DCPI 1770/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1770 OF 2007

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

CHUNG PING WAI Plaintiff

and

PEDDER LOGISTICS GODWIN LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in chambers (open to public)

Date of hearing: 31 July 2009

Date of decision: 31 July 2009

**DECISION**

1. In this action, Chung (the Plaintiff) claimed against Pedder (the Defendant) for damages for personal injuries sustained during work at Pedder’s warehouse then.
2. On 11 June 2009, I handed down the judgment and dismissed his claim with costs (the Judgment).
3. Chung now applies for leave to appeal against my judgment.
4. Leave to appeal shall not be granted unless this court is satisfied that the appeal has a reasonable prospect of success or this is some other reason in the interests of justice why the appeal should be heard: see s.63A(2) of the District Court Ordinance, Cap.336.
5. According to the grounds stated in the draft notice of appeal, it is essentially argued on behalf of Chung that this court:
   1. has failed to consider Pedder’s common duty of care for dangers arising out of activities on land, i.e., “Activity Duty” in accordance with the ordinary principles of negligence at common law; and
   2. has erred in finding that Pedder was under no duty to take reasonable steps to supervise or to check the operation of its contractor at the warehouse pursuant to section 3(4)(b) of the Occupier’s Liability Ordinance, Cap.314.

**Ground 1**

1. In the absence of dispute at the trial, I found (paras.19-20 of the Judgement) that:
   1. Pedder was the occupier of the warehouse; and
   2. Chung, who was not Pedder’s employee, was a lawful visitor of the warehouse.
2. I found that there was no suggestion that the accident was the result of any dangerous physical condition of the warehouse. But contrary to what was stated under this ground in the draft notice of appeal, I actually also found that the accident was not the result of any dangerous set up of the warehouse including the storage. (see paras.21 of the Judgment)
3. I found that but for the forklift driver’s request to Chung to do what he did and the manner in which the driver controlled the forklift truck at the material time, the accident would not have happened (see paras.22 and 37 of the Judgment).
4. The so-called “activity duty” stated under this proposed ground of appeal is in my view essentially general duty not to be negligent that is not peculiar to an occupier being such the occupier.
5. This court did consider (see paras.23-34 of the Judgment) the issues of:
   1. whether Pedder should be vicariously liable for the negligence of the forklift driver; and
   2. whether Pedder should be liable for the negligence of Ming Fu or the forklift driver being an employee or agent of Ming Fu.
6. I am not satisfied that the first proposed ground has reasonable prospect of success on appeal.

**Ground 2**

1. The probably too liberal mixing up of the concept of breach of the duty of care owed between neighbours and that of breach of duty of an occupier of premises owed to the visitor of the premises is repeated in the proposed ground 2 of the draft notice of appeal.
2. This is clear when one refers to the beginning part of s.3(4)(b) of Cap.314 that has somehow been left out of the citation under this ground in the draft notice of appeal.
3. The full text of the subsection is:

“In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) –

……

(b) where damage is caused to a visitor by **a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier**, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that **the work** had been properly done.”

1. As mentioned above, this court did consider whether Pedder was under a duty to supervise or to check the work of Ming Fu (which was erroneously typed as “Pedder” in the Judgment) under the principles of negligence. The pre-requisite to such a duty is a non-delegable duty on the part of employer towards the injured person (paras.32-34 of the Judgment).
2. The court then proceeded to consider whether Pedder was under such a duty in the context of occupier’s liability (para.35 of the Judgment). Contrary to what this proposed ground of appeal seems to suggest, this court did not hold anything contrary to what section 3(4)(b) provides or what the cases relied on by counsel for the Plaintiff at trial (and referred to in the Judgment) have decided in this regard.
3. Quite clearly, this court distinguished those cases from the present case on the basis of the crucial finding of fact that the accident in the present case had nothing to do with any dangerous physical condition or set up of the warehouse. In other words, the accident was not caused by a danger due to the faulty execution of any work of construction, maintenance of repair (to the premises) by Ming Fu that Pedder *would have been* under the duty to ensure to have been carried out properly (see paras.20-22; 35 of the Judgment).
4. In the circumstances, I am also not satisfied that ground 2 has a reasonable prospect of success on appeal.

[*Counsel submit on costs*]

**Order**

1. Application for leave to appeal is refused. Costs of and occasioned by the application be to Pedder to be taxed, if not agreed, with certificate for counsel.

Simon Leung

District Judge

Representation:

Mr Edward POON instructed by Messrs B Mak & Co for the Plaintiff

Miss Abigail WONG instructed by Messrs Tang & So for the Defendant