



Shipping

Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd [2016] 3 HKLRD 352, CACV 36/2016.

Facts

P was the owner of a vessel (“**Vessel**”) and D was the lawful holder of the bill of lading (“**B/L**”). The B/L incorporated the terms and conditions of a charterparty, which in turn contained an arbitration clause imposing a limitation period (1 year) for the institution of arbitration.

When the contractual time bar was about to expire in 4 months, D commenced proceedings in Mainland for wrongful discharge of cargo. However, due to P’s evasion of service, P only entered into an appearance 8 months after commencement of the mainland proceedings. By that time, the contractual time bar had expired. P then applied to the mainland court to challenge its jurisdiction based on the arbitration clause, but failed in both the first instance and appeal.

P applied for an anti-suit injunction in Hong Kong to restrain D from continuing in the Mainland Proceedings. P lost in the first instance and appealed, arguing that the Judge erred in ruling delay and comity considerations were sufficient free-standing justifications for refusing anti-suit relief.

Judgment

The CA dismissed the appeal.

In relation to the issue of delay, the CA cited the UK Court of Appeal case *Essar, Ecobank and Ecobank* and ruled that an applicant should act promptly and claim injunctive relief at an early stage. Here, P did not challenge the Judge’s finding that P was evading service in mainland in order to wait for the D’s claim to be time-barred, and there was inordinate and culpable delay on the part of P to take out the application for anti-suit injunction.

For the issue of comity, while CA agreed with P that comity considerations in contractual anti-suit injunctions (as in the present case) would be less important than in cases of *forum non conveniens* types of anti-suit injunctions, such considerations cannot be said to be of no or minimal importance. In the present case, the judge could not be said to have erred for giving significant weight to the comity considerations, as grant of an anti-suit injunction would mean that the two mainland courts decisions rejecting P's challenge to its jurisdiction would be practically overturned.

Since the CA could not find any fault in the Judge's exercise of discretion in refusing the relief sought, the appeal was dismissed.

Comments

The use of arbitration clause is widespread in the maritime industry. In the usual circumstances, parties must honour their obligation and refer any dispute to arbitration. If a party is in breach of the arbitration clause, anti-suit relief is available to the other contracting party. However, such relief is only discretionary. This case shows that while the sanctity of contractual rights are to be respected, it is not a trump card to other discretionary considerations such as delay and comity. A party must therefore act promptly if he wishes to claim anti-suit injunctive relief.

Personal Injury

Mohammad Amjad v John M Pickavant & Co CACV 698/2013, judgment on 21 February 2017

The Respondent was employed by the Appellant, a law firm, as a litigation manager. At the time of accident, he was earning about HK\$32,500 per month by a combination of salary and commission. On 1 March 2006, the Respondent, while walking from his room passing the reception area to the storage room, tripped on a cardboard carton for photocopier paper that was placed in the reception area near a sofa. As a result, he fell forward and suffered personal injuries.

Soon after the injury, Mr. Pickavant of the Appellant accused the Respondent of paying monies received from clients into the Respondent's own bank accounts and allegedly falsely telling clients that the Appellant required them to pay additional amounts. The Respondent and his wife were subsequently charged with criminal offences but they were acquitted of all charges after trial.

In the proceedings, the trial judge found the Appellant liable for the Respondent's injuries without any contributory negligence on the part of the employee. The Appellant appealed.

Held

Honourable Barma JA (giving the Judgment of the Court) dismissed the appeal.

Barma JA upheld that there had been no contributory negligence on the part of the Respondent. Barma JA rejected the Appellant's contention that the Respondent failed to heed the presence of the box and that the box was clearly visible. He accepted that at the time of accident, a client was seated on the sofa ahead of the box so that it would be quite possible (and perhaps likely) that the Respondent's view of the box would have been obscured, so that he would not have been aware of its presence.

The Appellant also contended that as a result of the allegations of dishonesty made against him, regardless of the accident, the Appellant would have ended employment with the Respondent and that any other employment the Respondent could have secured would not have included the element of commission that he was being paid by the Appellant. Hence, his loss of earnings would have been less than they would have been had he continued to be employed by the Appellant. Barma JA agreed with the trial judge's skepticism of the timing and circumstances in which the complaint of "dishonesty" came to be made against the Respondent, and thus had reservations as to whether or not the complaint was justified. Barma JA held the trial judge was hence entitled, in the circumstances, to decline to find that the Respondent would have been dismissed regardless of the accident.

Further, the Appellant contended that the trial judge erred in her approach to the assessment of the Respondent's loss of earnings. The Appellant argued (i) that the trial judge had wrongly adopted findings as to loss of earning capacity made in the Employee's Compensation proceedings and (ii) that the trial judge had wrongly sought to make use of concepts such as impairment of the whole person and reduced earning capacity expressed in percentage terms when assessing the Respondent's loss of earnings, as these were concepts applicable to Employees' Compensation claims but not in assessing loss of earnings in common law proceedings.

Barma JA accepted that the trial judge had adopted Judge Chow's assessment of likely income after the accident in the Employees' Compensation claim. Barma JA considered Judge Chow's decision that his approach was not to use an earning capacity percentage figure to calculate the award to be made in those proceedings but to make an assessment of the Respondent's actual likely level of earnings at the time of the trial of those proceedings and use that amount of the purposes of the calculation. Barma JA held that this does not differ in practical terms from the approach at common law, as that approach involves considering the Respondent's potential earnings in his post-accident condition at the relevant time with his pre-accident income.

Further, Barma JA held that the trial judge was perfectly entitled to use percentages of pre-accident earnings as loss of earnings at different stages of recovery. Barma JA acknowledged that the trial judge, in assessing the percentages, had considered the medical evidence, the evidence of both sides as to the nature of the Respondent's work and the Respondent's own evidence as to the impact of those injuries on him and on his ability to carry out those duties. Barma JA acknowledged that those figures are somewhat rough approximations but the assessment of loss of earnings is not always capable of exact or precise quantification. Barma JA also accepted that the trial judge did the best she could with the material available and the trial judge was perfectly entitled to come to the conclusions that she did.

Barma JA dismissed all the Appellant's contentions and upheld the trial judge's decision.

Comments

The present case is a personal injuries claims arising out of relatively safe office environment. More importantly in terms of the legal aspects, this case recognized the assessment of the Respondent's actual likely level of earnings at the Employees' Compensation proceedings and use that amount of the purposes of the calculation. Further, this case recognized the use of percentages of pre-accident income when assessing loss of earnings in different stages of recovery provided that all evidence has been thoroughly considered. Given the flexibility in this method of assessment of loss of earnings at different stages of recovery, it should not be surprised to see future personal injuries claims adopting this method.

WISDOM OF THE ISSUE

You reap what you sow.

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