IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 129

Suit No 730 of 2018

Between

HUATIONG CONTRACTOR
PTE LTD

… *Plaintiff*

And

CHOON LAI KUEN t/a
YISHUN TRADING TOWING SERVICE

… *Defendant*

GROUNDS OF DECISION

[Contract] — [Breach]
[Contract] — [Contractual terms] — [Exclusion clauses]

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Huationg Contractor Pte Ltd
v
Choon Lai Kuen (trading as Yishun Trading Towing Service)

[2020] SGHC 129

High Court —Suit No 730 of 2018
Lee Seiu Kin J
18 – 20 February, 24 February, 26 February, 26 March 2020

24 June 2020

Lee Seiu Kin J:

Introduction

1 Most of the journey from Fort Road to Benoi Crescent is conducted on the Ayer Rajah Expressway ("the AYE"). The route is relatively flat, gradient-wise,[1] and has few traffic lights or bends to negotiate.[2] Most drivers can expect an uneventful journey, especially on a late Friday afternoon. This was exactly Mr. Ong Sen Lian's ("Ong") experience[3] as he operated a concrete pump truck ("the Truck") which was towed across the AYE from Fort Road to Benoi Crescent on 20 July 2012. As he neared Benoi Crescent, he found smoke

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1 Notes of evidence ("NE") 26 Feb 2020, p 29 lines 12 – 22

2 NE 24 Feb 2020, p18 lines 6 – 10

3 Bundle of Affidavits Vol. 3 of 3 ("BAFF 3"), p 1061 para 11

emitting from the Truck.[4] Before long, the Truck's chassis and tyres had caught fire.[5] The present action centred on the nature and cause of this fire.

2 The suit was brought by the owners of the Truck against the towing company which had been entrusted with transporting the Truck. The plaintiff-owner alleged breaches of a bailment contract. The defendant-company denied the breaches and sought, in the alternative, to rely on limitation and exemption clauses which had been purportedly incorporated into the contract. Following five days of trial, I granted judgment in favour of the defendant. My reasons were as follows.

Facts

The parties

3 Huationg Contractor Pte Ltd ("Huationg") is the plaintiff-owner of the Truck. Yishun Trading Towing Service ("Yishun Towing") is the defendant-company that had been entrusted with transporting the Truck from Fort Road to Benoi Crescent on 20 July 2012.[6]

The contractual arrangement between the parties

4 The contract between the parties was not captured in any written document.[7] However, parties broadly agreed that Huationg's chief executive officer, Mr Patrick Ng ("Ng")[8] had spoken to Yishun Towing's operations

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4 BAFF 3, p 1061 para 12

5 Bundle of Affidavits Vol. 2 of 3 ("BAFF 2") p 597

6 BAFF 3, p 726 para 5

7 BAFF 3 p 726 para 8; BAFF 2 p 474 para 10

8 BAFF 2, p 471 para 1

manager, Mr Koh Tian Siew ("Koh")[9] and had engaged Yishun Towing for towing services at a meeting sometime in 2007.[10] The resulting contract ("the services agreement") envisioned Yishun Towing providing towing services as and when Huationg requested for them. At the meeting, the main term discussed was the price to be charged per towing trip.[11] Notably, the parties did not discuss any exemption or limitation of liability clause.[12] A set of limitation and exemption clauses were printed on the reverse side of Yishun Towing's work orders. These work orders however, were not shown or even referenced at the meeting.[13]

5 Work orders were operational documents that tracked and recorded the job assignments received by Yishun Towing. They followed a standard form[14] and, as stated earlier, had a set of limitation and exemption clauses ("the liability clauses") printed on the reverse side:[15]

> **TERMS AND CONDITIONS**
>
> 1. The Customer and the owner shall defend and indemnify the Company against all claims and demands of whatsoever nature and by whomsoever made and howsoever arising (from Company's fault, what of diligence, negligence or otherwise) in excess of SGD$20,000.00 or where the Company is excluded from liability under this Agreement without excess arising directly or indirectly from the collection carriage storage and/or delivery of the Goods.

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9 BAFF 3, p 964 para 1

10 BAFF 2, p 474 para 8; NE 20 Feb 2020, p 41 lines 19 - 21

11 BAFF 2, p 474 para 10; NE 20 Feb 2020, p 42 lines 15 - 17

12 NE 20 Feb 2020, p 42 lines 18 – 20; BAFF 2 p 484 para 40

13 NE 20 Feb 2020, p 42 lines 21 – 23

14 Bundle of Documents Volume 2 of 4 ("BDOC 2"), pp 543 - 766

15 BDOC 2, p 544

> 2. The Company shall not be liable for the loss, misdelivery or damage to the goods if such loss, misdelivery or damage has arisen from: -
>
> a) Act of God;
>
> b) compliance with instructions given to the Company by the Customer or Owner or any other person entitled to give them;
>
> c) Act. default or omission of whatsoever nature by the Customer, or Owner, its servant or agents or any person having an interest in the Goods;
>
> d) handling, loading, storage or unloading of the Goods by the Customer or Owner.
>
> …
>
> 5. The Company shall not in any [*sic*] be liable for any claim cost or damage to the Goods by whomsoever made and howsoever arising (from the Company's fault, what of diligence, negligence wilful misconduct or otherwise) if the Company is not notified in writing of the loss or damage before the expiration of 30 days after transit ends or 7 days after delivery whichever is the later.
>
> …

6 The standard practice[16] was for Yishun Towing's drivers to generate a work order upon receiving a towing assignment from Huationg. The work order would detail matters such as the arrival time, delivery time, the date of operation and route taken.[17] This work order would be collated by Yishun Towing and, together with an invoice, submitted to Huationg every two weeks. Huationg would then verify the work orders and invoices, and make payments to Yishun Towing accordingly. Yishun Towing too, would use these work orders to keep track of the trips that its drivers had completed.[18] This was useful for computing its drivers' salaries,[19] as they (the drivers) were paid on a per-trip basis.[20]

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16 BAFF 2, pp 483 – 484, para 38; BAFF 3, p 727 para 9

17 BDOC 2, p 543

18 NE 20 Feb 2020, p 17 lines 14 – 16

The events of 20 July 2012

7 Yishun Towing was instructed by Huationg to tow the Truck from Fort Road to 9 Benoi Crescent on 20 July 2012. Koh arranged for Ong and another driver to undertake the towing assignment.[21] A typical towing operation involved one driver operating the towing vehicle and another operating the towed vehicle, in this case, the Truck. Although this is described as a towing operation, the "towed" vehicle – the Truck – is propelled by its own motor even as it is attached to the rear of the towing vehicle (the parties agreed that this is a safety requirement of the Land Transport Authority). With the engines of both vehicles operating to propel each vehicle during the towing process[22], both drivers have to coordinate their driving through a series of hand signals and established practices[23] to ensure smooth acceleration and cruising deceleration.

8 Prior to commencing the towing operation, Ong and his partner visually inspected the Truck to check for deflated tyres and ensured that the brakes were functioning.[24] Nothing was amiss. Separately, Huationg had also serviced the Truck on 14 July 2012, finding no issues with the Truck.[25] In other words, there was nothing out of the ordinary when Ong and his partner commenced the towing operation.

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19 NE 20 Feb 2020, p 17 lines 27 – 29

20 NE 20 Feb 2020, p 17 lines 20 – 22

21 BAFF 3, p 967 para 16

22 BAFF 3, p 1060 paras 8 – 10

23 NE 24 Feb 2020, p 19 lines 3 – 22

24 BAFF 3, p 1060 paras 7 – 8

25 BAFF 2, p 476 para 17; BAFF 2, p 553

9 Throughout the journey, Ong said that he kept an eye on the brake air pressure meter[26], checked his mirrors regularly[27] and was alert to any sluggishness, drag or resistance whilst operating the Truck.[28] He did not experience anything unusual and described the journey as "uneventful".[29]

10 However, as they neared Benoi Crescent, he noticed that "the tyre area at the right portion of the [Truck]" was emitting smoke.[30] He saw this in the "right side mirror of the [Truck]". [31] Ong recounted that there had been "no squealing sound coming from the tyres, nor [had] there [been] skid marks on the road".[32] Ong and his partner pulled over their vehicles and before long, the Truck's tyres and chasis had caught fire. The Singapore Civil Defence Force's Report concluded that:[33]

> "The fire was localised to the tyre of [the Truck] which was on tow. We believed that the brake pads were somehow engaged and this resulted in frictional heating as the vehicle was towed. There were no other possible accidental fire causes and there were no indicators of incendiarism".

11 Both Huationg's and Yishun Towing's experts agreed with this conclusion.[34] The only question was how the brake pads had been engaged.

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26 NE 24 Feb 2020, p 21 lines 14 – 15

27 NE 24 Feb 2020, p 21 lines 23 – 26

28 NE 24 Feb 2020, p 20 lines 17 – 20

29 BAFF 3, p 1061 para 11

30 BAFF 3, p 1061 para 12

31 BAFF 3, p 1061 para 12

32 BAFF 3, p 1061 para 16

33 Bundle of Affidavits Vol. 1 of 3 ("BAFF 1"), p 27 para 2

34 BAFF 3, p 1039 section 2.2; BAFF 1, p 23 para 38; NE 26 Feb 2020 p 52 lines 27 – 31, p 53 lines 1 – 5, p 53 lines 15 – 22

Issues to be determined

12 The parties agreed that the services agreement was a bailment contract.[35] The onus was therefore on Yishun Towing to prove, on a balance of probabilities, that it had taken reasonable care of the concrete pump truck: *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR(R) 411 at [12] ("*Sun Technosystems*"). Though not obliged to identify the precise cause of the damage complained of, a bailee (Yishun Towing, in this case) may nonetheless do so in a bid to absolve itself of allegations of negligence: *Sun Technosystems* at [16].

13 To that end, Yishun Towing sought to prove that the fire was not caused by negligence on its part. Therefore, the first issue involved identifying the cause of the fire ("the Causation Issue"). In the alternative, Yishun Towing sought to rely on the liability clauses in defending itself against Huationg's claims. Therefore, the second issue was whether the liability clauses had been successfully incorporated into the services agreement ("the Incorporation Issue").

Issue 1: The Causation Issue

14 At trial, three theories were proposed by the experts:

(a) Ong had accidentally engaged the parking brake sometime during the towing operation. The parking brake however, had only been partially engaged so the vehicle could still move. The friction and resultant heat from brake pads rubbing against the brake drum caused the fire. This was Huationg's first theory ("the Accident Theory").

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35 Defendant's Closing Submissions ("DCS") p 33 para 113

(b) Ong, as a nervous and inexperienced driver, had periodically applied the service brakes while the Truck was in motion.[36] This is known as "riding"[37] the brakes. This caused frequent, regular application of the brake pads to a moving brake drum. The friction and resultant heat from brake pads rubbing against the brake drum caused the fire. This was Huationg's second theory ("the Riding Theory").

(c) Air pressure had slowly fallen in the parking brake's pressure chamber. Under normal circumstances, the air pressure would have kept a large spring in the braking chamber compressed. This spring, which was connected to the braking rod, slowly decompressed as the air pressure decreased in the chamber. As the spring was gradually released, the parking brakes were partially engaged. The vehicle could still move but the friction and resultant heat from the brake pads rubbing against the brake drum caused the fire. This was Yishun Towing's sole theory ("the Pressure Leak Theory").

15 I rejected both of Huationg's theories and accepted Yishun Towing's theory. My reasons were as follows.

The Accident Theory

16 The Accident Theory relied on two key assumptions, the absence of either being fatal to the theory. First, it assumed that Ong had accidentally engaged the brakes. There was no evidence to that effect. Ong testified that he kept an eye on all the necessary instruments throughout the journey (see above

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[36] NE 26 Feb 2020, p 67 lines 26 – 30

[37] NE 26 Feb 2020, p 66 lines 22 - 23

at [9]). These instruments, the air pressure gauge in particular, would have alerted him if the parking brake had been engaged. He was also reasonably experienced, having driven delivery lorries for a year[38] before joining Yishun Towing, and having operated heavy vehicles for Yishun Towing for one and a half years[39] by the time of the incident. In fact, he had been operating concrete pump trucks for towing operations since January 2012 after he had successfully obtained his Class 5 license.[40] I did not find any credible basis for finding that Ong had accidentally engaged the parking brake.

17 Indeed, the parking brake lever had a conspicuously red knob[41] and being a dead-man's switch,[42] required some amount of force to engage.[43] This was hardly a conducive setup for accidentally engaging a parking brake. Moreover, a red light would have lit up on the dashboard if the parking brake had been engaged[44] – the same dashboard which housed the air pressure gauge that Ong had been checking regularly during the trip.[45]

18 Even if the brake had been engaged without attracting any attention, the entire truck would have come to a standstill. As recounted by Mr Peter Joseph Holce ("Holce"), Yishun Towing's expert witness, a parking brake is "incredibly strong" when engaged: "2 tonnes [of force] acting on each push rod,

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38 NE 24 Feb 2020, p 3 lines 23 – 28

39 BAFF 3 1060 para 4

40 NE 24 Feb 2020, p 4 lines 25 – 28

41 NE 18 Feb 2020, p 51 lines 20 - 24

42 NE 26 Feb 2020, p 38 lines 11 – 13

43 BDOC 2, p 519 (video)

44 NE 18 Feb 2020, p51 lines 15 - 16

45 BDOC 2, p 535

on each brake; and you've got six of those".[46] But Ong's testimony did not mention any sudden halt of the vehicle, and neither were there any skid marks on the road[47] – the tell-tale signs of a parking brake engaged abruptly.[48]

19 Therefore, the Accident Theory required a second assumption: *ie,* that the parking brake had been faulty[49] and was only partially engaged when activated. But this assumption too, was not supported by the evidence. None of the pre-journey checks suggested that anything had been amiss (see above at [8]). Huationg's own maintenance check (conducted less than a week before the incident) indicated that the service brakes had been in good order.[50] As the service brake system and the parking brake system used the same braking system,[51] an assessment that the service brakes had been in satisfactory condition necessarily indicated that the parking brakes had been in good order too. Furthermore, Mr Kelvin Koay ("Koay"), Huationg's expert witness, acknowledged that *all* the parking brakes must have been somewhat faulty for this theory to hold.[52] Such extensive faultiness would have been identified in the maintenance check.

20 Taken together, the failure to establish both these assumptions meant that it was unlikely that the parking brake had been accidentally engaged. As such, I rejected the Accident Theory.

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46 NE 26 Feb 2020, p 40 lines 25 – 26

47 BAFF 3, p 1061 para 16

48 NE 26 Feb 2020, p 41 lines 7 – 15

49 NE 26 Feb 2020, p 64 lines 22 – 29

50 Bundle of Documents Volume 1 of 4 ("BDOC 1"), p 216

51 BAFF 3, p 1043 (diagram); NE 26 Feb 2020, p 80 lines 19 – 22

52 NE 26 Feb 2020, p 77 lines 27 – 31; p 78 lines 1 – 19

The Riding Theory

21 As mentioned earlier, a driver is said to "ride" his brakes when he constantly engages the service brakes while the vehicle is in motion. Each application of the brakes naturally creates friction and heat as the brake pads rub against the brake drums. However, given that braking systems are over-engineered with a significant "margin of safety",[53] it would take a substantial amount of friction to generate the sort of heat that lights tyres on fire. In determining whether riding the brakes could have generated such high amounts of friction and heat, three main factors were considered during trial:

(a) Weight of the vehicles – the heavier the vehicle, the more braking force would have been used to slow it down, generating more friction and heat.

(b) Speed that the vehicles were moving at before brakes were applied – the faster the vehicle moves, the more braking force would have to be used, generating more friction and heat.

(c) Frequency of brake application – the more frequently the brakes were engaged, the more friction and heat would be generated.

22 While the combined weight of these vehicles was substantial, I did not attach great importance to this factor. It is entirely normal for the vehicle being towed (the Truck, in this case) to do the braking for the towing operation.[54] In such cases, the Truck may very well be taking the load off slowing down both

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53 NE 26 Feb 2020, p 33 lines 13 – 18

54 NE 26 Feb 2020, p 33 lines 24 – 26

the tow truck in front as well as its own load.[55] However, a concrete pump truck is designed with towing in mind.[56] It is more than capable of handling the load of braking for two vehicles,[57] and is designed to dissipate the heat generated from such towing operations.[58]

23 Speed wise, the vehicles were travelling the fastest while on the AYE. This was about 60km/h.[59] However, Ong was unlikely to have ridden the brakes whilst on the AYE. There were no particularly steep or extensive incline to negotiate[60] and traffic conditions were normal that day.[61] The route had few bends[62] to navigate and being an expressway, did not have any traffic lights along the way. In other words, there was little reason for him to have used the brakes (besides normal operations) on the AYE, much less to riding the brakes.

24 If he had ridden the brakes on the Truck, it would have been done after the Truck had exited the expressway. But here, I was not convinced that Ong could have ridden the brakes so frequently and generated the sort of friction in the brake drums that would set the tyres on fire. For a start, the Truck was moving more slowly on the roads than on the expressway. There was only so much braking that could be done before the Truck simply slowed down and came to a halt. To generate the sort of friction and heat necessary for the tyres

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55 NE 26 Feb 2020, p 21 lines 27 - 31

56 Bundle of Documents Volume 4 of 4 ("BDOC 4"), pp 1297 – 1300

57 NE 26 Feb 2020, p 33 lines 30 - 31

58 NE 26 Feb 2020, p 24 lines 16 – 18

59 NE 24 Feb 2020, p 17 lines 6 – 8

60 NE 26 Feb 2020, p 29 lines 12 – 22

61 NE 24 Feb 2020, p 16 lines 30 – 31

62 NE 24 Feb 2020, p 18 lines 6 – 7

to catch fire, Ong would have needed to accelerate the Truck before applying the brakes. He would have needed to do this multiple times. The cumulative effect of alternately accelerating and braking constantly would have made for an incredibly jerky towing operation and made synchronising with the tow truck extremely difficult. I saw no reason for Ong to have driven the Truck in that manner. Huationg's suggestion was that Ong was "not so skilled [and] not so familiar"[63] with operating the Truck. This was a bare assertion that Ong was inexperienced and had driven the Truck poorly. I found this to be speculative, especially considering my earlier findings that Ong was reasonably experienced as a driver of heavy vehicles (see above at [16]). Accordingly, I rejected this assertion.

25 Moreover, Koay testified that the brakes must have been ridden for a fair distance to generate sufficient heat for a fire.[64] But the evidence showed that the Truck had only travelled a short distance (under a kilometre)[65] on the off-Expressway roads before the tyres caught fire. Even if a fire had broken out due to brake riding, it would not have taken the shape and form of the fire that broke out on 20July 2012. As agreed by both experts, the fire originated in one wheel.[66] There was some disagreement about which wheel this was, [67] but that was immaterial. The fact remained that the fire started life in a single wheel. If there had been brake-riding, the brakes would have been applied to all the

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63 NE 26 Feb 2020, p 67 line 28; Plaintiff's Closing Submissions ("PWS"), p 35 para 71

64 NE 26 Feb 2020 p 62 lines 5 – 8

65 NE 26 Feb 2020 p 62 lines 18 – 30

66 BAFF 3, p 1011 para 18(ii); BAFF 1, p 19 para 10

67 BAFF 3, p 1011 para 18(ii); BAFF 1, p 19 para 10

wheels and heat would have built up at all the wheels as well. Presumably, multiple fires would have broken out. That was not the case here.

26 For these reasons, I rejected the Riding Theory as well.

The Pressure Leak Theory

27 I accepted the Pressure Leak Theory as it was the theory most consistent with the available evidence. In particular, it best explained: (a) why nothing seemed amiss at the pre-journey check, the maintenance check and during the journey itself, (b) why the fire originated from a single tyre and (c) why the fire started only later on in the journey.

28 To recount, the Pressure Leak Theory suggested that air pressure had slowly fallen in the parking brake's pressure chamber. Under normal circumstances, this pressure chamber would have been filled with air. The resultant air pressure would have held back a large spring. This spring, which was connected to a braking rod, slowly decompressed as the air pressure decreased in the chamber. As the spring was gradually released, the braking rod would have been pushed forward, partially engaging the brakes. The friction and resultant heat from brake pads rubbing against the brake drum caused the fire.

29 Firstly, the pre-journey checks and maintenance checks could not have detected this sort of air leakage. The pre-journey check merely involved Ong checking the air pressure gauge to ascertain if the air pressure necessary for the braking system was at a suitable level.[68] The leak in the parking brake's pressure

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68 NE 24 Feb 2020, p 15 lines 22 - 23

chamber would have been too small to have registered on the pressure gauge.[69] The leak would not have been detected during the maintenance check either. That check simply involved Huationg's mechanics driving "[the Truck] a little bit forward and depress[ing] the brakes and mak[ing] sure that it [was] working fine".[70] But the effects of the leak would only have been perceptible after air had been leaking out of the chamber for some time, with the spring "creep[ing] forward"[71] and slowly pushing the brake rod to partially engage the brakes. A quick jaunt forward and some taps on the brake pedal would not have unearthed this underlying mechanical issue. Naturally, this same reasoning explained why Ong did not detect the air leakage during the journey as well – the problem was effectively asymptomatic and had evaded detection until it was too late.

30 Secondly, the air leak was confined to a single brake chamber. This explained why only one brake failed[72] and the fire originated in a single tyre.[73] The fire then spread along the axle and to the rest of the Truck.[74]

31 Thirdly, it took some time for the air leak to take effect. As stated earlier, the spring took a while to decompress and consequently it was not until later on that the brake pads were partially engaged. When the brakes were partially engaged, the heat built up "very quickly because of the huge forces involved"[75]

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69 NE 26 Feb 2020, p 97 lines 10 - 25

70 NE 18 Feb 2020, p 60 lines 31 – 32

71 NE 26 Feb 2020, p 75 line 16

72 NE 26 Feb 2020, p 89 lines 12 – 13

73 BAFF 3, p 1011 para 18(ii); BAFF 1, p 19 para 10

74 NE 26 Feb 2020, p 89 lines 12 – 16

75 NE 26 Feb 2020, p 61 lines 27 – 28

and resulted in the fire. This explained why the fire only occurred later on in the journey.

32 For these reasons, I accepted Yishun Towing's Pressure Leak Theory. It naturally flowed from this theory that Ong could not have detected any defect even if reasonable care had been taken. The particular instances of negligence pleaded (*ie,* that Yishun Towing had: (a) failed to implement proper standard operating procedures[76], (b) failed to implement an emergency action plan[77] and (c) had driven the Truck at an excessive speed[78]) were therefore irrelevant. No reasonable standard operating procedure expected of a driver could have unearthed this mechanical defect. No "emergency action plan", whatever this meant, could have catered for such a defect. No amount of care in driving could have anticipated this air leak and the resultant accident. As such, I held that Yishun Towing had not been negligent in discharging its duties under the services agreement.

Issue 2: The Incorporation Issue

33 Though my holdings in the Causation Issue sufficiently disposed of this matter, I also held that the liability clauses had not been incorporated into the contract.

34 Where exemption and limitation clauses are concerned, "[t]he question is whether the defendants had done all that was reasonable to bring this exclusion clause to the attention of the plaintiff so that it became a term of the

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76 PWS p 43 para 91 – p 47 para 103

77 PWS p 47 para 104 – p 105

78 PWS p 40 para 85 – p 42 para 90

bailment.": *Chua Chye Leong Alan v Grand Palace De-luxe Nite Club Pte Ltd* [1993] 2 SLR(R) 420 at [49] ("*Alan Chua"*). Ultimately, this inquiry is an endeavour to ascertain whether there had been a meeting of the minds. I found that there had been no *consensus ad idem* for three reasons.

Purpose of the work orders

35 First, the liability clauses were not intended to be incorporated into the contract. The work orders were not intended to supplement the terms of the contract. They were issued to Huationg to verify the work done by Yishun Towing,[79] and used by Yishun Towing to compute their driver's salaries.[80] They were operational documents – evidence of how the contract translated to actual work processes, rather than a document that sought to establish the terms of the contract itself.

36 Yishun Towing argued otherwise. It suggested that the services agreement (which would govern many towing assignments to come) was so wide in scope that the parties must have contemplated using additional documents to supplement the terms.[81] Yishun Towing relied on *R1 International Pte Ltd v Lonstroff AG* ("*R1 International*") [2015] 1 SLR 521 in support of that proposition.

37 There, the parties entered into five separate transactions. They would usually conduct negotiations for each of these transactions over email or telephone, send "Email Confirmations" once the basic terms had been ironed

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79 NE 20 Feb 2020, p17, lines 9 - 16

80 NE 20 Feb 2020, p17 lines 27 - 29

81 Defendant's Closing Submissions ("DCS"), p 62 para 207(i)

out and go on to supplement the finer details in a follow-up "Contract Note". The issue was whether the terms in the Contract Note had been incorporated into the contract for the second transaction.

38 The Court of Appeal held that it had been successfully incorporated because: (a) it was market practice in the industry for "parties initially to only discuss the commercial terms of each trade" and for "the specification of the rest of the terms of the transaction … [to] be followed up by the operations team": *R1 International* at [60]; (b) it was "improbable that the parties would have expected to contract purely on the bare bones of the Email Confirmations" given the size and scope of the supply contracts: *R1 International* at [63] and (c) the parties' conduct throughout all five transactions suggested that they had *both* in fact contemplated that the basic terms would be supplemented later on: *R1 International* at [65].

39 I distinguished the present case on two bases. First, the Contract Note in *R1 International* made reference to the basic terms that were initially agreed to between the parties. In that sense, it was clearly attempting to flesh out the details of a somewhat rough-and-ready agreement that had been meted out earlier. The work order in the present case did no such thing. And nowhere in the entirely verbal services agreement was there any reference to the terms in the work order either.

40 Moreover, the Contract Note in *R1 International* specifically requested for a signed copy to be returned: *R1 International* at [12(c)]. It was seeking reciprocal confirmation and building agreement with the counterparty. This went towards establishing the fact that *both* parties had intended for the term in the Contract Note to have been incorporated into the larger contract. The work order in the present case however, was unilaterally issued by Yishun Towing to

Huationg. There was no convergence of contractual intentions. "The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected": *Alan Chua* at [53] citing *Harling v Eddy* [1951] 2 KB 739 at 748; [1951] 2 All ER 212.

Time when work orders were exhibited

41 Crucially, the terms were never exhibited to Huationg at any point during the formation of the contract. The terms were not made known to Huationg when the business relationship with Yishun Towing began[82] and neither were they mentioned when a job was being assigned to Yishun Towing.[83]

42 To this, Yishun Towing's contention was that none of this mattered. The only thing that mattered was that Huationg had seen multiple work orders which had all included the liability clauses on their reverse side.[84] Coupled with their lack of protest, Huationg could have been taken to have assented to these terms.[85] In fact, there was a sustained lack of protests for over 300 work orders, all of which concerned towing services (*ie,* contracts similar to that in the present matter). This amounted to a course of dealing that established and incorporated the exemption clauses.[86]

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82 NE 20 Feb 2020 p 42 lines 15 - 20

83 NE 20 Feb 2020 p 14 lines 11 - 18

84 DCS p62 para 207(ii)

85 DCS p62 para 207(ii)

86 DCS p67 para 220

43 I disagreed. The starting point is that silence is equivocal in determining whether there has been a contractual acceptance/acquiescence. The crucial factor here is context: *R1 International* at [53]. The work orders were not given in any sort of context that suggested contractual formation was taking place. They were not given as part of a contractual negotiation, they were not proffered as a recap or confirmation (*ala R1 International*) and they were not discussed with any intention of building towards a meeting of the minds.

44 Yishun Towing's strongest argument was that the liability clauses had been incorporated through a course of dealing. To that end, it relied on *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar"*). But even this did not take its case very far. *Vinmar* involved four contracts which the plaintiff entered into with the defendant and the defendant's parent company. All four contracts explicitly included an exclusive jurisdiction clause. The issue was whether a fifth contract between the plaintiff and the defendant had also incorporated the exclusive jurisdiction clause.

45 *Vinmar* was distinguishable from the present case. The "course of dealings" seen in *Vinmar* had *clearly* included and incorporated the exclusive jurisdiction clause. It was an explicit term of the four previous contracts. The previous dealings discussed in the present case did not give any indication that the parties had agreed to the inclusion of the liability clauses. If anything, the previous dealings here (*ie,* the previous instances where work orders were received and accepted) suffered from the same sort of ambiguity in contractual construction as the present matter did. It was not clear if Huationg had accepted the liability clauses as terms of the contract when it had previously received work orders.

46 Ultimately, the test for incorporation laid out in *Vinmar* was "whether, at the time of contracting, each party as a reasonable person was ***entitled to infer from the past dealings and the actions and the words of the other in the instant case***, that the [term] [was] to be a part of the contract" [emphasis in original]: *Vinmar* at [53]. I noted Yishun Towing's reliance on some factors that *Vinmar* held were relevant to that analysis. These included: (a) the number of previous contracts, (b) how recent they were, (c) whether these contracts had a similar subject matter and (d) whether they had been made in a consistent matter.

47 I acknowledged that the present case involved multiple previous assignments dealing with the same subject matter, executed in the same manner with the same types of work orders being issued. But the crucial factor was that none of these previous dealings had ever brought the liability clauses to Huationg's attention.

48 Indeed, it was Ng's testimony that he had never even seen the work orders throughout Huationg's business relationship with Yishun Towing.[87] I accepted his testimony and noted that this put Huationg in the same position as the plaintiff in *Kua Lee Ngoh v Jagindar Singh* [1987] SLR(R) 119 ("*Jagindar"*). There, the plaintiff brought a suit against a garage where her husband had left her car for servicing. The car was stolen whilst under the garage's care and only discovered much later by the police in a damaged condition. In its defence, the garage relied on a set of exemption clauses which it had allegedly displayed prominently on its premises. Accepting the plaintiff's husband's testimony that his attention had not been drawn to these clauses, the

87 BAFF 2, p 484 para 39

learned judge ruled that the garage was not entitled to rely on these exemption clauses in its defence: *Jagindar* at [5].

49 In particular, I noted that the plaintiff's husband had been sending the vehicle to the defendant's premises for servicing for over a year: *Jagindar* at [1]. Yet, it was held that sufficient notice of the exemption clauses had not been given. This suggested that simple displays of contractual terms were, without more, insufficient to incorporate them into a contract. This was so, even if the terms had been displayed for a long time, such as in the course of about 300 work orders.

Recipient of work orders

50 Finally, I would add that the recipients of these work orders (mere employees of Huationg) were not authorised in any way to negotiate or contract on behalf of Huationg. Yishun Towing's bare assertion that the employees had "actual express authority or actual implied authority"[88] was founded on a misconceived reading of *Hely-Hutchinson v Brayhead Ltd and another* [1968] 1 QB 549 ("*Hely-Hutchinson*"). The protagonist of *Hely-Hutchinson* was a chairman of the company. Though appointed chairman of the company, he had not been vested with any express authority to enter into contracts on behalf of the company. The question was whether the company's conduct had effectively cloaked him with implied authority. The English Court of Appeal held that it had.

51 The employees in the present case were nothing like the chairman in *Hely-Hutchinson*. They did not enter into any contracts on behalf of Huationg.

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88 DCS p 63 para 209

They did not make "final decision" on important company finances (see *Hely-Hutchinson* at 584D). They were not in any meaningful way, de-facto directors of Huationg the way *Hely-Hutchinson*'s chairman was (see *Hely-Hutchinson* at 584D). Of course, Huationg's employees played a crucial role in allocating and assigning the tow jobs to Yishun Towing. But this does not amount to contracting with Yishun Towing. This was at most, an entirely ordinary instance of the employees *executing* a contract that had already been discussed between the two parties.

52 I therefore find that the liability clauses were not incorporated into the contract.

Conclusion

53 For the reasons set out above, I granted judgment for the defendants and dismissed the suit. I ordered the plaintiff to pay the defendant the sum of $100,000 in costs, inclusive of disbursements.

Lee Seiu Kin
Judge

Sham Chee Keat and Dawn Tan Si Jie (Ramdas & Wong) for the plaintiff;
Richard Tan Seng Chew and Michelle Peh Siqi (Tan Chin Hoe & Co) for the defendant.