The Court of Appeal for Bermuda

Civil Appeal
2009: No 22

Before:
THE HONOURABLE JUSTICE ZACCA, PRESIDENT
THE HONOURABLE JUSTICE WARD
and
THE HONOURABLE JUSTICE AULD

- -

Between :

ISLAND CLEANING SERVICES **Appellant**

- and -

ANTONIO MARQUES FAGUNDO **Respondent**

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JUDGMENT

Date of Hearing: 8th June 2010
Date of Judgment: 17th June 2010

Appearances:
Mr Kevin Taylor, Marshall Diel & Myers, for the Appellant
Mr Jai Pachai, Wakefield Quin Limited, for the Respondent

AULD JA:

Introduction

1. This appeal raises two issues of mixed law and fact arising out of an injury sustained by the Respondent, Antonio Mario Fagundo to his left hand in a slipping accident on 2nd September 2000 when stripping paint from the floor of premises in the course of his employment as a cleaner by the Appellant, Island Cleaning Services ("Island Cleaning"). They are whether the Judge, Kawaley J, correctly held that:

1) *the employer was liable for Mr Fagundo's injury in contract or in tort in failing in its general common-law duty of care to provide him with a safe system of work; and*

2) *Mr Fagundo's injury was not caused by any contributory negligence on his part.*

2. There is little issue of primary fact over the nature of the accident and the circumstances giving rise to it. Mr Fagundo was aged 57 at the time, an experienced floor cleaner and paint stripper, but severely disabled in his left hand. He had been employed in those tasks by Island Cleaning for some sixteen months since April 1999, and, for some sixteen years before that, between 1974 and 1990, by another Bermudian company, Marshall's Maintenance Company Ltd.

3. Mr Fagundo's contract with Island Cleaning, which was mainly in writing, made no express provision for special footwear for his work, but, as found by the Judge and acknowledged by the Company, there was an express oral or implied term that he should select and provide his own footwear. This is how the Judge put in paragraph 12 of his judgment:

> *"[12] There was no express written contractual requirement for ... [Mr Fagundo] to purchase his own footwear for use at work. However, I accept ... [Island Cleaning's] evidence that the practice of the company was that staff selected and purchased their own footwear. ... [Mr Fagundo] accepts that he understood and accepted this position in general terms. I find that there was a contractual agreement that it was ... [Mr Fagundo's obligation to select and purchase his own work shoes".*

4. The issue on primary liability was whether Island Cleaning's undoubted common law obligation to provide a safe system of work, included an obligation to provide Mr Fagundo with, and instruct him to use, special safety shoes for his work when working on slippery surfaces, and, if so, whether it was contractually excluded by the express or implied contractual term that he should select and provide his own working footwear. Put another way, the issue was whether Mr Fagundo's contractual obligation was so clear and wide as to be inconsistent with and negate Island Cleaning's broad common law duty of care. The Judge heralded his finding of no such inconsistency in the following passage in paragraph 15 of his judgment:

> *"[15] .... [the parties had not] agreed more than that ... [Mr Fagundo] was required to purchase his own working shoes and free (in the absence of specific directions from the employer) to choose what type of footwear to wear."*

The Judge's Findings on Primary Liability

5. The Judge found that Island Cleaning, pursuant to its broad common law duty, whether in contract or in tort, to provide a safe system of work for Mr Fagundo, should have provided him with, and instructed him to wear, special non-slip footwear for the task, and to do so whether or not he had requested it - as to which he made no finding. The Judge acknowledged that, where a contract of employment clearly excludes that broad common law duty, the contractual exclusion will prevail; see *Tai Hing Cotton Mill Ltd v Liu Ching Hong Bank Ltd* [1986] AC 80, per Lord Scarman giving the advice of the Board, at 107; and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, per Lord Goff at 191. But he held that, in the circumstances of the case, the express or implied term did not have that clear exclusory effect. In paragraph 19 of his judgment he said:

> *"... It will generally be a question of fact to be determined in individual cases whether the parties have contractually agreed to limit the tortious duty of care which exists either by virtue of or independently of the relevant contractual arrangements. Where there are no applicable express contractual terms, the implication of terms becomes a question of mixed fact and law."*

6. It is perhaps a matter of emphasis rather than principle, but, in our view, the Judge sought, unnecessarily in the circumstances, to reinforce that sound approach by an over-rigid formula by drawing on the undoubted overlap of contractual and tortious duties in play in employer's liability claims; see now *Chitty,* 30th Ed (2008) Vol 1, paras 1-140 - 1-147. He did so, seemingly in reliance on an *obiter dictum* of Dain J delivering the judgment of the Canadian Supreme Court in a case concerning a solicitor's concurrent liability for negligence in tort and contract to his client, *Central Trust Co v Rafuse (1986) 31 DLR (4th)* 481 at 522. The Judge (Kawaley J) asserted in a number of passages in his judgment that only exceptionally would an exclusionary term be implied - in paragraphs 23 and 25 for example:

> *"[23] ... Absent express agreement or highly unusual circumstances surrounding a contract (for instance where an employee is paid 'danger money'), it will not be open to a court to imply as equitable and necessary for the efficacy of an employment contract a term which displaces the standard implied terms as to the employer's duty of care for his employees' safety. ..."*
>
> *[25] ... The crucial question is whether there are grounds for implying an agreement to limit ... [the] duty of care, in the present case, on terms that the employee would assume full responsibility for determining what footwear was safe for the various tasks he was required to perform. ... unusual circumstances would be required to justify the implication of what amounts to an exemption clause, absent an express agreement. And where the contract is partially evidenced by writing, such an agreement would be so exceptional that one would expect to see it recorded in writing."*

7. However, the Judge, clearly had at the centre of his mind the stringent common law requirements for implying a contractual term in this or any context, namely business efficacy or reflecting what the parties must have agreed. We doubt whether any further or "special" test is required for employer's liability claims so as to limit the possibility of exclusion of the general duty of reasonable care to provide a safe system of work for employees to an express term or render it the norm save in "exceptional" or "unusual" cases.

8. A brief consideration of the evidence and of the findings of the Judge demonstrates the soundness of his conclusion on primary liability, largely one of fact, that Island Cleaning had, and was in breach of, a general duty of care to Mr Fagundo in failing to provide him with and instruct him to use safety footwear when stripping paint from floors with a paint-stripping solution. Such footwear, in the form of non-slip overshoes, was readily obtainable by Island Cleaning from abroad and was relatively inexpensive, as Marshall's Maintenance and another cleaning firm on the Island had experienced.

9. Mr Fagundo, on commencing employment with Island Cleaning in April 1999, came to the job as a highly experienced floor cleaner and paint stripper, having, as we have noted, previously worked as such for many years with another Bermudian company, Marshalls Maintenance. A well recognised hazard of his work – experienced or no - was that of slipping when applying, or just after having applied, stripping solution to the floor - always a brisk process, requiring as it did scraping and brushing clear before it dried. It was often necessary for him to go back over a section of the floor to which he had just applied the solution, to deal with "missed spots" or where the uneven nature of the floor had caused the fluid as it was applied to run off. Marshall's Maintenance, his previous employers on the Island had provided and instructed the use of safety footwear in the form of non-slip overshoes where appropriate. Island Cleaning did not, and left him to work in his chosen footwear for the job, "sneakers". And with Island Cleaning, his hours of work were very long, from 70 to 80 hours a week, for which he received no extra pay rates for overtime. Such long hours rendered him vulnerable to occasional inattentiveness, error and a tendency to take the odd risk of slipping when going about his repetitive and brisk work.

10. An additional vulnerability in his case, as Island Cleaning knew, was that he had a long-standing near-total disability of the right hand, which rendered him particularly vulnerable to the consequences of slipping should he damage his left hand in a slipping fall – say in using it to break his fall.

11. The evidence of these matters before the Judge, which he accepted and summarised in paragraphs 33 - 38 of his judgment, showed that the risk of slipping in such work, whether by momentary inattention, error or some risk-taking by a workman, however experienced and/or, like Mr Fagundo, particularly vulnerable by reason of disability, could be, and should have been, materially reduced by the provision of available special footwear, say in the form of over-shoes with a special grip, as Marshall's Maintenance

had done. It is for risks such as those that an employer has a broad duty to take reasonable care to provide a safe system of work for his employees, as famously and eloquently laid down by Lords Oaksey and Reid in the House of Lords in *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, HL, at 189-190 and 192-193, and by Lord Oaksey in *Paris v Stepney Borough Council,* [1951] 1 AC, 367, at 384-385. In this case, in the Judge's words at paragraph 28 of his judgment:

> *"... it is obvious that ... [Island Cleaning] as a company in the cleaning business owed a general duty, as part of the umbrella duty to provide a safe place of work, system of work and safe equipment, to have regard to what footwear was required for potentially hazardous work and to direct employees to wear appropriate footwear for any tasks where special protection was required."*

Contractual Exclusion of Island Cleaning's General Duty of Care?

12. As to Island Cleaning's claimed contractual exclusion of its primary duty to provide and instruct Mr Fagundo to use safety footwear to reduce the risk of slipping, on the strength of their mutual understanding that he would select and supply footwear for his work, the Judge held, as we have said, that the evidence did not support such exclusion, whether as an express or implied contractual term. In his view, Mr Fagundo's obligation, so far as it went, was neither wide nor precise enough as to be inconsistent with or negate Island Cleaning's broad common law obligation to take reasonable care to protect him from slipping when committing him to potentially slippery work.

13. In our view, the Judge was entitled so to hold. Mr Fagundo's contractual obligation to select and provide his own working footwear could not, on its bare terms, exclude Island Cleaning's broad obligation, whether contractual or tortious, to provide him with a safe system of work. If general authority is required for such an obvious principle of common sense in this context, it is to be found in *Wilson & Clyde Coal Company Ltd. V English* [1938] AC 57, HL, per Lord Thankerton at 67, and in *Johnstone v Bloomsbury Health Authority* [1992] QB 333, CA, in the reasoning of Stuart-Smith LJ at 343-345 and Sir Nicholas Browne-Wilkinson V-C at 349-350.

14. The Judge, in paragraph 27, and in succeeding paragraphs of his judgment when turning to the evidence in and circumstances giving rise to Island Cleaning's general duty of care in the circumstances to provide and instruct Mr Fagundo to use safety footwear, adopted the conventional approach in considering whether such duty was excluded by their mutual understanding that he would select and provide his own working footwear. He said that, to displace such a broad rule:

> *"... [a]t the very least, it must be clear as a matter of inference that the employer and employee must have agreed to exempt the employer from the standard duty of care either wholly or to a limited extent. In the present case there was no express written or oral exemption or limitation of liability agreement, nor is there any reasonable basis for concluding that the parties must by necessary implication be deemed to have reached any such agreement."*

15. We agree, and it, therefore, follows that we can see no basis for disturbing his decision as to primary liability.

Contributory Negligence

16. On the issue of contributory negligence, the Judge's finding in paragraphs 59 to 61 of his judgment that there was none was, in the circumstances, a question of fact for him on which this Court should not normally intrude. The relevant facts and circumstances going to consideration of the extent of Mr Fagundo's blameworthiness, if any, for his accident, overlap in part with those going to the issue of primary liability on Island Cleaning's duty of general care, not least of which is the need to guard against risks of inevitable inattentiveness in long, arduous and repetitive work.

17. It may be that Mr Fagundo, if he had worked more slowly, could have ensured that he left no "missed patches" when applying the paint stripper to the section of floor in question, and/or could have dealt with problem by allowing the recently applied stripper to dry and then returning to the missed patches. The reality was that such risk as he took in stepping back on to the slippery section of the floor was taken in the context of very long hours of repetitive work and in the interest of completing his work speedily and thoroughly in the interest of his employer. It was certainly, on the

evidence, not in defiance of any instruction or policy of Company to the contrary.

18. There is also the important factor that the Judge rightly noted. Mr Fagundo was a migrant worker on a job-specific work permit and, therefore, vulnerable to loss of employment and of the right to remain in the country if he failed to retain the goodwill of his employer. He should not reasonably be condemned as blameworthy in his claim for damages for serious personal injury because he got on with his job, albeit in a somewhat risky manner in the interest of his employer. See *e.g. Davies v Swan Motor Co. (Swansea) Ltd.* [1949] 2 KB 291, CA; and *Trustees of the 7th Day Adventist Church v Wilson* [1986] Bda LR 31, CA.

19. In our view, there is no basis on which this Court can properly interfere with the Judge's assessment of no contributory negligence on the part of Mr Fagundo.

20. Accordingly, we dismiss the appeal.

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Auld, JA

I agree _____
Zacca, President

I agree _____
Ward, JA