

HONG KONG / JUDGMENT

CHEN XIUMEI v. LI SIU WO AND ANOTHER

COURT

Court of Appeal

DECIDED

15 November 2007

CASE / FILE NUMBER

CACV26/2007

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bjbj CACV 26/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 26 OF 2007 (ON APPEAL FROM DCEC 645 OF 2005) BETWEEN Chen XiuMei for herself and for and on behalf of other members the family of Liang Yi Kai, deceased Applicant and Li Siu Wo 1st Respondent The Employees Compensation Assistance Fund Board 2nd Respondent Before : Hon Tang VP, Cheung JA and Waung J in Court Date of Hearing : 6 November 2007 Date of Judgment : 6 November 2007 Date of Reasons for Judgment : 15 November 2007 REASONS FOR JUDGMENT Hon Tang VP AUTONUMOUT I agree for the reasons given by Cheung JA that the accident arose out of and in the course of the deceased s employment. AUTONUMOUT Mr Wong conceded that on the basis of this court s decision in Yu Nongxian v Ng Ka Wing and Anor [2007] 4 HKLRD 159, he could not properly advance any argument on the exercise of the discretion under section 2(2) of the Employees Compensation Ordinance, Cap. 282. AUTONUMOUT I am satisfied that on the basis of the decision in Yu Nongxian the discretion should be exercised in favour of the applicant. Indeed, I regard the present as a stronger case for the exercise of discretion. Unlike the employer in Yu Nongxian, the 1st respondent has taken part in the proceedings. His means are not known. But I would not presume that he would not be in a position to pay any part of the compensation, by instalments or otherwise. That being the case there is strong public policy reason to exercise the discretion in favour of the applicant. AUTONUMOUT For the above reasons, I agree with the order proposed by Cheung JA. Hon Cheung JA AUTONUMOUT On 6 November 2007 at the conclusion of the hearing we allowed the appeal of the applicant and dismissed the cross appeal of the 1st and 2nd respondents. These are my reasons. The claim AUTONUMOUT Mr. Liang Yi Kai (Liang) was a Mainland resident. He came to Hong Kong on a two-way permit and worked for the 1st respondent Mr. Li Siu Wo (). On 22 November 2003 while working for Mr. Li, Mr. Liang died from an industrial accident when his body was caught between the forklift of a forklift truck (the truck) and the roof frame of the truck. AUTONUMOUT Mr. Liang was an illegal worker in Hong Kong. The conditions imposed on his entry to Hong Kong expressly prohibited the taking up of employment in Hong Kong. AUTONUMOUT Mr. Li was charged with the criminal offence of hiring an illegal worker and was sentenced to six months imprisonment. AUTONUMOUT The

applicant, namely Mr. Liang's wife on behalf of herself and the dependants of Mr. Liang claimed employees compensation against Mr. Li. The 2nd respondent, the Employees Compensation Assistance Fund Board (the Board) joined as a party to the proceedings. The case was heard before Deputy District Judge E. Yip. The issues AUTONUMOUT Two issues relevant to the appeal arose in the proceedings : whether the accident arose out of and in the course of the employment of Mr. Liang; whether the applicant was entitled to employees compensation when Mr. Liang was an illegal worker in Hong Kong. AUTONUMOUT The Judge found that the accident arose out of and in the course of employment of Mr. Liang. He, however, dismissed the applicant's claim for employees compensation on the ground that Mr. Liang was an illegal worker in Hong Kong and public policy precluded the claim. AUTONUMOUT The applicant appealed against the dismissal of her claim while Mr. Li and the Board appealed against the decision of the Judge that the accident arose out of and in the course of employment of Mr. Liang.

Facts

AUTONUMOUT The accident occurred at a factory situated in Pak Sha Village in the New Territories. Mr. Li received a job order to remove lard scraps from that factory. The scraps were contained in bags of 50 kg. The bags had to be put into a container which would be transported to the Mainland. In order to do the job Mr. Li borrowed the truck from a friend. Mr. Li claimed that he was the only one who could operate the truck. The work of Mr. Liang and another co-worker called Mr. Zeng Xianang (Zeng) was to put the bags onto wooden pallets. The pallets would then be lifted by the truck to the level of the container. The workers would then remove the bags and put them inside the container. AUTONUMOUT The loading of bags to the container had been carried on for a few days. For the purpose of this appeal it is sufficient to state that the work took place on 21 as well as 22 November 2003. AUTONUMOUT On 21 November Mr. Li only returned to the site at 11 a.m. He learned afterwards that Mr. Liang had driven the truck. Later on that day he told the workers that he would be late for work the following day and told them to start early. AUTONUMOUT On 22 November when he returned to the site shortly after 8 a.m. he saw the truck was being operated by Mr. Liang. He told Mr. Liang that it was dangerous to do so and he then operated the truck himself. AUTONUMOUT About one hour later Mr. Li took a break from operating the truck. He left the key in the truck and went to the washroom. While he was at the washroom he heard the engine sound of the truck. He suspected that Mr. Liang was operating the truck. He did not call out to stop him. Soon afterwards he heard some yelling and saw Mr. Liang standing on the dashboard panel of the truck and his chest was being trapped between the forklift and the roof frame of the truck. AUTONUMOUT Mr. Li further stated that on another occasion when he hired Mr. Liang to work at a site called the Upper Bamboo Garden he saw Mr. Liang operated a forklift truck belonging to the owner of the site. He told Mr. Li that it was dangerous to do so. Mr. Li did not use a forklift truck for the removal work at that site because of the limited space. The truck was required for the job at Pak Sha Village because it was a large place and the workload was substantial. Course of employment AUTONUMOUT I will deal with the issue of course of employment first. Section 5(1) of ECO AUTONUMOUT Under Sections 5(1) of the Employees Compensation Ordinance () Cap. 282 compensation is payable by the employer

to an employee in respect of personal injury caused to the employee by accident arising out of and in the cause of employment. The relevant principles AUTONUMOUT The following are relevant principles : The phrase in the course of his employment means in the course of the work which the workman is employed to do and what is incident to it : Lam Min v. Yau On Construction Co. [1981] HKLR 646, in which the Hong Kong Court of Appeal applied the English Court of Appeal's decision of R. v. National Insurance Commission ex. p. Michael [1977] 2 All ER 420. Each decision on what is in the course of is a decision on its own particular facts and previous decisions particularly on the old English Workmen's Compensation Acts (upon which ECO was modelled) are to be regarded only to a very limited extent as creating binding precedents : Nancollas v. Insurance Officer [1985] 1 All ER 833. The Court should adopt a broad approach in weighing all facts material to a particular claim and should then consider the aggregate of such factors in the final evaluation, no one factor being so decisive as to outweigh the others : Nancollas. The words out of points to the origin or cause of the accident. Section 5(4)(a) of the ECO provides a presumption that an accident arising in the course of an employee's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment. The Judge's finding AUTONUMOUT The Judge accepted the evidence of Mr. Li. The judge held that It is not in dispute that before coming to the factory site of Pak Sha Village, where the accident happened, there was never any need for a forklift due to the limitation of space. However, one day prior to the accident, the deceased had operated the forklift with the subsequent knowledge of the 1st respondent. The non-intervention by the 1st respondent and the necessity of the task rendered it the only reasonable inference that the deceased was impliedly authorized to operate the forklift on the date of the accident. The Board's case AUTONUMOUT The Board's case is that Mr. Liang was employed solely as a manual labourer to stack the bags onto the pallet boards and when the pallet board with the stacked bags was hoisted up to the level of the container he would push them inside of the container. As he was not employed to operate the truck, he was not in the course of employment when he was injured when operating the truck. The respondents challenge AUTONUMOUT Mr. Horace Wong SC, counsel for the Board, attacked the finding on two grounds : it was wrong to infer that a manual worker could be impliedly authorized to operate the truck; and it was illogical to convert a lack of express prohibition to implied authorization by Mr. Li to allow Mr. Liang to operate the truck. AUTONUMOUT Mr. Li who appeared at the appeal did not make separate submissions on the appeal and cross appeal. Finding justified AUTONUMOUT In my view the finding by the Judge that Mr. Liang was impliedly authorized to operate the truck was amply justified by the evidence. Unlike the previous assignment, Mr. Li expressly borrowed a forklift truck for the purpose of lifting the bags onto the container. The bags would be too heavy and the area too large for the job to be done manually. This clearly means that the truck was to be used for the job. If Mr. Li actually needed a truck to carry out the work one may ask what was the rationale for him to be its sole operator? He himself did not have a licence to operate the truck. So the fact that Mr. Li did not have a licence would not be a valid reason to confine his work only to the task of physically lifting the bags by hand only. To say that the work of Mr. Liang was simply to stack the bags onto the pallet boards first when Mr. Li was not there to operate the truck was to ignore the reality of the situation. Mr. Liang and Mr. Zeng were employed to carry out the removal of bags from the

factory to the container which was to be delivered to the Mainland. There was a deadline to meet. On the day of the accident there were still about 400 bags to be removed. The task was supposed to be finished that day. Each pallet board would be stacked with 12 bags. There was no evidence as to how many pallet boards were available at the site although the photographs produced at the trial faintly showed that there were some pallet boards at the site. It is significant that Mr. Li only returned to the site on 21 November at 11 a.m. when the operation had already started at 8 a.m. The most important question to be asked is this : What were Mr. Liang and Mr. Zeng to do before Mr. Li returned if he was the only one who could operate the forklift truck? It simply does not make sense if their task was confined to stacking the bags onto the pallet boards only and waited for Mr. s return when, as said earlier, there was no evidence as to how many pallet boards were available for the bags to be stacked. Further there was no evidence as to whether there was any available space on the floor of the site for this to be done. It makes no sense that Mr. Li who borrowed the truck for the sole purpose of doing the removal would expect the truck to remain idle until his return. All this is strong indication that Mr. s work was not merely a manual one of stacking up the bags onto the pallet and then loaded them onto the container when the pallet was hoisted to the level of the container. As part of the removal work which Mr. Liang had to perform it would include the operation by him of the truck from time to time. This was part of the work process. If Mr. Li really intended that he was the only one who would operate the truck and no body else, one would not expect him to leave the key in the truck when he was away. His lack of expressed prohibition when he learned Mr. Liang had operated the truck on 21 November and when he saw Mr. Liang operated the truck on 22 November is a matter of great significance. From this response the judge could indeed draw the inference that Mr. Li had authorized Mr. Liang to operate the truck. What the Judge said about implied authorisation must be considered in the context of this case. What he really meant was that the job required Mr. Liang both to physically carry the bags and also operate the truck. Other supporting evidence AUTONUMOUT In any event the Judge s finding is clearly supported by the evidence adduced at the hearing. Among the evidence is an Accident Report dated 16 March 2004 prepared by the Occupational Safety Officer. This Report was disclosed and produced as evidence by the Board. According to this Report information was obtained from Mr. Zeng, Mr. Li and the owner of the factory. AUTONUMOUT Paragraph 4 of the Accident Report contained a summary of the interview of the three witnesses

4.2.6 Li alleged that the forklift truck was operated by him on the day of accident but Zeng claimed that it was operated by D/P (i.e. Mr. Liang). However, both agreed that D/P had operated the forklift truck on the day before the accident and it was Li who instructed D/P to operate.

4.2.17 Li had instructed D/P to operate the forklift truck on the day before the accident as D/P told him that D/P had experience on operating forklift truck before. AUTONUMOUT Although the Report was not put to Mr. Li in cross examination, neither Mr. Li nor the Board expressly challenged the accuracy of the Report. AUTONUMOUT The Report also dealt with what Mr. Liang told Mr. Li after the accident 4.2.15 After releasing from the forklift truck, D/P had told Li that, at time of accident, D/P wanted to operate the forklift truck to lift up the laden pallet. While doing so a pack of feed on the pallet suddenly slipped out. D/P thus stepped on the control panel of the forklift truck to adjust the slipped out pack. During adjustment, D/P was trapped. Zeng also told by other workers of the same circumstances just after the accident. AUTONUMOUT The Report

then discussed the probable cause of the accident 5.3 As both Li and Zeng did not actually witness how the accident happened (item 4.2.7), what actually occurred at the material time could only be inferred from the circumstantial evidences provided by Li and Zeng. 5.4 Since there was a major discrepancy between Li and Zeng on who was the operator of the forklift truck on the day of accident (item 4.2.6), there might be two possible scenarios at the material time as stated below :

- (a) Scenario based on Li (Li was the forklift truck operator): While LI was operating the forklift truck to transport a laden pallet, he stopped the forklift truck near the rear end of the trailer with the laden pallet rested on the ground (item 4.2.11). Li then turned off the engine with the key left on the keyhole of the forklift truck (item 4.2.10). At this moment, D/P stayed inside the container and Zeng was at the rear end of the premises (item 4.2.9). And then, Li went to drink water and toilet. After LI s leaving, D/P got into the forklift truck and turned on its engine (item 4.2.10) in order to lift up the laden pallet (item 4.2.11). While doing so, a pack on the pallet suddenly slipped out. D/P thus stepped on the control panel of the forklift truck to lean out his body between the mast and overhead guard of the forklift truck to adjust the slipped out pack (item 4.2.15). During adjustment, one of D/P s feet accidentally pushed the tilt control lever backward (item 4.2.13) causing the mast of the forklift truck to tilt backward (item 4.2.12). D/P was thus trapped on the forklift truck.
- (b) Scenario based on Zeng (D/P was the forklift truck operator): While D/P was operating the forklift truck to move a laden pallet into the container s platform (item 4.2.8), a pack on the pallet suddenly slipped out. D/P thus stepped on the control panel of the forklift truck to lean out his body between the mast and overhead guard of the forklift truck to adjust the slipped out pack. During adjustment, one of D/P s feet accidentally pushed the tilt control lever backward causing the mast of the forklift truck to tilt backward. D/P was thus trapped on the forklift truck (item 4.2.15). 5.5. Scenario (a) was more likely to be the true picture when comparing with scenario (b), since Zeng s allegation of D/P as the forklift truck operator on the day of accident might confuse with that on the day before accident. Also, there was no reason for Li to lie on this point as he had already admitted that he instructed D/P to operate the forklift truck on the day before accident. AUTONUMOUT In my view the accident clearly occurred in the course of employment of Mr. Liang. This being the case it is not necessary to rely on the presumption in Section 5(4)(b) which provides that an accident to an employee shall be deemed to arise out of and in the course of his employment, notwithstanding that the employee was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the employee for the purposes of and in connection with his employer's trade or business. or the authorities concerning the application of this presumption. Discretion AUTONUMOUT I will now deal with the issue of discretion. Section 2(2) of the ECO confers a discretion on the Court to award compensation even when the contract under which the injured person was working at the time of the accident was an illegal one. AUTONUMOUT The judge declined to exercise the discretion in favour of the

applicant. He held that To countenance an illegal contract of employment would be an invitation to the potential law-breakers and squarely against clear public policy. *Chan Cheuk-ting v. Analogue Engineering Co. Ltd* AUTONUMOUT In so doing the judge ignored the decision of this Court (Silke JA, Power and Nazarett JJ (as they then were) in *Chan Cheuk-ting v. Analogue Engineering Co. Ltd. and Another* [1986] HKLR 935 which was concerned with the claim by a deceased worker who came to the Hong Kong from the Mainland as an illegal immigrant. This Court held that, We are in agreement with the judge that there is no consideration of policy of such weight that it would require the court to refuse to exercise its discretion. The deceased was performing lawful work. He was covered by a policy of insurance in the performance of the work he was doing. He suffered an injury causing his death in the course of his employment. We see nothing in public policy that would require a court to refuse to exercise its discretion so as to deny the dependants the benefit of the insurance policy. *Yu Nongxian v. Ng Ka Wing* AUTONUMOUT This Court (Tang VP, Cheung JA and Lam J) further applied *Chan Cheuk-ting* in *Yu Nongxian v. Ng Ka Wing* [2007] 4 HKLRD 159 and exercised the discretion in favour of the dependants of a deceased Mainland worker whose condition of stay in Hong Kong prohibited him from taking up employment in Hong Kong. Further observation AUTONUMOUT I do not intend to repeat the basis of the Court s decision in *Yu Nongxian*. I will only address the following two matters.

AUTONUMOUT First, in *Chan Cheuk-ting*, the employer had an employees compensation insurance coverage. I do not see any distinction in a situation where the employer does not have such a coverage. The employer is the person primarily responsible for the payment of compensation under section 5(1) of the ECO. This responsibility continues irrespective of whether he has an insurance coverage as required by section 40 of the ECO. AUTONUMOUT Second, even if, for the purpose of argument, the potential liability of the Employees Compensation Assistance Scheme Fund (the Fund) is a relevant factor to be taken into account on the exercise of the discretion, I agree with the argument of Ms Gladys Li S.C. and Mr. Mohan Bharwaney, counsel for the applicant, that it should not affect the outcome of the exercise. An employer is required to effect employees compensation insurance coverage under section 40 of the ECO. The levy imposed on such policies under s. 14 of the Employees Compensation Insurance Levies Ordinance, Cap. 411 (ECILO), is a source of revenue for the ECAS Fund to satisfy judgments for compensation against uninsured employers. *Chan Cheuk Ting* is a long established decision given more than 20 years ago. The Fund ought to have realized its exposure to potential claims by illegally employed workers whose employers were unlikely to provide them with insurance coverage. No steps had been taken by the Fund to adjust the levy or introduce legislative change so as to preclude the Fund from making payment in such a situation. The Fund should not be allowed to take advantage of its inertia and use it to preclude the claim of the applicant. AUTONUMOUT Mr. Wong S.C. very properly conceded that in the light of our decision in *Yu Nongxian* he could not advance any further argument on the issue of discretion. In *Yu Nongxian* the Board intends to seek leave to appeal from the Court of Final Appeal after this Court refused its application for leave to appeal to the Court of Final Appeal. Discretion exercised in favour of the applicant AUTONUMOUT In my view the discretion was wrongly exercised by the Judge

against the applicant. Apart from the fact that Mr. Liang was an illegal worker, there really was no other factor which called for a refusal of relief to the applicant. Mr. Liang was doing lawful work at the time of his death. I will exercise the discretion in favour of the applicant.

Conclusion

AUTONUMOUT Accordingly this Court allowed the applicant s appeal and dismissed the respondents cross-appeal. AUTONUMOUT There is a matter I will state in relation to compensation. The Judge stated that Mr. Liang was acting recklessly at the time of the accident. This may affect the level of compensation payable to the applicant. Without going further, I would just observe that based on the evidence I just cannot see how recklessness can be an issue at all. Costs AUTONUMOUT The applicant is entitled to the costs of the appeal and below. The applicant s own costs are to be taxed in accordance with Legal Aid Regulations. Hon Waung J : AUTONUMOUT I agree. Hon Tang VP : AUTONUMOUT By letter dated 14 November 2007, we were informed that the applicant was willing to accept the minimum compensation of \$303,000. That being the case we are prepared to make the necessary consequential orders unless the respondents or one of them wishes to pursue the point that the deceased had acted recklessly. In that event, they should inform my clerk and we will reconvene at an early date to deal with the matter. In the event that notice is not received from either party that they wish to have a further opportunity to be heard, the necessary consequential order will be made. (Robert Tang) (Peter Cheung) (William Waung) Vice-President Justice of Appeal Judge of the Court of First Instance Ms Gladys Li, SC and Mr. Mohan Bharwaney, instructed by Messrs Elaine Tam & Co., assigned by Director of Legal Aid, for the Applicant 1st Respondent, in person, present Mr. Horace Wong, SC, instructed by Messrs Gallant Y. T. Ho & Co., for the 2nd Respondent PAGE - A B C D E F G H I J 1udk 1udk G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V xqxq r p# r p# r p# "@AB9D / Jz @m2z iz14]C]6 }j<RK frXT0 uxB26I]C]6 iz14 & 6" CACV Judiciary abc-Cheung-CACV Judiciary Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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