IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1974] SGCA 10

CA 40/1973

Between

Lim Chin Yok Co Ltd

… *Appellant*

And

Malayan Insurance Co Inc

… *Respondent*

GROUNDS OF DECISION

Insurance — Liability insurance

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Lim Chin Yok Co Ltd v Malayan Insurance Co Inc

[1974] SGCA 10

CA 40/1973
T Kulasekaram J; Tan Ah Tah J; Wee Chong Jin CJ
28 November 1974

1 In this case the plaintiff sued the defendants for damages for personal injuries and consequential loss and expense occasioned by the negligence of the defendants in the maintenance of a piling frame.

2 In 1968 the defendants had a contract with the Ministry of the Interior and Defence to drive piles into the ground for the building of a retaining sea wall at Kallang. The defendants hired a piling frame from another contractor and they sub-contracted with one Pareed Kunju for the supply of labour to operate the piling frame. Pareed Kunju was to be paid according to the extent of the piles driven into the ground. The piles were cast at the site by another sub-contractor of the defendants and supplied to Pareed Kunju for him to cause them to be driven into the ground. The defendants took out a policy of insurance with the Malayan Insurance Co Inc the third party in these proceedings, to cover accidents at the site.

3 The plaintiff was one of the labourers supplied by Pareed Kunju to the defendants to work at the work site. It was his duty to work an engine situated at the base of the piling machine which engine pulled a wire rope which

ascended to the top of the said piling machine where it went round a pulley wheel fixed to the top of the piling machine and then descended to the hammer which drove in the pile which was to be driven into the ground by the piling machine. By means of the engine, the plaintiff raised the hammer of the piling machine a few feet and then released the power to allow the hammer to drop and thereafter again caused the engine to pull on the wire rope to lift the hammer for a further drop and so on.

4 On 2 April 1969 while the plaintiff was doing the work which has been described, the pulley wheel at the top of the piling frame, over which the said wire rope went, broke and part of the wheel fell and struck the plaintiff who sustained very severe injuries.

5 The defendants denied liability and in turn claimed that they were entitled under the said policy of insurance to be indemnified by the third party to the full amount of all compensation and costs and expenses incurred in the defence of this action. The third party denied liability on the ground, as alleged in their defence, that the plaintiff was not in the direct employ of the defendants at the material time. The third party also denied liability on the ground that it was a condition of the contract of insurance that the defendants would take reasonable precautions to prevent accidents and that the defendants were in breach thereof.

6 The facts of the case were not in dispute. According to their contract with the Ministry of the Interior and Defence the defendants had to construct a sea wall 460 feet in length involving reinforced concrete sheet piles. Their work was supervised by an engineer of the Public Works Department. The defendants were given possession of the site and they procured a piling frame from another contractor and made arrangements with another contractor to fabricate the piles

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at the site. Then they arranged with Pareed Kunju for the supply of labour by him to operate the piling machine and complete the piling work. All that Pareed Kunju contracted with the defendants was the `supply of labour`. The defendants` foreman supervised the piling work, gave orders to Pareed Kunju and his men as to how the work was to be done, instructed Pareed Kunju as to where the piling frame was to be placed and where the piles were to be driven. The only interest Pareed Kunju had in the piles was that he was to be paid by the foot length of the piles driven. The defendants supplied him the piling frame, the piles and oil for the engine of the piling frame.

7 The learned trial judge held that the plaintiff was entitled to succeed against the defendants. He accordingly entered judgment for the plaintiff against the defendants for the sum of $95,000, which had been agreed by all the parties, with costs.

8 With regard to the defendants` claim against the third party under the policy of insurance the learned trial judge referred to para 2 and conditions 3 and 9 of the policy.

9 Paragraph 2 of the policy reads as follows:

> *NOW THIS POLICY WITNESSETH that if at any time during the Period of Insurance any employee in the Insured`s immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the Insured in the Business and if the Insured shall be liable to pay compensation for such injury either under the law(s) set out in the Schedule or at Common Law then subject to the terms, exceptions and conditions contained herein or endorsed hereon the Company will indemnify the Insured against all sums for which the Insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation.*

10 Condition 3 of the policy reads as follows:

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> *The Insured shall take reasonable precautions to prevent accidents and disease and shall comply with all statutory obligations.*

11 Condition 9 of the policy reads as follows:

> *The due observance and fulfilment of the terms, conditions and endorsements of this Policy so far as they relate to anything to be done or not to be done by the Insured and truth of the statements and answers in the Proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy.*

12 The learned trial judge held that the defendants were not entitled to succeed against the third party for two reasons. The first reason was that the plaintiff was not `an employee in the Insured`s immediate service`. The second reason was that the defendants were in breach of condition 3 of the policy in that they had not complied with their statutory obligations, to wit, the requirements of s 31 of the Factories Act (Cap 123, 1970 Ed). For these reasons, the defendants` claim against the third party was dismissed with costs. It is against this decision that this appeal has been brought by the defendants.

13 It should be observed that in dealing with the claim of the plaintiff against the defendants the learned trial judge found that the defendants were the temporary employers of the plaintiff and he referred to the plaintiff as a temporary servant. He found as a fact that the defendants were in the position of being able to tell the labourers supplied by Pareed Kunju, including the plaintiff, what to do, where to do it and how to do it.

14 In the case of ***Denham v Midland Employers` Mutual Assurance*** [1955] 2 All ER 561 at p 564 in dealing with a labourer who was described as a temporary servant, Denning LJ (as he then was) said:

> *There is no harm in thus describing him, so long as it is remembered that it is a device designed to cast liability on the*

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> *temporary employer. The real basis of the liability, however, is, simply this: If a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility.*

15 It is true that Denning LJ goes on to say that he cannot regard the propositions about `temporary servant` and `temporary employer` as decisive of the questions before the Court of Appeal in that case. But the idea that there can be two types of employees in this context gives rise to confusion. In our opinion the word `immediate` in para 2 of the policy gives rise to an ambiguity. The policy must therefore be construed `contra proferentes.` If any authority is required for this proposition it can be found in ***Re Bradley and Essex and Suffolk Accident Indemnity Society*** [1912] 1 KB 415 at p 430 where Farwell LJ said:

> *Accordingly, it has been established that the doctrine that policies are to be construed `contra proferentes` applies strongly against the company.*

16 It is therefore necessary to construe the words `any employee in the insured`s immediate service`. These words may have more than one meaning. They may mean (i) any employee in the insured`s immediate service as contrasted with temporary service; (ii) any servant of the insured; (iii) any servant but not a temporary servant of the insured; (iv) any person employed by the insured or (v) any servant, permanent or temporary of the insured. It is to be remembered that in the context of employment in Singapore there have always been persons who are employed on a daily basis. Their employment is on a day to day basis and in that sense any one so employed can be said to be a temporary servant or employee. Nevertheless as a temporary servant or employee of his employer he is in one sense when so employed `in the ***immediate service*** ` of his then employer albeit his service or employment is only for one day.

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17 Accordingly, we are of the opinion that the learned trial judge should have applied the `contra proferentes` doctrine and should have held that the plaintiff was `an employee in the insured`s immediate service` and that the defendants were covered by the policy in question.

18 In dealing with the second reason, it is relevant to refer to ***Fraser v Furman (Productions)*** [1967] 3 All ER 57 where the condition was in these terms: `The insured shall take reasonable precautions to prevent accidents and disease.` In that case Diplock LJ (as he then was) said, at p 60:

> *There are three considerations to be borne in mind on the wording of this condition. (i) It is the insured personally who must take reasonable precautions. Failure by an employee to do so, although the employer might be liable vicariously for the employee`s negligence or breach of statutory duty, would not be a breach of the condition. That was established in, and was the ratio decidendi of* ***Woolfall & Rimmer v Moyle & Anor****. (ii) The obligation of the employer is to take precautions to prevent accidents. This means in my view to take measures to avert dangers which are likely to cause bodily injury to employees. (iii) The third word to be construed in this context is `reasonable`. `The insured shall take reasonable precautions to prevent accidents.` `Reasonable` does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is inter alia to indemnify the insured against liability for his (the insured`s) personal negligence. That, too, is established by the case that I have cited. Obviously the condition cannot mean that the insured must take measures to avert dangers which he does not himself foresee, although the hypothetical reasonably careful employer would have foreseen them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers is one of the commonest grounds of liability in negligence. What in my view is `reasonable` as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognised, by refraining from taking any measures to avert it. Equally the condition cannot mean that, where the insured recognises that there is a danger, the measures which he takes to avert it must be such as the hypothetical reasonable employer, exerci sing due care and observing all the relevant provisions of the Factories Act 1961,*

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> *would have taken. That, too, would be repugnant to the commercial purpose of the contract, for failure to take such measures is another ground of liability in negligence for breach of statutory duty.*

19 What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer`s omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, ie, made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy.

20 In the circumstances of the present case, condition 3 is in our opinion repugnant to the commercial purpose of the contract. The second reason is therefore also not a valid reason for dismissing the defendants claim against the third party.

21 In our judgment, the defendants` appeal should be allowed with costs here and in the court below.

22 ***Appeal allowed***

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T Kulasekaram J
Tan Ah Tah J
Wee Chong Jin CJ

HE Cashin and CR Rajah (Tan Rajah & Cheah) for the appellants
James C Chen (Laycock & Ong) for the respondents
