WISDOM

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Shipping

HKSAR v Kong Hing Agency Limited, HK Court of Appeal HCMA 144/2006 7 December 2007

The Appellant, Kong Hing Agency Limited, received instructions from a Wing Trans Limited, to arrange the shipment of water dispensers from Beijiao, to Inchon in Korea. The two containers were loaded, counted and sealed by the shipper. Neither the Appellant nor its subcontractor was instructed to take place in stuffing the containers or in supervising the loading of the same. The carriage was on "CY-CY" basis. The shipper and consignee stated in the Shipping Order were Wing Trans and a Korean company respectively.

The containers were first to be shipped to Hong Kong before transshipment to Inchon. The customs officials boarded the coaster in Hong Kong for inspection when she had arrived in Hong Kong from Beijiao. It was found out that the cartons on their face and the water dispensers contained the words "Made in Korea". The Magistrate convicted and fined the Appellant for attempting to import goods bearing a false trade description contrary to Section 12(1) of the Trade Description Ordinance ("TDO"). The appeal was heard by the Court of Appeal.

Held

A shipping agent as the Appellant in this case was an importer as defined under the TDO. In the normal course of a shipping agent's duties, it is not concerned with the goods at all other than as relating to their actual carriage, delivery or freight. Nor is a shipping agent concerned with the identity of the consignor or consignee, the quality of the goods or even what the goods are. The only relevant defence for this case is the reasonable diligence defence under the TDO. The word "reasonable" connotes an objective test taking into particular circumstances of the accused.

It was not in dispute that the Appellant did not have either actual knowledge or suspicion that the two containers carried the goods that bore or might bear a forged trade description. The Magistrate erred in ruling that the Appellant should have carried an inspection at loading or in Hong Kong by breaking the seal. In doing so, it might have caused civil liability to the carrier. Nor a shipping agent is required to supervise the loading of the cargo unless it is contractually instructed to do so. If shipping agents become aware of or suspects certain facts about the goods, they shall bear in mind under TDO that they are expected to take action and make further inquiries. The Court of Appeal in this case has linked the aspect of suspicion with the duties that could have reasonably expected of the shipping agents like the Appellant.

The Appellant has therefore made out a reasonable diligence defence. The appeal was unanimously allowed.

Insurance

Falcon Insurance Company (HK) Limited vs Cheshire Cat Restaurant & Pub Company Ltd. trading as Cheshire Cat Pub, HK District Court 20 November 2007

A fire broke out at the pub operated by the Defendant ("Cheshire Cat"). In 1998, Cheshire Cat was paid by the Plaintiff insurer ("Falcon Insurance") HK$ 491,453 under a fire insurance policy and the Defendant signed a subrogation letter in favour of Falcon Insurance. In 2003, the Defendant brought an action in the High Court against a security company for its losses suffered because of the fire. The suit was settled with the payment of HK$ 760,000. The Plaintiff claimed against the Defendant for the reimbursement of the insurance money from the settlement sum, since the Defendant has received more than the insurance money for its losses.

The Plaintiff argued that under the doctrine of subrogation, the Plaintiff was entitled under the policy and/or the subrogation letter to recover the said sum if the Defendant has recovered its losses from a third party to the same extent or more. In addition, by way of an oral agreement, the Defendant agreed to return to the Plaintiff the payment if it recovered the same or more from its intended action against the security company. The Defendant argued that it had suffered loss and damage close to HK$ 1.3M because of property damage (close to HK$1M) and loss of business, which is more than the total sum of HK$ 760,000 and HK$ 491,431, thus, it was not required to repay the sum even under the doctrine of subrogation. It also denied the existence of an oral agreement.

Held

The trial judge HH Thomas Au did not accept the Defendant's submission because the Defendant could not adduce any evidence on its profit, which the judge said "is crucial and fundamental to prove such a claim". Moreover, even if the accounting documents were lost in fire, it did not excuse the Defendant from adducing evidence such as calling directors to give evidence of monthly profit or to obtain a report of tax return from the Inland Revenue.

Furthermore, the judge accepted the Plaintiff's submission that the loss was likely to be no more than HK$ 760,000 because based on the Defendant's own contractors' valuation, the cost of reinstating the pub was HK$751,008 and the Defendant in fact accepted the settlement sum of HK$ 760,000 both were not more than HK$ 760,000.

As the judge pointed out that "It is well established that the doctrine of subrogation in insurance law requires one to imply in contracts of insurance such terms as are necessary to ensure that, notwithstanding that the insurer has made a payment under the policy, the assured shall not be entitled to retain, as against the insurer, a greater sum than what is ultimately shown to be his actual loss." The effect of the doctrine is taken place in this case because it is not disputed at trial and parties have signed a subrogation letter.

Therefore, the judge applied the doctrine of subrogation and granted judgment in favour of Falcon Insurance in the sum of HK$ 491,453 with interest.

Personal Injuries

Cheung Kai Chi, Administrator of the estate of Cheung Kin Keung, deceased v. Chun Wo Contractors Limited & Chun Wo Foundations Limited, HK Court of Appeal CACV 98/2006 29 November 2007

The Deceased was a welder of the 2nd Defendant for 7 years prior to the accident. At the time of the accident, he was a welder ganger. The 1st Defendant engaged the 2nd Defendant for the foundation and piling work at a Site. The Deceased and his gang had been doing welding work at a drill head on the Site for several days before the accident. On 13 March 2002, the Deceased was found lying on the ground between the rear of a crawler crane (not equipped to give any audio or visual signals by way of warning) and the drill head.

There was no eye-witness to the accident. He was not doing any welding work when the accident occurred as from the position of the welding equipments. Upon arrival at hospital, he was certified dead.

At the First Instance, the trial judge held that on a balance of probabilities, the Deceased was examining the drill head when the crane carriage slew around and crushed him at the back. The Deceased knew or ought to have known that "*the gap between the rear of the crane and the drill head was a risky place. If it was really necessary for him to inspect the drill head at that time, he should have told the crane operator to stop working for a while and not to resume until he had finished with his inspection. An employee whilst discharging his duties to the employer also owes a duty of care to himself*". The Deceased was found to have breached the aforesaid duty and have 25% contributory negligence. The Plaintiff then appealed against both the finding of contributory negligence and quantum.

Held

The trial judge failed to have regard to the fact that the works on the Site were being carried on in a highly dangerous manner as evidenced in the Fatal Accident Report dated 15 August 2002 that the workers had to escape from time to time to avoid dangers arising from the slewing motion of the crane, the highly unsafe system of work at the Site and the burden of proof of contributory negligence was on the defendants.

As the trial judge rejected the defence that the Deceased willfully and without reasonable course did something likely to endanger himself, it was probable that "*the Deceased was crushed to death when he was examining the welding work at the drill head and that he drifted too close to the gap between the carriage and the drill head due to momentary inattention or carelessness. On the authorities, a worker would normally not be regarded as guilty of contributory negligence in such circumstances*". Hon Tang VP said that "*the primary duty to provide a safe working place is on the employer, a worker who consents to work or continues to work in an unsafe working place should not normally be regarded as being liable for negligence. If the court is too ready to find contributory negligence it might encourage employers to be less careful, and their insurers to be less eager to insist on compliance with industrial safety*". Appeal against the finding of contributory negligence is thus allowed by a majority.

Hon Yuen JA (dissenting) said that the Deceased was not a novice on the construction site and he should be aware of the dangers posed by the crawler crane, in particular when he made the fatal mistake of putting himself between the crawler crane and the drill head. Also, there was nothing to indicate that he could not instruct the crawler carne operator to pause in its operation so as to facilitate his work. There was evidence to support the trial judge's finding of contributory negligence and no exceptional circumstances to justify an appellate court's interference.

WISDOM OF THE ISSUE

Parents are the pride of their children.

(Proverbs)

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