WISDOM 徐

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Insurance

Lo Siu Wa v Employees Compensation Assistance Fund Board and AXA China Region Insurance Company (Bermuda) Limited, CACV No.39 and 40 of 2016 (on appeal from HCA No.393 and 799 of 2014), judgment on 26 January 2017

Background

This is one of the latest cases (most notably **Law Lai Ha**, below) ruling on the issue of whether an insurance policy for Employees' Compensation ("EC") had been issued for the purpose of Part IV of the Employees' Compensation Ordinance ("ECO") in force at the time of accident in relation to an injured employee.

In this case, the Plaintiff was employed by his employer ("the Employer"), an interior design company, to perform carpentry work as part of renovations to a shop in 2007 when he was injured in an accident. The Plaintiff obtained EC and common law judgments against the Employer who failed to pay and was wound up.

The Employer had taken out an EC insurance policy ("Policy") with its insurer ("the Insurer"), but the Insurer declined to pay, saying that the Policy did not cover the Plaintiff or the accident. The Plaintiff thus sued Employees Compensation Assistance Fund Board ("ECAFB") and the Insurer for satisfaction of the judgments.

The central issue in this action, which later went on to appeal, was whether the Policy issued for the purpose of Part IV of the ECO was in force at the time of accident <u>in relation to the Plaintiff</u>. If so, the Insurer would be liable to satisfy the judgments obtained by the Plaintiff against the Employer under sections 43 and 44 (in Part IV) of the ECO.

Under the Policy, it was stated as *"If any employee in the Insured's immediate employ shall sustain bodily injury… in the course of employment by the Insured in the Business."* Meanwhile, the schedule of the Policy listed the employees of the Employer, namely 2 creative designers, 3 designers, a clerk and a coordinator, and their estimated salaries. It was further provided as a special condition that the insured should supply a declaration of actual earnings to the Insurer from time to time for adjustment of premium.

In the Court of First Instance ("CFI"), it was held that, the Policy was only issued in relation to the employees of the Employer specified in the Schedule, but not to the Plaintiff who was a carpenter. As a result, the Insurer was not liable under sections 43 and 44, and the ECAFB was ordered to pay the Plaintiff under sections 16 and 20A of the Employees Compensation Assistance Ordinance.

The ECAFB appealed to the Court of Appeal which was recently decided on 26 January 2017.

Held

The appeal by ECAFB was dismissed by the majority of the Court of Appeal.

It was held that while the scope of cover of the EC policy was clearly stated as "any employee in the Insured's immediate employ" and was wide enough to cover the Plaintiff, this clause must be read together with the other parts of the Policy as a whole including the schedule. Kwan JA recited the words of Sir Anthony Mason NPJ in *New World Harbourview Hotel Co Ltd v ACE Insurance Ltd* that "the interpretation which should be adopted in the case of an insurance contract, as with other commercial contracts, is that which gives effect to the context, not only of the particular provision but of the contract as a whole, consistent with the sense and purpose of the provision". It was held that reading the Policy as a whole, it was sufficiently clear that the Policy was only in relation to those employees matching those specified in the schedule, and not in relation to the Plaintiff. The Policy was not in relation to a carpenter engaged to work outside the office of the Employer.

Having found that the Policy was not issued in relation to the Plaintiff and that the CFI was right to follow the approach in the **Law Lai Ha** case, the Court of Appeal dismissed the appeal of the ECAFB.

Comments

The importance of proper documentation of the material circumstances of the insured (including those affecting calculation of premium) as part of the insurance contract has been demonstrated in this case. Here, despite the rule of *contra proferentum* being applied against the insurer, the Court found that the wide coverage clause of the EC insurance could still be limited by the intention of the parties as clearly shown in the policy schedule.

It is good and proper practice that the drafting of the insurance contract shall clearly identify the risk undertaken by the insurer in order to limit the risk within the listed employees in the Schedule against the widely drafted Scope of Cover of "any employee on the insured's immediately employ".

Personal Injury

Mohammad Amjad v John M Pickavant & Co, CACV 698/2013, judgment on 21 February 2017

The Respondent was employed by the Appellant, a law firm, as a litigation manager. At the time of accident, he was earning about HK$32,500 per month by a combination of salary and commission. On 1 March 2006, the Respondent, while walking from his room passing the reception area to the storage room, tripped on a cardboard carton for photocopier paper that was placed in the reception area near a sofa. As a result, he fell forward and suffered personal injuries.

Soon after the injury, Mr. Pickavant of the Appellant accused the Respondent of paying monies received from clients into the Respondent's own bank accounts and allegedly falsely telling clients that the Appellant required them to pay additional amounts. The Respondent and his wife were subsequently charged with criminal offences but they were acquitted of all charges after trial.

In the proceedings, the trial judge found the Appellant liable for the Respondent's injuries without any contributory negligence on the part of the employee. The Appellant appealed.

Held

Honourable Barma JA (giving the Judgment of the Court) dismissed the appeal.

Barma JA upheld that there had been no contributory negligence on the part of the Respondent. Barma JA rejected the Appellant's contention that the Respondent failed to heed the presence of the box and that the box was clearly visible. He accepted that at the time of accident, a client was seated on the sofa ahead of the box so that it would be quite possible (and perhaps likely) that the Respondent's view of the box would have been obscured, so that he would not have been aware of its presence.

The Appellant also contended that as a result of the allegations of dishonesty made against him, regardless of the accident, the Appellant would have ended employment with the Respondent and that any other employment the Respondent could have secured would not have included the element of commission that he was being paid by the Appellant. Hence, his loss of earnings would have been less than they would have been had he continued to be employed by the Appellant. Barma JA agreed with the trial judge's skepticism of the timing and circumstances in which the complaint of "dishonesty" came to be made against the Respondent, and thus had reservations as to whether or not the complaint was justified. Barma JA held the trial judge was hence entitled, in the circumstances, to decline to find that the Respondent would have been dismissed regardless of the accident.

Further, the Appellant contended that the trial judge erred in her approach to the assessment of the Respondent's loss of earnings. The Appellant argued (i) that the trial judge had wrongly adopted findings as to loss of earning capacity made in the Employee's Compensation proceedings and (ii) that the trial judge had wrongly sought to make use of concepts such as impairment of the whole person and reduced earning capacity expressed in percentage terms when assessing the Respondent's loss of earnings, as these were concepts applicable to Employees' Compensation claims but not in assessing loss of earnings in common law proceedings.

Barma JA accepted that the trial judge had adopted Judge Chow's assessment of likely income after the accident in the Employees' Compensation claim. Barma JA considered Judge Chow's decision that his approach was not to use an earning capacity percentage figure to calculate the award to be made in those proceedings but to make an assessment of the Respondent's actual likely level of earnings at the time of the trial of those proceedings and use that amount of the purposes of the calculation. Barma JA held that this does not differ in practical terms from the approach at common law, as that approach involves considering the Respondent's potential earnings in his post-accident condition at the relevant time with his pre-accident income.

Further, Barma JA held that the trial judge was perfectly entitled to use percentages of pre-accident earnings as loss of earnings at different stages of recovery. Barma JA acknowledged that the trial judge, in assessing the percentages, had considered the medical evidence, the evidence of both sides as to the nature of the Respondent's work and the Respondent's own evidence as to the impact of those injuries on him and on his ability to carry out those duties. Barma JA acknowledged that that those figures are somewhat rough approximations but the assessment of loss of earnings is not always capable of exact or precise quantification. Barma JA also accepted that the trial judge did the best she could with the material available and the trial judge was perfectly entitled to come to the conclusions that she did.

Barma JA dismissed all the Appellant's contentions and upheld the trial judge's decision.

Comments

The present case is a personal injuries claims arising out of relatively safe office environment. More importantly in terms of the legal aspects, this case recognized the assessment of the Respondent's actual likely level of earnings at the Employees' Compensation proceedings and use that amount of the purposes of the calculation. Further, this case recognized the use of percentages of pre-accident income when assessing loss of earnings in different stages of recovery provided that all evidence has been thoroughly considered. Given the flexibility in this method of assessment of loss of earnings at different stages of recovery, it should not be surprised to see future personal injuries claims adopting this method.

WISDOM OF THE ISSUE

You reap what you sow.

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