Xu Jin Long v Nian Chuan Construction Pte Ltd
[2001] SGHC 325

Case Number : Suit 494/2001

Decision Date : 24 October 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Lin Shiu Yi (Hoh & Partners) for the plaintiff; Teh Ee-Von (Wong & M Seow) for the defendants

Parties : Xu Jin Long — Nian Chuan Construction Pte Ltd

Contract – Contractual terms – Employment contract – Exclusion clause – Whether clause limits employer's liability for personal injuries – Whether clause contravenes s 2 of Unfair Contract Terms Act (Cap 396, 1994 Ed) – Whether clause precludes plaintiff from suing in tort – Scope and interpretation of s 2(1) – s 2 Unfair Contract Terms Act (Cap 396,1994 Ed)

Damages – Measure of damages – Fracture of bone in heel – Fracture united but plaintiff predisposed to post-traumatic arthritis – Loss of flexion with residual pain and stiffness in foot – General damages for pain and suffering – Damages for loss of future earnings – Costs for future surgery

Damages – Measure of damages – Pre-trial loss of earnings – Plaintiff's duty to mitigate loss by returning to work – Burden of proving mitigation

Tort – Negligence – Contributory negligence – Personal injury during course of employment – Plaintiff ascending staircase which collapses – Lack of warning or barricades – Whether reasonable worker would use staircase – Whether plaintiff contributorily negligent

Judgment

GROUNDS OF JUDGMENT

1. This was an action by the plaintiff against his employers for damages for personal injury occurred in the course of employment. The plaintiff is from the village of Long Qiao in the province of Anhui, China where his parents and 33 year old wife earn a living as rice farmers. He has an eight-year old son. The plaintiff, now 33 years of age, was previously working as a construction worker in China earning S$350 a month. He came to Singapore in March 1999 to work because he was able to earn about S$1,200 a month here. He signed a contract of employment with the defendants dated 16 March 1999 as well as a document entitled "Worker's Letter of Guarantee" also dated 16 March 1999. These two documents are in English but a Chinese version of each was given to the plaintiff before he signed. The plaintiff's admitted this assertion of the defendants but he says that he had just arrived from China and there were about 30 workers being enlisted and each had a copy of the documents to sign. He read the Chinese version and signed because he did not want to be sent back to China. The defendants are relying on certain terms in these documents in their defence and I shall revert to these terms shortly.

2. About the time of the accident, the plaintiff was engaged to work at a site at Ang Mo Kio Avenue 8. He was given workers' accommodation at the site by his employers. He was housed together with other workers in make-shift dormitories constructed from containers - the sort that are used for the transportation of cargo in container-vessels. There were three rows of such dormitories. Each dormitory consisted of three containers arranged end-to-end and stacked three-containers high. Each dormitory had a corridor that ran along the length of the dormitory leading to a metal staircase which provided the sole means of access (and egress) to the dormitories on the second and third levels.

3. The plaintiff was walking up the metal staircase to his dormitory on the third level to collect some tools about noontime on 19 October 2000. At that time there were about seven other workers ahead of him. The plaintiff reached the staircase landing at the second level and was a few steps up the second part of the stairs when the staircase collapsed. He fell about five metres to the ground and injured himself. The defendants subsequently erected a wooden staircase in place of the collapsed one. The defendants raised two defences in respect of the issue of liability. First they say that the plaintiff was warned not to use the staircase as it was in the process of being dismantled to make way for a re-arrangement of that particular row of dormitory. Secondly, they raised a contractual defence by which they say that under the terms of the employment contract as well as the guarantee the plaintiff had undertaken and agreed not to pursue any common law claim against the defendants. I shall consider the contractual defence first.

4. The contractual defence was constructed around cl 25 of the employment contract as well as cl 15 of the guarantee. For convenience I shall set out these two wordy clauses in full as follows:

> "Clause 25. – While under employment, the employer shall provide labour insurance for each employee.
>
> > a. If the employee is disabled or seriously injured due to an industrial accident, the employer shall, in accordance with the local labour laws and insurance regulations, initiate compensation procedures with the insurance company. The amount received shall be handed to the employee himself or his immediate family after deducting the various actual expenses. The employer shall not be responsible for any compensation. The employee shall be responsible for providing information to be obtained from China required for the compensation procedure, while the employee shall be responsible for the validity of the information provided. If the employee is involved in accidents not covered by the said insurance, the employer shall not compensate for any economic losses arising out of the said accidents."
>
> "Clause 15. – If I am injured while working, the employer shall bear the medical expenses and I can take the number of days of sick leave as stated in the medical certificate. Wage payment during the period of sick leave shall be as per the stipulations in the labour contract. The employer shall undertake to initiate procedures for collection of compensation arising from injury, disability or death through industrial accident from the insurance company. The amount of compensation shall be handed over to me or my immediate family after deducting the relevant expenses. Regardless of whatever type of injury, disability or death incidents occurred, I undertake that my family members shall not come to Singapore for visitation or arrangement of funeral matters. If the occurrence of the industrial incident is due to me, the employer shall not be responsible for the medical expenses and shall also not be responsible to initiate procedure for collection of compensation. If there are differences in the determination of the industrial accident or the handling of the said incident, I undertake not to go to the related parties such as Insurance Company, Singapore's Ministry of Manpower etc. to directly point out my view or interfere the handling of the compensation and shall ask the site supervisor to convey my view to the employer company or go through my domestic foreign labour unit to resolve the

> matter and I undertake to follow the related contract articles in carrying out this work. My family and I undertake not to request for other compensation.
>
> 16. If there are differences in the collection of compensation or payment deducted on behalf etc, I undertake that I will not brought up the issue in Singapore or argue with the employer. I am willing to hold this issue till I return home and go through my domestic foreign labour unit to resolve the matter." (sic)

5. Miss Lin submitted on behalf of the plaintiff that the contractual terms referred to above are restriction of liability clauses and are unenforceable by reason of s 2 of the Unfair Contract Terms Act, Ch 396 which provides as follows:

> "(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness."

Miss Teh argued on behalf of the defendants that "Clause 25 merely provides that all claims for compensation will be made for the plaintiff to the defendants' insurer and that the claim will be made under the Workmen's Compensation Act." She then submitted that –

> "[h]ence, under this clause, when an industrial accident occurs and the plaintiff is injured the defendant will make a claim for compensation on behalf of the plaintiff. It is in this context that the sentence 'The employer shall not be responsible for any compensation' must be read."

6. In a sense Miss Teh is right. Clause 25 merely provides that the employer shall recover insurance payments on behalf of the workman. As such, it is not strictly, a restriction of liability clause. But the error of counsel lies in the erroneous assumption that the defendants' insurer is their alter ego against whom all claims for personal injury must be brought. An employer may insure himself against any liability in negligence or breach of statutory duty but that does not mean that once he covers himself or his workman the latter shall not be permitted to sue him in tort in respect of such liability. How can the defendant employer in such a case as the present resist a claim merely by saying that his obligation and liability lie only in "[making] a claim for compensation on behalf of the plaintiff"? On behalf of the plaintiff against who? The tort, if any, was committed by the employer not the insurer. Clause 15 is not much more helpful to the defendants and, as in cl 25, nothing in it suggests that the workman had given up his right to sue for negligence at common law. In any event, if it had, that would be contrary to s 2 of the Unfair Contract Terms Act and would be unenforceable. In my opinion, it will be a disservice to the draftsman of s 2 of the Unfair Contract Terms Act if, in interpreting it, one strays from the clear words, or to read a complicated meaning into those simple words, or to stretch or mutilate them in order to fit a factual situation that is otherwise clearly within its scope. It is clear that any contractual term that prevents a party from being sued in negligence for death or personal injury, is a restriction of liability under s 2 of the Unfair Contract Terms Act, and such a term is not enforceable.

7. Counsel referred to *Thomson v T Lohan* [1987] 2 AER 631 for the proposition that s 2(1) "was not concerned with arrangements made by a wrongdoer with others for sharing or transferring the burden

of compensating the victim" and that "cl 25 read with cl 15 operates merely to transfer the defendants' liability for compensating the plaintiff for his injuries to the defendants' insurer". With respect, the submission of counsel was based on a very small part of the judgment of Fox LJ and cited completely out of context. In the *Thomson* case the injured plaintiff sued his employer for personal injury and succeeded. There was no dispute as to that liability or that part of the judgment of the trial judge. The issue before the Court of Appeal was whether the employer was permitted to enforce a contractual indemnity against the third party who had hired the excavator from the employer. The plaintiff was assigned to operate the excavator as part of the terms of the contract for hire but remained at all times an employee of the defendant employer. The appeal concerned the defendant employer's third party claim against the hirer (third party). It was the third party who sought to avoid liability on the ground that the indemnity clause was void because it transferred liability to him in contravention of s 2(1). That argument was rejected by the trial judge as well as the Court of Appeal. The relevant part of the judgment of Fox LJ makes the point utterly clear:

> "The plaintiff has her judgment against [the employer] and can enforce it. The plaintiff is not prejudiced in any way by the operation sought to be established of condition 8 [the indemnity]. All that has happened is that [the employer] and the third party have agreed between themselves who is to bear the consequences of Mr. Hill's negligent acts. I can see nothing in s 2(1) of the 1977 Act to prevent that. In my opinion, s 2(1) is concerned with protecting the victim of negligence, and of course those who claim under him. It is not concerned with arrangements made by the wrongdoer with other persons as to the sharing or bearing of the burden of compensating the victim. In such a case it seems to me there is no exclusion or restriction of liability at all. The liability has been established by Hodgson J. It is not in dispute and is now unalterable." *ibid* at p. 638.

There is nothing in the employment contract or letter of guarantee in the present case before me that can be read as preventing the plaintiff from suing the defendant employer.

8. I come now to the issue of contributory negligence. The defendants adduced evidence through one of their supervisors, Li Kai Bin that on 19 October 2000 he had given instructions to demolish the said staircase and erect a new one in its place. On inspection at 11.30am he saw that part of the staircase had been taken down. He deposed in his affidavit that he gave instructions to cordon off the area to prevent workers from using it during the lunch break. The evidence from the plaintiff, which I accept, was that this instruction was not carried out and during the lunch break the plaintiff and several of his colleagues climbed up the staircase which collapsed. The defendants' counsel submitted that the workers knew that part of the dormitories was being re-positioned and that the staircase was to be demolished. She argued that the plaintiff therefore "had to be more careful when making use of it". The sparse evidence before me does not support the suggestion that a reasonable worker would not have used the staircase at that time. It was the only staircase that led to the workers' quarters. There was no warning not to use the staircase, let alone any barricade or cordon that the defendants' supervisor said they had intended to erect but did not. I rejected the hearsay evidence that the team leader Zhao De Zhi had warned the workers not to use the staircase. Zhao was not called as a witness. There was no evidence to persuade me that the staircase was in such a state that any reasonable worker would have seen straightaway that it was unsafe for him to use it. Li Kai Bin deposed that when he inspected the site he had seen that part of the staircase had been demolished but no evidence was led as to the actual physical state. I cannot therefore conclude that the plaintiff or any of the other workers ought not have used it. In the circumstances, I find that the defendants were liable and there was no contributory negligence on the part of the plaintiff.

9. In respect of damages, the plaintiff is seeking damages as follows:

i. Pain and suffering and loss of amenities:	S$50,000.00
ii. future medical expenses:	S$10,000.00
iii. Loss of future earnings:	S$180,000.00
iv. Loss of pre-trial earnings and special damages:	S$13,058.97
TOTAL:	S$253,258.97

The medical evidence adduced by the plaintiff was by way of a medical report of Dr WC Chang dated 18 January 2001. The plaintiff was also reviewed by Dr. Peter Lee and his medical report dated 7 September 2001 was admitted into evidence by the defendants. Neither side required a cross-examination of the doctors. The medical reports were largely similar. The plaintiff suffered a fracture of his left calcaneum (quadrangular bone near the heel). The fracture has united but the plaintiff would be predisposed to post-traumatic arthritis. He has also suffered some loss of flexion and is likely to suffer residual pain and stiffness in the foot. He now walks with a slight limp. The plaintiff testified that consequently, he is unable to squat and carry heavy objects. He is also unable to walk long distances without pain and discomfort. Damages for pain and suffering for a similar injury have been awarded variously between S$6,000 in 1991 in *Nyah bte Sulaiman v Safie bin Mohamad* [1996] Mallal's Digest 470 to S$15,000 for what appears to be a more severe fracture in *Ong Kia Cheo v Ong Ah Tee* [1993] Mallal's Digest 357. In this case, given the sparse evidence and distinguishing factors, I am of the view that a sum of S$10,000 for pain and suffering and loss of amenities would be fair. I have taken into consideration the probability of post-traumatic ailments, such as arthritis, into account in coming to this part of the award.

10. The general principles governing a claim for loss of future earnings and loss of earning capacity are well established. The opinions of Scarman LJ opinion in *Smith v Manchester Corporation* [1974] 1 KIR 1, 8; Goh J in *Teo Sing Keng v Sim Ban Kiat* [1994] 1 SLR 634, 646; and Karthigesu JA in *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82, 92 are the oft cited authorities in respect of these heads of claim. In the present case, the plaintiff was on medical leave for about two months after the accident. He then returned to work on 12 December 2000 and was assigned light duties. He was again given medical leave from 2 to 30 January 2001. Although his work permit expires in March 2001 he agreed to return to China in January 2001. The defendants conceded, through their Human Resource Manager Lim Poh Lan, that the plaintiff was entitled to have his work permit extended for up to 10 years because he was a skilled worker. She also conceded that he was an above average worker and was among one of 20% of their workers to be given a pay increase of S$60 a month on account of good performance at work. On the evidence, I would award the plaintiff S$75,600 for loss of future earnings on the basis of a salary of S$1,100 a month after excluding the costs of his personal needs assessed at $200 over 7 years ($900 x 12 x 7). I am of the opinion that although the evidence is that he may have his work permit extended up to 10 years, he may not stay for such an extended period because he has a wife and young child in China. Whether the plaintiff may actually be extended is a matter of speculation. All these factors can never be proven but are, I think, reasonable matters to consider for the purposes of adjusting the award so that an equitable sum may be awarded as nearly as can be. When the plaintiff is no longer able to work in Singapore, he will have to resume work in China. The plaintiff's evidence that he was previously earning S$350 as a construction worker in China was not challenged. On that basis, and given that the plaintiff is 33 years old, I would award a further sum of S$26,880 for loss of future earnings. This was calculated on the basis of S$280 a month over a multiplier of 8 years, after deducting his personal needs which I estimate to be S$70 a month. The medical report indicated that the plaintiff will require future surgery which may cost about S$10,000.

It was not made clear, but it appears to me that the doctor was referring to surgery in Singapore. There is no evidence as to what the same surgery would cost in China. It is the plaintiff's duty to lead evidence to show whether that surgery can only be performed in Singapore or that the cost of performing it in China would be the same. In my view, I would award half of the amount of S$10,000, that is, S$5,000.

11. I shall now deal with the plaintiff's claim for pre-trial loss. I accept that a plaintiff has to mitigate his loss once he is able to return to work, but it must also be remembered that the burden of proving that the plaintiff was able to mitigate and had failed to mitigate is on the defendants. The defendants cannot rely merely on the allegation that the plaintiff had made no effort to find employment. The plaintiff, on the other hand, cannot rely on a bare statement that the job market is too competitive. He ought at least show what attempts he had made to secure a job. However, in order that they may adequately discharge their burden, the defendants were at least obliged to adduce some evidence of the kind of jobs available in China which the plaintiff would be capable of doing. Evidence from a witness who had searched advertisements in the plaintiff's home town would have shifted the evidential burden back to him but no such evidence was adduced. The evidence before me, therefore, was not very much; the best that the defendants could muster was an admission by the plaintiff that he had not made applications for either a job or a hawker's licence. Considering that the plaintiff may need some time to recover fully even though he had not produced a medical certificate, the period from January 2001 to trial is not, in the circumstances of this case, sufficiently long for me to rule that he is not entitled to pre-trial loss of earnings. I would therefore award him the amount claimed at S$12,567.58 as well as the sum of S$491.39 being medical expenses which I regard as reasonably incurred.

12. In view of the total amount awarded being less than S$250,000 I awarded the plaintiff costs to be agreed or taxed on the subordinate courts scale of costs. There will be the usual consequential orders in respect of interests on the sums awarded.

Sgd:

Choo Han Teck
Judicial Commissioner

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