## DCPI 1145/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1145 OF 2008

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| BETWEEN | KHAN HAMID | Plaintiff |
|  | and |  |
|  | PROFIT IN (HK) COMPANY LIMITED | 1st Defendant |
|  | FUK SHING ENGINEERING COMPANY LIMITED | 2nd Defendant |

Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 17, 18, 20 & 23 February, 2009

Date of handing down Judgment : 19 March, 2009

# JUDGMENT

**Background**

1. Mr. Khan was employed by the 1st Defendant ("**Profit In**") to work as a general labourer in a construction site located at Pai Tau Village in Shatin ("**Construction Site**") when he met with an accident on 31 August 2005. The 2nd Defendant ("**Fuk Shing**") was the principal contractor at the Construction Site, engaged to carry out landslip preventive works ("**Contract** **Work**") on a hill slope behind a row of village houses. Profit In was the subcontractor engaged by Fuk Shing to carry out the Contract Work.
2. Mr. Khan claims that on the day in question, he was instructed to drill holes on a part of the slope which was behind village house number one, to collect the mud and debris from the holes and put them into bags, and then to transport these bags to a storage area about 30 m away from where he was working. It is Mr. Khan's claim that he was working on a temporary wooden platform ("**temporary platform**") which Profit In had constructed a couple of days before the day of the accident alongside the part of the slope behind village house number one, and was carrying a bag full of mud and debris on his shoulder, and walking along the temporary platform or stairway of the temporary platform, when the steps made him slip, and he fell from the temporary platform onto the slope, and down the side of the retaining wall just behind village house number one. He claims that he fell from a height of about 6 to 8 m, together with the bag of debris, and injured his back as a result.
3. Mr. Khan alleges that the accident and his injury were caused by the breach of contract of employment, negligence or breach of duty on the part of his employer, Profit In; as well as the negligence and/or breach of duty on the part of Fuk Shing as the principal contractor of the Construction Site. He claims damages in the total sum of $581,949.
4. Profit In and Fuk Shing deny that there was any temporary platform or wooden steps above or in the vicinity of the location where Mr. Khan claims he had fallen. They deny that the accident was caused by any negligence or breach of duty on their part, and claim that the accident was caused solely or contributed to by the negligence on the part of Mr. Khan.
5. The issues which arose for determination at trial are :
   1. whether Mr. Khan sustained injuries in the manner he claimed;
   2. if Mr. Khan had sustained injuries in the manner he claimed, whether the injuries were sustained as a result of any negligence or breach of duty on the part of Profit In and Fuk Shing; and
   3. the amount of compensation payable.

**Whether Mr. Khan sustained injuries in the manner he claimed**

1. There is no dispute that Mr. Khan was found lying on the ground, injured, in the yard behind village house number one at about 10:15 a.m. on 31 August 2005. The hospital records and the ambulance treating record show that Mr. Khan had sustained injuries consistent with his having fallen from a height. However, the burden of proof is on Mr. Khan to establish, on a balance of probabilities, that he had sustained injuries in the manner he claimed and that the injuries he sustained were indeed caused by the negligence or breach of duty on the part of Profit In and/or Fuk Shing.
2. According to the Statement of Claim filed on 29 May 2008, Mr. Khan had "stepped onto the first 2 or 3 *steps* of the wooden *stairway*" of the temporary platform, when "the steps" made him slip and he fell together with the bag.
3. According to Mr. Khan's witness statement which was signed by him on 13 November 2008, he had "just stepped about first 2 or 3 steps towards the wooden stairway of the platform", when the steps of the platform made him slip and fall. A diagram was attached to Mr. Khan's witness statement, which diagram was edited from a photograph of the slope behind village house number one, taken at 11:14 a.m. on 31 August 2005 ("**Platform Photograph**"), shortly after the accident had occurred. The diagram shows that he was on the temporary platform, and not any stairway, when he slipped and fell.
4. There was still some confusion in Mr. Khan's evidence when he was cross-examined in court as to where exactly he had slipped. He explained that there was a small flight of steps leading from the temporary platform to a completed and proper wooden platform (which I shall refer to in this Judgment as the "**completed platform**"). The completed platform ran along the entire hill slope on which the Contract Work was to be carried out, and led from the north of the Construction Site to just behind village house number one in the southwest. Mr. Khan said in evidence that he was "near the staircase" leading from the temporary platform to the completed platform, and had "just gone down one step", when he "slipped on the stairs which were near the temporary platform". Immediately after this statement, Mr. Khan said that he had "not yet reached the proper stairs", and that at the end of the temporary platform, there was "a kind of stairs" which he had just reached when he slipped, and he thought it was part of the temporary platform but it was "made like a staircase". Eventually, however, he confirmed that he was at the location shown in the diagram of the edited Platform Photograph, and that this diagram shows that he was near the centre of the temporary platform. Mr. Khan also explained that the part of the temporary platform where he had slid was not stable, and sloped downwards, hence causing his slip.
5. Importantly, it is Mr. Khan's evidence throughout that he had been working and was walking along the temporary platform which had been built one or two days before the day of the accident, which temporary platform was connected to the completed platform. The parties agree that ***the end of the completed platform*** is shown in the Platform Photograph. Mr. Khan claims that parts of the temporary platform can also be seen from this same photograph, but this is disputed by Profit In and Fuk Shing.
6. The diagram made on the Platform Photograph shows Mr. Khan's representation of the location of the temporary platform on the hill slope, the location of the short flight of steps leading from the temporary platform to the completed platform, how the temporary platform was connected to the end of the completed platform as shown in the Platform Photograph, and where he was just before he slipped. Although the Platform Photograph does not actually show any platform on the slope other than the completed platform which ends just behind village house number one, Mr. Khan has drawn on and beyond the top edge of the Platform Photograph to show the temporary platform, as Mr. Khan claims that one supporting leg of the temporary platform can be seen in the top left corner of the Platform Photograph, together with a part of what he claims to be the base of the temporary platform. He identified the alleged supporting leg of the temporary platform in the Platform Photograph.
7. This is therefore not a case of Mr. Khan being unable, by reason of any limitations in his language abilities, to express himself sufficiently well in relation to the location of the temporary platform or the circumstances of the accident. The diagrams he made and which were attached to his statement make it very clear how, on his case, the temporary platform was connected to the completed platform, and how it stood on the slope.
8. Profit In and Fuk Shing rely on a photograph of the part of the hill slope behind village house number one, which depicts a metal railing which they say had been constructed at the location at the material time of the accident. The photograph appears on page 58 of the trial bundle, and I shall refer to this as the **Railing Photograph**. Profit In and Fuk Shing admit that the Railing Photograph was only taken 3 months after the date of the accident, but according to Mr. Yuen, the safety manager of Fuk Shing, the metal railing depicted in the Railing Photograph existed on the day of the accident.
9. According to the evidence of Mr. Yuen, the Railing Photograph shows that no temporary platform existed at the location of the hill slope where Mr. Khan claims the accident occurred. According to Mr. Yuen, at the material time of the accident, it was not necessary for any work to be carried out on that part of the slope beyond the completed platform behind village house number one, and where the metal railing was erected. Mr. Yuen claims that at the material time of the accident, it was not necessary for workers to go to that part of the slope behind village house number one, nor was it necessary for any working platform to be erected there. Hence, Mr. Yuen claims that Mr. Khan could not have fallen from the temporary platform behind village house number one, as he alleges.
10. No other witnesses were called by either Mr. Khan or Fuk Shing in relation to the existence or otherwise of the temporary platform, and whether Mr. Khan was indeed working on the temporary platform just before he fell. The evidence of Mr. Yuen is that Mr. Khan was employed by Fuk Shing's subcontractor, Profit In. Shortly after the accident, Profit In's contract was terminated by Fuk Shing as a result of delay in the progress of the Contract Work, and another contractor was appointed in its stead. According to Fuk Shing, there had been no further contact between Fuk Shing and Profit In since the termination of the subcontract, and this explained why no evidence was forthcoming from the workers employed by Profit In.
11. Although the Railing Photograph was taken about 3 months after the accident, there is no dispute that the Platform Photograph was taken shortly after the accident on 31 August 2005. Leaving aside everything else, it is clear from the Platform Photograph itself (found on pages 57 and 86 of the trial bundle) that the completed platform came to an end just above a flight of concrete steps leading to the top of the retaining wall behind village house number one. Mr. Khan claims that the completed platform was connected to the temporary platform from which he fell by a short flight of wooden steps built by Profit In. On Mr. Khan's case, there is no other access to the temporary platform save for its link to the completed platform by means of the wooden flight of steps. Despite Mr. Khan's assertion that the flight of wooden steps can be seen from the top centre part of the Platform Photograph, I simply fail to see how it can be so. It is my conclusion from the Platform Photograph that the completed platform did not lead to the other side of the slope above the retaining wall at all, that an empty space can be seen beyond the end of the completed platform, and that there are only bamboo or metal poles seen extending from the ground to the completed platform, and above what appears to be the kick plate of the completed platform. In my view, Mr. Khan's claim that the pole as seen in the Platform Photograph is the side of the flight of wooden staircase simply cannot be made out. My observation from the Platform Photograph is that the completed platform and what Mr. Khan claims to be the base of the temporary platform is divided by an open, empty space.
12. Further, after comparing the Platform Photograph and the Railing Photograph, I have concluded that what Mr. Khan claims to be the supporting leg and the base of the temporary platform are respectively the vertical metal railing, and the other parts of the railing on the ground which forms what appears to be a right angle, and either metal poles or metal pipes that can be seen lying horizontally along the ground, which can be seen in the Railing Photograph at the location of the hill slope above the retaining wall behind village house number one. The right angle structure and the horizontal pipes or poles can be seen in the top left corner of the Platform Photograph.
13. My conclusions summarized in the preceding two paragraphs lead me to find that there was in fact no temporary wooden platform erected on the hill slope behind and running parallel to village house number one, and which led to the completed platform, as Mr. Khan claims.
14. It is not Mr. Khan's claim that he had fallen from the completed platform near village house number one. It is not his case that he was walking up or down the flight of concrete steps below the completed platform, when he fell. In fact, it is his evidence that he was not on the concrete steps, as the workers were not permitted to walk down these concrete steps. It is Mr. Khan's case that he was drilling holes and working on the alleged temporary platform on the hill slope behind village house number one, and walking on the alleged temporary platform towards the completed platform, when he slipped and fell. On the evidence, I find that this is inherently impossible. I also find that Mr. Khan's evidence in this case is not credible, and totally unreliable.

**If Mr. Khan had sustained injuries in the manner he claimed, whether the injuries were sustained as a result of any negligence or breach of duty on the part of Profit In and Fuk Shing**

1. Mr. Khan has failed to prove, on a balance of probabilities, that he had sustained his injuries as a result of his having slipped in the course of working on the improperly constructed or insecure temporary platform, and that he had fallen from the temporary platform because it was not guarded or equipped with railings, as claimed. I reject his evidence that there was an insecure and unsafe temporary platform on which he had worked or walked, and that his injuries were sustained as a result of any negligence or breach of duty on the part of either Profit In, or Fuk Shing.
2. I further accept the submissions made by Counsel that whether as employer or occupier, Profit In and Fuk Shing are only required to guard against probable risks as opposed to possible risks (*Bolton v. Stone* [1951] AC 850). Where a safe access or egress has been provided, an employee who decides to take an unsafe route, even for purposes relating to the discharge of his duties, has only himself to blame (*Wallis v. Balfour Beatty Rail Maintenance* [2003] All ER (D) 83 (Jan); *Manford v. George Leslie Ltd.* (1987) SCLR 232). There is no evidence that the completed platform was unsafe for use by Mr. Khan in relation to his work, and if he chose to use any other unsafe route, then he was on a frolic of his own, for which Profit In and Fuk Shing are not liable.
3. In case I am wrong on the question of liability, I shall consider the next issue of quantum.

**The amount of compensation payable**

1. Mr. Khan was 19 years old at the time of the accident. Fortunately for him, he did not sustain very serious injuries as a result of the fall. He had a minor head injury, and neck and back contusion. He was discharged from hospital on 24 September 2005, and was given leave up to 26 October 2005. He was subsequently given further sick leave in respect of back pain.
2. Dr. Wong and Dr. Lam who prepared the joint medical report of 22 April 2008 agree that Mr. Khan suffered from back contusion with soft tissue involvement. There was no evidence of any more serious damage to his back, and the doctors agree that Mr. Khan had recovered from his minor head injury. The doctors also agree that Mr. Khan's residual back pain should not be severe, and that he may have exaggerated his symptoms.
3. I will award **$100,000** for PSLA.
4. Mr. Khan was earning $9,100 a month at the time of the accident. Dr. Wong and Dr. Lam agree that the sick leave granted, from 1 September 2005 to 17 December 2005, 19 December 2005 to 20 December 2005, 25 January 2006 to 29 January 2006, and 8 February 2006 to 12 February 2006, was appropriate.
5. Counsel for Mr. Khan accepts that earnings received by Mr. Khan during the periods when he was able to secure employment should be deducted from his pretrial loss of earnings award. Mr. Khan also spent time in Pakistan visiting his family and recuperating, and counsel accepts that an adjustment of $54,600 should be made for this period.
6. I accept Mr. Khan's calculations, and will allow the sum of **$192,015.65** for his pre-trial loss of earnings.
7. According to the joint medical report, Mr. Khan should be able to resume work in construction sites, although his working efficiency and endurance might be affected by his residual back pain. Given Mr. Khan's ethnic background and his limited language skills, I accept that it will be very difficult for him to find employment not involving manual labour, and that he will be more vulnerable in the local labour market as a result of his back injury, given the restrictions in his working efficiency and endurance, as is acknowledged by the doctors. I will award a sum of **$50,000** for loss of earning capacity.
8. In respect of special damages, I allow the sum of **$6,082** which is supported by documentary evidence.
9. If Mr. Khan succeeds on liability, the total amount of damages awarded is **$309,097.65**, after deducting the sum of $39,000 received by way of employees compensation. Interest will be payable on PSLA at the rate of 2% per annum from the date of service of the Writ to the date of judgment, and on other special damages at half judgment rate from the date of the accident to the date of judgment.

**Conclusion**

1. In view of my judgment on liability, Mr. Khan's claims in this action are dismissed. I will make an order nisi that the costs of the action are to be paid by Mr. Khan to Profit In and Fuk Shing, to be taxed if not agreed, with certificate for Counsel. Mr. Khan's own costs are to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Mr. Neal Clough instructed by Messrs. Massie & Clement (assigned by D.L.A.) for the Plaintiff*

*Mr. Samuel Chan instructed by Messrs. W.H. Chik & Co. for the 1st and 2nd Defendants*