WISDOM

TSUI & CO solicitors

Insurance

New World Harbourview Hotel Company Limited (1st Appellant) and others v ACE Insurance Limited (1st Respondent) and others, FACV No. 12 of 2011 (on appeal from CACV No. 97 of 2010), judgment on 9 February 2012

This case concerns about the construction of the terms of the insurance policies issued by the respondent insurers which covered for consequential loss of revenue resulted from "notifiable human infectious or contagious disease" ("the Clause"). The appellants sued on the policies to recover losses sustained from interruption of their business caused by Severe Acute Respiratory Syndrome ("SARS") in early 2003. The earliest of the losses claimed was 9 March 2003. However, SARS cases only became mandatory to be notified to the Government on 27 March 2003.

The appellants argued that the Clause means infectious or contagious diseases which are so serious as to warrant notification to the authorities. It would be satisfied by an administrative system or scheme of non-mandatory notification. The Clause should not be given a technical construction and should be construed *contra proferentem*.

The Court of First Instance (CFI) ruled that the word "notifiable" imports a legal or mandatory requirement to notify, so SARS only became a notifiable disease on 27 March 2003 and the appellants could not recover losses before that date. The Court of Appeal (CA) came to the same conclusion. The appellants appealed against the decision of the CA.

Held

The Court of Final Appeal (CFA) unanimously dismissed the appeal. First, the appellant's argument that the Clause signified an infectious or contagious disease so serious as to "warrant" notification suffers from the absence of a clear and objective criterion by which the disease can be determined as so serious as to be notified. Second, the administrative system or scheme posited by the appellants suffers from the weakness that it is based on a request rather than a requirement. A serious disease, is to be expected, would require notification. Third, there is no definition or description of the class of persons who are requested to notify the existence of the disease. Finally, there is a question whether the concept of notification of a disease contemplates a specific disease or a vague description.

The CFA placed substantial weight on the ordinary meaning of the word "notifiable" and held that it meant notifiable to an authority as a matter of mandatory legal obligation. The meaning is clear and certain. As there was no ambiguity, the *contra proferentem* principle would not apply. The CFA agreed that SARS only became a "notifiable" disease on 27 March 2003.

The CFA also considered when the coverage under the insurance policy in respect of the appellants' claim commenced and ruled that the appellants could only recover losses due to SARS from 27 March 2003 because before that date any loss caused by SARS was caused by a disease which was not notifiable.

Personal Injuries

Ho Foon Cheung (Plaintiff) v Shun Yip Engineering Company Limited (Defendant), CACV No. 33 of 2011 (on appeal from DCPI No. 1973 of 2009), judgment on 7 November 2011

The Plaintiff was a painter employed by the Defendant. On 12 October 2006, the Plaintiff was engaged to touch up the paint on a wall on the roof of a multi-storey building. There were two parallel cylindrical air conditioning pipes laid across the roof. In order to do his work, the Plaintiff had to get over the pipes to go from one side of the roof to the other. The top of the pipes were 750 mm above the floor and the diameter of each was 500 mm. After the Plaintiff had finished his work, he had to re-cross the pipes. While re-crossing, the Plaintiff stepped onto the convex surface of the pipes. He lost balance and fell onto the ground, fracturing his left femur.

The Plaintiff sued the Defendant for negligence, complaining about lack of instructions and warning. Deputy District Judge Victor Dawes ruled that there was no breach of duty on the Defendant's part in failing to warn the Plaintiff of the existence of the pipes and the danger created by their presence. The Plaintiff's claim was thus dismissed.

The Plaintiff appealed against the decision.

<u>Held</u>

The Court of Appeal (CA) unanimously allowed the appeal. The main issue considered by the CA was whether the Defendant, being the employer, should have warned the Plaintiff against stepping onto the pipes.

At trial, the Plaintiff accepted that the pipes themselves did not create any hazard. It is also not uncommon for there to be pipes and other utilities on rooftops of multi-storey buildings. However, Tang VP said it was the fact that the Plaintiff thought the pipes posed no danger and chose to cross the pipes by stepping onto them which attracted the need for him to have been warned otherwise. The Plaintiff was not aware of the danger of stepping on the pipes. Quite the contrary, he thought it safe to do so. Also, although the pipes could be commonly found on the rooftops, that did not necessarily make them any less of a hazard or render it unnecessary for an employer to at least devise a safe system whether by warning, training or otherwise.

The Defendant argued that what the Plaintiff had to do, namely, touching up the paint on a wall, was straightforward and that he was familiar with the roof. However, the accident showed that at least the employer should have told the Plaintiff never ever to step onto the pipes, and to warn him of the danger of doing so. It was not disputed that the Plaintiff was an experienced painter but there was no evidence showing that he was experienced in dealing with the danger posed by the pipes. The Plaintiff had not been trained to handle such situation nor told that on no account should he attempt to traverse the pipes by stepping onto them. Tang VP said even if a hazard is obvious, an employer is not entitled to leave his employee to fend for himself. If a workplace contains an obvious hazard but the danger could be removed or reduced, by training, warning or otherwise, it is the duty of the employer to do so.

Another argument put forward by the Defendant was that the Plaintiff was preoccupied when he was crossing the pipes because he was thinking of his other unfinished work. The CA held that preoccupation and momentary inattention are to be expected from a workman especially when they thought they were doing something which was safe. It is not an excuse for an employer to say that the accident resulted from momentary inattention on the part of an employee. The employee should not have been put by the employer into the unsafe position in the first place.

Shipping

Chimbusco Pan Nation Petro-Chemical Co Ltd (Plaintiff) v The Owners and/or Demise Charterers of the Ship or Vessel 'Decurion' (Defendants), CACV No. 198 of 2011 & CACV No. 214 of 2011 (heard together) (on appeal from HCAJ No. 141 of 2010), judgment on 31 January 2012.

By a series of contracts, the Plaintiff agreed to sell and the Defendants agreed to buy bunkers for delivery to ships owned and/or chartered by the Defendants and/or in the possession or control of the Defendants. Bunkers were delivered by the Plaintiff to the vessel 'Decurion' owned by the Defendants and ten other vessels not owned by the Defendants at the Defendants' instructions. It was pursuant to a Service Agreement entered into between the Defendants and a third party that the Defendants ordered the bunkers for delivery to those ten other vessels. The Plaintiff commenced legal proceedings both under the *in personam* and *in rem* jurisdiction of the Admiralty jurisdiction of the High Court against the Defendants for the value of the bunkers.

As prescribed by Order 12 Rule 8 of the Rules of the High Court, Cap. 4A, a challenge by the Defendants of the *in rem* jurisdiction of the court can only be undertaken during the time limited for service of a defence. The Defendants applied to Reyes J for an extension of time to file the defence and contended that the *in rem* jurisdiction was wrongly exercised in respect of claim of bunkers delivered to the ten other vessels. Reyes J did not agree with the Defendants' argument and refused to grant an extension of time. As a result of the Defendants not filing the defence, a default judgment was entered against the Defendants. The Defendants appealed against both orders of Reyes J.

Held

The Court of Appeal (CA) unanimously allowed the appeal and held that Reyes J had erred in exercising his discretion in refusing to grant the time extension because he had failed to take into account relevant considerations.

Section 12B(4) of the High Court Ordinance, Cap. 4, provides that an action *in rem* may be brought against a defendant if it was:- (i) the owner; (ii) the charterer; or (iii) in possession or control of the vessel. The burden is on the Plaintiff who seeks to uphold the *in rem* jurisdiction to show that the jurisdiction exists.

Cheung JA said the Defendants were neither the owner nor the charterer of the ten other vessels. The only issue was whether they were in possession or control of them. Reyes J ruled that the Defendants had possession or control of those vessels because the Defendants ordered the bunkers for those vessels. However, the CA disagreed. Cheung JA said it was in performance of their duties under the Service Agreement that the Defendants ordered the bunkers for those vessels. The Plaintiff had not shown that the Defendants had an interest and benefit in those vessels, thereby making the Defendants in possession or control of them. The Defendants had shown a real prospect of success if they were allowed to defend the case.

Further, the CA said that the courts have to consider all the circumstances of the case and should not apply the procedural rules too rigidly or deprive an adjudication on the merits due to a procedural default too readily. The Plaintiff was not prejudiced by an extension of time being given to the Defendants. On the contrary, a refusal operates to the Defendants' prejudice because default judgment would be entered against them.

WISDOM OF THE ISSUE

Nothing will work unless you do.

~John Wooden

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