WISDOM

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Insurance

China Ping An Insurance (Hong Kong) Company Limited (Plaintiff) v Tsang Fung Yin Josephine (Defendant), CACV No. 179 of 2012 (on appeal from HCA No. 308/2010), judgment on 20 March 2013

On 1 June 2006, the Defendant completed a proposal to the Plaintiff for a motor policy for the period 1 June 2006 to 31 May 2007. The proposal stated that the Defendant agreed to accept a policy in the Plaintiff's "usual insurance policy form for this class of insurance." On the same day the Plaintiff issued a cover note to the Defendant, stating that "the risk is hereby held covered in terms of the Company's usual form of THIRD PARTY ONLY Policy applicable thereto for a period of 30 days …" The cover note was not replaced by a formal insurance policy until 4 July 2006 and not at this stage forwarded to the Defendant. The policy contained notice requirements in case of accident under general condition 18(b) and clause 14 stated the insurers had a right of recourse against the Defendant.

An accident occurred on 12 July 2006, the defendant completed the insurers' standard claim form and faxed it to the insurers' agent the following day. In the meantime, the Plaintiff sent the formal insurance policy to the Defendant on a date prior to 22 July 2006. On 20 March 2007, the Plaintiff repudiated liability on the ground that the Defendant breaching the said general conditions under the policy but took over any claims against the Defendant on a without prejudice basis. The Plaintiff then sought indemnity from the Defendant for the damages paid to the injured persons.

On 8 April 2011, the Defendant took out an Order 14A summons asking for the dismissal of the action on the basis that general condition 18(b) and clause 14 formed "no part of the contract of insurance between the parties at the accident". The application was succeeded before Master de Souza but his decision was reversed by To J on appeal dated 19 March 2012. The Defendant then appealed.

Held

Hon Cheung CJHC from the Court of Appeal considered that at the time of the accident, the parties relationships was governed by an interim contract of insurance. The Defendant declared in the Proposal that she agreed to accept the policy in the Plaintiff's usual policy terms for third party motor insurance. Hon Cheung CJHC applied *Wyndham Rather Ltd v Eagle Star & British Dominions Insurance Co Ltd (1925) 21 Ll L Rep 214* and held that it could not have been the insurers' intention to offer greater protection during the periods of interim insurance than during the period of full insurance.

Hon Cheung CJHC considered that the concerned cover note taken out by the Defendant contained express incorporation of the General condition 18(b) and clause 14 of the Policy, in the form stated therein "in the Plaintiff's usual insurance policy form for this class of insurance". As far as the form of words used was concerned, it was unnecessary to use the words "subject to" in order to incorporate the usual terms in the formal policy into the interim contract of insurance. In Hon Cheung CJHC's view, the wordings in the present case were one of express incorporation, therefore the general exemption in the policy formed part of the contract of insurance entitling the Plaintiff to repudiate liability. The Appellate Court disagreed with the decision in *Re Coleman's Depositories Ltd [1907]2 KB 798*, where the cover note in that case did not purport to incorporate the terms of the policy into the cover note, and the question was simply whether the assured was required to comply with standard terms of which it was unaware. Besides, Hon Cheung CJHC opined that the Defendant had every opportunity to find out the usual policy terms.

On Appeal, Hon Cheung CJHC dismissed the Defendant's application for appealing the judgment of To J.

Personal Injuries

Lee Mei Chun, the administratrix of the Estate of Tse Ting Chun (Plaintiff) v Republic of Philipines (1st Defendant) and others, HCPI No. 723 of 2013, judgment on 29August 2013

On 23 August 2010, a former senior inspector Rolando Mendoza of the Manila Police District hijacked a tourist bus carrying 25 people in an attempt to get his job back. Mendoza brandished a weapon and handcuffed the driver of the Hong Tai bus to the steering wheel and hijacked the bus. He claimed that he had been unfairly dismissed and that he wanted an opportunity to defend himself. After about 10 hours since the hijacking, negotiation broke down when the police arrested Mendoza's brother and thus incited him to open fire. Mendoza first killed Tse Ting Chun ("the Deceased"), the tour leader whom Mendoza had handcuffed to the handrail. Eight of the hostage were killed thereafter. Eventually, Mendoza was killed after a gun battle which took place for around 90 minutes.

The Plaintiff now claims for damages for injury, loss and damage under the Fatal Accidents Ordinance, Cap 22, and the Law Amendment and Reform (Consolidation Ordinance), Cap 23, that was allegedly sustained as a result of the negligence and/or breach of duty of the 1st to the 9th Defendants, their servants or agents. However the writs as issued from the Registry of the High Court were marked not for service out of jurisdiction.

The issue herein is whether the court should strike out the claims against the Republic of the Philippines on the ground that the Republic of the Philippines enjoys sovereign immunity.

Held

Hon Bharwaney J reached his decision according to the principle of sovereign immunity that one sovereign state will not assert its judicial authority over another and will not by its processes make the other sovereign state a party to legal proceedings against its will. It is a procedural rule to the jurisdiction of the court. Hon Bharwaney J opined that when sovereign immunity is applicable, the national court has no jurisdiction to exercise.

Hon Bharwaney J is bound by and agreed with the decision of the CFA in *The Democratic Republic of Congo v FG Hemisphere Associates*, where the law of People's Republic of China on state immunity has been the applicable law in the Hong Kong Special Administrative Region, and the doctrine of state immunity that is applicable is the doctrine of absolute immunity, not the doctrine of restrictive immunity. The fact that the applicable doctrine of state immunity is the doctrine of absolute immunity makes it incumbent on the court to be astute to ensure that its processes are not invoked to assert judicial authority over another sovereign state and to invoke Order 18, rule 19 of the Rules of the High Court, and the inherent jurisdiction of the court, to strike out such proceedings of its own motion.

According to Order 18 rule 19 of the Rules of the High Court and the inherent jurisdiction, the Court may, either of its own motion or on application, at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, on that ground that it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be.

In exercise of the Court's discretion under Order 18 rule 19, Hon Bharwaney J ordered to strike out the claims against the Republic of the Philippines in this action on the ground that the Republic of the Philippines enjoys state immunity. Further to this, Hon Bharwaney J directed that ex parte applications to serve the writs out of the jurisdictions on the 2nd to 9th Defendants should be filed within 42 days from 29 August 2013, with liberty to apply for further time with good reason advanced.

Shipping

Hua Tyan Development Limited (Plaintiff) v Zurich Insurance Company Limited (formerly know as Zurich Insurance Company) (1st Defendant) and Courtesy Insurance Consultants Limited (2nd Defendant), CACV No. 190 of 2009) (on appeal from HCA No. 480 of 2009), judgment on 12 August 2013

The Plaintiff ("the Insured") is a trader in timber, in shipping round logs from South East Asia to China. The ships were covered by marine cargo insurance obtained by the Insured through a broker. In 2004, the 2nd Defendant ("the Broker") was engaged by the Insured as its new broker. The Broker obtained insurance coverage from the 1st Defendant ("the Insurer") in respect of shipments of the timber. The vessel which carried the timber was MV Ho Feng No. 7 ("Ho Feng 7").

At the material incident, Ho Feng 7 sank and the timber was totally lost. Subsequently, the Insured claimed under the policy. The Insurer refused to pay, claiming that the policy was discharged because the Insured had breached a condition of the policy, namely "Warranted DWT not less than 10,000.00" ("the DWT warranty"). Ho Feng 7's DWT was 8,960.13 which was less than 10,000 DWT, therefore according to the Insurer, the Insured was not entitled to claim under the Policy. The trial judge, Chung J found for the Insured against the Insurer and gave judgment for the Insured against the Insurer for the insured amount.

Held

The trial judge considered that there was inconsistency between the terms of the policy, on the one hand, the policy was to effect coverage of the timber carried on Ho Feng 7 and, on the other hand, a warranty by the Insured that the vessel's DWT must be not less than 10,000. On that basis, it could not be the contractual intention for the policy to mean that, despite the payment of premium by the Insured, it could never take effect purely because the vessel named therein never fulfilled the DWT condition.

Hon Cheung JA from CA disagreed with the trial judge, and opined that the coverage of the cargo on board Ho Feng 7 and the DWT warranty are not inconsistent at all, because by the policy, the Insurer was to provide the coverage subject to the Insured giving the warranty that Ho Feng 7's DWT was not less than 10,000.

The Insured admitted that it knew the vessel's DWT. The trial judge accepted that the Ho Feng 7's actual DWT was readily available on the internet. The CA judge considered that while it may be said that the Insurer could have inquired into the matter, it is a different issue whether it should have so inquired. The CA judge considered the issue should be whether the Insurer should have inquired about the DWT. The CA supported Moore-Bick J in *Kingscroft Insurance Company Limited v. Nissan Fire & Marine Insurance Company Limited (No 2) [1999]* which makes it clear that the Insurer is not to be presumed to have knowledge of matters simply he had the means of ascertaining them by appropriate enquiry.

The CA unanimously allowed the appeal and the judgment entered against the Insurer were to be set aside. The Insurer can rely on the warranty and its breach to avoid liability. As the Broker had chosen not to attend the appeal, the judge made orders against the Broker in its absence and entered judgment against the Broker.

WISDOM OF THE ISSUE

He who answers a matter before he hears it,
It is folly and shame to him.

~Proverbs

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