

Pacific Insurance Company Limited

Appellant

v.

Wong Po Wah by his next friend
Raymond Wong

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
13TH MARCH 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD ACKNER
LORD OLIVER OF AYLMEYTON
LORD GOFF OF CHIEVELEY

[Delivered by Lord Bridge of Harwich]

The respondent sustained injury by accident arising out of and in the course of his employment. He became entitled to compensation from his employer under the Employees' Compensation Ordinance (Cap. 282). In due course the amount of compensation was agreed in the sum of HK\$15,238.40. The agreement was approved by the Commissioner for Labour pursuant to section 17 of the Ordinance. The general rule under section 13(2) of the Ordinance is that compensation payable is to be first paid to the Court and then paid by the Court to the person entitled to receive it, but by proviso (ii) to the sub-section, when the Commissioner has approved an agreement under section 17 he may direct that the agreed amount be paid directly by the employer to the employee. He did so in this case, whereupon the agreed sum became due to the respondent from his employer. The employer was insured against his liability to pay compensation under the Ordinance by the appellant. The appellant promptly paid to the employer the sum due to the respondent, but the employer paid the cheque into an overdrawn bank account and the respondent received nothing. The employer's failure to pay the respondent within certain periods stipulated by section 17A of the Ordinance attracted surcharges by

way of additional compensation, bringing the total amount of compensation due to the respondent up to HK\$17,600.30.

In due course the respondent applied to the District Court claiming to recover the compensation due to him from the appellant. His claim was dismissed by the judge on grounds which are no longer relied on by the appellant. The Court of Appeal (Fuad V.-P., Hunter J.A. and Macdougall J.) allowed the respondent's appeal. The appellant now appeals to Her Majesty in Council by leave of the Court of Appeal.

The Employees' Compensation Ordinance was first enacted in 1953. Over the years it has been the subject of numerous additions and amendments. Perhaps it is not surprising that, viewed as a whole, it is not a model of statutory draftsmanship. But their Lordships do not entertain any doubt as to the effect of the provisions on which the issue in the appeal turns.

Part IV of the Ordinance which is headed "Compulsory Insurance" came into operation in 1984. Section 40 requires every employer to be insured for the full amount of his liability to employees for injuries by accident arising out of and in the course of their employment whether under the Ordinance or independently of the Ordinance. Non-compliance is an offence punishable by a fine of HK\$50,000 and imprisonment for 2 years. Section 42 invalidates any condition in an insurance policy issued for the purposes of Part IV which would enable the insurer to repudiate liability on the ground of anything done or omitted to be done after the happening of an accident giving rise to a claim under the policy. The crucial sections are sections 43 and 44 of which their Lordships set out the provisions relevant to the issue in the appeal:-

" 43.(1) Subject to this section, where in relation to an employee there is in force a policy of insurance for the purposes of this Part and the employer of the employee becomes liable to pay any sum under the Ordinance or independently of this Ordinance in respect of an injury to the employee arising out of and in the course of his employment, such sum shall forthwith become due and payable by the insurer, including any sum payable in respect of interest and costs, notwithstanding anything to the contrary in the policy of insurance.

...

(4) Where any sum is paid by the insurer which would, were it not for the provisions of this section, not be payable under the policy of insurance, such sum shall be recoverable by the insurer from the employer.

44. Every policy of insurance issued for the purposes of this Part shall be deemed to provide that any employee or other person having a claim against the person insured in respect of the liability in regard to which such policy was issued shall be entitled to recover in his own name, as though he were a party to the policy, directly from the insurer any amount which he would have been entitled to recover from the person insured."

It is common ground that the effect of these sections is to make the insurer directly liable to the injured employee and that he cannot escape this liability on any ground on which he might have repudiated liability under the policy to the employer such as fraud, material non-disclosure or breach of warranty. The appellant contends, however, that once the insurer has paid to the employer the amount due from the employer to the injured employee this discharges the insurer's liability to the employee. Reliance is placed in particular on the provisions of section 28 of the Ordinance which has the effect of transferring to an injured employee the rights of an insolvent employer under a policy insuring his liability to employees under the Ordinance. But section 28 was in the legislation before the provisions of Part IV introduced compulsory insurance and direct liability of insurers to employees and is now rendered effectively otiose. It certainly cannot cut down the effect of sections 43 and 44. Their Lordships are satisfied that the manifest intention of those sections in the context of Part IV is to enable an employee who has been injured at work in circumstances giving rise to a right to compensation or damages against his employer to recover the amount due directly from the insurer whenever for any reason he fails to recover it from the employer. The insurer's remedy, if either he would not have been liable under the policy to the employer or he has already paid the amount due to the employer, is to recover from the employer the amount he has had to pay to the employee.

For these reasons and in agreement with the reasons expressed in the judgments of the Court of Appeal their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs which are to be taxed on the indemnity basis unless otherwise agreed.

