18. INSURANCE LAW

Winston **KWEK** Choon Lin
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Adjunct Associate Professor, Faculty of Law,
National University of Singapore.

18.1 In August 2016, the UK Insurance Act 2015[1] took effect in the UK. The Singapore Academy of Law formed a Law Reform Subcommittee (Insurance) in 2017 to study the changes introduced by the UK Insurance Act and to evaluate if Singapore ought to adopt these changes. The subcommittee's report has been delayed but is expected to be issued in early 2019. In the meantime, in 2018, there are four reported cases which make for interesting reading.

Premature application/jumping the gun?

18.2 In *DNKH Logistics Pte Ltd v Liberty Insurance Pte Ltd*,[2] DNKH Pte Ltd ("DNKH"), whose principal business activities were freight forwarding, transport and warehousing, packing and crating of goods and providing services as general contractors for non-building construction, leased several warehouses for storage of its customers' equipment and goods. In relation to one of its warehouses at 8 Tuas Avenue 20, DNKH purchased a fire-warehouse risk insurance policy ("the Fire Policy") against any liability for fire damage to all real and personal property on the warehouse premises, including customer's machinery, plant and equipment as well as, under "Risk No 2": "On customers' stock (other than stocks already insured by customers (including containers owned by insured or held by them in trust or on commission)".

18.3 The sum insured for Risk No 2 was $10m.

18.4 A fire broke out at the warehouse in August 2015 and resulted in, *inter alia*, damage to goods/stock belonging to DNKH's customers. A number of these customers presented claims against DNKH. DNKH duly filed claims under the Fire Policy with Liberty Insurance Pte Ltd ("Liberty"), who agreed to indemnify DNKH for only one such claim. On 10 November 2017, DNKH filed an application for:

1 c 4.
2 [2018] SGHC 187.

(a) a declaration that the containers, goods and/or stocks belonging to DNKH's customers and affected by the fire are covered by the Fire Policy; and

(b) an order that Liberty indemnify DNKH for all costs, expenses and damages incurred and/or to be incurred by DNKH in respect of the claims of DNKH's customers arising out of the Fire.

18.5 DNKH took the position that the prayers in its application could be granted based simply on an interpretation of the terms of the Fire Policy, and the arguments it presented embarked on an exercise in construction, which included a contention that Risk No 2 was ambiguous and thus the *contra proferentum* rule applied such that it ought to be construed against Liberty. DNKH reiterated that it was not seeking a determination of fact. On the other hand, Liberty took the position that a decision on the prayers could only be made after determining the factual matrices of the claims brought by DNKH's customers that DNKH sought an indemnity on from Liberty. The principal contention by Liberty was that under Risk No 2, the policy excluded and did not cover goods/stocks that were already insured by DNKH's customers.

18.6 While noting that under s 18 of the Supreme Court Judicature Act,[3] read with para 14 to the First Schedule thereto and O 15 r 16 of the Rules of Court,[4] the court is empowered to grant declaratory judgments and that the grant of such a remedy is discretionary in nature (see *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*),[5] Belinda Ang Saw Ean J refused to exercise her discretion to make any declaration or order on DNKH's application. The judge cited, *inter alia*, the decision in *Tan Eng Hong v Attorney-General*[6] where the Court of Appeal set out three basic propositions:

(a) The applicant must have a "real interest" in bringing the action.

(b) There must be a "real controversy" between the parties to the action for the court to resolve.

(c) The declaration must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation.

3 Cap 322, 2007 Rev Ed.
4 Cap 322, R 5, 2014 Rev Ed.
5 [2006] 1 SLR(R) 112.
6 [2012] 4 SLR 476.

Her Honour was of the view that there was no real controversy for the court to resolve in this case.

18.7 In fact, DNKH had agreed at the outset that the cause of the fire had not, at time of the application, been established, so DNKH's liability to its customers had not been ascertained. At law, an insurer is liable to indemnify the insured only if the liability of the insured was established – see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*.[7] The judge accepted that the following issues formed the real controversies and involved fact-specific inquiries:

> (a) whether the goods/stocks of DNKH customers damaged in the fire that were separately insured were also covered by the Fire Policy; and
>
> (b) Liberty's extent of liability in relation to these goods/stocks.

18.8 Factual evidence would have to be adduced, apart from DNKH's liability for the cause of the fire, as to whether the alleged customers were in fact actual customers of DNKH; whether these customers' goods/stocks were in fact those that fell within the property covered by the Fire Policy; what the terms of the contracts between DNKH and its customers were in relation to insurance of the goods/stocks; and, of course, whether these had been separately insured and the terms of such insurance.

18.9 The judge pointed to another "stronger reason" for her decision not to grant declaratory relief – there would be no *res judicata* or finality in the court's declaratory judgment as, in the future, claims against DNKH by its customers in respect of liability might have to be litigated, as well as coverage of the customers' goods/stocks and Liberty's extent of liability.

18.10 The judge made no order on DNKH's application, and ordered DNKH to pay costs. DNKH has lodged an appeal, which is pending before the Court of Appeal.

Concluding remarks

18.11 Why did DNKH attempt such an application? One can only surmise that it was motivated by commercial pressure brought upon DNKH by the claims and repeated demands over time (from August 2015 when the fire occurred to mid-2017) of its customers, the value of

7 [2008] 3 SLR(R) 1029.

whose goods/ stocks must have been not insignificant, given the sum insured of $10m for Risk No 2.

Work injury compensation scheme – Mismatch between legislation and practice?

18.12 In *Temasek Polytechnic v Poh Peng Ghee*,[8] a claim for compensation was made under the Work Injury Compensation Act[9] ("WICA"). Whilst this case does not strictly involve principles of insurance law, it does clarify the role and position of insurers in the context of work injury compensation, a scheme administered by the Ministry of Manpower ("MOM") and the Commissioner for Labour ("the COL").

18.13 The facts are straightforward – on 16 January 2017 an administrative manager employed by the first applicant, Temasek Polytechnic ("TP"), was found slumped over her chair on TP's premises and was subsequently pronounced dead. Her husband, daughter and son ("the Claimants") made a claim for compensation under the WICA. At the material time, TP's insurer was NTUC Income Insurance Co-Operative Ltd ("NTUC"), the second applicant.

18.14 On or around 17 April 2017, Assistant Commissioner for Labour Damien Lim ("ACOL Lim") issued a notice of assessment of compensation ("NAC") stating that the claim was found to be valid and assessed the compensation payable to be $204,000.00. The NAC was in fact addressed to NTUC as the payer but was served on TP, NTUC and the Claimants on 19 April 2017 together with Form A – a notice of objection ("NOO") – which was to be used if there was objection to the NAC. Form A or the NOO was a form prescribed in reg 6 of the Work Injury Compensation Regulations[10] ("the WIC Regulations").

18.15 On 2 May 2017, NTUC submitted the NOO and objected, by ticking the relevant box, on the ground that the death of the deceased was not caused or aggravated by an accident that arose out of and in the ordinary course of employment; and further elaborated that the cause of death as stated on the death certificate was coronary atherosclerosis, which is a hardening of the artery walls due to build-up of calcium deposits over the years – this was a medical condition, and not due to her nature of work since her job scope involved the handling of daily administrative paperwork concerning her employer's operations and

8 [2019] 3 SLR 305.
9 Cap 354, 2009 Rev Ed.
10 Cap 354, Rg 1, 2010 Rev Ed.

admissions. NTUC further queried why the MOM would deem this to be work-related.

18.16 On 4 May 2017, the COL notified NTUC, TP and the Claimants that a NOO to the NAC had been received, and a series of pre-hearing conferences followed. At the fourth conference, the Claimants argued that the NOO was invalid as it was submitted by NTUC, an insurer, instead of TP, the deceased's employer, as required by s 25 of the WICA. At the fifth conference on 20 November 2017, Assistant Commissioner for Labour Manoj s/o PN Rajagopal ("ACOL Manoj") heard submissions and decided that the NOO submitted by NTUC was not a valid objection. The COL then issued a certificate of order (which was later amended and dated 18 December 2017) addressed to TP and NTUC but directing only TP to pay the Claimants the compensation sum of $204,000.00.

18.17 Both TP and NTUC appealed to the High Court on 12 January 2018 under s 29 of the WICA against the amended certificate of order and the decision of ACOL Manoj that the NOO was not valid.

18.18 The issue on appeal appeared simple and concerned a narrow point of law – whether the NOO, submitted on prescribed form by an employer's insurer, was valid. However, the mismatch between legislation (the WICA and WIC Regulations) and the work injury compensation scheme as administered by the MOM and the COL was thrown into sharp relief by the facts, simple as they were, and prompted the Attorney-General to intervene in the proceedings on 2 June 2018.

18.19 The appeal was heard before Woo Bih Li J, who had in an earlier decision of *MST Ruma Khatun v T & Zee Engineering Pte Ltd*[11] ("*Ruma Khatun*") raised concerns about the mismatch between legislation and practice. This time, however, the judge embarked on a comprehensive scrutiny of the issues raised by the mismatch, including a preliminary point in relation to s 24(3B) of the WICA which states that no appeal shall lie against any order under s 24(3). Counsel for TP, NTUC and the Attorney-General were in agreement that s 24(3B) was *sui generis*, there being no equivalent provision in similar legislation of other countries, and the Claimants naturally relied on this provision. The judge agreed with the applicants ("the Applicants") and the Attorney-General that given the way s 24(3) operates – that is, the employer and the claimant are deemed to have agreed to the assessment by the COL and the relevant certificate of order will follow to be issued if a NOO on Form A is not filed within 14 days of service of the NAC – s 24(3B) is confined to the situation where no NOO was submitted. Where a NOO has been

11 [2017] 4 SLR 1045.

submitted and its validity questioned, then any person aggrieved by any order of the COL may appeal to the High Court under s 29 of the WICA. For completeness, the judge further considered whether an appeal had been brought via originating summons and served within 28 days after the date of "the judgment, order, determination or other decision" being appealed against, as required by O 55 r 3(2) of the Rules of Court – the specific question being whether the 28-day period commenced from the date of the decision of ACOL Manoj or the date of his amended certificate of order of 18 December 2017. However, as parties had assumed it was the latter, no issue was raised as to whether the appeal, filed on 12 January 2018, had been in time.

18.20 Turning to the main dispute between the parties, the judge identified the source of the mismatch as follows. Section 24 of the WICA provides that the COL shall serve on "the employer and the person claiming compensation" a NAC stating the amount of compensation, which NAC is deemed to have been agreed upon by "the employer and the person claiming compensation" if no objection to the NAC is received by the COL within 14 days of the date of service of the NAC. Section 25 of the WICA provides that "any employer of person claiming compensation" objecting to a NAC shall, within the said 14-day period, give notice of his objection in the prescribed form and manner to the COL stating precisely the grounds of objection. However, whilst the NOO is in the prescribed Form A as set out in the Schedule to reg 6 of the WIC Regulations, the NAC is not in a form that is prescribed in the WICA or the WIC Regulations. Instead, the NAC that had been in use for some time is in a form that was presumably drafted by the COL or MOM. It names the insurer as the party liable to pay the compensation when in ss 24 and 25 of the WICA, an insurer is not mentioned – indeed, it will be an employer who is the party liable to pay.

18.21 The NOO, whilst in Form A as prescribed by legislation, adds further to the confusion. Form A is in two sections – section A is for the identity and particulars of the objecting party to be stated, and apart from the two boxes for the employer or person claiming compensation to be ticked or checked, there is a third box for an insurer! If this third box is ticked, the insurer is required to identify itself on Form A, with additional space for the representative of the insurer signing Form A to state his/her name. What follows is an express clause that states that the representative is acting on behalf of the "abovenamed insurance company/firm" (and thus not on behalf of the employer).

18.22 Section B of Form B also has boxes for various grounds of objection to be ticked or checked, with space for further elaboration of the selected ground of objection. There is no express statement on Form A that restricts the objecting party to only one ground of

objection. When read in its entirety, Form A or the NOO suggests that an insurer may use it to object to a NAC and on any ground.

18.23 Thus, on one hand, statute (in the form of ss 24 and 25 of the WICA) contemplates that the assessment and objection thereto of work injury compensation is a matter only between an employer and the person claiming compensation; on the other hand, the NAC as well as the NOO prescribed under reg 6 of the WIC Regulations suggest that the insurer may object to an assessment in its own name. The Applicants submitted that it was the practice of the MOM to designate the insurer as the payer in a NAC and alleged that where an insurer confirmed that its policy was engaged, it was invited by the MOM to file an objection to the NAC on behalf of the employer; furthermore, since September 2017 it had been the practice of the MOM when it receives an objection from the insurer to follow up with the employer and insurer to confirm that the insurer is objecting on behalf of the employer – this new practice demonstrates that insurers were able to object in their own names in the past. The Attorney-General disputed the alleged practices of the MOM. The judge did not make any finding on these practices, but did note that the NAC itself, in naming the insurer as the payer, and the MOM's practice of serving it together with Form A on the insurer suggests that an insurer may serve a NOO in its own name, thereby adding to the confusion.

18.24 In *Goh Yee Lan Coreena v P & P Security Services Pte Ltd*[12] ("*Coreena*"), Chua Lee Ming JC (as he then was) decided that an insurer who filed an objection using Form A in its own name was not an objection filed by the employer under s 25 of the WICA. An insurer could file Form A in the name of the employer, its insured, if:

> (a) the relevant policy contained terms authorising the insurer to do so; or
>
> (b) on the facts, the employer had authorised the insurer as its agent to do so.

18.25 ACOL Manoj had relied on *Coreena* at the fifth conference on 20 November 2017 when he rejected the NOO submitted by NTUC. ACOL Manoj had also referred to the judge's earlier decision in *Ruma Khatun*[13] where the judge had accepted that the literal interpretation of s 25(1) of the WICA would mean that only an employer or the person claiming compensation may object to the NAC.

---

12 [2016] 4 SLR 1065.

13 See para 18.19 above.

18.26 After hearing submissions from the Applicants, the Claimants and the AG, the judge affirmed his agreement with Chua JC's view in *Coreena* and of course his own in *Ruma Khatun* that only an employer or the person claiming compensation may object to a NAC under ss 24 and 25 of the WICA, not an insurer. However, given that the NAC in its current form and the NOO or Form A that included the insurer as a possible objector would continue to remain in use (until such time the Attorney-General completes its review of and addresses the mismatch), they would be misleading and a pitfall for unsuspecting insurers and employers, who "cannot be faulted for assuming that if the insurer completes and serves Form A to object that is a valid objection for the purpose of" ss 24 and 25 of the WICA. The judge recognised that the inclusion of the insurer as a possible objector may have been influenced by the fact that the insurer is likely the ultimate payer of the compensation amount, and allowing the insurer to object ensures that the views and considerations of all interested parties in the assessment may be considered and addressed at the same time to expedite matters.

18.27 The judge preferred a purposive approach to the construction of ss 24 and 25 the WICA and reg 6 of the WIC Regulations:[14]

> 110. In summary, there is nothing objectionable in principle *per se* in construing an NOO served by an insurer as a valid objection under the Main Provisions (Sections 24 and 25 of the WICA), if it contains a valid ground of objection, ie, one which addresses the issue of liability or quantum as between the employer and the claimant, even though the insurer has repudiated or may later repudiate the policy. The objection on behalf of the insurer is prima facie made on behalf of the employer and it is up to the employer to disavow it.
>
> 111. I am aware that other questions may arise if an objection by an insurer using Form A is to be construed prima facie as an objection on behalf of the employer where it contains a valid ground of objection.
>
> 112. For example, what if both the employer and the insurer serve a Form A and the grounds of objection pertaining to liability or quantum as between the employer and the claimant differ? If the grounds of objection are not inconsistent, both the grounds of the employer and of the insurer could still apply. But what if there is an inconsistency? Perhaps they could then be considered as alternative grounds of objection.
>
> 113. In any event, I do not think that such questions raise insurmountable obstacles such that they suggest that the approach which I have mentioned is incorrect. Rather they reinforce the point that WICA, the WIC Regulations and the practice of MOM and the COL should be reviewed holistically to ensure consistency and to

14 *Temasek Polytechnic v Poh Peng Ghee* [2019] 3 SLR 305 at [110]–[116].

> avoid pitfalls for unwary parties, as well as to address various gaps or uncertainties to achieve the laudable aim of providing an expeditious avenue to resolve a claim for compensation on a no-fault basis. In *Ruma Khatun*, I already raised concerns about the mismatch between legislation and practice. I understand from counsel for the AG that a review is being undertaken.
>
> 114. In the meantime, unless the NAC and Form A are amended to avoid confusion, each insurer should ensure that that its insured completes, signs and serves Form A in the insured's own name in time with the requisite grounds of objection to avoid further arguments. If the insurer is still concerned that the insured may omit to serve Form A at all or in time, then it is for the insurer to decide whether to also complete and serve Form A in its own name in time with the valid grounds of objection as a matter of caution. If necessary, this can be done with the insurer reserving the right to repudiate liability under the policy if, for example, the insurer has not completed its own investigations.
>
> 115. To avoid inconsistency and other confusion, the insurer should ensure that the grounds of objection raised by the insured and itself using Form A are the same to the extent possible.
>
> 116. In the light of the use of the NAC and Form A, as presently drafted, MOM should decide whether it wishes to take the lead to draw to the attention of all insurers about the dispute that has arisen if only the insurer serves the Form A objection and about the suggestions made above. I add that the suggestions do not mean that the court is pro-employer or pro-insurer. They are made to avoid a technical objection arising from a situation through the use of forms imposed on parties.

18.28 Finding that the NOO served by NTUC contained a ground of objection that addressed the issue of liability as between TP and the Claimants, it was *prima facie* construed as an objection submitted on behalf of TP and since TP did not disavow the same, the judge accepted that it was a valid objection and set aside the amended certificate of order of ACOL Manoj.

Concluding remarks

18.29 With a thorough exposition and treatment of the mismatch, the industry now awaits news from the Attorney-General.

The MIB

18.30 In *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd*,[15] the third party, Liew Voon Fah ("Liew"), a Malaysian, was taking his wife and second plaintiff, Koo Siew Tai ("Koo"), also a Malaysian, to work in Singapore on his Malaysian-registered motorcycle on 8 December 2007 when his motorcycle skidded on the Ayer Rajah Expressway. Koo, riding pillion, was flung off the motorcycle and suffered serious head injuries (including skull fractures and loss of brain tissue) and later post-traumatic epilepsy. The motorcycle was then insured under Policy No JVA 0647209 ("the Policy") issued by AM General Insurance Bhd ("AM"), which did not cover passenger liability.

18.31 On 16 July 2009 Koo commenced proceedings in Singapore against Liew in Suit No 613 of 2009 ("Suit 613"). AM instructed lawyers to represent Liew initially but the lawyers discharged themselves on 5 July 2010 on instructions that the Policy did not cover passenger liability. On 10 August 2010, interlocutory judgment was entered against Liew and damages to be assessed. On 21 February 2011, final judgment after assessment was entered against Liew in the sum of S$788,057.73, plus interest and costs ("the Judgment Debt").

18.32 When the Judgment Debt remained unpaid, Koo filed Originating Summons No 404 of 2012 ("OS 404") against the Motor Insurers' Bureau ("MIB") on 26 April 2102, seeking satisfaction of the same from the MIB pursuant to its obligations under a memorandum of agreement entered into between the MIB and the Minister of Finance on 22 February 1975 ("the Principal Agreement") where the MIB is obliged to compensate victims of road accidents when, essentially, there is no effective insurance for the vehicle involved, where the driver of the vehicle cannot be traced or where the insurer has become insolvent. In practice, it is not the case that the MIB is the actual party that compensates road accident victims at first instance. Also on 22 February 1975, the MIB entered into another memorandum of agreement with Lloyd's underwriters and all insurance companies conducting motor insurance business in Singapore ("the Domestic Agreement") pursuant to which the "Insurer Concerned" (defined in cl 1 as the insurer who had provided insurance in respect of the vehicle involved in the accident giving rise to liability of the insured driver, notwithstanding any terms in the insurance that excludes such liability) would satisfy the Judgment Debt, and, under cl 3(1), within 28 days of the date within which the judgment may be enforced. In the case of cars registered in Malaysia that are driven into Singapore, the MIB enters into special agreements with individual Malaysian insurers of such cars where such Malaysian

15 [2018] 4 SLR 882.

insurers agree to be bound by the terms and obligations of the Domestic Agreement in the same manner as a Singapore insurer; *vice versa*, Singapore insurers would sign special agreements with the Malaysian MIB agreeing to be bound by the equivalent Malaysian versions of the Principal and Domestic Agreements in respect of Singapore-registered cars that are driven into Malaysia. AM signed such a special agreement on 26 October 1987 with the Singapore MIB ("the Special Agreement").

18.33 The MIB joined AM as a third party in OS 404 on 19 November 2013 and sought an indemnity from AM against Koo's claim under the Principal, Domestic and Special agreements. However, Koo and the MIB agreed to stay OS 404 in favour of a joint action against AM, and on 21 June 2016 both Koo and the MIB commenced Suit No 647 of 2016 ("Suit 647") against AM to compel AM to satisfy the Judgment Debt in favour of Koo. On 7 October 2016, Koo and the MIB applied via Summons No 4880 of 2016 ("Summons 4880") in Suit 747 for the following against AM:

> (a) a determination of whether AM was the Insurer Concerned under the terms of the Domestic Agreement and thus liable to satisfy the Judgment Debt;
>
> (b) final judgment against AM in the sum of $788,057.73 and interest thereon at the statutory rate of 5.33 %;
>
> (c) alternatively, interlocutory judgment in favour of the MIB with damages to be assessed; and
>
> (d) in the further alternative, an order of specific performance of the Special Agreement read with the Domestic Agreement requiring AM to pay the sum of $788,057.73 and interest thereon to Koo within 14 days.

18.34 AM resisted Summons 4880 on numerous grounds, including contentions that it did not frame proper questions that would resolve the issues in dispute; that it raised questions of public importance; that there were substantial factual disputes and thus triable issues; that the MIB (in not having paid Koo on the Judgment Debt) has suffered no actionable loss; and that, under the terms of the Principal and Domestic agreements, AM is liable to indemnify the MIB only after MIB has compensated the victim. In the case of Koo, AM challenged her *locus standi* to sue given that there was no privy of contract between her and AM, as she was not a counterparty to the Principal, Domestic and Special agreements. As such, a determination of Summons 4880 would not resolve the issues in dispute and dispose of Suit 647 in its entirety. Summons 4880 was placed before Quentin Loh J, who pointed out there was "some disjoint between the issues actually in dispute (as seen from the parties' respective positions) and the questions framed for determination", which AM relied on for its contentions in the preceding

paragraph. However, given that AM had conceded at the outset that it was the Insurer Concerned as defined in cl 1 of the Domestic Agreement and that if the MIB were to pay the Judgment Debt to Koo, the MIB would "have a full right of indemnity against AM on the basis of" *Pacific & Orient Insurance Co Bhd v Motor Insurers' Bureau of Singapore*[16] ("*Pacific*"), the judge framed the real issues between the parties as whether:

(a) Koo and the MIB had *locus standi* to sue AM;

(b) AM was contractually obliged to satisfy the Judgment Debt; and

(c) if so, what relief Koo and the MIB may obtain.

18.35 Citing O 14 r 12(1) of the Rules of Court, which reads:

> The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause of matter where it appears to the Court that —
>
> (*a*) such question is suitable for determination without a full trial of the action; and
>
> (*b*) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein
>
> …

the judge took the view that the court could on its own motion proceed on a determination of these issues as that would dispose of the dispute between parties, particularly since parties had dealt with these issues at length in submissions and there being no factual disputes, the court was called upon to construe the Principal, Domestic and Special Agreements and apply established legal principles.

Locus standi

18.36 In the case of the MIB, the court readily found that being a counterparty to the Special Agreement entered into with AM, the MIB clearly had *locus standi* to sue AM for contractual breaches of its terms.

18.37 On the other hand, the court disagreed with Koo's contention that she had *locus standi* as the beneficiary of an implied trust arising out of the Domestic Agreement, in relation to which the MIB was the trustee for traffic accident victims. Koo had cited a number of cases in support, all of which were distinguished by the judge. Koo had relied

16 [2013] 1 SLR 341.

primarily on *Gurtner v Circuit*[17] ("*Gurtner*") and *Ramli bin Shahdan v Motor Insurers' Bureau of West Malaysia*[18] ("*Ramli*"). The judge read both *Gurtner* and *Ramli* as authorities that a traffic accident victim has no action at common law against the MIB directly, but may compel the Public Trustee (to whom the Minister for Finance had, by a deed of assignment dated 13 August 2003, assigned its rights, benefits, interests, privileges, powers, remedies and duties) to sue the MIB on the Principal Agreement should the MIB fail to discharge its obligations thereunder. Both these cases dealt with the UK and Malaysian equivalents of our Principal Agreement, not the Domestic Agreement under which Koo was suing AM as the Insurer Concerned. There was another hurdle for Koo: for the court to find that the promisee holds the contractual promise on trust for a third party, the contractual promise must have been obtained for the benefit of the third party. Whilst this may be said to be true of the Principal Agreement, where MIB's obligation to satisfy unpaid judgments was given to the minister for the benefit of traffic accident victims, who would otherwise face great difficulty obtaining compensation from uninsured or untraced drivers, the preamble to the Domestic Agreement does not mention traffic accident victims at all – the purpose of the Domestic Agreement was to benefit the MIB by transferring its obligation to satisfy unpaid judgments to the insurers concerned.

AM's contractual obligations under the Special Agreement

18.38 Having conceded that it was the Insurer Concerned under the Domestic Agreement, AM's position was the MIB's obligation under cl 3 of the Principal Agreement took priority over an Insurer Concerned's obligation under cl 3(1) of the Domestic Agreement such that the Insurer Concerned has a duty to indemnify the MIB after the MIB pays the Judgment Debt. It cited in support a passage *Pacific*,[19] a case decided by the judge himself, who was quick to point out that that passage merely stated that if the MIB were to satisfy a judgment obtained by a victim, the MIB would be entitled to an indemnity; not that the MIB had to do so. The MIB retained a discretion to do so in the stead of the Insurer Concerned under cl 6 of the Domestic Agreement if the MIB considered that payment to be expedient.

18.39 The judge went on to reject AM's argument and in fact found it misplaced for several reasons. First, the Principal and Domestic Agreements were entered into between different parties, and neither contained provisions that subjected one over the other, or required,

17 [1968] 2 QB 587.
18 [2006] 2 MLJ 116.
19 See para 18.35 above.

expressly or by implication, that the MIB had to satisfy a judgment under the Principal Agreement first before any liability arises on the part of the Insurer Concerned under the Domestic Agreement, read with the Special Agreement in this. Secondly, upon proper construction, cl 3 of the Principal Agreement envisages that the MIB will pay or satisfy or cause to be paid or satisfied any unsatisfied judgment, with one cause being to cause the Insurer Concerned under the Domestic Agreement to do so – this implied that the MIB had no obligation to pay. In relation to the Domestic Agreement, cl 3(1) unequivocally obliges the Insurer Concerned to pay the judgment sum to the victim direct, not via or to indemnify the MIB. Such direct payment would, under cl 4, discharge the MIB's liability under cl 3 of the Principal Agreement; cl 4 would be redundant if the MIB had to pay first and thereafter seek an indemnity. In situations where the MIB exercised its discretion to satisfy the judgment debt first, cl 6 entitled the MIB to recover the payment from the Insurer Concerned.

18.40 AM had also relied on the first edition of a UK treatise, Merkin & Stuart-Smith, *The Law of Motor Insurance*,[20] in support of its position. Singapore's Principal and Domestic agreements are modelled on those in Malaysia, which were in turn modelled on the UK arrangements. In the UK, the UK MIB signed an Uninsured Drivers' Agreement and an Untraced Drivers' Agreement with the Secretary of State for Transport, and both agreements correspond with Parts II and III of the Singapore Principal Agreement. The Domestic Agreement corresponds with the then Art 75 (now Art 79) of the UK MIB's articles of association, with the Insurer Concerned known as the "Art 75 Insurer". Clauses 4 and 5 of Art 75 obliges the Art 75 Insurer to satisfy the judgment debt, without any recourse to the MIB for any reimbursement, but cl 6 of Art 75 expressly states that "[i]f a judgment is obtained against any judgement debtor and remains unsatisfied, MIB will after the expiry of seven days from the execution date itself satisfy the same". Not only did the judge disagree with AM's reliance solely on cl 6 without considering cll 4 and 5 together; he also noted that AM did not bring to the court's attention that cl 6 of Art 75 had subsequently been deleted and cll 4 and 5 amalgamated into the present cl 3 to similar effect as with Singapore's Domestic Agreement. With the deletion of cl 6, the UK treatise had also been revised in a second edition.

18.41 Last but not least, since AM placed great reliance on it, AM cited a recent decision of the Federal Court of Malaysia in *Iskandar bin Mohd Nuli v AM General Insurance Bhd*,[21] a case in which AM was itself

20 Robert Merkin & Jeremy Stuart-Smith, *The Law of Motor Insurance* (Sweet & Maxwell, 1st Ed, 2004).

21 [2017] 5 MLJ 25.

a litigant. In this case, Sharul, who owned a motor car insured with AM under a policy that, similar to the policy in this case, excluded passenger liability, lent his car to Iskandar, who drove into Singapore with his wife, Zuraini, as a passenger. In Singapore, the car was involved in an accident on 13 December 2010 that resulted in Zuraini sustaining injuries. On 13 January 2013, Zuraini sued Iskandar for negligence in the Singapore High Court.

18.42 While Zuraini's suit in Singapore was pending, AM commenced a suit in the Malaysian High Court against Sharul and Iskandar and sought four declarations:

> (a) AM was not liable to satisfy any judgment or part thereof obtained by Zuraini in the Singapore suit against Iskandar ("the Singapore Suit")
>
> (b) Under the relevant policy, that:
>
> > (i) AM was not liable to Sharul and/or Iskandar for Zuraini's injuries sustained in the accident.
> >
> > (ii) Iskandar was in fundamental breach of the policy.
> >
> > (iii) AM was entitled to an indemnity from Sharul or Iskandar if AM was held liable in whole or in part on any judgment obtained by Zuraini in the Singapore Suit.

18.43 It did not escape the judge's attention that AM had, on 20 April 2010, shortly after its lawyers discharged themselves in Suit 613 on 5 April 2010, embarked on a "pre-emptive strike" and commenced Originating Summons No 383 of 2010 ("OS 383") seeking the following relief:

> (a) a declaration that, under the terms of the Policy, AM was not liable to satisfy any judgment sum for damages, interests and costs as might be found or adjudicated to be payable by Liew to Koo in Suit 613; and
>
> (b) a permanent injunction restraining Koo and Liew from making any claim against the MIB in respect of any judgment sum for damages, interests or costs which might be awarded by the court in favour of Koo against Liew in Suit 613.

OS 383 was dismissed with costs by Judith Prakash J (as she then was) on 2 July 2010.

18.44 The Malaysian High Court judge declined to grant any of the declarations and held that AM was liable to satisfy the judgment if

obtained by Zuraini notwithstanding that the policy excluded cover for passenger liability.

18.45 The judge noted:[22]

> Three things stand out from this action in Malaysia. First, it was an action by an insurer against its insured and the authorised driver, and three of the four declarations sought related to claims as between the insurer and insured. Secondly, the first declaration was, whether deliberately or not I cannot tell, worded widely enough to encompass the rights as between AM Gen and the MIB and indeed Zuraini as well. Thirdly, and most importantly, having started the action in Malaysia and asking for a widely worded declaration that affected MIB's claim under the Domestic Agreement and Special Agreement against AM Gen as the Insurer Concerned, AM Gen nonetheless chose, again whether deliberately or not I cannot tell, not to add the MIB as a party to that action. Similarly, AM Gen also chose not to add Zuraini as a party to the Malaysian action.

and continued:[23]

> It is a very basic tenet of law that before one obtains a remedy against another party, including a declaration of rights, *inter se*, or that affects the rights of that other party, that other party should at least be heard or made a party to the action : see *Family* …, where the Court of Appeal at [64] cited the Privy Council decision of *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MIJ 52 at 55:
>
> 'In their Lordships' view one of the principal objects of the rule [*ie*, the then Malaysian equivalent of O 15 r 6 of the ROC] is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard …'

18.46 The judge added that, unsurprisingly, Malaysian authorities are to similar effect and cited the following Malaysian decisions in *Hong Leong Bank Bhd v Staghorn Sdn Bhd*,[24] *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd*,[25] *Dewan Undangan Negeri Kuantan v Nordin bin Salleh*,[26] *Ketua Pengarah Jabatan Alam Sekitar v Kajing*

22 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [88].
23 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [89].
24 [2008] 2 MLJ 622.
25 [2012] 4 MLJ 59.
26 [1992] 1 MLJ 697.

Tubek,[27] *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd*[28] and *Eh Riyid v Eh Tek*.[29]

18.47 AM appealed to the Malaysian Court of Appeal but only on the second and fourth declarations, not the first or third. The Court of Appeal allowed AM's appeal based on the terms of the Policy which excluded cover for passenger liability, and drew a distinction between AM's liability under the Policy and under the Special Agreement which had no effect on AM's rights under the Policy. The Court of Appeal did cite *Pacific*[30] in *obiter*, commenting that AM's liability under the Special Agreement would only arise if Zuraini obtained a judgment in the Singapore Suit and the MIB paid on the judgment (which the judge disagreed was the finding in *Pacific*).

18.48 Iskandar appealed to the Federal Court and framed eight questions of law for determination. The Federal Court granted leave to proceed to four and amongst them, only Questions II and III were relevant, and they read:

> (II) Whether pursuant to the Special Agreement (together with its annexures), a Malaysian insurer is liable to satisfy a judgment obtained by a victim of an accident involving a Malaysian registered vehicle in Singapore, even though the motor insurance policy issued by the Malaysian Insurer does not cover passenger liability;
>
> …
>
> (III) If question (II) is answered in the affirmative, whether under the Special Agreement (together with its annexures), the Malaysian insurer is entitled to seek indemnity against the authorised driver of the Malaysian registered vehicle that was involved in the accident in Singapore?

18.49 The Federal Court answered Question II in the negative and did not see the need to address Question III or the other Questions posed. AM relied on the Federal Court's answer for the proposition that the MIB had no cause of action until it paid Koo first and thereafter sought an indemnity from AM. Noting again that Question II may be read widely enough to encompass the rights and obligations of the MIB and AM *inter se* and the MIB was not made a party or given an opportunity to be heard in the Malaysian proceedings, the judge found AM's reliance on the Federal Court's answer to be misplaced, when AM "ignores the fact" that the Malaysian proceedings were an action between an insurer and its insured, without Zuraini or the MIB joined as parties or given

27 [1997] 3 MLJ 23.
28 [1989] 2 MLJ 298.
29 [1976] 1 MLJ 262.1.
30 See para 18.35 above.

opportunities to be heard, and both the Malaysian Federal Court and Court of Appeal drew distinctions between the Policy and the Special Agreement when AM's rights were dealt with. Both courts had taken the Policy as the starting point and basis of the contractual relationship between AM and its insured, into which the terms of the Special Agreement were not incorporated, with the rights and obligations being between AM and the Singapore MIB governed in a special arrangement in the Special Agreement.

18.50 The judge went on to state that in the event that the Federal Court answer to Question II could be interpreted as AM contended, he could not, with the greatest respect, agree with the Federal Court's conclusions, as *Pacific*[31] did not stand for the proposition that the MIB had to pay on a judgment first and thereafter seek an indemnity from the Insurer Concerned, and the detailed definition of Insurer Concerned in the Domestic Agreement clearly stated that an insurer remains an Insurer Concerned:

> Notwithstanding that – … (iii) some term, description, limitation, exception or condition (whether express or limited) of the insurance … expressly or by implication excludes the Insurer's liability whether generally or in the particular circumstances in which the Judgment Debtor's liability was incurred.

18.51 The judge found that AM was liable to satisfy the Judgment Debt pursuant to cl 3(1) of the Domestic Agreement and had breached the same in failing to do so.

31 See para 18.35 above.