WISDOM

TSUI & CO solicitors

Personal Injuries

Tamp Fu Yip Fip v. Sincere Engineering & Trading Company Limited, HONG KONG COURT OF APPEAL CACV 208/2007, 8 April 2008

The Plaintiff slipped from the top of a ladder and fell some 6 or 7 feet, landing on his leg and hip and sustained injuries at work while he was employed by the Defendant on 12 September 2002. The Plaintiff earned HK$14,300 per month at the time of the accident. He was granted a total 913 days of sick leave.

There was a disagreement between the parties' respective orthopaedics as to the appropriate length of sick leave. While the orthopaedics for the Plaintiff endorsed the sick leave in full without stating any reasons, the orthopaedics for the Defendant considered, after taking into account the nature of injury sustained by the Plaintiff, that a sick leave period of 90 days was reasonable. The orthopaedics for the Defendant also considered that the Plaintiff was grossly exaggerating his symptoms and that he sustained no more than a relatively minor soft tissue injury.

After trial, the trial judge expressed that the Plaintiff only suffered a minor soft injury in the fall and that the Plaintiff was an untruthful witness who had exaggerated his complaints. He was fit and able to return to his former employer no later than January 2003. Notwithstanding the aforesaid findings, the trial judge considered that there was no evidence adduced to suggest or imply that those who had granted the Plaintiff sick leave had done so improperly and thus there was an impediment for him to go behind the periods of sick leave given by the treating doctors.

As a result, the trial judge allowed the sick leave in full and the pre-trial loss of earning and MPF was calculated at HK$450,450. The Defendant appealed.

Held

It is the patient who makes the request for a certificate from the doctor and a doctor may, consistently with the code of practice, issue the certificate without carrying out any detailed examination as such an examination is not always practicable or necessary.

The Plaintiff has been found to have grossly exaggerated his complaints during the joint examination. It would be open to the judge not to disregard the possibility of the Plaintiff also having exaggerated his symptoms when he saw the treating doctors responsible for issuing the sick leave certificates.

Sick leave certificates are no more than a piece of evidence before the Court. The judge could not be bound by the mere issue of sick leave certificates. Logically, if the finding that the Plaintiff could have gone back to work after three months, that was the period relevant to the assessment and award of the pre-trial loss of earnings and no other.

Accordingly, the appeal was unanimously allowed. The pre-trial loss of earnings and MPF was substituted by a sum of HK$52,552.50, representing 3.5 months of loss of earnings and MPF.

Insurance

Anbest Electronic Limited v CGU International Plc (formerly General Accident Insurance Asia Limited), HONG KONG HIGH COURT HCCL 82/2000, 3 April 2008

The Plaintiff claims to recover under a contract of marine insurance covering electronic goods shipped from Hong Kong to Khor Fakkan in UAE, sold by the Plaintiff to First Star Electronics ("First Star") in UAE. The insurance covered all risks as per the Institute Cargo Clauses (A) dated 1 January 1982 ("ICC(A)").

Three sets of original bills of lading were sent to Habib Bank AG Zurich (Sharjah Branch) ("Habib Bank") as consignee under the bills of lading. A dishonest employee within Habib Bank sent one set of the original bill of lading, apparently "endorsed" by the bank, to First Star, with which First Star successfully arranged to transfer the subject containers, without the knowledge of the Plaintiff, from the container stack at Khor Fakkan port to Sharjah Terminal, where First Star collected the containers.

Proceedings was brought against Habib Bank in Sharjah but was dismissed. The Plaintiff commenced proceedings in Hong Kong under the insurance contract.

The defendant submitted numerous heads of defences, the more substantive ones include the following :-

The insurance cover terminated when the goods had arrived at the Khor Fakkan terminal, as this represented "the Consignee's or other final warehouse or place of storage" for the purpose of Clause 8.1.1 of ICC(A).

Alternatively, the insurance cover terminated when the goods commenced transit from Khor Fakkan terminal to the Sharjah Terminal, as Clause 8.2 of ICC(A) provides that if the goods "are to be forwarded to a destination other than that to which they are insured, … insurance… shall not extend beyond the commencement of transit to such other destination". The geographical limits of the cover extended only to Khor Fakkan, as named in the bill of lading as the port of discharge and the place of delivery. The loss took place when the goods were in Sharjah, when the cover had already terminated.

Failure to procure an appeal against the Sharjah judgment represented a breach of the Plaintiff's duty under Clause 16 of ICC(A) to minimize or avert loss.

Held

Upon arrival, the containers were placed in a terminal stack at Khor Fakkan port inside both the Customs and Port area. The containers were transferred from Khor Fakkan to Sharjah under Customs bond. A container in an open air container stack stored in Customs bond could not be characterized as a "final warehouse or place of storage".

The words "are to be forwarded to" within Clause 8.2 of ICC(A) referred to a pre-planned transit with the knowledge and consent of the assured. As the Plaintiff had no knowledge of the transfer from Khor Fakkan to Sharjah, the present case did not fall within Clause 8.2.

The goods only could have been moved to Sharjah upon the instructions of First Star upon presentment of original bill of lading and other shipping documents. There is an overwhelming inference that there was a pre-planned theft carried out by First Star. In the circumstances, the loss occurred upon the goods leaving Khor Fakkan.

Further, the instruction to transfer represented an act where First Star assumed the rights of an owner and amounted to an appropriation under the Theft Ordinance. Alternatively, the transfer of goods constituted a conversion by First Star. The loss thus occurred at Khor Fakkan during the pendency of the "all risks" cover.

In respect of the Sharjah proceedings, there could be no certainty that an appeal would be successful. The decision of the Plaintiff not to proceed with an appeal did not fall short of what a reasonable assured could be expected to have done, having regard to the interests of the insurers and of himself. Judgment was granted in favour of the Plaintiff.

Shipping

Northrop Grumman Ship Systems, Inc. v The owners and/or demise charterers of the ship or vessel "Asian Atlas", HONG KONG COURT OF APPEAL CACV 257/2007, 23 April 2008

The Ship "Asian Atlas" collided with a submerged submarine launchway belonging to the Plaintiff in Mississippi, and damage was caused to the Ship. The Ship was then subsequently sold to the Defendant. The then owners of the Ship commenced proceedings in US against the Plaintiff and the compulsory pilots on board the Ship for damages. The Plaintiff filed an in rem claim in US against the Ship for indemnity if it were to be held liable in the main action to the then owners on the basis that the accident was caused by the fault of the compulsory pilots, and thus the Ship under US law. The basis of the Plaintiff's indemnity is that if both the Plaintiff and the compulsory pilots are held liable to a percentage in the US main action to the then owners of the Ship, the Plaintiff seeks to recover from the Defendant any sum which it has to pay on behalf of the compulsory pilots when for any reason they have failed to satisfy their contribution to the judgment debt ("the Indemnity Claim").

The Plaintiff issued a warrant of arrest against the Ship in Hong Kong for such Indemnity Claim and for damage caused to the subsurface launchway ("the Damage Claim"). The Ship was released from arrest upon payment by the Defendant into court of USD4.5 million, in which USD4 million was attributable to the Indemnity Claim and USD500,000 was referable to the Damage Claim. The Defendant applied to set aside the warrant of arrest and for payment out on the ground that the Indemnity Claim did not fall within the jurisdiction of in rem action, specifically, section 12A(2)(e) of High Court Ordinance; as to the Damage Claim, there were material non- disclosure on the part of the Plaintiff. Wuang J. rejected both argument and dismissed the Defendant's application. The Defendant appealed to the Court of Appeal.

Held

Section 12A(2)(e) provides that "any claim for damage done by a ship". Adopting the principle in English case *The Rama* [1996] 2 LL. L. Rep.281, (1) the relevant damage must be caused by something done physically or directly by the ship herself in the course of her navigation or management: (2) the ship must be the actual or noxious instrument by which the damage is done; and (3) such damage must be caused to persons or objects external to the ship.

As regards the Indemnity Claim, the Court of Appeal held the 1st requirement is satisfied in that the relevant damage could be said to have been caused by the compulsory pilots for which the Ship would be responsible. The 2nd requirement is not satisfied because the damage damage was not caused directly or indirectly by the Ship as the actual or noxious instrument, but it would have been caused by the fault of the compulsory pilots. The Plaintiff also failed in the 3rd requirement because the damage was sustained by the Ship herself. The Court held that there was no jurisdiction to arrest the Ship in relation to the Indemnity Claim.

As to the Damage Claim which was within the ambit of Section 12A(2)(e), however, there was no evidence that any damage had been suffered by the Plaintiff, and no loss that had been quantified. Moreover, there had been a material non-disclosure of the fact that the Plaintiff's submerged submarine launchway, with which the Ship had collided, had not been used for a period of 36 years prior to the accident. The court might have taken the view that no real claim existed in the first place if such fact had been disclosed at the ex parte stage. The appeal was thus allowed.

WISDOM OF THE ISSUE

I hear and I forget. I see and I remember. I do and I understand.

Confucius

Contact Us

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

You received this email because we believed that you would be interested in the contents of Wisdom. If you do not wish to receive Wisdom from us, please reply to this message with "Remove" at the subject line.
The material produced herein is for information only. It is not intended to be legal advice. Please do not act or refrain from acting upon this information without seeking professional legal advice. Tsui & Co. does not warrant the quality, accuracy or completeness of any information in this newsletter.