Shipping

Parakou Shipping Pte Limited (Plaintiff) v Jinhui Shipping and Transportation Limited (1st Defendant) and others, CACV 225 of 2010, Court of Appeal (on appeal from HCAJ 184 of 2009), judgment on 30 November 2010

The Plaintiff's claim against the Defendants was for a declaration that it was entitled to be indemnified and for damages in the event that it was held liable to Galsworthy for a wrongful repudiation of a charterparty. Galsworthy, which was a wholly subsidiary of the 1st Defendant, commenced an arbitration against the Plaintiff in London in February 2009 ("London Arbitration"). Other defendants were all wholly owned subsidiaries of the 1st Defendant. Galsworthy's case was that the Plaintiff had concluded a fixture through the agency of one Mr. Jin of Ocean Glory Shipping Ltd ("Ocean Glory"). The arbitrators held that Mr. Jin had not been authorized by the Plaintiff to enter into the charterparty on its behalf with Galsworthy but the Plaintiff had subsequently ratified the unauthorised act of Mr. Gin and had thereby concluded a fixture with Galsworthy on the terms of the clean fixture recap dated 18 June 2010. The arbitrators made and published their award on 31 August 2010.

At trial, Reyes J had struck out the Plaintiff's claim as an abuse of process because it is a collateral attack on the outcome of a London Arbitration. The Plaintiff's claim was secured by a bank guarantee dated 2 September 2009 in South Africa following the arrest of a vessel there and then by a sum of US$44,412,905 paid into Hong Kong court in early September 2009. An Order Nisi made by Reyes J in his judgment provided for the payment out of the security to be stayed for 28 days which was further extended by consent to 4 November 2010. The Plaintiff lodged a notice of appeal and then applied for a stay of the Order Nisi, which Reyes J refused a stay pending appeal and ordered that the sum (less US$1,500,000) in court be paid out to the 2nd Defendant ("11 November 2010 Order").

The Plaintiff thus applied for a stay of the 11 November 2010 Order.

Held

The Court of Appeal (CA) placed substantial weight on Reyes J's agreement to the Defendants Counsel's submissions that based on the arbitrator's finding of a binding charterparty, the Plaintiff had to establish, not only that there were misrepresentations by the Defendants, but also that the Plaintiff had not ratified the charterparty, which was well-nigh impossible. It was at the end of the day an attempt to re-litigate what had been decided against in the arbitration by obtaining from the Court a fundamentally different conclusion.

The CA accepted Reyes J's observation that there was no blanket rule to prevent an application of the principle of abuse of process when at least one of the proceedings involved an arbitration.

The Plaintiff could make payment into the Court, for what it was ordered to pay Galsworthy in the arbitration, to provide security for itself. The CA rejected that there was common intention between the Plaintiff and the Defendants that the security should remain in court as security in the event of any appeal by the Plaintiff.

The CA refused a stay as the Plaintiff failed to show that the appeal has good prospect of success.

Personal Injuries

Luen Hing Fat Coating & Finishing Factory Limited (Appellant) v Waan Chuen Ming (Respondent) (FACV No. 19 of 2009) (on appeal from CACV No. 281 of 2008), judgment on 21 January 2011

The Appellant was a factory operator and the Respondent was an employee to an Independent Contractor engaged by the Appellant. On around 10 June 2000, the Respondent and the Independent Contractor went to the Appellant's factory premises to repair a unit of a machine. In so doing, the unit fell on and crushed the Respondent's legs.

It was undisputed fact that the Independent Contractor was competent and that the Appellant had exercised due diligence in selecting a competent Independent Contractor. The work to be done was simple and the equipment provided by the Appellant to the Independent Contractor was not intrinsically faulty. Nevertheless, it was established that a supervisor of the Appellant knew or ought reasonably to have known that the Independent Contractor had history of using the equipment supplied to conduct the work in an unsafe manner. The Appellant was found liable under the Occupiers Liability Ordinance in the first instance and was affirmed by a majority in the Court of Appeal ("CA") which the Appellant was also found liable in negligence. The Appellant appealed to the Court of Final Appeal ("CFA").

Held

At trial, Suffiad J held in favor of the Respondent on basis of occupiers' liability. The Appellant appealed to the CA and the Respondent filed a respondent's notice asking the CA to hold that at common law the Appellant was a joint tortfeasor with the Independent Contractor. The CA (with Stone J dissenting) affirmed the trial judge's decision in favor of the Respondent and found that a clear case of negligence was made out against the Appellant as the joint tortfeasor for the following reasons. The trial judge's reasoning for breach of common duty of care by an occupier was equally applicable to that based on joint tortfeasor. There was in existence of the requisite proximity between the Appellant and the Respondent because the Respondent was lawfully in the Appellant's premises. The injuries suffered by the Respondent were foreseeable because the operation was dangerous. It was fair, just and reasonable to impose liability on the Appellant because it had allowed the dangerous operation to take place in its premises while doing nothing to prevent it. In expanding the element of proximity, CA judges further considered that the Appellant had participated in creating the dangerous situation by lending the Independent Contractor the equipment used in the dangerous operation.

The Appellant appealed to the CFA. The CFA judges unanimously dismissed the Appellant's appeal and upheld the previous decision. In the CFA judges' view, persons are said to be joint tortfeasor when their respective shares in the commission of the tort are done in furtherance of a common design. The fact that the Appellant lent the equipment to the Independent Contractor in this case provided that basis.

In analyzing the existence of the duty of care owed, the CFA reviewed various well-known authorities in this respect and recognized the importance to include the fair, just and reasonable criterion as an intrinsic element of the duty of care. While paying regard to the importance of predictability and continuity, the CFA judges emphasized that the courts will develop the common law to provide such fresh and adapted solutions as may be needed to cope with new problems as and when they emerge.

Insurance

Durham v BAI (Run Off) Ltd, Court of Appeal (Civil Division) (on appeal from Queen's Bench Division), judgment on 8 October 2010 (UK cases)

There were employers' liability insurance policies in force when the employees were exposed to asbestos dust. However, they were not in force when mesothelioma developed decades later. When the employees died and their families claimed compensation, the respondent employers sought to be indemnified under the policies from the appellant insurers.

Although each policy contained different wording, they either covered the employers for "injury sustained" or "disease contracted" by "employees in the course of their employment" during the policy period. The crucial question was whether the insurance policies were triggered at the time the disease was caused, i.e. when the asbestos dust was inhaled, or instead at the time of the onset of the disease.

In the first instance, the High Court disagreed the appellant insurers' view that injury was only sustained or disease only contracted when the employees actually suffered it and not at the period of exposure. The High Court ruled that, whilst there was no injury at the time the asbestos dust was inhaled, it was only consistent with public policy and the courts' approach in ensuring that employees could look to insured employers, to construe the words "contracted" and "sustained" as meaning "caused" or "be caused". This meant that the policies covered the period of inhalation or exposure to asbestos dust and not when the tumour started to develop. The appellant insurers were held liable to indemnify the respondent employers.

The appellant insurers therefore appealed against the High Court decision.

Held

The Court of Appeal (CA) allowed the appeal by majority (Rix L.J. and Burnton L.J.) and held that where the insurance policy was worded in terms of "injury sustained", liability was only triggered if the insurance policy was in force when the tumour developed, as that was when the injury was sustained.

The CA felt constrained by the duty to follow precedent in relation to "sustained" wording of which injury was sustained when it occurred. On that basis, "sustained" wording in an employers' liability insurance policy would render the same result as the "occurring" wording in the public liability insurance policy in Bolton. In relation to "disease contracted", the CA recognized that the word "contracted" was capable of referring to disease either in its origin or in its onset, and even in its progress. The combination of the phrase with "injury sustained" suggested that it was concerned with the onset of the disease, not with its origins. The commercial context was held to prevail and should be construed to mean the causal origins of the disease.

Smith L.J. (dissenting in part) said that the wording of the policies should be given the meaning as it existed at the time the contract was entered into. Thus, there was no difference in meaning between policies that used "sustained" and one which used "causation".

WISDOM OF THE ISSUE

All hard work brings a profit, but mere talk leads only to poverty.

~Proverbs

Contact Us

Mr. Sam Tsui, Partner
Tel: (852)2111 2180 Fax: (852)3100 0125
Email: sam.tsui@tsuico.com
Website: http://www.tsuico.net

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