Privy Council Appeal No. 15 of 1992

Chan Woon-hung trading as Ocean Plastic Factory *Appellant*

v.

Associated Bankers Insurance Company Limited *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD JAUNCEY OF TULLICHETTLE
LORD SLYNN OF HADLEY
LORD WOOLF
SIR CHRISTOPHER SLADE

*[Delivered by **Lord Jauncey of Tullichettle**]*

The appellant who is a Chinese resident in Hong Kong, speaking no English, was at all times material to this appeal the proprietor of a small plastics factory in the Colony. In July 1980 he effected a policy of employer's liability insurance with the respondents and thereafter renewed the policy annually for a number of years, receiving on each occasion of renewal a new policy with the same conditions. Each policy, which covered the insured's liability both at common law and under the Hong Kong employees' compensation legislation, was written in English and headed "Employees' Compensation Policy". Immediately above this heading were Chinese characters which their Lordships were informed provided a similar description. The policies contained ten conditions and underneath there was a box which contained the following words in English:-

> " For your own protection you are requested to read the Policy and its Conditions in order to ascertain that it is in accordance with your intentions and, if it is incorrect, return it immediately for alteration."

Within the box and immediately below the English words were Chinese characters which spelled out a similar message. To each policy were appended an endorsement

and schedule setting out in English *inter alia* the number and classification of employees to be covered and certain exceptions. Each policy had attached to it a note in Chinese headed "Procedures For Handling Employee's Compensation Claim". This appeal concerns the interrelation of the policy and the Chinese note and it is therefore necessary to set out certain conditions as well as the contents of the note.

Conditions 2 and 5 of the policy were in the following terms:-

"2. The due observance and fulfilment of the Terms of this Policy in so far as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy. ...

5. In the event of any occurrence which may give rise to a claim under this Policy the Insured shall as soon as possible give notice thereof to the Company with full particulars. Every letter claim writ summons and process shall be notified or forwarded to the Company immediately on receipt Notice shall also be given to the Company immediately the Insured shall have knowledge of any impending prosecution inquest or fatal inquiry in connection with any such occurrence."

The translation of the Chinese note certified by a court translator was in *inter alia* the following terms:-

" PROCEDURES FOR HANDLING EMPLOYEE'S COMPENSATION CLAIM

FORM:

If an employee is injured at work during his employment, the employer should immediately send the injured to a government hospital for treatment and obtain from the Labour Department and Hang Seng Bank separately the following forms for completion:

(A) Obtain from the Labour Department a 'Form 2' 6th Floor, Hennessy Centre, 500 Hennessy Road, Hong Kong. [and other addresses]

(B) Obtain from the Insurance Agent Division, Hang Seng Bank a 'Notice of Accident' Head Office: 77 Des Voeux Road C., H.K. [and other addresses]

HANDLING PROCEDURES:

1. Submit within 7 days of the accident duly completed 'Form 2' (in duplicate) to the Labour Department, with a third copy to the abovementioned Insurance Agent Division, Hang Seng Bank.

2. Complete the 'Notice of Accident' and send it to Hang Seng Bank as soon as possible.

3. If sick leave period granted to the employee does not exceed 14 days and the employee is not permanently disabled, you may wait for a 'Certificate of Assessment' to be issued by the Labour Department. If the sick leave granted to the employee exceeds 14 days, and/or if the employee is permanently disabled, then upon receipt of a notification from the Labour Department or of the 'Certificate of Assessment' issued by the Employee's Compensation ('Ordinary Assessment') Board, you should within 21 days sign the 'Agreement Between Employer Employee' (in triplicate) with the employee.

4. The completed 'Agreement Between Employer and Employee' (in triplicate) should be sent within 3 days to the Labour Department for approval.

5. Upon receipt of the 'Certificate of Assessment' issued and/or the approved 'Agreement Between Employer and Employee' by the Labour Department, the employer should settle all the balance of compensation set out on the Certificate to that employee.

6. Please send the 'Certificate of Assessment' or the approved 'Agreement Between Employer and Employee' together with sick-leave certificates or the original 'Certificate of Assessment' to the Hang Seng Bank for its processing of the compensation.

ITEMS FOR ATTENTION:-

1. Within the period of injury, under the law, the employer should pay the employee periodic payment during his period of injury on the pay-day. However the Insurance Company will only pay the employer in one lump sum after it has received all the relevant documents.

2. Under the law, if the employer shall fail to pay in full the compensation within 21 days after the Agreement or Certificate of Assessment is approved, he has to pay surcharge of 5% of the compensation or $100.00 which-ever is higher. Therefore every employer should proceed with the compensation procedure as soon as possible (the said surcharge is not covered by the insurance policy)."

On 10th October 1983 an employee named Mak sustained an injury to his right hand while operating a pressing

machine. The appellant thereupon sent to the Hang Seng Bank a "Notice of Accident" and complied with all the other procedural requirements in the Chinese note. On 16th May 1984 the appellant pleaded guilty to the statutory offence of failing to provide an effective guard for dangerous machinery. He informed neither the Hang Seng Bank nor the respondents of his plea nor indeed that he had been charged. In October 1985 Mak commenced proceedings under the statutory employees' compensation scheme and the respondents' solicitors were instructed to act on behalf of the appellant. In March 1986 Mak commenced a common law action against the appellant in the High Court and on 27th January 1987 the employee's compensation case was settled. On 26th February 1987 the respondents' solicitors, who had acted on behalf of the appellant in relation to the statutory claim, learned for the first time of his prosecution and plea of guilty. On 26th June 1987 the respondents repudiated the contract relying *inter alia* on the appellant's failure to notify the respondents of his prosecution contrary to the terms of condition 5.

On 17th March 1989 the appellant issued an originating summons against the respondents for a declaration that he was entitled to be indemnified by them in respect of Mak's claims at common law and under the employees' compensation legislation. The respondents counterclaimed for the money which they had expended in settling Mak's statutory claim. On 6th April 1990 Mak obtained judgment in his common law action on the basis that the appellant was 75% to blame for the accident. On 4th January 1991 the deputy judge granted the declaration upon the ground that the Chinese note fell to be treated as part of the contractual relationship between the parties, that when read together with the policy there was an ambiguity between the procedure therein contained and condition 5 and that the appellant having done all that was necessary in terms of the Chinese note could not be faulted for not complying with the provisions of condition 5. The Court of Appeal reversed the order of the deputy judge and ordered the appellant to repay the sum at which Mak's statutory compensation claim had been settled. The learned Chief Justice, with whom the other members of the court agreed, held that the Chinese note was intended to be nothing more than a guide as to procedures and as such created no ambiguity when read with condition 5.

Before this Board the appellant argued that the respondents knowing that the appellant did not understand English had, by attaching the Chinese note to the policy, misled him into thinking that it contained exhaustive instructions as to what he must do in the event of a claim by an employee. There was in any event an ambiguity between condition 5 and the Chinese note which ambiguity should be resolved in favour of the appellant. He further argued that the respondents by accepting the Notice of Accident which the appellant gave to their agents, the Hang Seng Bank, in terms of paragraph 1 of the Handling Procedures in the Chinese note had waived the whole of condition 5 of the

policy which required *inter alia* that notice be given to the respondents. The appellant did not suggest that there was any ambiguity within condition 5 standing alone.

Their Lordships have no doubt that in the circumstances of this case the appellant is not entitled to maintain either that he was misled because of his lack of understanding of English or that, having regard to that lack of understanding, the respondents had failed to do what was reasonably necessary to bring to his attention the continued operation of condition 5. The position here is entirely different from a case where the plaintiff purchases a ticket to a particular destination which refers him to conditions of carriage to be found elsewhere. For a continuous period of more than three years before Mak's accident the appellant had had in his possession the policy including the conditions. His lack of understanding of English would have prevented him not only from reading those conditions but also from ascertaining precisely against what legal liability he was being indemnified, which categories of employees were being covered and what were the exceptions contained in the body of the policy and in the attached Endorsement and Schedule. In short he would have known that he had effected an employees' compensation policy but would have been wholly ignorant of the terms thereof. Is it to be assumed that he would have been content to continue to contract annually with the respondents in almost total ignorance of the terms of the contract in question? The circumstances suggest not. The appellant was a businessman employing some eleven workers in a small factory. He had throughout the three years had the policy in his possession and could no doubt at any time have obtained a translation thereof if so minded.

Their Lordships were referred to no decision involving a contract in a language which one of the contracting parties did not understand. They were referred to *Thompson v. L.M and S. Railway Company* [1930] 1 K.B. 41 which concerned an excursion railway ticket whose conditions had been sufficiently brought to the notice of a literate person purchasing the ticket. The illiterate plaintiff for whom the ticket had been bought was held by Lord Hanworth M.R. at page 46 not to be able to avail herself of her illiteracy in order to avoid the effect of the condition. That case did not lay down any general principles in relation to the inability of a party to read the terms of a contract. In *Chan Lam-chun v. National Insurance Co. Ltd.* (1977) H.K.L.R. 417 differing views were expressed by Briggs C.J. and Huggins J.A. as to whether a letter in English sent by insurers to a Chinese driver was adequate notice to him to comply with conditions of a policy of assurance. These cases do not assist the resolution of the problem in this appeal.

In the view of their Lordships it must always be a question of circumstances to what extent, if at all,

ignorance of the language of a contract is relevant to the position of one of the parties thereto. In this appeal the fact that the appellant had in his possession for a prolonged period all the contract documents and that he could at any time have obtained a translation thereof must negative any disability from which he suffered by his lack of understanding of English and any suggestion that the respondents had not afforded him reasonable means of certiorating himself as to the contents of the documents.

Their Lordships were also referred to *Hood v. The Anchor Line* [1918] A.C. 837, a case relating to the conditions attached to a steamship ticket from New York to Glasgow, which conditions were handed over with the ticket. Viscount Haldane, after posing the question whether the defenders had done all that could be reasonably required under the usages of proper conduct to bring to the ticket holder's notice the condition excluding certain liability, and concluding that they had, went on at page 845:-

> "But I am of opinion that the real question was not whether they" (the pursuer and his servant) "did read it, but whether they can be heard to say that they did not."

In this case it would be quite unrealistic for the appellant to be heard to say that although he had had in his possession a contract of insurance for some three years he had only read the title thereof and the warning in the box. The respondents had given him the contract, they had drawn his attention in Chinese to the need to read the policy and conditions, they were entitled to assume that if he could not read English he could reasonably obtain a translation. In these circumstances what more could they reasonably have done? The answer is nothing. It therefore follows that the appeal must be dealt with upon the assumption that the appellant was aware of the contents both of the policy and of the Chinese note.

The question then comes to be whether there was such a discrepancy as between condition 5 and the Chinese note as to entitle the appellant to treat the Chinese note as providing exhaustive requirements for the procedure to be followed in the event of an accident. Condition 5 which applied both to claims against an insured under the employees' compensation legislation and at common law contained three separate requirements namely:-

(1) that any occurrence which might give rise to a claim be notified to the respondents as soon as possible;

(2) that any letter, claim, writ, summons and process be immediately forwarded to the respondents; and

(3) that notice be given to the respondents immediately the insured had knowledge of any impending prosecution, inquest or fatal inquiry.

The Chinese note, after directing the insured employer to obtain a form from the Labour Department and another from the Hang Seng Bank, contained six numbered paragraphs of Handling Procedures. Although the "Notice of Accident" referred to in paragraph 2 is relevant to both claims under the compensation legislation and at common law it is clear that the remaining five paragraphs and all the other parts of the Chinese note had relevance only to an employee's statutory compensation claim.

Their Lordships are satisfied that, although the greater part of the Chinese note is concerned with the employer's dealings with the Labour Department and the employee, it does have contractual effect at least in the case of paragraph 2 of the Handling Procedures and the last sentence of the first Item for Attention, but of these provisions only paragraph 2 is relevant to condition 5 and that only to the first sentence thereof. However their Lordships are equally satisfied that the Chinese note in no way departs from or supersedes the requirements of the second and third sentences of condition 5. The Chinese note neither expressly nor by implication makes any reference to the receipt by the insured of common law claims and writs nor to impending prosecutions nor inquiries. If the appellant's argument were correct, it would mean that once an insured had sent the Notice of Accident to the Hang Seng Bank he was under no obligation to notify the insurers of any common law claim or impending prosecution nor indeed to furnish them with any information relating to such matters. Such a situation would be wholly at odds with normal insurance practice and there would require to be the most compelling and unusual reasons for reaching such a result. No such reasons here exist. It follows that the appellant was not entitled to treat the Chinese note as exhaustively providing for the only procedures to be followed by him in the event of an accident to an employee.

Two further arguments of the appellant must be mentioned. It was submitted that by accepting the Notice of Accident to the Hang Seng Bank, in accordance with paragraph 2 of the Handling Procedures in the Chinese note, the respondents had waived the whole of condition 5 of which the first sentence required that notice be given "to the Company". Assuming for the purposes of argument that those requirements could only be fulfilled by notice to the respondents and not to their agents any waiver which there was could only relate to the first sentence and would have no relevance to the second and third. This argument therefore fails.

It was further argued that the respondents, having been in no way prejudiced by the appellant's failure to give notice of the impending prosecution, should not be entitled to found thereon as grounds for repudiation. The subsumption of the argument was that there could

have been no defence to the prosecution in view of the absolute terms of the relevant statutory provisions. The appellant relied on an obiter dictum of Lord Denning M.R. in *Barrett Brothers (Taxis) Limited v. Davies* [1966] 1 W.L.R. 1334 at page 1340 to the effect that if an insurer was not prejudiced by the failure of an insured to furnish them with information relative to a claim they could not rely on the condition to defeat that claim. In *Farrell v. Federated Employers Insurance Association Limited* [1970] 3 All.E.R. 632 and *Pioneer Concrete Limited v. National Employers Mutual Insurance* [1985] 2 All.E.R. 395 MacKenna J. and Bingham J. respectively declined to accept this dictum as a statement of general principles. It is however unnecessary for this Board to determine whether or not Lord Denning's dictum correctly stated the law. Yang C.J. rightly, in the view of their Lordships, concluded that the respondents had suffered prejudice by being deprived of the opportunity of contesting the summons through the appellant and having the summons dismissed. Any dismissal could have been relevant not only to Mak's common law claim but to his claim to statutory compensation to which he would not have been entitled if it had been demonstrated that at the time of the accident he was not acting in the course of his employment but was engaged upon some frolic of his own. It follows that the argument based on lack of prejudice fails on the facts.

For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs before the Board.