# DCPI 1041/2018

[2022] HKDC 420

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1041 OF 2018

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BETWEEN

LUI CHO YIN Plaintiff

and

雷健邦 1st Defendant

HONG KONG FACILITY SOLUTIONS 2nd Defendant

COMPANY LIMITED

DAH FUNG HONG (HOLDINGS) 3rd Defendant

COMPANY LIMITED trading as

DAH FUNG SERVICE

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Before: Deputy District Judge Liza Jane Cruden in Chambers

Date of Plaintiff’s written submission: 27 January & 17 February 2022

Date of 2nd Defendant’s written submission: 2 March 2022

Date of Plaintiff’s written reply submission: 16 March 2022

Date of Decision: 19 May 2022

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DECISION

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*Introduction*

1. On 30 December 2021, I handed down a Decision (“Decision”) allowing the 2nd defendant’s appeal from the Decision of Master Matthew Leung dated 19 March 2021.
2. At §§142-143 of the Decision, I ordered that the Master’s Decision be set aside, that the plaintiff’s statement of claim (“SoC”) as against the 2nd defendant be struck out for it discloses no reasonable cause of action, that the plaintiff’s action against the 2nd defendant be dismissed, and that the 2nd defendant be awarded its costs.
3. On 27 January 2022, the plaintiff filed a summons seeking leave to appeal against the Decision (“Summons”). The Summons states:-

*“2. The Grounds of intended appeal will be as follows:- The learned judge erred in applying Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming (2011) 14 in her Decision, which is distinguishable on facts from those of the present Action*”

1. On 11 February 2022, I directed that the plaintiff’s leave application be determined on paper without an oral hearing. I also gave directions for the parties to lodge and serve written submissions. The plaintiff lodged and served “*full submissions*” dated 16 February 2022 (“P’s Submissions”). The 2nd defendant lodged submissions in opposition to the leave application dated 2 March 2022 (“D2’s Submissions”). It also prepared a paginated bundle (“D2B/page”). The plaintiff then lodged “S*ubmissions In Reply of the Plaintiff*” dated 14 March 2022 (“P’s Reply Submissions”). The hearing date of 15 June 2022 was vacated.

*Leave to appeal legal principles*

1. Section 63A of the District Court Ordinance (Cap 336) (the “DCO”) provides that:-

*“(2) Leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that—*

*(a) the appeal has a reasonable prospect of success; or*

*(b) there* *is some other reason in the interests of justice why the appeal should be heard.”*

1. The plaintiff relies upon *Wing Tat Haberdashery Company Limited v Elegance Development Industrial Co. Limited* (unrep, HCMP 357/2011, 8 July 2011, Hon Hartmann and Fok JJA), where the Court of Appeal held that [§6]:-

*“[…] A reasonable prospect of success therefore means an appeal with prospects that are more than ‘fanciful’ but which do not need to be shown to be ‘probable’”*

*Overview of the plaintiff’s intended appeal*

1. The plaintiff’s claim is for common law damages for personal injury suffered following an accident where he fell off a ladder while carrying out air-conditioner maintenance work as the 1st defendant’s employee on 16 May 2015. It is the plaintiff’s case that the 3rd defendant was the principal contractor, the 2nd defendant was the subcontractor, and the 1st defendant was the sub-sub-contractor of the relevant works.
2. The plaintiff’s pleaded case on liability against the 2nd defendant is based on negligence alone. The 2nd defendant denies that it owed any duty to the plaintiff, and sought to strike out his statement of claim and have the action against it dismissed both on the basis of *(i)* lack of a reasonable cause of action, and *(ii)* time bar. In respect of the former ground, the Decision identified that “*[the] real issue is whether, on the pleaded facts, the plaintiff can establish any relevant duty of care owed directly by [D2] to [P].*” (§26 of the Decision).
3. Central to the Decision were the holdings at §42 that:-

“*…. nowhere in the SoC has the plaintiff identified the facts upon which a duty on the part of the 2nd defendant owed to the plaintiff can arise. What the plaintiff has pleaded against the 2nd defendant is that: (i) the 1st defendant was the 2nd defendant’s sub-contractor; and (ii) the ladder the plaintiff fell from was provided by the 2nd defendant.* ***The authorities make it clear that neither (i) nor (ii), individually or combined, establishes a relevant duty of care on the part of the 2nd defendant. Something more is required. The facts pleaded by the plaintiff fail to establish a relevant duty of care.*** *Therefore I hold that the SoC discloses no reasonable cause of action against the 2nd defendant.*” (emphasis added)

1. “*The authorities*” refer, firstly, to the judgment of the CFA in *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2011) 14 HKCFAR 14 which laid down authoritative guidance on when a duty of care is owed by a person to an employee of his independent contractor (§21 of the Decision). As cited at §21(4) of the Decision:-

“*(4) A person will owe a duty of care to the employee of his independent contractor if: (1) he lends the independent contractor equipment; (2)* ***as he knew or ought reasonably to have known would happen, the independent contractor uses that equipment to do the work by a method which is unsafe****; and (3) the employee is injured as a result (§§2, 47)*” (emphasis added)

1. The “*other authorities*” refer to the English and Hong Kong cases listed under §28 of the Decision[[1]](#footnote-1). These support the well-established principle that a principal contractor does not *per se* owe a duty to take care of his independent contractor’s employees. Something more is needed. In order for such a duty to arise, the principal contractor must be shown to possess *knowledge* of the relevant danger and/or defects.
2. P’s Submissions do not suggest that any of the foregoing principles are wrong as a matter of law. Specifically in response to both *Luen Hing Fat* and the other authorities, the plaintiff argues that I erred in the way I applied these cases, or that they are “*irrelevant*”, or that they are “*distinguishable on the facts*”.
3. The plaintiff further prays in aid two additional authorities[[2]](#footnote-2), neither of which was cited before me, said to support his case that the 2nd defendant owed a direct duty of care to him on the facts.
4. Finally, the plaintiff relies on the Master’s finding that “*§1&5 of the [statement of claim] duly provided for the role of [D2] to the Work shows that [P’s] case against [D2] is a clear one concerning failure to provide proper equipment, training, manpower and supervision*” in support of his argument that “*this is not a plain and obvious case for striking out.*”.
5. The 2nd defendant submits that none of the plaintiff’s arguments have any merit. The plaintiff has failed to show that “*there was an error in law, or misapprehension of material facts, or the judge had failed to take into account relevant matters, or had taken into account irrelevant matters, or the decision was plainly wrong*”: *Tan Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd* (unrep, CACV351/2018, 15.5.2019) [2019] HKCA 523*per* Yuen JA at §16, which is the applicable test when the plaintiff is seeking to appeal against an exercise of discretion by a judge in a striking out application. The 2nd defendant submits the plaintiff’s leave application should accordingly be dismissed with costs.

*Luen Hing Fat and “other authorities”*

1. The Summons states the ground of appeal is that I erred in application of *Luen Hing Fat* on the facts, which is distinguishable. P’s Submissions refer to additional grounds. Under the first ground of intended appeal, the plaintiff contends:-
   1. *Luen Hing Fat* was distinguishable from the present case since the equipment provided by the principal contractor there was “*not intrinsically dangerous or faulty*”, whereas the ladder supplied by the 2nd defendant to the plaintiff of the 1st defendant was “*clearly pleaded to be not safe and proper*”;
   2. In *Luen Hing Fat*, the lending of “*unsuitable*” equipment was held (at §16) to impose a duty of care “*by reason of having had a hand in the creation of the danger which flowed from the use of unsuitable equipment and then failing to take any steps to put a stop to or even warn against such use before it resulted in an accident*”;
   3. The plaintiff further contends that in the SoC, the plaintiff has pleaded that *(i)* the ladder provided by the 2nd defendant was “*not safe and proper for the work*”; *(ii)* the 2nd defendant has failed to provide the relevant training, manpower, supervision and instruction.
2. In my view the plaintiff’s above contentions suffer from the fundamental flaw that the plaintiff has failed to plead the necessary facts that would give rise to a duty of care in the first place. What he has pleaded falls clearlyshort of what is required for a duty to arise. In particular:-
   1. It is wrong for the plaintiff to rely on the matters pleaded in §5 of the SoC to argue the existence of a duty of care owed by the 2nd defendant to the plaintiff. What is pleaded at §5 are “*particulars of negligence*”. These relate to the question of *breach*, not the prior question of duty of care owed by the 2nd defendant. In the absence of the existence of any duty of care owed by the 2nd defendant to the plaintiff in the first place, there is simply no question of breach by the 2nd defendant arising. It was held at §37 of the Decision, “*[if] the plaintiff has not pleaded the relevant duty owed by [D2] to [P] a necessary averment is missing. Pleading breach would not save the pleading of negligence.*” The plaintiff does not suggest that holding was wrong. The 2nd defendant submits hence, any reliance by the plaintiff on the matters pleaded at §5 of the SoC fails *in limine*. The P’s Reply Submissions argue that one should not separate pleadings of duty and breach, as the provision of unsafe equipment is sufficient to establish a duty of care, “*in other words the so-called pleadings of breach are in effect pleadings of duty-cum-breach.*”. The plaintiff continues that the 2nd defendant’s interpretation wrongly focuses on the form such as the title of “*particulars of negligence*”, instead of the substance of the pleaded case. I reject that argument. The issue was not determined on the basis of headings or the paragraph numbers in the SoC. Rather, the substance, reading the actual averments and words used to plead the case against the 2nd defendant. The plaintiff must plead each of the elements of the cause of action relied upon. They are necessary averments.
   2. The P’s Reply Submissions state that “*despite that the plaintiff did not expressly plead the Ladder was too short and unsteady for the Work*” a reasonable reader can understand the pleading in §4 of the SoC as such. Further, that it is undisputed that the ladder that was not safe for the Work was provided by the 2nd defendant. However, the SoC does not plead that “*the ladder was not safe for the Work*”. The plaintiff seeks to rely on the pleading at §5(f) of the SoC, “*Failing to provide a safe and proper working platform for the plaintiff to carry out his work at height*” because it “*supports that the plaintiff was referring to the unsafeness of the Ladder*”. The plaintiff argues that reading §4 and §5(f) of the SoC together means that the plaintiff’s case is that the ladder was an unsafe and improper working platform provided by the 2nd defendant. I am not satisfied that §4 and §5(f) of the SoC can be read as a pleading that the 2nd defendant owed the plaintiff a duty of care as required, on any basis. The plaintiff has not suggested that any part or parts of the SoC, whether read alone or together, plead any knowledge on the part of the 2nd defendant that the working platform or ladder was improper or unsafe.
   3. Even if the plaintiff could rely on the §5 particulars of breach to find also a pleading that the 2nd defendant owed a duty to the plaintiff :-
3. While it is pleaded, that the ladder was “*provided by*” the 2nd defendant, nowhere does the rest of §4 or §5 allege that the specific ladder was “*unsuitable*”, “*unsafe*”, “*improper*”, or “*dangerous*”, let alone explain why that was so;
4. Similarly, while an allegation of breach by “*[failing] to provide a safe and proper working platform*” is pleaded at §5(f) of the SoC, it does not allege that the specific ladder was “*unsuitable*”, “*unsafe*”, “*improper*”, or “*dangerous*”. Alleging a failure to provide a safe and proper working platform is quite different from alleging the provision of something that is unsafe and improper, which averment is missing;
5. In any event, the plaintiff has ignored the *essential* element of the 2nd defendant’s state of *knowledge* in order for a duty of care owed to the plaintiff to arise in the first place. Significantly, *nothing* is pleaded to the effect that the 2nd defendant “*knew or ought reasonably to have known*”that the plaintiff would use the ladder “*to do the work by a method which is unsafe*” (*see* above on *Luen Hing Fat*). Absent such knowledge, the 2nd defendant would not owe a duty to the plaintiff by having merely provided the ladder. Bokhary PJ in *Luen Hing Fat* held at §46:-

“*46.* *Moreover the Factory Operator’s* *position is adversely affected by something besides its employee Mr Ip’s omission.* ***It had taken a positive part, thus assuming a positive role, in the creation of the danger, doing so by lending the Factory Operator equipment which it knew or ought reasonably to have known would be used to do the work by an unsafe method****. Such participation, too, goes to it being fair, just and reasonable to hold that the Factory Operator owed the Worker a duty of care. Indeed, such participation lies at the heart of the Worker’s case against the Factory Operator in negligence, and justifies the result reached by the majority in the Court of Appeal.*” (emphasis added)

1. As to the plaintiff’s reliance on the alleged failure to provide the relevant training, manpower, supervision and instruction (at §5(c), §5(d) and §5(h) of the SoC, the Ps Submissions have no foundation as there is no pleaded basis to explain why, despite not having the said knowledge, the 2nd defendant would even owe such duty to the plaintiff when the 2nd defendant has subcontracted the work to an independent contractor, the 1st defendant. At §3 of the SoC the plaintiff has pleaded the 1st defendant employer’s duties, *inter alia*, to provide training, manpower, supervision and instruction implied under the contract of employment.
2. Dealing with the plaintiff’s points regarding the “*other authorities*”:-
   1. Those other authorities relied upon by the 2nd defendant were cited in support of the general *legal* proposition that “*something more is needed*” in order to affix a principal contractor with a duty to take care of his independent contractor’s employees;
   2. Similar to *Luen Hing Fat*, the emphasis is on whether the principal contractor possessed the relevant *knowledge*;
   3. The plaintiff has not suggested that these principles are wrong as general propositions of law, nor has it been satisfactorily explained why these principles of law would be “*irrelevant*” or inapplicable to the present dispute;
   4. In these circumstances, it is beside the point, for the plaintiff to “*distinguish*” the facts of these authorities from the present case. These legal principles governing the existence of a duty of care owed by a person to the employee of his independent contractor are not “*irrelevant*” to the issue.
3. As noted at §29 of the Decision, the plaintiff has failed to plead, *inter alia*, that *(i)* the ladder was defective; or *(ii)* the 2nd defendant provided the ladder knowing that it would be used in an unsafe way; or *(iii)* the 2nd defendant knew that the 1st defendant used a defective system of work; or *(iv)* the 2nd defendant had any control over the 1st defendant’s system of work. The 2nd defendant submits that the finding that no duty of care arose from the pleaded facts was thus plainly correct. In my view the plaintiff has not shown why that may be wrong. Therefore I am not satisfied that the first ground of the proposed appeal has a reasonable prospect of success.

*McGarvey and Toner*

1. P’s Submissions second ground of intended appeal is based on *McGarvey v Eve NCI Ltd* and *Toner v George Morrison Builders.*
2. Apart from the fact that these cases were not cited previously and the plaintiff is not saying the judge was wrong in failing to consider them, the 2nd defendant submits that *(i) McGarvey* in fact supports it’s position that the plaintiff’s claim ought to be struck out; and *(ii)* *Toner* has no relevance whatsoever to the present case.
3. In *McGarvey*the claimant was injured after falling from a ladder while doing work for his employer which was sub-contracted by the appellant (§2). He was assigned by his employer to report to the appellant’s foreman (§3), who provided him with the ladder and told him to use it to do the work (§4). The ladder turned out to be inappropriate and dangerous for being too long (§6).
4. The trial judge found the appellant negligent on the grounds that “*a wholly inappropriate ladder was given to [the claimant], and he was told, in effect, to get on with it*” (§8), and that the ladder was “*too long. It could not be used for this purpose. It was something [the appellant’s foreman] should have known, and [the claimant] had, clearly, been left in his presence to take instructions from him, and he told him to use that ladder*” (§12).
5. The English Court of Appeal in *McGarvey* agreed, holding that the appellant’s foreman assumed responsibility for the claimant’s safety when he instructed him to use the ladder that could not have been used safely at all for the work which he knew the claimant was to do alone (§15). Here there is no pleading that any employee of the 2nd defendant instructed or had anything to do with the plaintiff.
6. However, based on the aforesaid, the plaintiff argues:-
   1. First, the plaintiff has pleaded, at §4 of the SoC, that immediately before the accident, he “*had to stand on the top rung of the ladder*” hence suggesting that “*the ladder was obviously too short for the Work*”;
   2. Second, the plaintiff relies on *res ipsa loquitur*, pleaded at §9 of the SoC;
   3. It follows that the ladder provided by the 2nd defendant “*was not a safe and proper working platform*”, pleaded in §§4 and 5(f) of the SoC.
7. The 2nd defendant submits that none of these arguments has any merit:-
   1. To begin with, it is plainly a quantum leap for the plaintiff to contend that the ladder “*was obviously too short for the Work*”, which is not pleaded, from the pleaded fact that he “*had to stand on the top rung*”;
   2. This is clear from what the plaintiff has admitted in his Witness Statement:-
8. “*… the Ladder was the most suitable ladder I could find at the Place of Accident*” **[**D2B/42-43/§22];
9. “*Before I climbed the Ladder, I had checked whether the Ladder was intact and had made sure that the Ladder was placed flat on the ground and would not shake*” [D2B/43/§23].
   1. Secondly, the plaintiff’s reliance on *res ipsa loquitur*is plainly bad. It is well-settled that the doctrine is an evidential rule going only to the questions of breach of duty and causation. It is *not* applicable to the prior question of duty of care, which is a question of law. This is supported by *Yu Yu Kai v Chan Chi Keung* (2009) 12 HKCFAR 705, which Ribeiro PJ explained at §§41-44, including:-

*“43. Whether one uses the label “res ipsa loquitur” or one speaks (as Hobhouse LJ would have preferred) of establishing a prima facie case, one is concerned with a rule regarding the proper approach to the evidence. It is an approach whereby, in cases where the plaintiff is unable to say exactly how his injury was caused but, consonant with his duty of care, one may expect the defendant to know, one asks whether the evidence has raised a prima facie case against the defendant and if it has, whether the defendant has, at the end of the day, dispelled that prima facie case by providing a plausible explanation for the plaintiff’s injury which is consistent with the absence of negligence on his part.”*

* 1. Accordingly, there is simply no basis for the plaintiff to submit that the ladder provided by the 2nd defendant was “*unsafe*”, “*improper*” or was an “*unsuitable and unsafe tool (however it is used)*”, when none of these has been pleaded by the plaintiff within the four corners of his SoC. I accept the 2nd defendant’s submissions that *McGarvey* does not support the plaintiff’s case. It is consistent with*Luen Hing Fat*. There was an assumption of responsibility by the appellant’s foreman for the safety of the independent sub-contractor’s employee, the claimant.

1. In *Toner*, the question for the Scottish Court was whether the defendant had breached the specific *statutory* duty, under the Provision and Use of Work Equipment Regulations 1998, to provide safe work equipment when he had left a ladder in a place where it could be used by the claimant. That decision turned on the specific meaning of “*control*” under Regulation 4 of those Regulations, and is wholly unrelated with the duty of care under common law. Contrary to the plaintiff’s assertion that this is a “*relevant*” authority, it has no relevance at all.
2. The P’s Reply Submissions contends that “*the main difference in the parties approach to the application of two lines of case law can be summarised in the question: whether it is the plaintiff’s pleaded case that the 2nd defendant provided him with an unsafe and improper ladder*”. If yes, *McGarvey* applies. If no, *Luen Hing Fat* applies, and the 2nd defendant did not owe a duty of care to the plaintiff by reason of their principal-and-independent contractor relationship. The plaintiff continues that “*One should be careful not to mix up the two lines of cases*”. First, in my view there are not 2 separate lines of authority. In any event this court is bound by *Luen Hing Fat*. The Ps Reply Submissions contend that “*Luen Hing Fat Coating* *(including knowledge of unsafe method of work) and the other authorities*” cited in the Decision do not apply to this case as they are not concerned with provision of unsafe equipment by principal contractor to independent contractor. The plaintiff seeks to set up 2 different lines of authority. Whereas there is no conflict. In *McGarvey* the appellant’s foreman should have known the ladder was too long, the claimant had been left in his presence to take instructions from him and he told the claimant to use that ladder. The decision is consistent with the principles set out in *Luen Hing Fat*. Notwithstanding use of an independent contractor the position was adversely affected by something besides a pure omission to provide equipment. As in *Luen Hing Fat*, the appellant in *McGarvey*had taken a positive part, thus assuming a positive role, in the creation of the danger, doing so by lending the ladder which he knew or ought reasonably to have known was too long and instructing the claimant to use it. Such participation would go to it being fair, just and reasonable to hold the appellant owed the claimant a duty of care.
3. In my view the two additional authorities do not assist the plaintiff. I am not satisfied that the second ground of appeal based on the above matters has a reasonable prospect of success. They do not provide any bases for granting leave to appeal to the Court of Appeal.

*Reliance on the Master’s Decision*

1. Finally, the plaintiff refers to the Master’s decision at §52 for the “*finding*” that the 2nd defendant’s role was pleaded at §1 and §5 of the SoC. As noted at §42 of the Decision, I had taken into account the plaintiff’s pleaded case that the 2nd defendant was the sub-contractor, which sub-contracted the work to the 1st defendant.
2. However, the mere fact that the 2nd defendant had subcontracted the work to the 1st defendant does not, *ipso facto*, create a duty of care owed by the 2nd defendant to the plaintiff. This is clear from both *Luen Hing Fat* and the “*other authorities*” discussed above.
3. I do not accept P’s Submissions to the effect that the pleading of the 2nd defendant’s role alone “*shows that [P’s] case against [D2] is a clear one concerning failure to provide proper equipment, training, manpower and supervision.*” This submission does not satisfy the test for granting the plaintiff’s leave to appeal application.

*Order*

1. For the above reasons I hold that the plaintiff has failed to show that his proposed appeal has any reasonable prospect of success or that there is some other reason in the interests of justice why the appeal should be heard as required by section 63A DCO.

1. Therefore, I order that the plaintiff’s Summons dated and filed on 27 January 2022 be dismissed with costs to the 2nd defendant with a certificate for Counsel. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

( Liza Jane Cruden )

Deputy District Judge

Ms Josephine Tjia, instructed by V Hau & Chow, assigned by the Director of Legal Aid, for the plaintiff

The 1st defendant acting in person, being absent

Mr Benny Lo and Mr Clark Yan, instructed by Vivian Chan Law Office, for the 2nd defendant

The 3rd defendant acting in person, being absent

1. *Ferguson v Welsh* [1987] 1 WLR 1553; *Willmott Dixon Construction Ltd v Robert West Consulting Ltd* [2016] EWHC 3291 (TCC); *Gauchan Som Prasad v Hin Wah Construction Co Ltd* (unrep., DCPI 2398/2009, 26.7.2011); *Rai Gehendra Raj v Yick Hing Construction Co Ltd* (unrep., HCPI 48/2012,31.8.2017). [↑](#footnote-ref-1)
2. *McFarvey v Eve NCI Ltd* [2002] EWCA Civ 374; *Toner v George Morrison Builders* 2011 RepLR 18. [↑](#footnote-ref-2)