Tan Lip Tiong, Rodney as Deputy for Tan Yun Yeow
v
The Commissioner of Labour and another matter

[2015] SGHC 87

High Court — Originating Summons No 265 and 918 of 2014
Quentin Loh J
3 March 2015

Administrative law — Judicial review

Employment law — Work Injury Compensation Act

2 April 2015 Judgment reserved.

Quentin Loh J:

1 These proceedings arise from horrific injuries suffered by a workman who went into a coma, and involves his right, exercised through his elder brother, to pursue his claim for damages at common law. It is contended that his right to do so is barred because he opted for and obtained an order for compensation under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("the Act").

2 Originating Summons No 265 of 2014 ("OS 265") was filed on 21 March 2014 by Tan Lip Tiong Rodney ("Rodney Tan") as the court appointed deputy under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("Mental Capacity Act") for Tan Yun Yeow ("the Injured Employee"). Rodney Tan seeks to bring judicial review proceedings under O 53 of the Rules of Court

(Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") to quash the decision of the Commissioner of Labour ("the Commissioner") made on 2 January 2014 that the Injured Employee had made a valid claim for compensation under the Act.

3 Originating Summons No 918 of 2014 ("OS 918"), filed on 30 September 2014, is brought in the name of SBG Starkstrom Pte Ltd ("the Employer") by its insurer, MSIG Insurance (Singapore) Pte Ltd. The Employer seeks to bring judicial review proceedings to quash a later decision of the Commissioner made on 1 July 2014 that the Injured Employee had *not* made a valid claim for compensation under the Act. The Employer also seeks a declaration that the notice of assessment issued by the Commissioner dated 21 June 2010 ("the Notice of Assessment") was validly issued.

4 Counsel are agreed that these proceedings involve the following issue: Whether a mentally incapacitated employee's next-of-kin, who has not been appointed a deputy under the Mental Capacity Act, can nonetheless make a claim under the Act on behalf of that employee?

Background

5 The facts in OS 265 and OS 918 are undisputed. The Injured Employee was employed as an engineer by the Employer at the material time. On 19 March 2009, the Injured Employee was involved in an electrical explosion and slipped into a coma as a result.[1] The Injured Employee suffered severe burns involving his face, anterior trunk and bilateral upper limbs. The medical report states that his treatment was complicated by multi-resistant acinetobacter baumanii wound infection, septicaemia and septic shock. Kidney

---

[1] Chung Wah Fook's Affidavit ("CWFA") at para 3.

failure developed which required renal replacement therapy from 26 March to 29 April 2009. Right lower lobe pneumonia followed and he suffered respiratory arrest on 26 March 2009. Tracheostomy was performed on 29 April 2009. The Injured Employee was comatose for slightly over a year.[2] In April 2010, he was assessed as having a reduced conscious level and able to only obey half commands and perform single step commands. Although he is making slow progress, his residual cognitive function is insufficient to benefit from intensive rehabilitation. He was considered a mentally disordered person of unsound mind and incapable of managing his financial and personal affairs by the Singapore General Hospital.

6 While the Injured Employee was in hospital, the Employer filed an i-Notification under the Act on 26 March 2009 notifying the Commissioner of the accident.[3] A standard form letter was sent to the Injured Employee on 2 April 2009 asking whether he wished to make a claim under the Act. This letter enclosed an application form to be filled in and returned in the event the Injured Employee wished to make a claim. On 11 June 2009, the Employer wrote to the Commissioner stating that the Injured Employee was still hospitalised and had not regained consciousness.

7 On 22 January 2010, M/s Marican & Associates ("Marican") wrote to the Commissioner to inform her that Marican represented Rodney Tan, the brother of the Injured Employee, and that Rodney Tan was given a power of attorney by the Injured Employee's wife, Mdm Lim Davy.[4] I was informed by

---

2 Chris Loh Yip Lee's Affidavit ("CLYLA") at para 13.

3 CWFA at para 7.

4 CLYLA at p 48.

counsel that the Injured Employee's wife was from Vietnam, knew very little English and hence left her eldest brother-in-law to deal with matters in relation to her husband.

8 On 27 April 2010, the Commissioner received a medical report from the Singapore General Hospital confirming that the Injured Employee was of unsound mind and incapable of managing himself or his affairs.[5] The Commissioner then sought confirmation from Marican as to whether the Injured Employee's next-of-kin wished to claim compensation under the Act on behalf of the Injured Employee.[6]

9 Marican replied in a letter dated 20 May 2010 that "the next of kin … wishes to claim compensation for employee [*sic*] under the [Act]"[7] ("the 20 May 2010 Letter").

10 Based on the 20 May 2010 Letter, the Commissioner issued the Notice of Assessment pursuant to s 24(2) of the Act and addressed it to Marican by way of a letter dated 14 June 2010. The Commissioner assessed that the Injured Employee was entitled to $225,000 in compensation, the maximum sum allowed under the Third Schedule of the Act. In the letter dated 14 June 2010, the Commissioner noted that the Injured Employee was mentally incapacitated, and that under the law, a person can only act for the injured employee's estate if he/she has obtained a court order for the Committee of the Person and Estate of the injured employee. The Commissioner advised

---

5 CLYLA at pp 51–52.

6 CLYLA at p 55.

7 CLYLA at p 56.

Marican to apply for such a court order.[8] The Commissioner's letter was also accompanied by, amongst other documents, an "Authority to Claim" form.[9] The form requires the person claiming on behalf of the employee to declare that he/she has been "appointed vide a Court Order … as the Committee of the Person and Estate of [the injured employee]". It bears noting that although the Injured Employee's claim was made after the one year limitation period for making a claim under the Act, the Commissioner lifted the limitation on the basis that there was a reasonable cause for the delay.[10]

11 I pause here to note that when the Mental Capacity Act came into force on 1 March 2010, the practice of appointing a Committee of the Person and Estate under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed) to manage the personal welfare and financial matters of a person who has become mentally incapacitated was replaced with that of appointing a deputy under the Mental Capacity Act.

12 In response to the Commissioner's letter, Marican wrote to the Commissioner on 23 June 2010 stating that the Injured Employee lacked the capacity to make the decision whether to accept or reject the compensation assessed by the Commissioner, and that Marican was taking instructions from the Injured Employee's next-of-kin. Marican also requested that the Commissioner keep the Notice of Assessment in abeyance in order to stop the time required under the Act to file an objection from running.[11] The

---

8 CLYLA at p 57.

9 CLYLA at p 67.

10 CLYLA at para 14.

11 CLYLA at p 70.

Commissioner did not reply to this letter as she was of the opinion that she had no express power under the Act to hold the Notice of Assessment in abeyance.[12] However, as the Commissioner had not received any forms from Marican, she sent a reminder on 12 November 2010 repeating what she stated in her letter of 14 June 2010.[13] There was no reply to this letter from Marican.

13 Almost two years later, Rodney Tan was appointed by the court as the deputy of the Injured Employee pursuant to the Mental Capacity Act on 23 August 2012. The court order expressly conferred authority on Rodney Tan to, *inter alia*:[14]

> (a) instruct lawyers to make such claim against the Employer or such parties as Rodney Tan, on legal advice, deems necessary and to commence legal proceedings under common law;
>
> (b) if the common law claim is withdrawn or dismissed, obtain such compensation as assessed by the Commissioner or the court under the Act;
>
> (c) give instructions to the Injured Employee's lawyers in respect of such a claim and to accept any settlement that Rodney Tan considers reasonable as advised by lawyers appointed by Rodney Tan; and
>
> (d) apply monies belonging to the Injured Employee from whatever source including any compensation monies or damages to

---

12 CLYLA at para 16.

13 CLYLA at p 71.

14 CLYLA at pp 94–95.

> pay legal fees and other related costs and expenses incurred for the purpose of making the said claim.

14 Upon receiving a copy of the court order appointing Rodney Tan as deputy, the Commissioner wrote to Marican on 29 October 2012 to check if Rodney Tan "wishes to claim compensation for the deceased".[15] According to the Commissioner, this choice of words was a mistake on her part as she had intended to ask whether Rodney Tan "wished to receive the compensation on behalf of the Injured Employee".[16] I also note that although the Commissioner referred to the Injured Employee as "the deceased" in her letter dated 29 October 2012, the Injured Employee is still alive at the time of this application.

15 At this point, Rodney Tan appeared to have changed his mind about making a claim under the Act on behalf of the Injured Employee. Marican replied to the Commissioner on 7 November 2012, stating that they needed a copy of the Commissioner's investigation report in order to "consider whether to pursue [a claim] under [the Act]".[17] On 28 February 2013, Marican wrote to the Commissioner stating that the Injured Employee did not make an application for compensation under the Act and that the Notice of Assessment was invalid.[18] The Commissioner, however, was of the opinion that the Notice of Assessment issued was valid and that it was not objected to by the Injured Employee or his representative within the time limit required by the Act. The

---

15 CLYLA at p 103.

16 CLYLA at para 20.

17 CLYLA at p 104.

18 CLYLA at p 113.

Commissioner hence sent multiple letters to Marican requesting that Rodney Tan provide certain bank details in order for the Commission of Labour to disburse the compensation accordingly.[19]

16 On 29 August 2013, Marican stated clearly to the Commissioner that Rodney Tan had decided to claim compensation under the common law on behalf of the Injured Employee, that he had never applied for compensation under the Act, and that the Notice of Assessment was a nullity. On 24 September 2013, Rodney Tan commenced Suit No 851 of 2013 ("Suit 851") for damages against three defendants, one of which is the Employer.

17 During this period of exchanges between Marican and the Commissioner, the Employer laboured under the impression that a valid claim was made. The Employer's insurers had paid the sum of $225,000 as compensation under the Act to the Commission of Labour on 12 July 2010. As far as the Employer was concerned, it was of the opinion that it had satisfied its liability under the Act and that there would be no common law claim brought by the Injured Employee or his representatives thereafter.[20] The Employer thus applied to strike out Suit 851 on 13 December 2013 on the basis that a claim was already made under the Act.

18 On 2 January 2014, the Commissioner wrote to Marican stating that the 20 May 2010 Letter was a valid claim under s 11(1) of the Act. The Notice of Assessment was also not objected to within the time period required by the Act and therefore the Notice of Assessment was deemed to be an order under

---

19 CLYLA at pp 107, 110 and 117.

20 SGB Starkstrom's Written Submissions ("SGB") at para 44.

the Act. She also added that since the claim was not withdrawn within the requisite time, Rodney Tan might not be able to pursue a claim under the common law.[21] In response, Marican wrote to the Commissioner on 27 February and 17 March 2014 requesting the Commissioner to agree that Rodney Tan had never made a claim under the Act, failing which, Marican would bring judicial review proceedings to quash the decision made by the Commissioner.[22] The Commissioner did not reply to Marican's request and Marican brought OS 265 accordingly.

19 After seeking the advice of the Attorney-General's Chambers ("the AGC"), the Commissioner's position changed. She wrote to Marican on 1 July 2014 stating that the Injured Employee had no capacity to make a decision for himself in relation to his property and affairs at the time the 20 May 2010 Letter was sent. Hence, no valid claim for compensation was made by the Injured Employee or on his behalf, and the Notice of Assessment was a nullity.[23] This prompted the Employer's lawyers to write to the Commissioner on 21 July 2014 to disagree with the Commissioner's new position and to request the Commissioner to reconsider it.[24] On 14 August 2014, the Commissioner replied the Employer, maintaining her position as stated in her letter of 1 July 2014. The Employer then filed OS 918.[25] The striking out application that the Employer filed was stayed pending the determination of OS 265 and OS 918.

---

21 CLYLA at p 135.

22 CLYLA at pp 139–141.

23 CLYLA at p 142.

24 CLYLA at pp 143–146.

25 CLYLA at pp 147–148.

20 By consent, the parties agreed at the pre-trial conference on 4 February 2015 to conflate the issues of leave and the substantive application under O 53 of the Rules of Court during the hearing on 3 March 2015. Prior to the hearing, the parties also agreed for both Originating Summonses to be heard together, with OS 918 to be heard first.

The parties' submissions

21 Counsel for the Employer, Mr Anparasan s/o Kamachi ("Mr Anparasan"), contends that under the Act, a next-of-kin does not need to be appointed as a deputy in order for him to make a claim on behalf of an injured employee who has become mentally incapacitated. He submits that the starting point is s 11(1) of the Act, which is the only provision that makes reference to the making of a claim. Section 11(1)(*c*) provides that a claim shall be "made in such form and manner as the Commissioner may determine". This gives a discretion exercisable by the Commissioner to decide whether a claim is validly made or not, and this includes whether the claim was brought by the appropriate person(s) on behalf of the employee. Mr Anparasan further submits that this position is buttressed by first, the fact that there are other provisions in the Act, such as s 12A, s 22(2), s 27(1)(*ba*) and s 28A(2)(*c*), which provide for certain decisions to be made on behalf of a mentally incapacitated employee without the appointment of a deputy, and secondly, the spirit of the Act, which is to provide for a quick and straightforward manner for injured employees to claim compensation. It would run contrary to the spirit of the Act if an injured employee's dependant had to commence further legal proceedings to be appointed a deputy before he could make a claim on behalf of the injured employee. Mr Anparasan's position is that the Commissioner, in the exercise of her discretion, had deemed the 20 May 2010 Letter to be a valid claim made by the Injured Employee's next-of-kin on

behalf of the Injured Employee. This discretion was properly exercised since on the face of it, Rodney Tan had all the bearings of a proper claimant. Mr Anparasan submits that this therefore constitutes a "claim" under the Act and the Notice of Assessment is thereby validly issued. The Commissioner's decision that the Notice of Assessment is a nullity was incorrect.

22 Counsel for the AGC, Mr Viveganandam Jesudevan ("Mr Jesudevan"), does not dispute that the Commissioner assumed, at the relevant time, that the 20 May 2010 Letter was a valid claim for compensation under the Act. However, he submits that this assumption is a jurisdictional error of fact. He argues that in order for a person to make a claim under the Act on behalf of an injured employee, that person must have the requisite legal capacity. This is the position embodied in the common law and has not been abrogated by either the Act or the Mental Capacity Act. A next-of-kin who has not been duly authorised by the court does not have the requisite capacity to make such a claim under the Act. Mr Jesudevan also argues that the position he advocates is supported by the purpose and scheme of the Act. Thus, the Commissioner had come to the wrong conclusion in assuming that Rodney Tan or Mdm Lim Davy had the requisite legal capacity on 20 May 2010 to make a claim under the Act on behalf of the Injured Employee. Accordingly, the Notice of Assessment issued by the Commissioner thereafter was issued in error and is a nullity.

Issue

23 As noted above, parties have agreed that the single issue is whether the 20 May 2010 Letter is sufficient to constitute a valid claim under the Act in the absence of any due authorisation for Rodney Tan or Mdm Lim Davy to act on behalf of the mentally incapacitated Injured Employee.

My decision

OS 918

24 Before dealing with the parties' submissions, I examine the relevant provisions under the Act. Section 11 of the Act governs the procedural requirements for making a claim. The relevant portions of s 11 provide:

> **Notice and claim**
>
> **11.**—(1) Except as provided in this section, proceedings for the recovery of compensation for an injury under this Act shall not be maintainable unless —
>
> (*a*) notice of the accident has been given to the employer by or on behalf of the employee as soon as practicable after the happening thereof;
>
> (*b*) a claim for compensation with respect to that accident has been made within one year from the happening of the accident causing the injury, or, in the case of death, within one year from the date of the death; and
>
> (*c*) the claim has been made in such form and manner as the Commissioner may determine.

25 When a valid claim is made under s 11, the Commissioner is then empowered under s 24(1) of the Act to assess and make an order on the amount of compensation payable to the employee. Upon doing so, the Commissioner shall serve on the employer and the person claiming compensation a notice of assessment of compensation, stating the amount of compensation payable in accordance with the Commissioner's assessment (see s 24(2) of the Act).

26 Section 24(3) of the Act states that after the notice of assessment is served, the parties may object to the notice within 14 days of its service. If no objection is received by the Commissioner within this period, or if an objection is received but withdrawn within 28 days of the service of the notice of assessment, the employer and the person claiming compensation shall be

deemed to have agreed to the notice. Section 24(3) also provides that the notice is to have the effect of an order for the payment of compensation made by the Commissioner under s 25D of the Act.

27 As is well known to practitioners in this field, a key consequence of making a claim and receiving compensation under the Act is the employee's loss of his right to proceed with a claim under common law. Section 33(2) of the Act provides that no action for damages shall be maintainable by an employee against his employer in respect of any injury if, *inter alia*, he makes a claim under the Act and does not withdraw his claim within 28 days from the service of the notice of assessment, or if he and his employer have agreed or are deemed to have agreed to the notice of assessment.

28 It is undisputed that the Injured Employee lacked the mental capacity at the relevant time to decide whether to make a claim under the Act or pursue a claim at common law. From the exchanges between the Commissioner and Marican leading up to the 20 May 2010 Letter, and the exchanges shortly after, it is clear that by the 20 May 2010 Letter, Rodney Tan or Mdm Lim Davy (whoever was the one instructing Marican) had *elected* to make a claim under the Act on behalf of the Injured Employee. However, whether they had the *capacity* to do so at law at that point in time is another matter altogether.

29 The Act is silent on who has the requisite capacity to make a claim under the Act on behalf of a mentally incapacitated employee, *ie*, an employee who is unable to make a decision whether to make a claim under the Act because of an impairment of, or a disturbance in the functioning of, the mind or brain (see s 4 of the Mental Capacity Act). Section 11(1)(*c*) of the Act only deals with the form and manner in which a claim, or more accurately, the election to make a claim, may be made. The Commissioner has a wide

discretion to accept different modes of election, for example, by way of email, by verbal representations, or by letter. There is also no prescribed content as long as the intention to elect to claim under the Act is sufficiently clear. It is clear that s 11(1)(*c*) does not extend to granting the Commissioner a discretion to determine who may make an election to claim under the Act on behalf of a mentally incapacitated employee.

30 Mr Anparasan submits that the Commissioner has such a discretion and highlights certain provisions to show that such discretion was envisaged by the Act. The first provision he relies on is s 22(2) of the Act. Section 22(2) provides:

> (2) Where it appears to the Commissioner that compensation or interest is payable to an employee under this Act and the employee is mentally incapacitated before such payment is made, it shall be lawful for the Commissioner to receive and pay the compensation or interest to any one or more of the dependants of the employee for the benefit of the employee without the appointment of any deputy for the employee under the Mental Capacity Act 2008.

31 He contends that s 22(2) envisages a scenario where a claim is made on behalf of a mentally incapacitated employee without a deputy being appointed. Otherwise a power would not be given to the Commissioner to pay compensation to the employee's dependents without the appointment of any deputy. With respect, I am unable to agree. On a plain reading, s 22(2) was meant to provide for a case where compensation or interest *is payable* under the Act, and the employee becomes mentally incapacitated *after* he made a valid claim, but before compensation is paid. The purpose of s 22(2) is thus to enable the Commissioner to disburse the monies to the employee's next-of-kin, especially where the employee is in need of the funds for payment of medical or other expenses, without undue delay and without having to wait for the appointment of a deputy. The same concept can be seen in s 61 of the

Insurance Act (Cap 142, 2002 Rev Ed) where payment can be made by an insurer to any proper claimant under a life or accident and health policy without the production of any probate or letters of administration. From the clear words of the opening sentence in s 22(2), there can be no implication that a claim under the Act may be made on behalf of an employee who became mentally incapacitated without a deputy being appointed.

32 Mr Anparasan also submits that the insertion of s 22(2) into the Act, when read in the spirit of the Act, which he alleges is to provide a quick and straightforward process for injured employees to make a claim for compensation, shows that Parliament intended for a next-of-kin to be able to make a claim on behalf of a mentally incapacitated employee without having to apply to be a deputy under the Mental Capacity Act. However, the exact opposite may be said about the insertion of s 22(2) into the Act. The fact that Parliament had not made such a similar amendment to s 11 of the Act or the claims process indicates its intention *not* to extend the dispensation of an appointed deputy with respect to who may make a claim on behalf of a mentally incapacitated employee. Unfortunately, the parliamentary debates do not reveal much about the reasons for the introduction of s 22(2).

33 Another provision Mr Anparasan relies upon is s 12A of the Act. Section 12A(1) begins with: "[w]here any claim for compensation has been made under this Act by an employee or *by a person acting on behalf of an employee who is dead or mentally incapacitated*" [emphasis added]. Mr Anparasan argues that by not using the term "deputy", this indicates that the Act envisages claims being made on behalf of a mentally incapacitated employee without a deputy being appointed. I note there are other provisions which make an express reference to the term "deputy", such as s 27(1)(*ba*) and s 28A(2)(*c*) of the Act, whereas s 12A(1) does not. However, I do not accept

that just because there are other provisions in the Act which use the term "deputy", Parliament intended the phrase "by a person acting on behalf of an employee" to mean persons other than a deputy. Provisions like s 12A(1), s 27(1)(*ba*) and s 28A(2)(*c*) are neutral at best with regards to the question of whether a claim may be made on behalf of a mentally incapacitated employee by persons other than a deputy.

34 Mr Jesudevan relies on the Court of Appeal case of *Teo Gim Tiong v Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased)* [2014] 4 SLR 15 ("*Teo Gim Tiong*"). In *Teo Gim Tiong*, the plaintiff sustained injuries in an accident and sued the defendant. The defendant made an offer to settle which remained open for acceptance when the plaintiff passed away from his injuries. The plaintiff's mother then obtained an order of court to be made a party to the proceedings as the legal representative of the plaintiff's estate under O 15 r 7(2) of the Rules of Court, and purported to accept the defendant's offer to settle. The issue on appeal was whether the plaintiff's mother had the capacity to act for the estate of the plaintiff to accept the offer to settle. The Court of Appeal held at [19]–[20] that as the action had been pursued as an estate claim for damages under a cause of action that survived death under s 10(1) of the Civil Law Act (Cap 43, 1999 Rev Ed), only the proper appointed executor or administrator of the estate could act for the estate. The plaintiff's mother therefore did not have the capacity to accept the offer to settle on behalf of the estate because she had not been granted letters of administration. At [31], the Court of Appeal held that the rationale is that "[i]n cases of intestacy, the court jealously guards the assets – including causes of action – of the deceased's estate through the procedure by which letters of administration are granted". Hence, only persons who have been granted letters of administration can act on behalf of a deceased's estate.

35 This rationale is axiomatic. Capacity, be it legal or mental competence, is an often unsung but self-evident concept that underlies much of our law. It is the basis on which we view responsibility and liability for, as well as the validity of, certain acts. In the context of criminal law, the lack of mental capacity or understanding in appropriate cases negatives *mens rea*. Hence the insane or those with diminished mental capacity cannot be guilty of murder. By the same token, children under the age of 7 are presumed not to have the capacity to commit crimes and those between the ages of 7 to 12 who have not attained sufficient maturity or understanding to judge the nature and consequences of their conduct are not held criminally responsible for their acts. In the law of contract, generally speaking, those under the age of 18 lack the legal capacity to enter into contracts except for contracts for necessaries or training or analogous contracts.

36 These considerations also arise where an adult loses his mental faculties or suffers a diminution in mental capacity to the point where he cannot be said to be of sound mind and capable of making a decision affecting his affairs or giving a valid consent. As *Teo Gim Tiong* illustrates, the law is careful to scrutinise that when A does something on behalf of B or his estate, A has satisfied the legal requirements to do so, *ie*, a person must have the requisite legal capacity before he/she can make a decision on behalf of another. Similarly, legal capacity in relation to legal proceedings is governed by O 76 r 2 of the Rules of Court which provides that where a person is under "disability", only his litigation representative has the capacity to bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on the mentally incapacitated person. The meaning of a person under "disability" under O 76 of the Rules of Court includes a person lacking capacity within the meaning of the Mental Capacity Act.

37 In the case of this Injured Employee, the informed choice to be made was whether to proceed under the Act or under common law. The plight of this Injured Employee brings into stark relief the consequences of a wrong choice. The Commissioner has assessed and made an award of the sum of $225,000, the maximum under the Act. In the statement of claim in Suit 851, the medical expenses incurred up to the date of the writ, 24 September 2013, amounted to $523,504.91, transport expenses were estimated at $8,083.85, legal costs for an Order under the Mental Capacity Act came to $7,831.00 and pre-trial nursing care up to 3 August 2013 amounted to $27,150.63. Pre-trial loss of earnings, loss of future earnings and/or loss of earning capacity, cost of future medical costs, nursing care and transport were to be assessed. The Injured Employee was 30 years old at the time of the accident. His common law claim will be far in excess of the Commissioner's award. There can be but few choices which are of greater import than a decision whether to proceed under the Act or common law.

38 It is beyond doubt that this Injured Employee lacked the mental capacity and competence to make such a choice right from the time of the accident. Just as the court in *Teo Gim Tiong* stated that the courts will jealously guard the assets, including causes of action, of an intestate estate through the procedure by which letters of administration are granted to proper legal representatives, the courts will also jealously guard the rights of injured workers who lack the mental capacity and competence to make choices that are in their best interests by making sure fit and proper persons are appointed as their deputy under the Mental Capacity Act.

39 There is a procedure under the Mental Capacity Act for fit and proper persons to be appointed a deputy and to represent the injured employee. The Mental Capacity Act imposes a statutory duty on the deputy to act in the best

interests of the mentally incapacitated person (see s 3(5) of the Mental Capacity Act). In conjunction, r 179 of the Family Justice Rules 2014 (S 813/2014) requires an application to become a deputy of a mentally incapacitated person to be served on all named defendants and "relevant persons", the latter of which includes the immediate family members of the person and even relatives or friends who have a close relationship with the person. This will allow the "relevant persons" to intervene in the application if they so wish. The court, having all the relevant and necessary information before it, would then be able to appoint the most suitable person(s) to be the deputy to act on behalf of the mentally incapacitated person. Hence, a deputy appointed under the Mental Capacity Act would be in the best position to decide whether to make a claim under the Act on behalf of the mentally incapacitated employee. That deputy will be granted various express powers that the court deems necessary and this includes the power to make a claim under the Act or to pursue a common law action on behalf of the injured employee as will be in his best interests. The potential for abuse of position is thus kept, as far as is possible, within acceptable limits.

40 Accordingly, in my judgment, the next-of-kin of a mentally incapacitated employee do not have, without more, the requisite capacity to make a claim under the Act on behalf of the employee. Only a person duly appointed by the court under the Mental Capacity Act will have the legal capacity to do so. I am therefore unable to agree with Mr Anparasan's submission that such other person may be any next-of-kin of the Injured Employee that the Commissioner has deemed satisfactory.

41 Importantly, this is the current position adopted by the Commissioner as well. In the "Authority to Claim" form that is normally issued by the Commissioner to any person intending to claim on behalf of a mentally

incapacitated employee, it specifically provides that a claim can only be made by a Committee of the Person and Estate (currently known as the deputy) appointed by the court. Oddly though, the Commissioner in the present case appears to have overlooked this requirement and proceeded to issue the Notice of Assessment before receiving the "Authority to Claim" form from Rodney Tan or Mdm Lim Davy. Finally, although a duly appointed deputy would typically be the only appropriate person to make a claim under the Act on behalf of the mentally incapacitated employee, I must not be taken to have decided that no one else can ever do so. There may be very exceptional circumstances, for example emergency situations, but this is certainly not the case here and I say no more.

42 I recognise that there is a one year limitation under the Act to make a claim beginning from the date of the accident, or in the case of death, within one year from the date of death. The process of appointing a deputy may, in some circumstances, be a lengthy one. For example, it took more than a year after the Injured Employee's accident before Rodney Tan became appointed as deputy. The cause of the delay is not in the evidence before me. However, s 11(4) of the Act clearly provides that the making of a claim after the lapse of this one year limitation shall not be a bar to making a claim under the Act if it is found that there was, *inter alia*, a reasonable cause for the delay. A delay due to the next-of-kin having to apply to become a deputy because the employee himself has become mentally incapacitated can constitute reasonable cause. That having been said, the application for a deputy by the next-of-kin should be made within a reasonable time of the determination of the employee's mental incapacity.

43 It follows that for the reasons set out above, neither Rodney Tan nor Mdm Lim Davy had the legal capacity to decide on behalf of the Injured

Employee to make a claim under the Act as neither had been appointed a deputy of the Injured Employee under the Mental Capacity Act at the relevant time, *ie*, 20 May 2010. Their instructions to Marican to write to the Commissioner to make a claim under the Act were similarly made without legal capacity and competence and accordingly of no effect. I accept the submission of Mr Jesudevan that the Notice of Assessment issued by the Commissioner was issued in error and therefore a nullity and of no effect.

44 The Injured Employee left no indication as to who he desired to make decisions on his behalf in the event he was incapacitated. The law must follow its course. The power of attorney granted by Mdm Lim Davy to Rodney Tan is similarly of no effect as she was not the duly appointed deputy of the Injured Employee and did not have the legal capacity or competence to make a claim under the Act. Accordingly, the 20 May 2010 Letter does not constitute a valid claim under the Act.

45 Does the fact that Rodney Tan was subsequently appointed to be the deputy of the Injured Employee, and was granted express powers by the court to make a claim under the Act on behalf of the Injured Employee, make any difference? In my judgment it does not. At the relevant point in time when the 20 May 2010 Letter was sent, it is clear that Rodney Tan had not yet been appointed the Deputy of the Injured Employee. The subsequent appointment of Rodney Tan as the deputy of the Injured Employee does not change the fact that the 20 May 2010 election was made without legal capacity.

46 Since the 20 May 2010 Letter does not amount to a valid claim, the Notice of Assessment issued by the Commissioner is issued in excess of jurisdiction and in error. It is axiomatic that an *ultra vires* decision is a nullity (see *Anisminic Ltd v Foreign Compensation Commission and another* [1969] 2

AC 147). The Notice of Assessment is hence a nullity and the Commissioner's decision on 1 July 2014 was correctly made. I accordingly dismiss OS 918.

OS 265

47 Having held that the Notice of Assessment is a nullity and the Commissioner has accepted it as so, there is no longer any need for OS 265. However, to put the matter beyond doubt, I grant the Quashing Order prayed for in OS 265.

Conclusion

48 Before I conclude, I note that the Employer and its insurer have suffered some degree of prejudice in the present case. The Employer was always under the impression, and not wrongfully so, that they had satisfied their liability under the Act. In this regard, they had closed their books. Furthermore, their ability to defend a common law action for damages may be affected as it would be difficult to reinvestigate the matter given that almost six years have passed since the day of the accident. Nonetheless, the Commissioner had mistakenly acted beyond her jurisdiction and her Notice of Assessment is a nullity and there is no bar for the Injured Employee to proceed with his claim at common law. Nothing in my judgment impinges upon or is in any way expressing a view on liability and/or contributory negligence in Suit 851. That remains within the domain of the judge trying the case.

49 I will hear the parties on costs.

Quentin Loh
Judge

Noor Mohamed Marican and Ramasamy Chettiar (Marican & Associates) for the applicant in OS 265;
Anparasan s/o Kamachi and Tan Hui Ying Grace (KhattarWong LLP) for the applicant in OS 918;
Viveganandam Jesudevan, Lim Kah Hwee Nicholas and Ang Ming Sheng Terence (Attorney-General's Chambers) for the respondent in OS 265 and OS 918.