Magaforce Construction v Khamso Wirat and Others
[2005] SGHC 186

Case Number : OM 45/2004

Decision Date : 29 September 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Gopinath Pillai (Tan Peng Chin LLC) for the applicant; M P Rai (Cooma and Rai) for the third and fourth respondents

Parties : Magaforce Construction — Khamso Wirat; Nisshin Engineering Pte Ltd; Eng Keong Pte Ltd; Tenet Insurance Co Ltd

Employment Law – Employee of sub-subcontractor claiming compensation under Act for injuries suffered in traffic accident – Whether subcontractor hiring sub-subcontractor liable to pay compensation as principal under s 17(1) of Act – Section 17 Workmen's Compensation Act (Cap 354, 1998 Rev Ed)

Employment Law – Whether definition of "place" within s 17(5) of Act including lorry travelling on road – Whether principal liable for accident happening to workmen while travelling on transport provided by principal – Sections 3, 17 Workmen's Compensation Act (Cap 354, 1998 Rev Ed)

29 September 2005

Woo Bih Li J:

Background

1 On 14 August 2000, the first respondent, Khamso Wirat ("Khamso"), was sitting in the back of a lorry travelling along Mountbatten Road when, apparently, a car came out of Crescent Road and collided with the lorry causing Khamso to be flung out and knocked unconscious. The lorry was owned by the second respondent, Nisshin Engineering Pte Ltd ("Nisshin"), and driven by an employee of Nisshin.

2 A claim was made by Khamso for compensation under the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("the Act"). Khamso's employer was Magaforce Construction ("Magaforce"). At the hearing before the Commissioner of Labour, Magaforce agreed that the Housing and Development Board ("HDB") was the developer of a proposed project at Choa Chu Kang. The main contractor was the third respondent, Eng Keong Pte Ltd ("Eng Keong"). Eng Keong had sub-contracted the air-conditioning and mechanical ventilation works to Nisshin. After the award of that sub-contract, Nisshin entered into a contract with Magaforce for the supply of labour by Magaforce to Nisshin. Khamso was one of the workmen provided under the supply of labour.

3 Before the commencement of the works on the project, Eng Keong obtained a workmen's compensation policy ("the Policy") issued by The People's Insurance Company Limited whose name was changed to Hartford Insurance Co Ltd and then to the name of the fourth respondent, Tenet Insurance Co Ltd ("Tenet"). It was agreed that the Policy covered the workmen of HDB, Eng Keong and Eng Keong's subcontractors and that while the Policy covered Nisshin's workmen, it did not cover Magaforce's as Magaforce was not a subcontractor but a sub-subcontractor.

4 On 13 October 2004, the Commissioner of Labour made an order that Magaforce was to pay Khamso $156,130.20 as compensation under the Act. Magaforce was dissatisfied with this decision as

it was of the view that Nisshin, Eng Keong and Tenet should also be liable to compensate Khamso. Accordingly, Magaforce filed Originating Motion No 45 of 2004 ("the OM") in the High Court seeking "an order reversing the order of the Commissioner for Labour … made herein on 15th October 2004, ordering inter alia, that [Magaforce] be liable for compensation payable to … [Khamso]".

5 As mentioned above and for easy reference, I list out the names of the respondents in the OM:

(a) first respondent : Khamso

(b) second respondent : Nisshin

(c) third respondent : Eng Keong

(d) fourth respondent : Tenet

6 At the hearing of the OM, Magaforce was represented by Mr Gopinath Pillai. Eng Keong and Tenet were represented by Mr M P Rai. Khamso was represented by Mr Shankar who was holding a watching brief. Nisshin did not appear nor was represented by Counsel. After hearing submissions, I dismissed the application for the reasons stated below.

The court's reasons

7 Sections 3(1) and 3(2) of the Act state:

> **3.**—(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the provisions of this Act.
>
> (2) An accident happening to a workman while he is, with the express or implied permission of his employer, travelling as a passenger by any means of transport to or from his place of work shall be deemed to arise out of and in the course of his employment if at the time of the accident the means of transport is being operated by or on behalf of his employer or by some other person by whom it is operated in pursuance of arrangements made with his employer and is not being operated in the ordinary course of a public transport service.

8 Counsel before me presented their submissions on the basis that *prima facie* Magaforce was liable to pay compensation to Khamso under the Act, presumably in view of ss 3(1) and 3(2). Under s 23 of the Act, every employer is required to obtain insurance cover against any liability which he may have under the Act. Apparently, Magaforce did not itself obtain such cover.

9 I now come to ss 17(1) to 17(5) of the Act which state:

> **17.**—(1) Where any person (referred to in this section as the principal) in the course of or for the purpose of his trade or business contracts with any other person (referred to in this section as the contractor) for the execution by the contractor of the whole or any part of any work, or for the supply of labour to carry out any work, undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him.
>
> (2) Where a claim has been made against the principal for compensation under

subsection (1), this Act shall apply as if references to the principal were substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed.

(3) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the person who would have been liable to pay compensation to the workman independently of this section.

(4) Nothing in this section shall be construed as preventing a workman from recovering compensation under this Act from the contractor instead of the principal, and a claim made against a principal or a contractor, as the case may be, shall not bar subsequent proceedings under this Act against the other to recover so much of the compensation as may remain unpaid.

(5) This section shall not apply in any case where the accident occurred elsewhere than at or about the place where the principal has undertaken to execute work or which is under his control or management.

10 Mr Pillai contended that as Magaforce had contracted to supply labour to Nisshin, Nisshin was the principal under s 17(1) and, therefore, Nisshin was liable to pay Khamso the compensation. However, I noted from s 17(4) that a finding to that effect would still not absolve Magaforce from liability to Khamso. Furthermore, even if Nisshin was found to be the principal and if Nisshin paid the compensation to Khamso, Nisshin would be entitled under s 17(3) to be indemnified by Magaforce.

11 The main reason for the OM was not so simple. Magaforce was hoping that if Nisshin was the principal under s 17(1), this would deem Khamso to be Nisshin's workman and in turn engage the Policy. If so, then Tenet would have to pay under the Policy and Tenet, as insurer, would presumably have no recourse against Magaforce for an indemnity. I should mention that even if Magaforce had achieved the desired result, Eng Keong would still not be liable to pay compensation to Khamso or to indemnify any of the parties. Eng Keong was not the principal under s 17(1). Neither was Eng Keong the insurer.

12 As regards the relief sought in the OM, it seemed to me that the OM should have sought a variation, not a reversal, of the Commissioner's order in that Nisshin and Tenet should be found liable to pay compensation in addition to Magaforce's own liability.

13 Coming back to s 17, Nisshin would have been the principal of Khamso under s 17(1) if s 17(5) did not kick in. The first limb of s 17(5) did not kick in as the accident had not occurred at or about the place where Nisshin had undertaken to execute work. Accordingly, Mr Pillai relied on the second limb of s 17 and contended that because the lorry was driven by Nisshin's employee, the vehicle was a place which was under Nisshin's control or management. He added that Khamso was being driven back to his quarters at the time of the accident.

14 Mr Pillai relied on certain observations made by Lai Siu Chiu JC (as she then was) in *QBE (International) Ltd v Julaiha Bee Bee* [1992] 1 SLR 406 about the mode of transport having to be operated by or on behalf of the employer or by some other person pursuant to arrangements made with the employer. However, as that case involved the interpretation of s 3(2) and not s 17(5), it did not assist Mr Pillai's submission.

15 Mr Rai, on the other hand, relied on *Andrews v Andrews and Mears* [1908] 2 KB 567 ("*Andrews*"). The law report at 576 summarises the facts as follows:

> The appellant Mears was a builder and contractor. In August, 1907, he had contracted to do certain paving work near the Albert Hall, Knightsbridge. Part of his contract was to cart sand to Knightsbridge and remove rubbish from the same place. Mears had sub-let a part of this contract to a carter named Andrews. On August 16, 1907, the deceased, who was a son of Andrews and in his employment, was engaged in carting a load of rubbish from the Albert Hall. While on this journey he fell from his cart in the public street at a place about two miles distant from the Albert Hall and was killed.

16 An issue was whether Mears was liable as "the principal" within s 4(1) of the UK Workmen's Compensation Act 1906 (c 58), on the ground that under the contract the work of carting was to be executed not only at the termini from and to which the rubbish was to be carted, but also on the roads between those termini along which the carting was to be done. Section 4(4) of the Workmen's Compensation Act 1906 stated:

> (4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

17 The Court of Appeal did not find Mears liable as principal. Buckley LJ said:

> In my opinion a street, the public highway, was not for this purpose "premises" on which the work was to be executed. That word implies some definite place with metes and bounds, say land, or land with buildings upon it. Nor was it a place "otherwise under the control or management" of the principal. A public street is not, in my opinion, within these words at all. One might put numerous instances of work which is to be done, coupled with the obligation of bringing and delivering the finished article or of taking away the work to be done and bringing it back again. It seems to me that it would be impossible to say that the operation of so conveying the work over the public road is done on premises on or in or about which the principal has undertaken to execute the work or which are otherwise under his control or management. The result is that s.4 does not, in my opinion, apply, and the principal here is not liable.

18 I was of the view that *Andrews* was not a direct authority on the second limb of s 17(5) of the Act. Firstly s 4(4) of the English Act is not *in pari materia* with s 17(5) of the Act because it refers to "premises" whereas s 17(5) refers to "place". Secondly, the issue there was whether the street where the accident occurred came within the meaning of "premises". Mr Pillai's contention was not that Mountbatten Road was a place which was under the control or management of Nisshin but that the lorry constituted such a place.

19 Nevertheless, I found the reasoning of Buckley LJ helpful. There are numerous instances of workmen travelling to and from the principal's work site, or some other place under the principal's control or management. Often, transport on such travel would be provided by the principal. If such transport constitutes a "place" for the purpose of s 17(5), the scope of liability of one who is not the immediate employer of the workman would be expanded quite greatly. As Penlington JA noted in *Leung Chack v Asia Insurance Co Ltd* [1991] 2 HKLR 496 ("*Leung Chack*"), one of the fundamental principles of statutory interpretation is that legislation should not be taken to impose financial liability on any person unless it does so in clear and unambiguous terms. Although Penlington JA was in the minority in *Leung Chack*, the majority did not disagree with this principle of statutory interpretation. In respect of the Act, I was of the view that Parliament had not intended to expand the liability of one who would have been a principal to include liability for accidents while travelling on transport provided by the principal.

20 It seemed to me that a "place" for the purpose of s 17(5) extends only to a fixed location, if on land, like, for example, a site next to the work site of the principal or another site where work is done for the purpose of the principal's job at the work site. Consequently, if the lorry was at such a site, and another vehicle had collided with the lorry there, then the accident would have occurred at a "place" for the purpose of s 17(5). However, as the lorry in Khamso's case was travelling on the road to Khamso's quarters, the lorry itself was not a "place" for the purpose of s 17(5).

21 I come back to s 3(2) which deals with an accident happening to a workman while he is travelling by any means of transport to or from his place of work. Mr Pillai had submitted that the terms of s 3(2) show that it was to apply to a principal under s 17. I set out below in italics the particular terms of s 3(2) which Mr Pillai had relied on:

> An accident happening to a workman while he is, with the express or implied permission of his employer, *travelling as a passenger by any means of transport to or from his place of work shall be deemed to arise out of and in the course of his employment if at the time of the accident the means of transport is being operated by or on behalf of his employer* or by some other person by whom it is operated in pursuance of arrangements made with his employer and is not being operated in the ordinary course of a public transport service.

In my view, there was nothing in s 3(2) itself to suggest that s 3(2) also applies to a principal under s 17.

22 Furthermore, if the intention was to expand the liability of the principal to accidents occurring on transport while on the road, provided that the transport was under the principal's control or management, it would have been simple enough to add words similar to s 3(2) in s 17(5) or elsewhere in the scheme of things under s 17. That this was not done also suggests that that was not the intention and that the omission to do so was not accidental but deliberate.

23 Accordingly, I was of the view that s 17(5) kicked in and s 17 did not apply. Hence, Nisshin was not the principal of Khamso. This conclusion meant that neither Nisshin nor Tenet was liable to Khamso.

24 However, I will address another issue raised by Mr Pillai if I had found that Nisshin was a principal. That issue was whether Khamso was deemed to be Nisshin's employee (if Nisshin was the principal), and, if so, whether the Policy would then cover Khamso, as Nisshin would conversely be the deemed employer of Khamso. I will refer to the former issue as "the deeming issue". I am addressing the deeming issue as Mr Rai had suggested that the deeming issue was of general importance and would arise in other pending cases again.

25 Mr Pillai's written submission did not make any argument on the deeming issue. In oral submission, he sought to rely on various "facts" to establish that factually Nisshin was Khamso's employer. However, that, of course, was not a tenable approach since the agreed facts were that Khamso's employer was Magaforce, not Nisshin. In turn, Mr Rai relied on some cases which I shall elaborate on later.

26 As it turned out, the deeming issue was irrelevant for the purpose of engaging the Policy. Mr Pillai's approach had assumed that this issue had to be determined first before Khamso could be covered by the Policy on the ground of some operation of law notwithstanding that Magaforce's workmen were not covered by the express terms of the Policy. In my view, the correct approach would have been to construe the terms of the Policy and see whether they cover Magaforce's workmen if Nisshin was found liable as principal.

27 As regards Mr Rai's submission that Nisshin would not have been obliged under the Act to obtain insurance cover for its liability to Khamso in any event, I was of the view that although Mr Rai was probably correct, the point was not relevant as the case before me was not one of prosecution of Nisshin, or even Magaforce, but whether, *vis-à-vis* Tenet, the Policy was engaged. It is important to remember that s 17(2) states that, "this Act shall apply as if references to the principal were substituted for references to the employers". It does not purport to affect the construction of the terms of policies issued to cover workmen's compensation. Therefore, the focus in the case before me should not be what the Act requires but what the Policy was covering. An insured may have wanted to obtain cover for all his and his sub-contractor's liabilities under the Act but this does not necessarily mean that the policy he obtained in fact covers all such liabilities. The point is expressed succinctly by Walsh J in *State Mines Control Authority v Government Insurance Office of New South Wales* (1964) 65 SR (NSW) 258 at 261:

> [I]t is to the language of the policy that one must look to ascertain the extent of the indemnity for which the defendant contracted. If it should appear that its language provides for an indemnity either greater or less in its extent than might have been expected having regard to the provisions of the Act, nevertheless the liability of the insurer must be measured by the contract itself.

This passage was cited with approval by Hutley JA in *Employers' Mutual Indemnity Association Ltd v K B Hutcherson Pty Ltd* [1976] 2 NSWLR 302 ("*Hutcherson*") at 304–305.

28 Although the deeming issue turned out to be irrelevant, I would like to say something more on the Australian case of *Hutcherson* and the Hong Kong case of *Leung Chack* ([19] *supra*) should the deeming issue become relevant in another case. I would caution against undue weight being placed on these two cases for the reasons stated below.

29 Mr Rai had placed emphasis on these two cases for the deeming issue on the basis that the workmen's compensation legislation considered in these cases was the same as s 17(2) of the Act. I note that while the legislation considered in each of those cases encompassed a provision which appeared to contain a combination of s 17(1) and s 17(2), there are some differences, when compared with our s 17(1), which may be material depending on the facts in each case. For example, the Australian and Hong Kong legislation do not expressly refer to a contract for the supply of labour. Secondly, the Hong Kong provision, *ie* s 24(1) of the Employees' Compensation Ordinance (Cap 282) refers to a principal contractor's contracts with a subcontractor for the execution by "or under" the sub-contractor and the principal contractor's liability to pay any employee employed by that sub-contractor "or by any other sub-contractor" in the execution of the work. Section 17(1) of the Act does not have the words in inverted commas. Furthermore, the reasons of the courts in those cases were based on other provisions in the legislation they were considering and the Act does not have all of those other provisions. I would add that the majority judgment of the Hong Kong Court of Appeal in *Leung Chack* focused on the interpretation of the policy there and not the deeming issue as Mr Rai had suggested.

30 As for the issue as to whether the terms of the Policy would have covered Khamso, if Nisshin was the principal, Mr Rai submitted that Andrew Ang JC (as he then was) had decided in another case in Originating Motion No 18 of 2004 that the terms of the Tenet policy for the main contractor there, which were allegedly similar to the terms of the Policy before me, did not cover the injury of a workman of a sub-subcontractor.

31 I did not reach any conclusion on the terms of the Policy as that issue was academic since I had already concluded that Nisshin was not the principal under s 17. Furthermore, I did not have the

benefit of full arguments thereon as the focus of the arguments before me was not so much on the construction of those terms but on the application of certain provisions in the Act and in particular s 17(5).