WISDOM

TSUI & CO solicitors

Shipping

Mau Wing Industrial Limited v Ensign Freight Pte Ltd and other, HCCL 27 of 2008 (Hon Stone J, 9 September 2009

The principal question to which the Court is concerned in this action is whether the contractual carrier, which admitted to be liable for breach of contract for delivery of cargo without presentation of an original bill of lading, is entitled to limit its liability by reference to a clause within the terms and conditions on the reverse of the bill of lading containing or evidencing the contract of carriage.

The Plaintiff engaged the 1st or 2nd Defendants to carry 3 containers of garments from Singapore to Felixstowe. The 1st and 2nd Defendants were related companies which carried on business as freight forwarders. There was no dispute that carrier under the contract of carriage in question either was the 1st or 2nd Defendant. The goods were delivered to the buyer without production of an original bill of lading, but against a letter of indemnity obtained by the Defendants' agents from the buyer. The buyer was insolvent while the Plaintiff has not been paid the price. Hence, the Plaintiff claimed against the Defendants.

<u>Held</u>

There was a clause in the Bill of Ladings to limit the liability of the carrier howsoever arising to US$500 per package or US$2 per kg of the goods misdelivered, whichever is the lower. The Defendants' counsel argued that the words of the limitation clause were clear and unambiguous: reading the bill of lading contract as a whole, it clearly provided that in all cases "howsoever arising". He further submitted that the attitude of the courts towards limitation clause was not as hostile as towards exclusion clauses attempting to exclude liability. The limitation clause was not unreasonable *per se* – that freight forwarders arrange carriage on vessels all for a remuneration which is very small when compared with the value of the goods they arrange to ship. It was always open to that shipper to make declaration of value under the bill of lading. However, the Judge found that it would seem nonsensical were a construction of the contractual clauses in question to result in a situation whereby the entirely advertent misdelivery of the goods against, not an original bill of lading but in lieu thereof a letter of indemnity, was to be regarded as an act subject to a contractual limitation of liability clause. If the contractual Carrier wished this to be the result, it would have to say so in the bill of lading contract in the most explicit language. The taking by the Defendants' agent of the letter of indemnity in exchange for delivery of the goods without production of an original bill of lading indicated that it clearly was understood that such act exposed the Defendants to the risk of a claim by the holder of the bill of lading. Therefore, the Court found in favour of the Plaintiff and held that the 1st Defendant was liable to the Plaintiff for the invoice value of the goods.

Personal Injury

Law Ping Leung by Siu Siu Wa, his wife and next friend v Ng Sze Pong, HCPI 601 of 2008 (Recorder Benjamin Yu, S.C., 11 September 2009).

The Plaintiff was knocked down by a public light bus ("PLB"). The Defendant was driving the PLB on Sai Sha Road towards Sai Kung. According to a witness statement of a passenger on board the PLB, the Plaintiff, who was already on the vehicular road, walked ahead without looking towards the side of the PLB.

The witness said that even when she was able to see the Plaintiff, the Defendant did not slow down, and the PLB continued to move slowly. The Plaintiff did not pay attention to the PLB, the PLB continued to move on and hit the Plaintiff. Both liability and quantum were in dispute.

The Defendant was convicted on his own plea of careless driving. On liability, the Defendant argued that (i) although the evidence suggested that the Defendant became aware of the presence of the Plaintiff later than the passenger, this does not per se justify a finding that the Defendant failed to keep a proper lookout; (ii) even if the Court were to find that the Defendant was negligent, there is no causation as the accident was inevitable.

Held

As to the first point, the Court held that a reasonable prudent driver would have noticed the Plaintiff much earlier and that the Defendant has failed to keep a proper lookout. The failure resulted in his not taking notice of the Plaintiff until it was too late for him to brake or to sound the horn or take effective measure such as swerving to avoid collision. Concerning the second point, the Court held that the position of the bloodstain on the police sketch suggests that the Plaintiff had been walking for a few meters outside the railing before he was knocked down. The Recorder did not accept that the collision took place almost immediately after the Plaintiff stepped out on to the road and is satisfied that the Defendant's negligence in failing to keep a proper look out was a main cause of the accident. However, the Plaintiff has plainly failed to exercise reasonable care for his own safety by walking outside the railing on the roads with his back to the traffic. The Recorder thus held that the Defendant was 75% to blame.

On quantum, the Plaintiff was unconscious with a Glasgow Scale score of 7/15 on admission. He had multiple lacerations over the limbs, his left eye and left knee. He only regained consciousness after about 10 days. He had fractured right clavicle together with bilateral lung contusion with pneumothorax. He had skull base fracture. Emergency burr hole operation for intracranial pressure monitoring and clot evacuation were performed. After operation he stayed in intensive care unit for 2 weeks. The Plaintiff's thinking process and memory have been substantially impaired. His response to verbal communication is slow and sometimes irrelevant. Memory is poor. Though he managed normal daily living by himself, he has to be accompanied when going outdoors because his sense of direction is poor. Considering the orthopaedic injuries, cosmetic impairment and neurological injuries and impairment, the Court awarded $1,100,000.00 for PSLA.

Section 20C of the Law Amendment and Reform (Consolidation) Ordinance creates a cause of action for damages for loss of the injured person's "society". In *Chan Yuk v. Dragages et Travaux Publics (HK) Ltd. [2000] 2 HKLRD 795 (and on appeal [2000] 3 HKLRD 1)*, the Court awarded loss of society short of the maximum in a case where the injured person had a change of personality. Seagroatt J described the wife as having suffered the loss of society "to a significant extent". Instead of the normal society and kindly companionship, the plaintiff had become a mentally damaged man, with physical problems which rendered him dependent on the wife. On appeal, it was merely to correct the error of the judge wrongly taking the maximum as $40,000, instead of $150,000.

The Recorder found the present case a total loss of society insofar as the Plaintiff's wife has been deprived, by reason of the accident, of her enjoyment of sex with her husband and awarded $100,000 under this head.

Other heads of damages are quite standard.

Insurance

The New India Assurance Company Limited v Dewi Estates Limited (D1), Lau Kwok Kow trading as Lau Kwok Kow Plumbing Engineering Company (D2), Wong Wai Man Raymond trading as Vinsen Engineering Company (D3), HCA 508 of 2007 (Hon Reyes J, 14 September 2009)

D3 was the main contractor for plumbing work at D1's premises, D2 was D3's sub-contractor and employed Chan Chi Ming ("Chan") as a plumber. Chan was injured by an accident at work and claimed employees' compensation and damages. The Plaintiff, as assignee of the rights and obligations under the Policy concerned, took over the proceedings initiated by Chan against D2 and D3 and paid $900,000 in settlement of the personal injuries claim. The Plaintiff also paid to Chan $355,816 as employees' compensation. D1 was not a party to those proceedings.

The Plaintiff in this action contended that there were breaches by the Insured (i.e. D1, D2 and D3) under the Policy, and therefore claimed against D1, D2 and D3 for an indemnity in respect of the said $900,000, $355,816 as well as the legal costs and expenses incurred amounting to $564,231, which the total sum was over $1.8 million.

D1 applied to strike out the Plaintiff's claim as misconceived.

Held

Firstly, Endorsement W32 under the Policy, which provided that the Plaintiff was not liable for any claim in connection with work at a height exceeding 30 feet above ground. The trial judge Reyes J. found that Endorsement 232 did not apply as the Schedule to the Policy did not set out or specify Endorsement 32 as being applicable to the Policy.

Secondly, the Plaintiff asserted that there was late notification of the accident by D2 or D3 and of no notification of D3's guilty plea of his prosecution by Labour Department, which are breaches of conditions under the Policy. The judge found that the Policy itself expressly identified D1 as having a separate and distinct insurable interest. Where a policy was composite, the misconduct of one insured, would not affect the entitlement to insurance of another insured. Given the composite nature of the Policy, such breaches by D2 or D3 (if the assertion is right) could not be a basis for the Plaintiff denying insurance coverage to D1. Further, D1 was not a party to D3's prosecution, there would have been no obligation on D1's part to inform the Plaintiff of the same.

Thirdly, assume that D3's guilty plea was made in breach of the Policy. Even then, because the Policy is composite, D3's alleged wrong could not have affected D1's entitlement to insurance under the Policy.

The judge thus found that the Plaintiff's claim against D1 was not viable, which should be struck out and the action by the Plaintiff against D1 should be dismissed.

WISDOM OF THE ISSUE

Happy is the man who finds wisdom; and the man who gains understanding.

~Proverbs

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