WISDOM

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Shipping

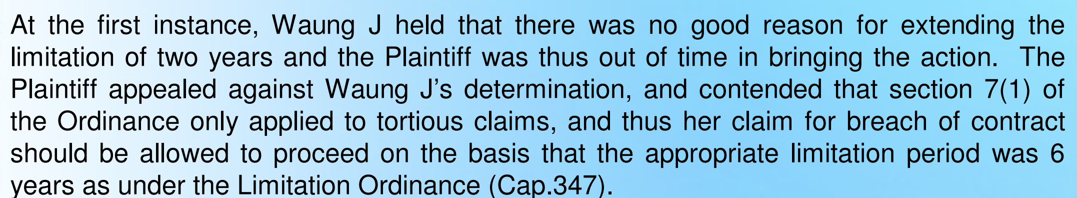
Chan Kwai Ha v Wong Chick Bun trading as Sang Ming Sing Motorboat Company, Hong Kong Court of Appeal (Ma CJHC, Stone J & Reyes J) CACV 200/2007, 1 February 2008

In August 1999, the Plaintiff's barge (the Tow) sank while being towed by the Defendant's vessel (the Tug). In April 2005, the Plaintiff issued a writ against the Defendant claiming damages for the loss of the Tow. The writ alleged "breach of contract on the part of the Defendant and/or negligent navigation and/or management of the Tug".

In his Defence, the Defendant contended that the Plaintiff's claim was time-barred by reason of section 7(1) of Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap.508) (the **"Ordinance"**), which states that, subject to any extension granted by the Court :-

"no action shall be maintainable to enforce any claim or lien against a ship or its owners in respect of any damage or loss to another vessel, its cargo or freight, or any property on board the vessel, or damages for loss of life or personal injuries suffered by any person on board the vessel, caused by the fault of the former vessel, whether such vessel is wholly or partly in fault, unless proceedings in the action are commenced within 2 years from the date when the damage, loss or injury was caused."

At the first instance, Waung J held that there was no good reason for extending the limitation of two years and the Plaintiff was thus out of time in bringing the action. The Plaintiff appealed against Waung J's determination, and contended that section 7(1) of the Ordinance only applied to tortious claims, and thus her claim for breach of contract should be allowed to proceed on the basis that the appropriate limitation period was 6 years as under the Limitation Ordinance (Cap.347).



Held

There was nothing in section 7 of the Ordinance indicating that it is to be construed as applying only to tort and not to contract. The word "fault" does not by itself normally connote a tortious (as opposed to a contractual) wrong. In Admiralty law, "fault" means blameworthiness and is not a term or art synonymous with tort. All actions for recovery of damages in collision cases are barred after an interval of two years from a casualty. In the maritime context canvassed by section 7(1) of the Ordinance, the word "fault" simply alludes to the causative nature of the act or omission complained of.

The Ordinance deliberately qualifies the possibility of contracts overriding the two-year time bar. Whether the two-year limit is or is not trumped by a contract is left to the Court's discretion. Under the Ordinance, the Court may only extend the time bar if the existence of a contract constitutes a good reason for doing so.

When the Court construes an ordinance in light of a convention, it must be the text of the Ordinance that ultimately governs, not that of the convention, as the Legislature may not have enacted a convention in its entirety, or a statute may modify the terms of a convention.

For the above reasons, the Plaintiff's action was out of time. The appeal was dismissed unanimously by the Court with costs to the Defendant.

Insurance

Chui Man Kwan v Bank of China Group Insurance Co. Ltd. (D) and Tugu Insurance Co. Ltd. (TP), District Court (HH Judge Mimmie Chan) DCMP 211/2008, 18 July 2008

The Plaintiff was injured and covered by an ECC insurance policy issued by Bank of China Group Insurance Co. Ltd. (**"BOC"**) in favour of Chak Luen Construction Co. Ltd. (**"CL"**) which was the employer of the Plaintiff. Tugu Insurance Co. Ltd. (**"Tugu"**) also issued an ECC insurance policy in favour of the Polytechnic University as principal and/or Vibro (Hong Kong) Ltd. as the principal contractor and/or any other subcontractors of any tiers. CL was a subcontractor of Vibro (Hong Kong) Ltd.. BOC claims contribution from Tugu in respect of a judgment entered against BOC.

The BOC policy provides, inter alia, that *"Other Insurance. If… there is any other insurance covering the same liability [BOC] shall not be liable to pay or contribute more than its ratable proportion of any such claims…"*

The Tugu policy contains a similar clause as above under the condition (D) of the Claims Settlement Conditions. Besides, an additional Memorandum B containing a non-contribution clause was contained in the Tugu policy : *"Notwithstanding claims settlement condition (D) of this policy, if… there is any other insurance indemnifying any person… who are entitled to be indemnified under this policy, this policy is not to be called upon in contribution and… is only to pay any amount if… not recoverable under such other insurance."*

Held

Tugu can rely on the Memorandum B and BOC is not entitled to any contribution in the present case. It is clear that the ratable proportion clause in Tugu policy is made subject to the non-contribution clause in Memorandum B in which the language itself is clear and BOC must take this clause as it finds it. The wording in Memorandum B is tantamount to providing for excess insurance and only covers any amount over and above that recoverable under any other insurance policy including the BOC policy in the present case. The Tugu insurance is not "insurance covering the same liability" within the meaning of the BOC's ratable proportion clause. As such, BOC is not entitled to rely on its ratable proportion clause to pay only its ratable proportion of the claim, but should fully indemnify its insured. As CL is entitled to full indemnity under the BOC policy, Memorandum B of the Tugu policy is not triggered so as to make Tugu liable to pay.

Counsel for BOC submitted, inter alia, that the present proceedings should follow *Weddell & Anr v Road Transport and General Insurance Company Ltd.* [1932] 2 KB 563 which held that the provisions are cancelled by each other such that Bank of China and Tugu should share liability for the claim on an equal basis. However, the Judge did not agree to this and found that in *Weddell* the court was endeavoring to avoid creating an absurd result whereby the insured would not be covered under either policy, when both the policies contained provisions which purported to exclude the insurer's liability to indemnify the insured in the event of the existence of some other insurance policy. In the present case, neither the BOC policy nor the Tugu policy has any clause which attempts to vitiate the policy if the insured is also covered by insurance under another policy.

Personal Injuries

Leung Po Chun v Yat Lee Booth Construction Co. Ltd (D1) & Hanison Construction Company Limited (D2), Court of Appeal (Tang VP, Yam and Stone JJ) CACV 399 / 2007, 6 June 2008

The Plaintiff had 20-year work experience in bamboo scaffolding. At the time of the accident, he had been employed as dismantler in bamboo scaffolding by the 1st Defendant for about 12 years. The Plaintiff and his co-worker were instructed to dismantle the "catch fences" which had been built at the base of the material hoist. The hoist comprised a platform for placing and transporting material. No person was allowed to enter the hoist. The catch fence of Block 5 was drooping down. The Plaintiff got into the hoist frame and climbed up in order to proceed to dismantle the catch fence. The hoist operator was unaware of the Plaintiff on the hoist and pressed the button to send the platform to a higher level. The platform struck the Plaintiff and the Plaintiff sustained serious injury to his right knee.

At the first instance, the trial judge referred to a Code of Practice for Bamboo Scaffolding Safety issued by the Labour Department, which requires that the work should be done by trained workmen under immediate supervision of a competent person. Neither the Plaintiff nor his co-worker had undertaken the required formal training courses. The Defendants adopted a laisse faire attitude as the Plaintiff was very experienced that he could safely be left to his own devices. However, the Plaintiff having entered the hoist frame without jamming the hoist door open at ground level and having put up a warning sign to the effect that work was in progress in the hoist frame. The Plaintiff must have realized the risk that he was running and despite that decided to take it. The Plaintiff was found to have 50% contributory negligence. The Plaintiff appealed against, inter alia, the findings of contributory negligence.

Held

The trial judge was wrong to have regarded that the Plaintiff had not jammed the door open as significant, but have attached insufficient significance to the fact that the Plaintiff should not have been left personally to improvise. The Defendants were totally unmindful of their obligations as employer, or as contractor responsible for the site, regarding the hazardous job of the dismantling of scaffoldings, and a 'drooping' one at that. The Plaintiff was sent to work or allowed to work without the required supervision by competent person under the Code. Thus, even if the Plaintiff could have faulted for not jamming the door could not be regarded as contributory negligence, and it is common sense that the requirement of a trained supervisor to provide immediate supervision was to ensure that even trained workman is not left to improvise. The fact that the Plaintiff had 20 years of experience as a scaffolder is irrelevant. The Court was mindful of the limited basis to interfere with the trial judge's apportionment of liability, as each case must depend on its own fact. The job of a bamboo scaffolder is specialized and highly dangerous. Appeal against the finding of contributory negligence is thus allowed that there was no contributory negligence on the part of the Plaintiff.

WISDOM OF THE ISSUE

But as for you, be strong and do not give up, for your work will be rewarded.

~Bible

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