



Personal Injury

Cai Guoping (Plaintiff) v Yim Hok Wing (1st Defendant), May's Asia Limited (2nd Defendant) & Hip Hing Construction Company Limited (3rd Defendant), CACV 96/2015, judgment on 9 September 2015 & 13 October 2015

This is an appeal brought by the Plaintiff against the judgment of HCPI 494/2013 in relation to a work accident on a construction site. In the subject accident, a concrete panel fell and struck the Plaintiff when he was moving another concrete panel in a hoist. As a result, he sustained multiple facial injuries and was given intermittent sick leave over 16 months from the date of accident.

During the trial, the Plaintiff gave a version of the alleged accident which is largely different from the version set out in his declaration to the Labour Department, his Statement of Claim and his signed witness statement, leaving the trial judge with a real sense of doubt. The trial judge preferred the evidence given by the defendants' witness, i.e. the Plaintiff was taught to first untie the two panels on the hoist, then rotate the first panel by 90° to the side of the hoist whilst another worker would tend to the second panel to ensure that it did not fall. It was ruled that this did not constitute a safe system of work since very heavy, large concrete panels were being transported in pairs, which required handling the panels in a confined space and handling one panel whilst the other was not secured. The trial judge held that common law liability was established against all three defendants but there was 50% contributory negligence on the part of the Plaintiff.

On the issue of quantum, the trial judge found the appropriate sick leave period to be 6 months and 5 days and did not allow any loss of earnings beyond this sick leave period and loss of earning capacity. Damages assessed at HK\$473,229.00 was reduced by 50% to HK\$236,614.00, which was less than the award for the employees' compensation already received by the Plaintiff in the sum of HK\$333,300.00. Therefore, no award for damages was made even when liability was established. The Plaintiff's action was dismissed with an order *nisi* that there be no order as to costs. The order *nisi* was later varied pursuant to Order 22, rule 23(5) of the Rules of the High Court, Cap.4A. In the light of the Sanctioned Payment made by the Defendants on 18 November 2014, it was ordered that the Plaintiff was to pay the Defendants indemnity costs from the expiry of the Sanctioned Payment on 17 December 2014 and enhanced interest on disbursements incurred after 17 December 2014 up to the judgment date.

On appeal, the appeal judges revisited the evidence put forward at trial. They found that the Defendants should be liable for failing to take the simple measures which could have helped prevent the risk arising to workers handling the panels; the "correct method" taught to the Plaintiff, although not found to be unsafe, was cumbersome and needed sufficient strength in maneuvering the panels; the Plaintiff and his co-worker were engaged in performing the hard, physical and repetitive task for up to 100 panels a day; the system of work provided was not designed to protect the Defendants' workers as much from their carelessness as from anything else. At the same time, the appeal judges upheld the trial judge's finding that the Plaintiff should also be responsible for the occurrence of the accident as it was not a momentary lapse of attention but the Plaintiff and his co-worker had made a conscious decision to depart from the Defendants' instructions and not to follow the "correct method". However, re-weighing the above findings, however, the appeal judges allowed the Plaintiff's appeal against liability and reduced the apportionment of contributory negligence from 50% to 25%. In the absence of any serious error or wrong application of the principle of law however, the Plaintiff's appeal against quantum was dismissed.

After the reduction of contributory negligence to 25%, the net award of damages to the Plaintiff would be HK\$21,621.75.00. Therefore, the Plaintiff still failed to beat the said Sanctioned Payment in the sum of HK\$120,000 dated 18 November 2015 by a wide margin. The appeal judges maintained that the Plaintiff was to pay the Defendants indemnity costs from the expiry of the Sanctioned Payment on 17 December 2014 up to the judgment date. However, the appeal judges set aside the costs order that the Plaintiff do pay enhanced interest on disbursements (i.e. half of the fees for mediation on 17 November 2014 paid in January 2015) as it was actually not incurred after 17 December 2014.

Comments:

The above case illustrates that on top of whether safety training is given to the injured employees, the court would also consider in detail the training/instructions given to the injured employees in assessing liability. With the availability of a detailed description of the training given, the court would be able to find that the Plaintiff did not follow the instructions and allocate a substantial percentage of contributory negligence on the part of the Plaintiff. In order to better defeat the Plaintiff's credibility and absolve the employers' liability in similar work-accident related personal injury claims, employers are advised to keep a detailed record of the trainings/instructions given to their workers and attendance records of training courses signed by their workers.

It can be seen that after reconsidering the available evidence, the appeal court upheld the trial judge's findings and continued to allocate a substantial percentage of contributory negligence on the part of the Plaintiff for not following the employer's instructions thereby causing the accident. It appears that whilst the law poses obligations for the employers to do as far as reasonably practicable to ensure their workers' safety, the employers are protected from being held liable for accidents to disobedient workers who voluntarily act not in accordance to the employers' instructions.

The above case also indicates how the mechanism of sanctioned payments could protect the defendant's position on costs. Whenever the Plaintiff fails to obtain a judgment that is better than the sanctioned payment, the Plaintiff would have to bear not only the defendant's costs of the proceedings from the date when the sanctioned payment expired but also enhanced interests on disbursements incurred after the expiration of the sanctioned payment. In the above case, the appeal judges opined that it was a "sheer speculation" to say that there was an objective basis for thinking that the Plaintiff might have a reasonable chance of beating the sanctioned payment. There is no excuse for the Plaintiff to not accept an adequate sanctioned payment within the prescribed deadline. In other words, the sanctioned payment can exert pressure on the Plaintiff to reasonably assess his/her own claim at an earlier stage before trial, taking into account the risks on costs as mentioned above.

To safeguard the defendant's position on costs, the defendants are advised to effect a sanctioned payment at an "early stage" in the proceedings. Taking into account the chance that some documents enhancing the plaintiff's claim might not yet be disclosed at the early stages, the amount paid into court could be a bit higher than the actual assessed damages to ensure that the risks of costs sits firmly with the plaintiff.

Shipping

Cargill International Trading Pte Limited v Loyal Base Development Limited, HCCL 12/2015, Decision on 24 November 2015.

This is a Court of First Instance case concerning an application made by the Defendant to discharge an ex parte mandatory injunction order (“Order”) granted in favour of the Plaintiff.

Under a sale contract, the Plaintiff was the seller of a cargo and the Defendant was the buyer. In order to procure the Plaintiff to deliver the cargo to the port agents without production of the original bills of lading, the Defendant issued a letter of indemnity (the “LOI”). In the LOI, the Defendant promised that, inter alia, it would provide, on demand, any security required to secure the release of the vessel, in the event the vessel is being arrested in connection with the delivery of the cargo regardless of “whether or not such an arrest or detention ... may be justified”. The cargo was then released to the port agents and ultimately released from the port without production of the original bills of lading.

Subsequently, a bank obtained an order from the Qingdao Maritime Court for the arrest of the vessel. The order was based on the bank’s claim that it was entitled to take delivery of the cargo, but the cargo had been wrongly released without the original bills of lading which was in the bank’s possession.

When the Defendant was unwilling to provide for the security as required under the LOI, the Plaintiff applied for and obtained the Order ordering the Defendant to provide security to secure the release of the vessel. The Defendant later applied for the discharge of the Order on various grounds, including, inter alia, (1) the Plaintiff has misled the Court, and (2) the Plaintiff has failed to disclose to the Court the material facts.

Held

The Court of First Instance, in a decision given by Mimmie Chan J, dismissed the application for discharge of the Order.

On the issue of the Court allegedly being misled by the Plaintiff, the Defendant sought to argue that the Plaintiff failed to demonstrate that there would be a high degree of assurance that at trial, the Court will find that the arrest of the vessel fell within the scope of the LOI, to trigger the Defendant’s obligations and liabilities thereunder. The reasons for the Defendant’s argument are two-fold. First, it was argued that, during the negotiation of the LOI, the parties intended that the LOI was to cover the “discharge” of the cargo to the port agent from the vessel, and not “delivery” of the cargo (after discharge) without the original bills, so the LOI should be rectified on the ground of alleged common mistake. If the Court did rectify the LOI, then it follows that the Defendant would not be liable under the LOI because the vessel’s arrest was in relation to wrongful “delivery” of the cargo, as opposed to “discharge”. In rejecting this line of argument, the Court acknowledged that in reality, parties had limited opportunities for close textual analysis before committing to a wording, so the distinction between “discharge” and “delivery” was artificial and there was no basis that the LOI needed to be rectified. Accordingly, the Defendant’s obligations and liabilities under the LOI were triggered because the cargo was delivered to the port agent, which was *prima facie* acting as the Defendant’s agent in taking delivery of the cargo.

The Defendant’s second argument was that the bank’s claim underpinning the arrest of the vessel had no merit and was not connected with the delivery of the cargo. The Court rejected this argument as well on the basis that the LOI expressly provided that the Defendant’s liabilities would be triggered regardless of whether the arrest may be justified and the phrase “in connection with” used in the LOI was a very broad term.

On the issue of alleged material non-disclosure, the Defendant sought to argue, inter alia, that the Plaintiff failed to disclose the fact that the Plaintiff was arranging security after the Order was granted with another bank which eventually led to the release of the vessel. Mimmie Chan J first pointed out that the duty to make full and frank disclosure in an application for ex parte relief continues while the proceedings remain on an ex parte basis. She then held that the Plaintiff had the duty to disclose to the Court that it was arranging security for the release of the vessel because it was relevant to the Court's consideration of whether it should continue or vary the Order. Nevertheless, the Plaintiff's failure to disclose was not sufficiently material to justify the discharge of the Order because such failure did not discharge the Defendant from its liabilities under the LOI.

Comments

In rejecting the Defendant's argument that the LOI did not reflect the true intention of the parties, Mimmie Chan J noted that the word "delivery" was used throughout the LOI. The LOI, which is in the standard form used in the shipping industry and is commonplace in international trade, is to be construed robustly and in a straightforward way.

Another lesson from this case is that in a letter of indemnity such as the LOI, the phrase "whether or not such arrest or detention... may be justified" could have far reaching implications. Such a phrase could be relied on by an applicant for ex parte relief to show a prima facie case that the respondent's liability is triggered, without proving the merits of the arrest, as illustrated in this case where Mimmie Chan J spent very little time discussing whether the arrest was justified.

It is well established that, for an ex parte application, the applicant shall make full and frank disclosure of any material facts. If the failure to make material disclosure ground can be made out, this ground alone is sufficient for the Court to set aside the ex parte order with costs ordered against the applicant. It is imperative that the applicant shall disclose all the material facts, whether to the disadvantage to the applicant or not, in any ex parte application.

WISDOM OF THE ISSUE

When one door closes, another opens.

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