Jurong Port Pte Ltd v Huationg Inland Transport Service Pte Ltd [2009] SGHC 145

Case Number : DC Suit 2876/2007, RA 23/2009

Decision Date : 26 June 2009

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Loo Dip Seng and Leong Lu Yuan (Ang & Partners) for the plaintiff; Patrick Chin (Chin Patrick & Co) for the defendant

Parties : Jurong Port Pte Ltd — Huationg Inland Transport Service Pte Ltd

Contract – Contractual terms – Indemnity clauses – Plaintiff and defendant agreeing to construction contract – Plaintiff alleging defendant agreed to indemnify plaintiff from liability arising from negligence by plaintiff's employees pursuant to certain clauses in contract – Whether clauses were clear enough to require defendant to indemnify plaintiff for liability arising from negligence by plaintiff's own employee

26 June 2009

Woo Bih Li J:

1 This indemnity claim turned on the construction of several clauses in a contract between the parties. On or about 3 December 2005, an accident occurred at the port facility of the plaintiff/appellant ("the plaintiff"). This resulted in the tragic death of an employee of the defendant/respondent ("the defendant"), a prime mover driver. It was agreed that the death of the defendant's employee was caused by or was the result of the negligence of an employee of the plaintiff. The estate of the prime mover driver made a claim against the plaintiff who settled the claim by paying $150,000 as damages and $23,358.75 as costs. The plaintiff then brought an action in the Subordinate Courts claiming the sums of $150,000 and $23,358.75 against the defendant relying on an alleged indemnity pursuant to a contract entered between the plaintiff and defendant on 14 April 2004. The plaintiff then applied by Summons No 4584 of 2008 and obtained an order for the determination of certain issues as preliminary issues. Subsequently, a deputy registrar ruled in favour of the plaintiff on the preliminary issues and the defendant appealed successfully before a district judge in Registrar's Appeal No 174 of 2008 (*Jurong Port Pte Ltd v Huationg Inland Transport Service Pte Ltd* [2009] SGDC 57). The plaintiff then brought an appeal to the High Court.

2 Before me, the plaintiff raised the following clauses of the contract for consideration:

> **CONDITIONS OF CONTRACT**
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> 13 INJURY TO PERSONS AND PROPERTY
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> (1) The Contractor shall be solely liable for and shall indemnify the Employer in respect of any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the Works.
>
> (2) The Contractor shall be liable for and shall indemnify the Employer in respect of any liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any properly [*sic*] real or personal in so far as such injury or damage rises out of or in the course of or by reason of

the execution of the Works and provided always that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor or to any circumstances with the Contractor's control.

…

(4) The Contractor shall before commencement of any work under this Contract ensure that there is in force a policy of insurance indemnifying the Employer, the Contractor and all sub-contractors against the aforesaid risks or matters. Such insurance shall be effect [*sic*] by the Contractor with such company or companies for such amount and on such terms as he shall in his discretion think fit. All policies shall be retained by the Superintending Officer.

…

SPECIFICATIONS…

23 INDEMNITY

The Contractor shall be fully responsible for all injuries (fatal or otherwise) and loss or damages to properties including cargo and/or of the Employer's property caused by the acts, defaults, omissions or negligence of the Contractor, their servants, or agents and the Employer shall be exempted from all liabilities for any injury, loss or damage arising directly or indirectly from the Contractor's performance of the obligation under this Contract and the Contractor shall indemnify, defend and keep the Employer fully indemnified from and against all penalties, costs, claims, demands action and proceedings which may be made against the Employer or which the Employer may incur by reason of or in any way connected with this Contract. [I will refer to this paragraph as "Specification 23a".]

The Contractor shall be fully responsible for any lost [*sic*], claim proceeding or demand in respect of personal injury to or death or any person arising out of or in the course of … or caused by or in any way connected with the performance of the obligations under this Contract and in respect of any damage or loss to any property real or personal whether belonging to the Employer or otherwise (including cargo and contents therein handled by the Contractor) arising out of or in the course of or in any way connected with the performance of the obligations under this Contract. [I will refer to this paragraph as "Specification 23b".]

…

The Contractor shall be deemed to be the SOLE employer of the personnel supplied pursuant to this Contract and the Employer shall be exempted from all liabilities for any injury (fatal or otherwise) caused to any such personnel or to any other persons arising directly or indirectly from the performance of the obligations under this Contract and the Contractor must defend indemnify and save the Employer harmless. [I will refer to this paragraph as "Specification 23e".]

…

26 INSURANCE

Without prejudice to the Contractor's liabilities under this Contract, the Contractor shall insure themselves fully with a reputable insurer against all risks and liabilities relating to the operations and the provisions of Works under this Contract and without affecting the generality of this

clause the Contractor shall submit to the Employer within fourteen (14) days of acceptance of Tender and shall maintain during the term of the Contract, the following insurance policies, which shall be in the joint names of the Employer and the Contractor and should contain the following:-

a Public Liability Policy

i …

ii Must have the following endorsements:-

Endorsement 'A' – Injury to Persons

It is expressly understood and agreed that the Insurers shall indemnify and keep indemnified the Contractor and the Employer for any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of any personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the Works.

…

3 The plaintiff was relying on Condition 13(1) and Specifications 23b and 23e to impose the desired liability and the other provisions referred to above to aid in its construction of the provisions relied upon.

4 It is evident from a perusal of the clauses how unwieldy and infelicitously drafted they were. The issue was whether the clauses which the plaintiff relied on were clear enough to require the defendant to indemnify the plaintiff for liability resulting from negligence by the plaintiff's own employee. The district judge applied the test adopted by the Court of Appeal at [7] in *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 3 SLR 625 ("*Marina Centre Holdings*") from the judgment of Lord Morton of Henryton delivering the judgment of the Privy Council in *Canada Steamship Lines Ld v The King* [1952] AC 192 at [208] on the construction of exemption clauses. The three steps enunciated there have been referred to as three tests but I will refer to them as the three-step test which seems more appropriate. The steps are:

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Co v Pilkington* (1897) 28 SCR (Can) 146.

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: 'In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.

(3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence,' to quote again Lord Greene in the *Alderslade* case [1945] KB 189, 192. The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's

words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

5 The district judge found that the first step of the test (as the plaintiff conceded) was not satisfied since there was no express reference to negligence of the plaintiff or its employees; the second step was satisfied as the ordinary meaning of the words in Condition 13(1) encompassed such negligence; but at the third step, the words in Condition 13(1), while wide enough to cover such negligence, could also be construed to refer to another type of culpability, *ie*, wilful misconduct on the part of the plaintiff's employees and this was fatal to the plaintiff's claim. The district judge also noted at [16] that his finding on the third step of the test was:

> merely [a] finding that the words there are not wide enough to overcome the improbable construction that the [defendant is] also liable to indemnify the [plaintiff] in respect of loss arising out of the [plaintiff's] or its servant's negligence as is the case here. Seen in that way the principles of construction apply consistently whether seen in the approach taken in *CST Cleaning* or in *Marina Centre Holdings*. There is no inconsistency.

6 He thus allowed the defendant's appeal and dismissed the plaintiff's claim for indemnity. Before me, the plaintiff argued that the district judge erred in finding that the words of Condition 13(1) could be construed to refer to a ground of damage other than negligence and, in particular, that they covered wilful misconduct but not negligence on the part of the plaintiff's employees. This argument is addressed below. It is apposite to first consider the "inherently improbable" principle.

The "inherently improbable" principle

7 In *Marina Centre Holdings* at [37], LP Thean JA explained in relation to the third step of Lord Morton's test:

> We now turn to Lord Morton's third test. The only question here is whether there are heads of damage founded on liability other than that for negligence which are covered by cl 36.1(b). This is subject to the caveat that the nonnegligent liability must not be so fanciful or remote that the appellants could not have desired protection against it. The underlying reason for this approach is that the court starts with a presumption that parties to a contract do not normally agree to accept the consequences of each other's negligence, ie by way of an exemption clause, much less to shoulder responsibility for them, ie by way of an indemnity clause, and will not be taken to have intended to do anything so improbable, unless the contract does not admit of any other reasonable construction (per Oliver LJ in E Scott (Plant Hire) Ltd v British Waterways Board (supra) at p 10).

8 In *CST Cleaning & Trading Pte Ltd v National Parks Board* [2009] 1 SLR 55 ("*CST*"), Chan Sek Keong CJ observed at [22]-[23] that the "inherently improbable" principle was equally applicable to indemnity clauses:

> 22 The principles of construction relating to exemption clauses are well established – having been stated by Lord Morton of Henryton in *Canada Steamship Lines Ld v The King* [1952] AC 192 ("*Canada Steamship Lines*") and accepted by all courts in the common law world. These principles are equally applicable to indemnity clauses (see Viscount Dilhorne and Lord Fraser of Tullybelton in *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 ("*South Wales Switchgear*") at 167 and 172, respectively). In *E E Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 221 ("*Caledonia*"), Hobhouse J gave a useful summary of these principles and their relationship to the

contra proferentem rule of construction. He said (at 227):

> The question remains one of the construction of the contract, applying the established principles of construction. These include the principle that the parties to a contract are not to be taken to have agreed that a party shall be relieved of the consequences of its negligence without the use of clear words showing that that was the intention of the contract. In *Walters v*. *Whessoe Ltd*. (1960) 6 B.L.R. 23, 35, Devlin L.J. said: "The law therefore presumes that a man will not readily be granted an indemnity against a loss caused by his own negligence." In *Smith v. South Wales Switchgear Co*. *Ltd*. [1978] 1 W.L.R. 165, 168, Viscount Dilhorne said:
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> > "While an indemnity clause may be regarded as the obverse of an exempting clause, when considering the meaning of such a clause one must, I think, regard it as even more inherently improbable that one party should agree to discharge the liability of the other for acts for which he is responsible."
>
> This principle overlaps with but is not the same as the "contra proferentem" rule – that contractual provisions should prima facie be construed against the party who was responsible for the preparation of the contract and/or who is to benefit from the provision. … The relevant principle is simply one which involves construing exemption and indemnity provisions as applying to a party's own negligence, only if that intent is made clear in the contract; this principle is equally capable of application whether the clause is mutual or unilateral.

23 This principle as applied to the construction of indemnity clauses (which I shall refer to as "the 'inherently improbable' principle of construction") was accepted by our Court of Appeal in *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 3 SLR 625, a case concerning an exemption clause. L P Thean JA said at [37]:

> The underlying reason for this approach [the "inherently improbable" principle of construction] is that the court starts with a presumption that parties to a contract do not normally agree to accept the consequences of each other's negligence, ie by way of an exemption clause, *much less to shoulder responsibility for them, ie by way of an indemnity clause*, and will not be taken to have intended to do anything so improbable, unless the contract does not admit of any other reasonable construction. … [emphasis added]

9 In the present case, the plaintiff sought an indemnity from the defendant for the admitted negligence of the plaintiff's own employee which resulted in the death of the defendant's employee. It seemed to me inherently improbable that the defendant had agreed to indemnify the plaintiff in such circumstances. In any event, the language of Condition 13(1) was that of indemnity without specifying for whose conduct the defendant should indemnify the plaintiff. Thus, it was one thing to say that Condition 13(1) required the defendant to indemnify the plaintiff in respect of "any liability… whatsoever arising" but those words did not necessarily mean indemnifying the plaintiff for liability arising from the negligence of the plaintiff's own employee. The most obvious liability intended to be covered would be that arising from the conduct of the defendant's employees and perhaps also for that arising from the conduct of those for whom the plaintiff was not responsible.

10 The plaintiff also referred to Condition 13(2) which imposed a liability on the defendant to indemnify the plaintiff for damage to property. Condition 13(2) had a proviso that the damage must be caused by the defendant or its sub-contractor or something within the defendant's control. The plaintiff's argument was that since Condition 13(2) had this proviso whereas Condition 13(1) did not, this meant that under Condition 13(1), the defendant was liable to indemnify the plaintiff for the

negligent conduct of the plaintiff's own employee. I did not agree that such an omission was sufficient to do the job for the plaintiff under Condition 13(1).

11 Besides, there was yet another provision which the plaintiff had conveniently ignored. Condition 45 stated:

> The Contractor and his servants or agents and property belonging to them enter or are on the Employer's premises at their own risks. The Employer shall under no circumstances whatsoever be liable to the Contractor, his servants or agents for injuries suffered by them not arising directly or indirectly from the acts, omissions, defaults, negligence of the Employer, their servants or agents and the Contractor shall indemnify defend and save the Employer harmless from and against all demands claims actions, proceedings in this respect.

12 Under Condition 45, the plaintiff was not liable to the defendant or its employees for injury which did not arise from the conduct of the plaintiff or its employees. This in turn implied that the plaintiff would be liable for injury to the defendant's employees if the injury arose from the conduct of the plaintiff's own employees.

13 Specification 23b also did not impose on the defendant the liability desired by the plaintiff for similar reasons. Specification 23e was further off the mark as it seemed to apply to a situation covering an employer's liability to employees and provisions where certain persons may be deemed to be the employer of a workman for the purpose of specific legislation. In any event, Specification 23e also did not impose on the defendant the liability desired by the plaintiff.

14 The other provisions which the plaintiff raised to bolster its construction of Condition 13(1), Specifications 23b and 23e did not help the plaintiff.

The *contra proferentem* principle

15 The defendant also submitted that the *contra proferentem* principle of construing the clause against the party who had drafted and/or sought to benefit from it (this contract being a standard-form contract supplied by the plaintiff to its contractors) also applied. In this case, I agreed that the clauses relied on by the plaintiff were ambiguous since the plaintiff's negligence was not clearly included as one of the situations giving rise to indemnity liability on the defendant's part. That, together with the inherently improbable principle, would have been sufficient to dispose of the plaintiff's appeal. It was therefore not necessary to consider the third step of Lord Morton's test. Nevertheless, I will also address the third step as applied by the district judge for completeness.

The third step of Lord Morton's three-step test

16 As mentioned, the district judge found, at para 22 of his grounds of decision, that the third step of the test was not satisfied because Condition 13(1) as well as Specifications 23b and 23e were capable of covering more than negligence, such as loss arising from the wilful conduct of the plaintiff or its employees and such a liability was neither fanciful nor remote. It seemed incongruous to me that the defendant could be liable to indemnify the plaintiff for *wilful* conduct of the plaintiff's employees but not to indemnify the plaintiff for the negligent conduct of the plaintiff's employees. Nevertheless, while I agreed with the plaintiff that the analysis of the district judge at the third step of the test was flawed, I still did not agree with the plaintiff that Condition 13(1) or any other provision it had relied on, would apply to cover the negligence of the plaintiff's own employees for the reasons stated above.

Public policy

17 It seemed to me unreasonable for the plaintiff to seek an indemnity for a liability arising from the conduct of its own employee although, in fairness, I should mention that I was informed that its claim was driven by its insurer.

18 At present, the common law allows a party to include a contractual term to exempt itself from liability for its own negligence. It even allows a party to go one step further, that is, to claim an indemnity from the other contracting party for the claiming party's own negligence provided that the contractual term is clear in imposing such an indemnity.

19 With the qualification that I have not had the benefit of full arguments on the point and if I were not constrained by authority, I would be inclined to the view that such a provision for an indemnity should not be upheld even if the contractual term is clear in imposing such a liability unless (a) there is clear evidence that such a liability was drawn specifically to the attention of the other contracting party, instead of being hidden in a host of provisions, and accepted or, (b) it satisfies the requirement of reasonableness (like the one stipulated in s 4 of the Unfair Contracts Term Act (Cap 396, 1994 Rev Ed) which applies to consumer contracts). Furthermore, bearing in mind that many of those who do not qualify to be categorised as consumers are actually in weak bargaining positions, the common law should perhaps go one step further and make requirement (b) above mandatory, whether in addition to requirement (a) above or not.

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