owner of a house at Shouson Hill Road (the “Site”) to carry out renovation works (the “Work”) to the house. The 2nd defendant sub-contracted certain parts of the Work to the 1st defendant.
3. The plaintiff was employed by the 1st defendant as a general labourer cum driver and was assigned by the 1st defendant to work at the Site.
4. The plaintiff was injured on 22 July 2011 when he, together with the 1st defendant’s wife, was lifting up a bag of cement weighing 45kg. The plaintiff pleaded that at the material times the 1st defendant’s wife was assisting him to put the bag of cement on his shoulder. When the plaintiff was about to stand up with the bag of cement, the 1st defendant’s wife withdrew her hands when the bag of cement was not properly placed on the plaintiff’s shoulder. He felt severe pain in his back and heard a cracking sound from the back. He lost balance and fell, with his right knee landing on the ground. As a result, he suffered injuries.
5. The plaintiff claims against the 1st defendant for breach of employment contract and/or negligence and/or breach of statutory duty on the part of the 1st defendant and the 1st defendant’s servants, employees and/or agents.
6. The plaintiff’s claim against the 2nd defendant is set out in paragraph 22 of the Statement of Claim which pleads as follows:

“22. With the 1st Defendant being, at all material times, a sub-contractor of the 2nd Defendant, the 2nd Defendant is vicariously liable for the negligence and breach of statutory duties of the 1st Defendant, and as such, the 2nd Defendant is and shall be responsible and/or liable to compensate all loss and damages suffered by the Plaintiff.”

**This application**

1. The plaintiff is legally aided and Messrs WT Law Offices issued the writ herein for the plaintiff on 4 January 2013.
2. The 2nd defendant took out the summons for this application on 4 March 2013 and filed his supporting affirmation on the same day.
3. On 8 March 2013, the court gave directions for the plaintiff and the 1st defendant to file affirmation in opposition. No such affirmation was filed by the plaintiff or the 1st defendant.
4. Mr Tsui of Messrs WT Law Offices informed me at the hearing that the Director of Legal Aid had issued a notice of re-assignment of solicitor on 22 March 2013 assigning Messrs Massie & Clement to act for the plaintiff in place of Messrs WT Law Offices. However, Messrs Massie & Clement by their letter dated 11 April 2013 informed the Director of Legal Aid that the plaintiff no longer wished to appoint Messrs Massie & Clement to represent him in this case. As such, Messrs Massie & Clement had not filed Notice of Change of Solicitors with the court. When the 2nd defendant’s said summons was heard on 16 April 2013, Messrs WT Law Offices were still solicitors acting for the plaintiff on records in the court’s file. Mr Tsui attended the hearing for the plaintiff and told me that the legal aid certificate did not cover this application but he agreed to assist the plaintiff in this application. Mr Tsui made submission for the plaintiff at the hearing.

**The Order 14A (“O.14A”) application**

1. Although the plaintiff has not filed any affirmation in opposition, the plaintiff does not concede to the 2nd defendant’s application. Mr Tsui made submission on behalf of the plaintiff at the hearing to resist the 2nd defendant’s application.
2. Before I will determine the substantive application of the 2nd defendant, I have to determine whether the question set out in the 2nd defendant’s summons is suitable for determination without a full trial under O.14A.
3. O.14A rule 1(1) of the Rules provides that:

“The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that ─

1. such question is suitable for determination without a full trial of the action; and
2. such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.”
3. In cases which involve the determination only of a question of law or where the whole case largely depends on the resolution of a question of law, the O.14A procedure is often adopted to put an early end to the entire case. This procedure can also be invoked for final determination of any claim or issue in the cause or matter.
4. In this case, the only ground for the plaintiff’s claim against the 2nd defendant as pleaded is that the 2nd defendant being the principal contractor is vicariously liable for the negligence and breach of statutory duties of the 1st defendant.
5. The relationship between the 1st defendant and the 2nd defendant is a common ground of the parties. The 2nd defendant in his Defence admitted that the 1st defendant was a sub-contractor of the 2nd defendant at the material times.
6. The question which the 2nd defendant asked the court to determine is: “Whether the 2nd defendant as the principal contractor of the 1st defendant is vicariously liable for any negligence of the 1st defendant.”
7. The determination of this question of law will dispose of the main issue between the plaintiff and the 2nd defendant. If the determination is in favour of the 2nd defendant, it will bring the plaintiff’s claim against the 2nd defendant to an end. If the determination is in favour of the plaintiff, it will finally dispose of a crucial and substantial issue between them. The 2nd defendant will then only be interested to know how much the 1st defendant is liable to pay the plaintiff for his injury claim.
8. As stated by Chan PJ in *Shell Hong Kong Ltd v Yeung Wai Man Kiu Co Ltd & Anor* [2003] 3 HKLRD 62 at 69 that:

“It is not necessary for the making of an application under O.14A that the determination of a question of law or construction of any document would finally determine the whole action. Such a requirement would be wrong as a matter of “interpretation of the order and as an exercise of discretion”. See Leggatt LJ in *Korso Finance Establishment Anstalt v Wedge & Others* (unrep., 15 February 1994), CA Transcript, at p.7 (in which it was held that an issue of construction was still suitable for determination under O.14A even though a determination of this issue would not finally determine the entire action between the parties). It is sufficient if an issue in the case can be disposed of using such procedure.”

1. Although the determination of the question of law raised will not dispose of the plaintiff’s claim against the 1st defendant and depending on the determination as aforesaid may not wholly dispose of the plaintiff’s claim against the 2nd defendant, I am of the view that the O.14A procedure is suitable for the determination of the question raised without a full trial as the facts relevant for the determination of the question are not under dispute and the determination of this question will wholly dispose of the plaintiff’s claim against the 2nd defendant or will dispose of a crucial and substantial issue between the plaintiff and the 2nd defendant.
2. I shall now deal with the merits of the 2nd defendant’s O.14A application.
3. Mr Lam representing the 2nd defendant submitted that the general rule in relation to independent contractor was that the employer was not responsible for any tort committed by the contractor or its employees at work unless it was proved that the damages were attributable to the employer’s negligence or personal fault, or that the wrongful act was authorized by the employer.
4. He submitted that the 2nd defendant was the principal contractor of the 1st defendant and would generally not be vicariously liable to the plaintiff for the 1st defendant’s tort.
5. Mr Lam agreed that if the employer was in breach of some duties which he personally owed to the claimant, the employer might not rely on the aforesaid general rule. The employer also could not shift his duty to the contractor if the duty was “non-delegable” under statute or at common law. He submitted that no such non-delegable duty was involved in this claim.
6. Mr Lam relied on *Chong Ngan Seng v China Harbour Engineering Co Ltd* (unrep., CACV 54/2012, 1 February 2013) to submit that there was no vicarious liability on the 2nd defendant’s part in this case. In the *Chong Ngan Seng* case the Court of Appeal held that the employer was not liable for negligence committed by an employee of a sub-contractor.
7. Mr Tsui submitted that there were factual matters on the plaintiff’s claim which had to be dealt with at trial. He referred to the Form 2 filed by the 2nd defendant naming a Boota Singh (Jacky) instead of the 1st defendant as the plaintiff’s employer.
8. He further submitted that the 1st defendant was carrying out the Work for and on behalf of the 2nd defendant. The 2nd defendant had control on the whole performance of the 1st defendant. The plaintiff was working on the Work which was contracted by the 2nd defendant when the plaintiff suffered the injuries. He said that in the absence of any affirmation in opposition from the plaintiff and the 1st defendant, the case had to proceed to trial before the court would have the opportunity to consider evidence as to whether the acts of the 1st defendant were expressly requested by the 2nd defendant or whether such acts were for the benefits of the 2nd defendant. Mr Tsui submitted that it was to the prejudice of the plaintiff and the 1st defendant if the question was determined only upon the 2nd defendant’s affirmation.
9. Mr Tsui submitted that the law imposed strict duty on the 2nd defendant as employer and the 2nd defendant could not discharge the duty by delegating its performance to the 1st defendant. If the duty was not fulfilled, the 2nd defendant was still liable although it was caused by the 1st defendant.
10. However, Mr Tsui did not refer me to any authority, whether in statute or in decided cases, which suggested that the work sub-contracted to the 1st defendant was strict duty imposed on the 2nd defendant.
11. The 1st defendant confirmed at the hearing that he had no submission to make.
12. Mr Tsui’s contention on the plaintiff and the 1st defendant not having filed any affirmation in opposition is ill-founded as the court had on 8 March 2013 gave directions for the plaintiff and the 1st defendant to file affirmation in opposition. I note that such directions were given even before the Director of Legal Aid issued the aforesaid notice of re-assignment of solicitor. It is the choice of the plaintiff and the 1st defendant not to file any affirmation in opposition.
13. The identity of the plaintiff’s employer as stated in the Form 2 does not affect the plaintiff’s claim against the 2nd defendant, i.e. the 2nd defendant shall be held vicariously liable for the negligence of the plaintiff’s employer who was the sub-contractor of the 2nd defendant. In fact the Form 2 stated that the 1st defendant was the direct employer of Jacky. The ambiguity was on whether there was a further sub-contractor with the name Jacky being involved in the plaintiff’s employment. However, this factual issue has no bearing on the determination of the question of law posted to the court.
14. As pointed out in paragraph 6-56 of *Clerk & Lindsell on Tort* (20th edition):

“If the employer has employed an independent contractor to do work on his behalf the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of work and in this respect the employees of the contractor, while acting as such, stand in the same position as their employer, so that the employer of the contractor is not liable for torts committed by the contractor’s employees.”

1. The 2nd defendant being the principal contractor shall be regarded as the 1st defendant’s employer for the purpose of the legal principle that an employer is not vicariously liable for the torts committed by its independent contractors. (See *Chong Ngan Seng v China Harbour Engineering Co Ltd*)
2. I agree with Mr Lam that unless this case falls into those exceptions to the aforesaid general rule, the 2nd defendant as the principal contractor of the 1st defendant is not vicariously liable for any negligence of the 1st defendant or the 1st defendant’s employees.
3. Exceptions to the aforesaid general rule include damage attributable to the negligence or other personal fault of the employer; tort authorized or ratified by the employer; breach of duty personally owed by the employer to the claimant; or breach of “non-delegable” duty by the employer which the law by statute or common law imposes a strict duty upon the employer.
4. As pointed out above, the plaintiff had not filed any affirmation in opposition to the 2nd defendant’s application. The case of the plaintiff against the 2nd defendant is that pleaded in his Statement of Claim.
5. In the Statement of Claim, the plaintiff has not pleaded any statute requiring the 2nd defendant to do a particular act and the 1st defendant failed to do such act which led to the plaintiff suffered the injuries.
6. The Statement of Claim does not plead any negligence or personal fault on the part of the 2nd defendant causing the injuries to the plaintiff. The plaintiff’s case is not that the 2nd defendant had breached a duty personally owed by the 2nd defendant to the plaintiff or a “non-delegable” duty which led to the plaintiff’s injuries. The fact that the plaintiff was working on the Work of the 2nd defendant does not mean that it was a “non-delegable” duty. A “non-delegable” duty is a strict duty imposed by statute or at common law. No such “non-delegable” duty has been pleaded in the Statement of Claim.
7. In the premises, the plaintiff’s claim herein falls within the general rule governing vicarious liability of an employer for tort committed by an independent contractor in the course of the execution of the work.
8. According to the plaintiff’s pleaded case, the 1st defendant’s wife was the 1st defendant’s servant, employee and/or agent. As stated above, the employer of an independent contractor is not liable for the torts committed by the contractor’s employees. The same applies to the contractor’s servant and agent.
9. As such, the 2nd defendant as the principal contractor of the 1st defendant is not vicariously liable for negligence of the 1st defendant claimed by the plaintiff.
10. I determine the question of law raised in favour of the 2nd defendant. As this is the only ground of the plaintiff’s claim pleaded against the 2nd defendant, it follows that I shall also dismiss the plaintiff’s claim against the 2nd defendant which I do.

**The striking out application**

1. For the same reasons as stated above, I also find that the plaintiff’s Statement of Claim discloses no reasonable cause of action against the 2nd defendant.
2. In the premises, if the plaintiff’s claim against the 2nd defendant is not dismissed consequential to the O.14A determination, I shall also strike out the plaintiff’s such claim under Order 18 rule 19 of the Rules on the ground that the Statement of Claim discloses no reasonable cause of action against the 2nd defendant.
3. As I have dismissed the plaintiff’s claim against the 2nd defendant under the O.14A application, it is not necessary for me to make any order in respect of the 2nd defendant’s striking out application.

**Costs**

1. I order that the plaintiff shall pay the costs of the 2nd defendant for this action and this application (including costs previously reserved between the plaintiff and the 2nd defendant) with counsel certificate to be taxed if not agreed. This application does not directly concern the 1st defendant who has not filed any affirmation in opposition and has not made any submission at the hearing. I make no order as to costs incurred by the 1st defendant for this application. Mr Tsui had informed me that the legal aid certificate did not cover this application. Accordingly, I need not make any legal aid taxation order for the plaintiff’s own costs in respect of this application.
2. The above costs orders are orders nisi which shall become absolute after 14 days from the date of this decision unless application to vary the costs orders nisi is received from any party within this 14 days period.

(R Lai)

Deputy District Judge

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Mr W Tsui of Messrs WT Law Offices for the plaintiff

The 1st defendant unrepresented and attended in person

Mr Simon Lam, instructed by Messrs Henry Lam & Associates, for the 2nd defendant