WISDOM

TSUI & CO solicitors

Personal Injuries

Waan Chuen Ming v Lo Kin Nam trading as Kar Kin Engineering & Supplier Co. (D1) & Luen Hing Fat Coating & Finishing Factory Limited (D2), Court of Appeal (Hon Tang VP, Cheung JA and Stone J) CACV 281/2008, 12 May 2009

The Plaintiff was an employee of the 1st Defendant. The 2nd Defendant was the operator of a factory. The 2nd Defendant engaged the 1st Defendant to do repair and maintenance work for the stentering machine at its factory. The machine had a detachable calendaring unit ("the Unit") and was about 1.5 tonnes in weight.

The repair work required the Unit to be detached and removed from the stentering machine so that repair and maintenance can be done on the Unit. After the Unit had been detached, the Plaintiff and the 1st Defendant used a pallet jack and a roller bearing trolley to transport the Unit. After having it repaired, they had to push back the Unit into its original position within the machine and a second pallet jack was used.

At the time of accident, the Plaintiff heard the 1st Defendant said that the forks of the second pallet jack would not rise. The Plaintiff then came over to the front. At that moment the Unit began to topple towards the Plaintiff and the 1st Defendant. The Plaintiff tried to push back the Unit with his hands but it was too heavy for him and as a result the Unit fell on top of him and crushed both of his legs.

At the first instance, the trial judge found that the 1st Defendant as employer of the Plaintiff had failed to provide a safe system of work for the Plaintiff in that (i) the pallet jack was only 1.5 metres but the Unit was 2.5 metres long, (ii) the Unit was some 1.5 tonnes in weight with a cylinder of some 500 kg at the top part of it and having it transported on the pallet jack must result in being top heavy thereby increasing the risk of its toppling over, (iii) no steps were taken to secure the Unit in any manner whatsoever; and (iv) a makeshift system without any proper regard to safety measures.

As for the 2nd Defendant the trial judge found that by permitting its pallet jacks and bearing trolley to be used for the unsafe system of transportation together with the failure to stop such unsafe system of transportation as being a breach of the common duty of care owed by the 2nd Defendant to the Plaintiff in respect of this accident. The 2nd Defendant was found liable to the Plaintiff for the accident, being in breach of the common duty of care under the Occupiers Liability Ordinance. The 2nd Defendant appealed against liability.

Held

By a majority, the appeal was dismissed.

Hon Cheung JA adopted the three criteria approach in *Bottomley v Todmodern Cricket Club* [2003] EWCA Civ 1575. First, the injuries suffered by the Plaintiff were foreseeable because of the dangerous operation. Second, there was the requisite proximity between the 2nd Defendant and the Plaintiff who was lawfully on its premises. Third, it is fair, just and reasonable to impose liability on the 2nd Defendant because it had allowed and did not stop the dangerous event to take place on its premises. Hon Tang VP agreed with the analysis of Cheung JA that a clear case of negligence was made out against the 2nd Defendant as a joint tortfeasor and the appeal should be dismissed.

Hon Stone J held a minority view and found that the accident as occurred had nothing to do with the premises themselves. It was transpired not by reason of the use of the premises but from the manner in which the work in question was carried out upon those premises. It is trite law that use of an independent contractor precludes vicarious liability ensuring to the person who retained the services of such contractor. Therefore unless this was one of those tasks which is regarded by law as intrinsically "non-delegable", the fault of such contractor does not permeate through to the party which retains that contractor. Stone J, in his view, held that "as a matter of policy and principle our law does not make, nor indeed does it seek to make, the employer of an independent contractor effectively the insurer of that contractor should anything go amiss in the performance of an normally delegable task which that contractor is retained to carry out, and if this be correct, it follows that, with respect, the majority conclusion that liability to the Plaintiff thus can be founded against his employer, the 2nd Defendant, is not one to which I feel able to subscribe."

Insurance

Farman Khan (Applicant) v Shun Sum Engineering Company (Respondent) & Bank of China Group Insurance Co. Ltd. (intended Respondent), District Court (HH Judge Lok) DCEC 89 / 2008, 19 December 2008

The Applicant was injured in a work accident and claimed for employees' compensation. The Respondent, the employer of the Applicant, acted in person disputing liability. Bank of China Group Insurance Co. Ltd. ("BOC"), the insurer of the employees' compensation policy taken out by the Respondent, disclaimed liability for reason that the policy only covered "2 site supervisors" (non-manual work) which the Applicant did not fall within the category of site supervisor. The Applicant thus made application to join BOC in the proceedings as additional respondent on the ground that BOC would be liable to pay employees' compensation under the provisions in Part IV of the Employees' Compensation Ordinance ("ECO").

Held

The Court dismissed the Applicant's joinder application.

Part IV of the ECO imposes an obligation on the insurer to pay employees' compensation to the injured employee provided that certain conditions are met. In considering the application for joining the insurer by the employee in the proceedings, the Judge considered that three issues are relevant and held that:-

(1) applying the dicta in the Court of Appeal case, *Pang Wai Chung v The Tai Ping Insurance Co. Ltd.*[1999] 2 HKLRD 354, the time for the accrual of the right of the employee in bringing a Part IV claim was only after the quantification of the compensation against the employer, such right derives from section 43(1) and 44(1) of the ECO. Section 44(2) and 44(3), on the other hand, deal with procedures only;

(2) it was not appropriate to join the insurer in the proceedings as there was no common issue in the employees' compensation claim and the Part IV claim. The presence of the insurer is not necessary for the court to make a determination of the issues relevant in the employees' compensation proceedings; and

(3) on jurisdictional issue, once a Part IV claim is regarded as a claim for compensation under the ECO, the District Court will have exclusive jurisdiction over such claim by virtue of the provisions in section 18A and 21 of the ECO (*the obiter dictum*).

Shipping

Carewins Development (China) Limited (Plaintiff) and Bright Fortune Shipping Limited (Defendant), Court of Final Appeal (Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Litton NPJ and Mr Justice Gault NPJ) FACV 13/2008 and FACV 14/2008, 12 May 2009

The shipper had not been paid and the consignee did not have an original bill of lading but received the cargo because the carriers made delivery without presentation of original bills of lading.

The carriers put forward two defences. First, they said that since the bills of lading concerned were "straight" bills, presentation was unnecessary. Secondly, they said that if presentation was necessary, they were protected by a clause which excluded liability for misdelivery whether or not negligent.

At the first instance, the trial judge held that delivery of the goods by the carriers without presentation of the straight bills of lading amounted prima facie to a breach of the contract of carriage but that the exemption clause contained in the bills of lading operated to exempt the carriers from liability. The shipper's claim was dismissed.

The Court of Appeal allowed the appeal by the shipper and held in favour of the shipper that delivery without production of the straight bills was a breach of contract and conversion, and that the exclusion clause did not exempt the carriers from liability.

The carriers appealed to the Court of Final Appeal.

Held

The appeal of the carriers was dismissed.

The Court of Final Appeal upheld the lower courts' decisions on the issue of presentation of straight bill. Mr Justice Bokhary PJ held that the delivery only upon presentation of bill of lading is an implied term of a contract between shipper and carrier and is a main object of the contract, whether "order" bill or "straight" bill. Mr Justice Ribeiro PJ in delivering the leading judgment held that "save for the absence of onward negotiability, a straight bill of lading has the same characteristics as an order bill. It is in my view clear that the requirement of delivery only against production of the bill of lading is a cardinal purpose of both straight and order bills. This is so since the presentation rule underpins the ultimate purpose of the contract which is for the cargo to be delivered to the person properly entitled to receive it. It would be hardly be performance of the contract for the carrier to take the cargo all the way to the destination only to deliver it there to someone not authorized to receive it, having failed to require that person to produce the "key to the warehouse"." He also added that save in exceptional circumstances the presentation rule applies to a straight bill of lading even if it contains no attestation clause.

The Court of Final Appeal also upheld the Court of Appeal's decision that the exclusion clause in the bill of lading did not exempt the carriers from liability for a conscious delivery to a recipient without presentation of an original bill of lading. Mr Justice Bokhary PJ pointed out that "where a term goes to a main object of a contract, the surest way to exclude liability for its breach is of course to do so by a specific rather than general form of words." In these cases, ambiguity defeats the carriers' reliance on the exclusion clause which they invoke.

WISDOM OF THE ISSUE

A good name is rather to be chosen than great riches…

~Proverbs

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