#### DCPI 2078/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2078 OF 2009

BETWEEN

CHONG NGAN SENG Plaintiff

and

CHINA HARBOUR ENGINEERING 1st Defendant

COMPANY LIMITED

YIP YAT WO 2nd Defendant

UNION DUTY LIMITED 3rd Defendant

SUN GLORY ENGINEERING LIMITED 4th Defendant

and

UNION DUTY LIMITED 1st Third Party

SUN GLORY ENGINEERING LIMITED 2nd Third Party

##### Coram: Deputy District Judge Rebecca Lee in Court

Date of Hearing: 27 January 2012

Date of Judgment: 3 February 2012

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## DECISION

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###### Introduction

1. This is an application by the 1st Defendant (“D1”) for leave to appeal against my Judgment dated 19 December 2011 (“the Judgment”) where I found D1 to be vicariously liable for the negligence of the 2nd Defendant (“D2”).
2. D1 also applies for a stay of execution of the Judgment in the sum of HK$305,155.55.
3. I shall adopt the same abbreviations used in the Judgment for the purpose of the present hearing.

The Principles

Leave to Appeal

1. Section 63 of the District Court Ordinance, Cap. 336 provides that a party may only appeal from the District Court to the Court of Appeal with leave. If a judge below refuses leave, the intended appellant may still apply to the Court of Appeal for leave.
2. Section 63A(2) provides that 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:
3. the appeal has a reasonable prospect of success; or
4. there is some other reason in the interests of justice why the appeal should be heard.
5. Section 63A(2) test is the same test as laid down by the long line of authorities since***Smith & Cosworth Casting Processes Limited*** [1997] 4 All ER 840 (at 841) as set out in ***Ma Bik Yung & Ko Chuen*** HCMP No. 4303 of 1999 :

“(1) The court would only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word ‘realistic’ makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue whether law requires clarifying.”

1. The applicant needed to show that there was a good arguable case in respect of the intended appeal that had a reasonable and not a fanciful prospect : ***Commissioner of Inland Revenue v Nam Tai Trading Co Ltd***. [2009] 3 HKC 421.

Stay of execution of judgment

1. Mr. Lim referred to ***Mak Hoi Chu v. Lui Chi Yin***, DCPI 1861 of 2009 where the principles are helpfully summarized by HH Judge Mimmie Chan:

“The service of a notice of appeal does not by itself have any effect on the right of the successful party to act on a judgment in his favour and to enforce the order of the trial court. The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal, and that hurdle is higher than that of the chances of success for consideration whether leave to appeal should be granted. The court will not grant a stay unless it is satisfied that there are good reasons for doing so.”

1. I agree the above and adopt the same.
2. In this regard, Mr. Lim submitted that D1 has high chance of success of the intended appeal and that D1 is good for its money.

D1’s Stance

1. The Draft Notice of Appeal contains 6 intended grounds of appeal.
2. Mr. Lim for D1 said that the intended appeal is on a point of law.
3. Mr. Lim has succinctly framed the issue of the intended appeal as follows: since I have found that D2 was driving the LGV under the sub-contract between D4 and D3, it was a tort committed by an employee of an independent contractor of D1, it is therefore not open to the Court to hold that D1 was vicariously liable for the tort committed by D2.
4. It is argued that my finding that D2 was an agent of D1 could not stand.
5. Mr. Lim sought to distinguish the cases relied on by the Plaintiff, namely ***Rambarran v. Gurrucharran*** [1970] 1 All ER 749, ***Ormrod v. Crosville Motor Services Ltd***. [1953] 2 All ER 753 etc., on the ground that none of those cases involved the intervention of independent contractor.
6. Mr. Lim submitted that an employer (i.e. D1) had no control over how the work was to be done by the independent contractor (be it D3, D4 or D2), it does not matter whether it was an accident occurring in a construction site or involving a vehicle owned by the employer.
7. Mr. Lim referred to the well established principle that an employer who procures work to be done for him by an independent contractor is in general, subject to certain exceptions, not liable for the negligence or torts committed by the contractor in the course of the execution of the work under the contract: ***para.6-52 to 6-70, Clerk & Lindsell on Torts, 19th ed***.
8. It is said that D2’s driving of the LGV did not come within any of the exception that would render D1 liable. D1 had discharged its delegable duties by engaging independent contractor.
9. On such basis, Mr. Lim suggested that D1 has a reasonable prospect of success on appeal and leave to appeal should be granted.
10. Mr. Lim further submitted that D1 has a high chance of success and thus execution of the Judgment should be stayed.

The Plaintiff’s Stance

1. Mr. Wong for the Plaintiff (who also appeared at trial) submitted that the relationship between D1 and D2 was not only that of a main contractor and employee of a sub-sub-contractor, but that of an owner of a vehicle and an authorized driver. As such, it takes this case out of the general rule regarding liability of main contractor for tort committed by independent contractors and their employees.
2. Mr. Wong pointed out that Mr. Lim’s argument failed to deal with the fact that D1 was the registered owner of the LGV.
3. Mr. Wong reiterated his argument that in order to determine vicarious liability against D1 as owner of the LGV, the Court had to be satisfied that (a) D1 had permitted D2 to drive and; (b) D1 had an interest in the trip in question.
4. According to Mr. Wong, the Court was not wrong to find that D1 had an interest in the trip whereby D2 was in the course of discharging delegated tasks for D1’s project work, having found that D1 had permitted D2 to drive the LGV and that D2 was transporting D1’s road signs and fences etc. between D1’s sites at the material times.
5. It is said the D1, while not seeking to appeal the finding of facts, cannot challenge the finding that D1 had an interest in the trip (which is based upon finding of facts) and was therefore vicariously liable for D2’s negligent driving.

D2’s Stance

1. Mr. Wong, solicitor for D2, also argued that the finding of vicarious liability was based on facts.
2. Mr. Wong specifically referred to paragraph 80 of the Judgment where I had cited D2’s testimony at trial.
3. Mr. Wong also referred to ***Ormrod*** and submitted that D1 had an interest in D2’s trip.

Discussion

Leave to Appeal

1. The real issue for the intended appeal is whether I should find D1 to be vicariously liable for the tort committed by D2, when I have found that D2 was an employee of D1’s sub-sub-contractor.
2. I have no quarrel with the general principle cited by Mr. Lim that the employer is not liable for the negligence of an independent contractor except when the employer failed to discharge non-delegable duties.
3. However, I agree with Mr. Wong for the Plaintiff that D1’s argument failed to take into account the fact that D1, being the owner of the LGV, has permitted D2 to drive the LGV as its agent.
4. As cited by Mr. Wong for the Plaintiff and Mr. Wong for D2, I have analyzed the evidence and made finding of facts. See: ***paragraphs 78 to 89, Judgment***.
5. It was based on such findings of facts that I have found D1 has authorized D2 to drive the LGV, that D2 was carrying out a task or duty delegated from D1. I then concluded that D2 was driving the LGV as agent of D1 at the material time and as such D1 was vicariously liable for D2’s negligence.
6. The reasoning of Deputy Judge Longley in ***So Wing Kwong v. Cheng Chi Kwong*** [1999] 3 HKLRD 689 is applicable to the present case.
7. After the hearing, quite out of the ordinary, Mr. Lim submitted the case of ***Ching Kin Sang v. Galluck International Ltd.,*** HCA 8225 of 1994, a decision by Mr. Recorder Edward Chan Q.C., for the Court’s consideration.
8. Mr. Lim’s basis is that Mr. Wong for the Plaintiff has submitted at the hearing, for the first time, that the legal principle that an employer would not be vicariously liable for the act of independent contractor (and its employees) only applies to industrial accidents and not when the independent contractor was driving the vehicle owned by the employer.
9. I have invited parties to make further written submissions in this regard.
10. I do not agree that the principle only applies to industrial accidents. The real question is whether D1, being the owner of the LGV, has permitted D2 to drive the LGV as its agent.
11. I am of the view that ***Ching Kin Sang*** is distinguishable on facts.
12. Besides, ***Ching Kin Sang*** was decided before ***So Wing Kwong***, andMr. Recorder Edward Chan Q.C. did not have the benefit of Deputy Judge Longley’s analysis on authorities like ***Rambarran*** and ***Ormrod***.
13. The fact that D2 was an employee of D1’s independent contractor does not mean that D2 could not be D1’s agent in driving the LGV. I see no contradiction to the general principle relied on by Mr. Lim. Any legal principle has to be considered in context with the factual background of the case.
14. The Judgment is a conclusion based upon finding of facts. I agree with Mr. Wong for the Plaintiff that D1 cannot challenge such finding unless they seek to appeal against the said finding of facts (which they do not).
15. In the premises, I do not see that D1 have a realistic prospect of success or an arguable case in the intended appeal.
16. I also see no basis for granting leave under the second limb of section 63A(2) in the circumstances of the case.
17. I refuse D1’s application for leave to appeal.

Stay of Execution of Judgment

1. It follows that D1’s application for stay of execution should also be dismissed.
2. For reasons explained under Leave to Appeal, I should also add that there are no strong grounds of the intended appeal for the purpose of an application for stay of execution of Judgment, following the prinicples stated in ***Mak Hoi Chu***.
3. D1’s application for stay of execution is dismissed.

Order

1. D1’s summons for leave to appeal and summons for stay of execution of Judgment are dismissed.
2. I see no reason why costs should not follow the event. I order costs of both Summonses to the Plaintiff and D2, with certificate of counsel (in the case of the Plaintiff), to be taxed if not agreed.
3. I thank you Counsels for their assistance.

# (Rebecca Lee)

# Deputy District Judge

Mr. Charles C. T. Wong (instructed by Messrs. Szwina Pang, Edward Li & Co.) for the Plaintiff

Mr. Patrick D. Lim and Mr. Jerry Chung (instructed by Messrs. K.H. Lam & Co.) for the 1st Defendant

Mr. Wong Charn Hung Andrew of Messrs. Huen & Partners for the 2nd Defendant

The 3rd Defendant in person, absent

The 4th Defendant in person, absent