**DCPI 1388 OF 2007**

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 1388 OF 2007**

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

BWTWEEN

CHONG CHUN WAH FRANKY

formerly known as

CHONG SIU WAH FRANKY Plaintiff

and

TSUI YIU WAH JOHNNY trading as

PAKLY HORTICULTURE 1st Defendant

YUNG CHING POR PAUL trading as

PAULINUS HORTICULTURE DESIGN 2nd Defendant

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

Coram : H. H. Judge YUNG, District Judge

Dates of Hearing : 7th& 11th November and 3rd & 5th December,

2008

# Date of Handing

Down Judgment : 18th December, 2008

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

## J U D G M E N T

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

### The Present Claim

1. The 2nd Defendant obtained from the building manager of a housing estate a contract to cut the trees standing on the hillside adjoining the estate. The whole the work was sub-contracted to the 1st Defendant who employed the Plaintiff as one of his workers. He was injured while in the course of his employment. Disputes as to employees’ compensation has been resolved. The Plaintiff is now seeking damages for common law negligence against both defendants.

The Extent of the Compromise Reached between the 2nd Defendant and the Plaintiff

1. The 2nd Defendant and the Plaintiff reached a compromise for compensation shortly after the accident. The issue before me is whether the compromise covers the instant claim for common law negligence or just, alleged by the Plaintiff, as only the claim for employees’ compensation.
2. Shortly after the accident the Plaintiff and his co-workers could not trace the 1st Defendant for payment of their wages. Quite understandably, they looked to the 2nd Respondent for payment of arrears of wages. The workers had the 2nd Respondent cornered and negotiation took place. This was not a pleasant meeting. The 2nd Defendant was faced with the demand for arrears of wages and compensation. It is common ground that he wanted to wriggle out of the situation denying liability and stressing the point to the workers including the Plaintiff that he was not their employer. The 2nd Respondent stood firm and insisted that the arrears of wages of all workers and the compensation for the Plaintiff’s injury had to be settled together and at the same time. This, needless to say, put pressure on the Plaintiff. Eventually agreement was reached between all parties. Under the agreement the Plaintiff was to receive a cheque of $1800 for his arrears of wages, and 4 cheques of $7000 each. These cheques were post-dated to be due one in each of the following 4 months. The Plaintiff and the 2nd Respondent took the trouble to go the Labour Department to have the Plaintiff’s claim for employees’ compensation withdrawn, while the other workers waiting at a restaurant for the Plaintiff’s return to drink a beer to the overall settlement.
3. Each party to the settlement agreement gave evidence to the extent of the agreement. I find each of them exaggerated part of their evidence to their own respective advantage and to bolster their own rationale behind entering into such agreement. I do not believe that the 2nd Defendant told the Plaintiff that if he did not fully recover within four months, the Plaintiff could come back for more money. When asked why the 2nd Defendant would have paid him four months’ earnings if he expected the Plaintiff would come back for more, he said it was the 2nd Defendant’s obligation to pay in any event. This is not the attitude of the 2nd Defendant at the time. He was most unwilling to accede to the demand of the workers. He even used the fact that he was not the employer as a pretext in denying liability. At that point of time, the 2nd Respondent was not yet liable to pay any sick leave pay not yet due. I am sure he knew it. Furthermore I cannot see any reason, at least the Plaintiff did not tell me or had an opportunity to tell me, why he was entitled to ask the 2nd Defendant for sick leave pay for four months and which sick leave pay was not yet due, bearing in mind at that time he had not yet been give 4 months’ sick leave. On the other hand I do not believe the 2nd Defendant that he knew at the time of entering into the compromise he was liable to pay common law damages on the top of employees’ compensation. If he did know it, he would have extracted some form of written acknowledgement from the Plaintiff to that effect. He was so careful about requiring the Plaintiff to withdraw the claim at the Labour Department. Extracting such written acknowledgement would be much easier and less inconvenient than paying a visit to the Labour Department.
4. The fact that by law an employee can lay a separate claim against an employer and the principal contractor for common damages for negligence may not be readily known or understood by a principal contractor. I find that the 2nd Defendant was not aware of the possibility of a separate claim for common law damages for negligence. Similarly the Plaintiff was not aware of his right to a separate claim against 2nd Defendant, not his employer, for common law damages. No doubt the common intention of the parties was that the claim registered at the Labour Department should be settled. In view of the fact that both of them did not have in mind other possible claims, albeit through mistaken belief or knowledge of the law and fact, the meeting of minds which is pre-requisite for a settlement, does not extend to the Plaintiff forgoing his claim for damages for negligence. The Plaintiff is not precluded by the settlement agreement to pursue his present claim against the 2nd Defendant.

### Causation

1. There cannot be any dispute that the Plaintiff suffered his injury from a fall from the top of the boundary metal fence of the housing estate in question. Earlier he cut off a tree trunk, which fell down the slope the wrong way and ended in straddling over the top of the metal fence. He climbed up to the top of the fence and saw a gap in some branches to enable him to break them off completely from the trunk with hand after returning to the ground. After the sawing work, he stood up with feet on the top narrow bar of the fence and he stretched his waist or back and was about to climb down. Right at this moment he fell down. In the report of accident he made to the Labour Department, the Plaintiff said he slipped. In evidence, he said he was brushed by the branch and slipped causing him to fall. I find that there was no material inconsistency between his evidence and his descriptions in the accident report. The omission in the report is nothing more than an inadvertent omission. The moment he was struck by the branch, he lost balance and fell. If he could manage a firm grip with his feet he would not have fallen. When he said he slipped, he was not wrong. He merely failed to give good details. He cannot be blamed for failing to give such good details in the report. I accept his evidence that he was struck by a branch while standing on the top of the fence causing him to fall.

Liability of the 1st Defendant--- Contributory Negligence of the Plaintiff

1. The Plaintiff gave evidence of how the job of cutting trees should be done. From his evidence I find he was a person who knew his trade well. It was not clear how the tree trunk in question would fall into such an embarrassing position. In the normal and proper course of cutting down the trunk, it should not fall with its top in the downhill direction as it did. It is more likely than not that when the trunk was cut down, there were no other workers using or if there were any, using properly, a rope or other means to guide it to fall in the usual, proper and safe direction. Either way this was a failure on the part of the employer, the 1st Defendant, in providing a safe system of work. This failure did not directly cause the accident. It is because, despite the wrong direction of fall, the job could still be finished off in a safe manner if proper procedures the Plaintiff described had been followed. However to finish the job while the tree trunk was straddling over the metal fence entailed great risk for the Plaintiff. . This should be taken into account in favour of the Plaintiff when assessing his contributory negligence.
2. I do not think it safe to let the Plaintiff to finish the job off alone after the trunk fell the wrong way and landed in such an embarrassing position. At least one worker should have been assigned to stand watch over the condition of the branches, which had a gap or gaps sawn into them. A prudent employer must be able to foresee the probability that any one of such branches might snap and that the danger of sweeping a worker off the top of the fence when the branch snapped was realistic. Had the Plaintiff been given any warning that the branch was about to snap, he would have taken precaution or evasive actions in time, say, not releasing the anchor of his safety belt or refraining from spending time stretching his waist or his back on the top of the fence. I find the 1st Defendant negligent.
3. The Plaintiff should not have released the anchor of his safety belt. He was guilty of not taking reasonable care of his own safety. Taking into account the short duration when his safety belt was unsecured, and other circumstances I have mentioned earlier, I find him 20% contributory negligent.

Liability of the 2nd Defendant

1. Mr. Lau cited a number of cases in his exhaustive analysis of the liability of a principal contractor for the employees of his subcontractors. These cases can all be distinguished on facts. For the purpose of the instant case, it serves no useful purpose to give an analysis of the 2nd Defendant’s general duty to a worker of its sub-contractor. It suffices to give an analysis by reference to the causation of the accident. One should ask what it is that the 2nd Defendant had done or failed to have done and by such his act or omission caused, or was a contributory cause of, the accident.
2. It is legitimate for the 2nd Defendant to contract out to 1st Defendant the whole of the work he himself was employed to do. There was no evidence that the 1st Defendant was not as equally competent as he himself was. The contract he procured did not require personal performance by him. It is delegable. Even if it was not, it was a matter between the 2nd Defendant and the building manager. The 2nd Defendant owed no duty to the Plaintiff to ensure the latter’s employer to provide a safe system of work.
3. The omission, which caused the accident, was the failure to post a worker to watch over the condition of the branches while the Plaintiff was still off the ground. This is the duty of the 1st Defendant and not the 2nd Defendant’s. There is no duty for the 2nd Defendant to be on site while the work is done, not to mention the duty to ensue such worker be assigned to watch the conditions of the branches with gaps sawn or to provide other equally effective protective measures for the same purpose.
4. The Plaintiff also contended that the negligence of the 1st Defendant should be regarded as the negligence of the 1st Defendant. Counsel for the Plaintiff argued ably that the 2nd Defendant was liable because when he had sub-contracted the whole of the contract to the 1st Defendant, the latter became his agent. Of all his argument this is the strongest and the highest he could have presented given the special circumstances of the case. From the standpoint of the employer of the principal contractor, the sub-contractor was indeed the agent of the principal contractor. The employer would hold his principal contractor responsible for the due performance under the contract. However this is not the right way to look at the matter in the instant case. The matter should be looked at from the angle of the employee of the sub-contractor, and the foresight of the principal contractor. The Plaintiff did not enter into employment of the 1st Defendant on account of the 2nd Defendant, and he knew too well that he was not dealing with the 2nd Defendant. Agreeing to take up the job he only agreed to work for the 1st Defendant. The 2nd Defendant had no reasons to believe that the 1st Defendant could not have discharged his duty of care as an employer. As it has been pointed out, there is no law or policy to prohibit the delegation of the work the 2nd Defendant was employed to do. Counsel for the Plaintiff submitted that to allow the principal contractor to shift the duty of care to an independent contractor is unjust and unfair. Be that as it may, the only remedy is by legislation.

### Quantum

1. The 1st Defendant did not appear at the trial. I do not have the benefit of his argument on quantum. The 2nd Defendant disputed various major items. Although his estimates have been revised upwards in the course of the proceedings, I still find his final estimates unacceptably low. I agree with the estimates submitted by counsel for the Plaintiff and find them reasonable.

### Order

1. (1) Judgment for the 2nd Defendant with costs on upper scale, with certificate for counsel.  
    (2) Judgment for the Plaintiff against the 1st defendant for $316902($396128X80%) with usual interest and costs on the upper scale, with certificate for counsel.  
   (3) Plaintiff’s own costs be taxed accordingly to Legal Aid Regulations.  
   (4) Liberty to apply to vary costs orders within 6 weeks.

(Y. W. YUNG)

District Judge

Mr. Keith Lau, instructed by M/S Yip, Tse & Tang assigned by D.L.A. for the Plaintiff.

The 1st Defendant absent.

Mr. Vincent Lam, instructed by M/S Kitty So & Tong for the 2nd Defendant.