Hwa Aik Engineering Pte Ltd *v* Munshi Mohammad Faiz and another [2021] SGHC(A) 1

Case Number	: Originating Summons No 5 of 2021
Decision Date	: 17 March 2021
Tribunal/Court	: Appellate Division of the High Court
Coram	: Woo Bih Li JAD; Quentin Loh JAD
Counsel Name(s)	: Cephas Yee Xiang, Pang Haoyu Samuel and Ng Zhenrong (Aquinas Law Alliance LLP) for the applicant; Han Hean Juan, Neo Jie Min Jamie and Wong Ying Joleen (Hoh Law Corporation) for the first respondent; Raymond Wong and Ang Xue Ying Rachel (RWong Law Corporation) for the second respondent.
Parties	: Hwa Aik Engineering Pte Ltd — Munshi Mohammad Faiz — Interpro Construction Pte Ltd

Civil Procedure – Appeals – Leave

17 March 2021

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 This is an application by a co-defendant for leave to appeal to the Appellate Division of the High Court against a decision of the General Division of the High Court given in respect of a personal injuries claim. On 9 March 2021, we dismissed the application. Our reasons are stated below but we start with the background to the application.

Background

2 The plaintiff in the suit (DC/S 265/2017) was Munshi Mohammad Faiz (the first respondent in this application). He was injured by an excavator operated by Sujan Abdur Razzak Sikder ("Sujan") while he was working at a construction project at 22 Grove Crescent, Singapore. He commenced action in the District Court against three defendants.

(a) Interpro Construction Pte Ltd – the second respondent in the present application – was the first defendant ("D1"). D1 was the sub-contractor engaged by the main contractor to carry out general construction work including certain excavation work. The plaintiff was employed by D1.

(b) K P Builder Pte Ltd was the second defendant ("D2"). D2 was the main contractor who had engaged D1 as a sub-contractor. The two companies shared a common director. D2 was not a party in the present application.

(c) Hwa Aik Engineering Pte Ltd – the applicant in the present application – was the third defendant ("D3"). D2 had engaged D3 to supply an excavator and a trained and qualified excavator operator. Pursuant to this arrangement, D3 provided an excavator and Sujan as the excavator operator. D3 was the employer of Sujan who was to work under the directions of D1 at the worksite.

3 On 31 May 2016, the plaintiff was injured by the excavator operated by Sujan when the excavator moved and collided into the plaintiff. It is not necessary for present purposes to elaborate on the details as to how the accident occurred. Suffice it to say that the excavator was not supposed to be moving at the material time. There was some argument about the liability of one Panchanathan Santhosh Kumar ("PSK") who was appointed by D1 as a foreman and site safety supervisor for the project. However, as there was no finding of liability on the part of PSK, we need not elaborate further on his conduct.

4 On 16 April 2020, the District Court found only D1 and D2 liable to the plaintiff and no contributory negligence on the plaintiff's part. D3 was not liable. The plaintiff appealed to the General Division of the High Court as did D1 and D2.

The present application for leave to appeal

5 On 3 February 2021, the Judge of the General Division of the High Court ("the Judge") found D1 and D3 100% liable to the plaintiff. D2 was not liable. There was again no finding of contributory negligence on the part of the plaintiff. The Judge also considered how liability should be apportioned as between D1 and D3. However, as neither D1 nor D3 had brought contribution proceedings against any other co-defendant, the Judge decided not to make any order in this regard. The Judge's decision was reported in *Munshi Mohammad Faiz v Interpro Construction Pte Ltd and others and another appeal* [2021] SGHC 26.

6 On 10 February 2021, D3 filed the present application by way of an originating summons for leave to appeal in respect of issues arising from the decision of the Judge. At the outset we observe that the application was poorly drafted. Firstly, the originating summons states that the application is made pursuant to "s 29(1)(*a*)" read with para 2 of the Fifth Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). However, "s 29(1)(*a*)" of the SCJA does not exist. If D3 was intending to refer to s 29(*a*) of the SCJA, that provision deals with a situation where no appeal can be brought. The correct provision is s 29A(1)(*b*), read with para 2 of the Fifth Schedule of the SCJA. Secondly, there was no explicit mention in the originating summons that it was an application for leave to appeal.

7 The application was supported by written submissions for D3. The plaintiff and D2 were named as respondents in the application but no written submission was filed by either of them, even though the Registrar of the Supreme Court had notified the solicitors for each of these parties to file written submissions within 7 days after service of the relevant documents on them.

8 The three grounds for granting leave to appeal are well established: there must be (a) a *prima facie* case of error of law; (b) a question of general principle decided for the first time; or (c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage: see *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 at [16]; *IW v IX* [2006] 1 SLR(R) 135 at [20].

9 In D3's written submissions, D3 sought leave to appeal on the basis that each of the following issues it raised was an issue of public importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

(a) What is the applicable test upon which the court should impose joint and dual vicarious liability in the situation involving the lending of an employee?

(b) On the facts of the present case, is the test for vicarious liability as set out in *Ng Huat*

Seng and another v Munib Mohammad Madni and another [2017] 2 SLR 1074 ("*Ng Huat Seng*"), and/or the tests per Rix and/or May LJJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2006] QB 510 ("*Viasystems*") satisfied such that [D3] should be vicariously liable for the acts of Sujan?

(c) If the court finds that both [D3] and [D1] are vicariously liable for the acts of Sujan, is the court empowered to apportion liability between the respective defendants even if they have not made claims for contribution against each other under ss 15 and 16 of the Civil Law Act (Cap 43, 1999 Rev Ed) (the "CLA")?

10 The first two issues overlapped and could be considered together as one issue. They pertained to the question of dual vicarious liability for the conduct of the same worker where the employer had supplied its employee to another party to work under the instructions of that other party. The employer may be referred to as the lending or general or permanent employer and the other party may be referred to as the borrowing or temporary employer even though, strictly speaking, it is not an employer of the worker. For present purposes, we refer to the former as "the permanent employer" and the latter as "the temporary employer". We refer to the first issue as the "Dual Vicarious Liability issue".

11 The next issue set out in D3's written submissions was whether the court was empowered to apportion liability between co-defendants where none of them had made a formal claim for contribution against the other under ss 15 and 16 of the CLA. We will refer to this as "the Contribution issue".

The Dual Vicarious Liability issue

12 It was important to bear in mind that D3 was not asserting that dual vicarious liability is impermissible in law. Indeed, all the defendants apparently accepted that this was permissible. D3 was focusing on the question as to when such liability would arise and, more specifically, when such liability would arise in the situation mentioned above, *ie*, where a permanent employer has sent a worker to a temporary employer to work under the instructions of the temporary employer. D3 argued that the lending of workers was an increasingly common practice due to the COVID-19 pandemic and hence the decision of a higher tribunal would be to the public advantage. We accepted that, even before the COVID-19 pandemic, it was not uncommon for a permanent employer to send its employee to a temporary employer to work on the instructions of the temporary employer. However, we found D3's arguments to be confusing. As we elaborate below, it was not clear whether D3 was arguing that the test for vicarious liability was the same in various cases but that the Judge had erred in applying the test or that the tests in Singapore and in the United Kingdom were different and there should be clarity on the test.

13 As mentioned above at [9], D3 had framed its issue as what the applicable test should be and then whether, on the facts, the test for vicarious liability as set out in *Ng Huat Seng* "and/or" the tests per Rix LJ "and/or" the test of May LJ in *Viasystems* was satisfied such that D3 should be vicariously liable for Sujan's action. This suggested that D3 was proceeding on the premise that there were different tests between the test in *Ng Huat Seng* and/or the test of Rix LJ and/or the test of May LJ in *Viasystems*.

14 Yet para 19 of D3's written submissions referred to the Judge's assessment of dual vicarious liability on "the two-stage test as set out in *Ng Huat Seng* and *Viasystems.*" At para 24 of its written submissions, it argued that "[b]oth *Ng Huat Seng* and *Viasystems* require the Court to consider the relationships which had created or significantly enhanced the risk of the tort being committed". The

two paragraphs suggested that D3 was proceeding on the premise that the test in *Ng Huat Seng* and the test in *Viasystems* were the same and that, where the permanent employer was concerned, the test took into account the relationship between the permanent employer and the employee and not so much the extent of control that the permanent employer had over the actions of the employee. However, the other parts of its submissions emphasised that it had no control over Sujan's work at the site.

15 If D3 was proceeding on the premise that the test was the same and took into account the relationship between the permanent employer and the employee, but D3 was dissatisfied with the application of the test to the facts, then that would not merit an application for leave to appeal to a higher tribunal. It appeared from the thrust of D3's submissions that that was, in truth, the substance of its concern, although it couched its concern on a wider plane by suggesting that the Judge's decision would render a permanent employer always vicariously liable even where it does not have actual control over the actions of the employee. D3 appeared to be seeking a general decision whereby a permanent employer would never be vicariously liable in such a situation.

16 If D3 was arguing that the tests or inquiries in Singapore and in the United Kingdom are different, it is not the case that the inquiries are different.

17 *Viasystems* was discussed by Lord Phillips in *Various Claimants v Catholic Child Welfare Society and others* [2012] 3 WLR 1319 ("*Christian Brothers*"). He noted that, in *Viasystems*, May LJ had suggested that the inquiry should focus on who, as between the permanent and the temporary employer, was entitled, and perhaps theoretically obliged, to give orders to the employee. However, Rix LJ had focused on the relationship between the employee and the permanent and temporary employers. *Christian Brothers* preferred the approach of Rix LJ (see *Christian Brothers* at [41]–[45]).

18 In *Ng Huat Seng*, the Court of Appeal set out a two-stage inquiry in order to determine whether vicarious liability should be imposed. The first stage examines the nature of the relationship between the defendant and the tortfeasor. The second stage asks whether there was a sufficient connection in the relationship between the defendant and the tortfeasor on the one hand and the commission of the tort on the other. Although that case involved very different facts from the ones in the present case, the principle was still applicable to D3's situation, as D3 itself recognised. The focus of the two-stage inquiry is not on the extent of control over the actions of the employee. Importantly, *Ng Huat Seng* clarified, at [62], that *Christian Brothers* did not present a new analytical framework for determining whether vicarious liability should be imposed.

19 Furthermore, it seemed to us that the cases establish that it would be wrong to take a rigid approach (see, for example, the observation at [62] of *Ng Huat Seng*, which referred to such an observation from Lord Phillips, although that was in the context of clarifying that vicarious liability is not limited to an employment situation). In the present case, D3 accepted that it was Sujan's employer.

20 We add that neither of the judgments in *Viasystems* suggested that a permanent employer would never be liable in a similar situation as that facing D3. For example, although D3 sought to distinguish *Viasystems* by suggesting that there was a representative from the permanent employer on site, that was not the basis of the decision of either May LJ or Rix LJ.

21 From D3's point of view, it seemed unfair that a permanent employer should be liable at all for the negligence of a worker where the permanent employer itself was not guilty of any negligent conduct. For example, D3 mentioned that its employment, training and selection of Sujan did not bear any nexus with the operative negligent act in question and there was no suggestion that Sujan was

not qualified to operate the excavator or that D3 had made a wrong choice in selecting Sujan for the work.

22 All that can be said, at present, is that the absence of direct control by the permanent employer does not mean that the permanent employer is exempt from vicarious liability. A permanent employer may not be directly negligent itself. The question is whether it should be vicariously liable for the action of its employee where it has no direct control over that employee's conduct at the time of the accident. The fault in question is not that of the permanent employer but of the employee. Nevertheless, the permanent employer may be vicariously liable to the injured party because of policy reasons, some of which have been mentioned in *Viasystems, Christian Brothers* and *Ng Huat Seng.* That is the *very purpose* of the doctrine of vicarious liability – to impose liability on an employer for an employee's tort, even though the employer was not directly at fault for the tort (see, *eg*, *Viasystems* at [18]). Therefore, D3's submission that it did not have control over Sujan's actions on the day of the accident not only missed the point but also did not raise any novel issue of public importance.

23 If employers like D3 still consider the legal position to be unfair, there are options available to them.

(a) First, they may seek a contractual indemnity from the temporary employer for the conduct of the employee. The value of that indemnity would depend on the scope of the indemnity and the financial strength of the temporary employer.

(b) Second, they may seek insurance cover for vicarious liability for the actions of the employee in such a situation. The scope of such a cover would have to be carefully framed.

24 Accordingly, we concluded that leave to appeal should not be granted for the Dual Vicarious Liability issue. The appropriate inquiry has been set out in *Ng Huat Seng*. The mere application of that inquiry to a given factual scenario, which is the situation in this case, does not satisfy any of the grounds to grant leave to appeal.

The Contribution issue

25 We come now to the Contribution issue. D3 accepted that it did not make a formal claim for contribution below. It is important to bear in mind that D3 also did not argue for any contribution from D1 or D2 before the Judge. Its argument for its liability to be capped at 15% was *vis-à-vis* the plaintiff. In other words, its argument for the apportionment of liability between the defendants was to confine its liability *to the plaintiff* to a certain proportion, *eg*, 15%. It did not argue that, even if it were found to be 100% liable to the plaintiff together with a co-defendant, it would then seek an order for contribution against that co-defendant.

26 As the Judge stressed at [82] of its written judgment, none of the defendants appeared to appreciate the distinction between (a) the defendants' liability *vis-à-vis* the plaintiff; and (b) the apportionment of liability as between the defendants only. The defendants had focused on their liability *vis-à-vis* the plaintiff. D3's argument for 15% liability was made in that context only.

27 Insofar as the Judge had expressed its view that it would not make any order for contribution as between D1 and D3, who were the ones found to be liable to the plaintiff, because there was no claim for contribution, this view was *obiter dicta*.

28 For the purpose of its present application, D3 relied on *Viasystems* where the English Court of

Appeal proceeded to determine the proportion of liability between the co-defendants even though there was no formal claim for contribution there. However, in that case, there was apparently a formal claim for contribution although it was not pursued (see *Viasystems* at [50]). Moreover, it was not clear whether the order for contribution in that case was sought by the consent of the co-defendants or if there was any argument about the court's power to order contribution between co-defendants in the absence of a formal claim for contribution.

29 In Singapore, there is another decision of the High Court in *Manickam Sankar v Selvaraj Madhavan (trading as MKN Construction & Engineering) and another* [2012] SGHC 99 about making an order for contribution between co-defendants. In that case, the High Court was of the view that the power of the court to apportion liability between co-defendants would be relevant only if contribution proceedings had been brought under ss 15 and 16 of the CLA. The High Court was of the view that an earlier High Court decision in *Ng Kim Cheng v Naigai Nitto Singapore Pte Ltd and another* [1991] 1 SLR(R) 270 was of no assistance for various reasons which we need not elaborate on.

30 In the present case, D3 had submitted at para 29 of its written submissions for the leave application that "this is the first case where the issue of apportionment under a shared control situation has been the subject of argument before the Singapore Courts". As we have elaborated above, D3 had not argued for contribution from D1 or D2 before the Judge. Nor did it argue that the court had power to make such an order for contribution in the absence of a formal claim for contribution. It was too late to seek such an order under an application for leave to appeal.

31 We add an observation. We accept that it may not be uncommon for a possible tortfeasor to overlook making a formal claim for contribution from another tortfeasor. However, such a situation often arises because of the omission of the solicitor concerned who should know better than to launch a defence without considering a formal claim for contribution against another tortfeasor. Each such solicitor should be immediately aware of the possible need to seek contribution from another co-defendant under ss 15 and 16 of the CLA where there is possibly more than one tortfeasor, and then consider taking the step to file a formal claim for contribution.

32 Instead, unfortunately, some solicitors overlook the step of filing a formal claim for contribution. Order 16 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) sets out the procedure where a defendant in an action claims against another party to the action any contribution or indemnity. The procedure under O 16 r 8 is that the defendant is to issue and serve on the other party a notice containing "a statement of the nature and grounds of his claim" or "the question or issue required to be determined". The sooner the situation is rectified, the better.

33 Furthermore, quite often, solicitors also seek an order for contribution without addressing the question whether the court has the power to do so in the absence of a formal claim for contribution. This is all the more important if the other tortfeasor has not participated in the proceedings below. We hope that, in future, solicitors will not assume that there is such a power and will make the appropriate submissions before the court of first instance but, as mentioned, it would be preferable if the situation were simply avoided by the filing of a formal claim for contribution.

Conclusion

34 For the foregoing reasons, we dismissed the application. As the respondents did not file submissions for this application, we made no order as to costs of the application.