Published on e-First 6 June 2022

19. INSURANCE LAW

YEO Hwee Ying
LLB (Singapore), LLM (London);
Associate Professor, Faculty of Law, National University of Singapore.

I. Introduction

19.1 2021 was a significant year for local insurance jurisprudence in that there appeared two cases on appeal – one from the High Court and the other from the District Court – where hitherto uncontested but critical doctrines were addressed. The first case to be discussed in this review chapter is particularly important because for the very first time in Singapore the court clearly endorsed in *ratio decideni* a crucial common law principle regarding the precise ingredients of non-disclosure and misrepresentation in insurance contract formation. The second case selected for discussion is also noteworthy for resolving a challenge lodged by the issuer of a performance bond with regard to the salient principle of subrogation that is of great import to insurers in general.

II. Non-disclosure and misrepresentation

19.2 The essential purpose of a life insurance policy is largely to offer crucial protection for family members in the event of the insured's death which, in stark contrast to the non-life risks commonly covered by insurance, is an eventuality waiting to happen. In certain instances, the insured may find it necessary over time to take out multiple life policies in order to expand the financial safety net for his or her beloved. Unfortunately, any failure by the insured to disclose other life policies (whether already issued or still pending) can in principle constitute grounds for avoidance by insurers whenever the applicants for coverage have breached their duty of utmost good faith. That insurers are able to do so after having discharged the two-pronged proof of both materiality and inducement has thus far not been conclusively ruled upon by any local court. The recent decision of the Appellate Division of the High Court ("High Court (Appellate Division)") in *Tan Yi Lin Cheryl v AIA Singapore Pte Ltd*[1] has henceforth affirmed the insurer's entitlement to avoid the policy when the insured is found to be at fault for not disclosing and/or misrepresenting material information (regarding the risks to be insured

1 [2021] SGHC(A) 23. See also earlier decision by High Court in *Tan Yi Lin Cheryl v AIA Singapore Pte Ltd* [2021] SGHC 130.

against) and the underwriter has (as a consequence of the breach) been induced into issuing the policy on the terms contained therein.

A. Facts

19.3 The deceased insured (who was the husband of the appellant, Cheryl) took out a life policy for $1m with the respondent insurer, AIA Singapore Pte Ltd ("AIA"). Assisted by Aik (who was AIA's authorised financial services consultant), he declared in the application form on 7 May 2014 that he had neither existing life policies nor pending applications for life coverage. In actual fact, however, he submitted three previous applications (during the six-week period prior to 7 May 2014) and three subsequent applications (after Aik had forwarded the completed application form to AIA for risk evaluation). By the time AIA issued the $1m policy on 30 June 2014, he had successfully taken out a total of five other life policies with multiple insurers and one more was about to be approved by yet another insurer. All in all, his seven life policies (including that issued by AIA) eventually amounted to a total assured sum of $6,250,000.

19.4 Shortly after her husband died on 26 September 2016, Cheryl lodged claims under the life policies with the different insurers in her capacity as the sole executrix of the insured's estate pursuant to a Grant of Probate. On learning of the other undisclosed policies, AIA denied liability after drawing attention to the warning contained in the application form that the insured must continue to disclose any and all material facts that might arise or have since changed after his application, as well as the insured's declaration that the answers he had provided "shall form the basis of the contract between the parties hereto"[2] with the understanding that "the policy issued hereunder may be void and [he] may receive nothing"[3] by way of compensation for any claim if his answers were untrue.

19.5 During the proceedings before the High Court, Cheryl (who was present during the discussion at the time of her husband's application for the $1m policy) insisted that Aik was apprised of the existing policies and pending applications and he had even advised that there was no need to disclose these facts in AIA's form. In addition, she contended that Aik's completion of the application form on her husband's behalf implied that

2 *Tan Yi Lin Cheryl v AIA Singapore Pte Ltd* [2021] SGHC 130 at [7] for the basis clause in AIA's application form (which is also known as "proposal form" in insurance context)

3 *Tan Yi Lin Cheryl v AIA Singapore Pte Ltd* [2021] SGHC 130 at [7] for cl 2 of AIA's application form.

AIA was deemed to have knowledge of these existing policies and pending applications as well. According to her version of events, Aik furthermore pointed out that it was not necessary for her husband to disclose to AIA any future applications to other insurers for life coverage.

19.6 The High Court[4] ruled against Cheryl after finding that her husband had made fraudulent misrepresentation during the completion of the application form as well as fraudulently failed to disclose three policies at the time of application and another three policies before the issuance of the policy. These misrepresentations and non-disclosure would then have induced AIA into entering the contract. Moreover, AIA also relied on the basis clause which turned the insured's answers into warranties. Hence, the trial judge accepted the open-and-shut defences of AIA which was accordingly entitled to avoid the policy after the insured's breach of warranty was established.

19.7 During her appeal to the High Court (Appellate Division), Cheryl argued that the trial judge had erred in his findings and tendered the following counterclaims:

(a) that there was no fraudulent misrepresentation on the part of her husband; and

(b) that the misrepresentation, if any, had not induced AIA to enter the contract.

19.8 The following were Cheryl's key arguments in support of her appeal:

(a) Her husband's existing policies and pending applications had (in her presence) been disclosed to Aik in his capacity as AIA's authorised agent (who filled in the application form), and such knowledge ought to be imputed to his principal AIA.

(b) Her since-deceased husband had relied on Aik's advice that there was no need to disclose (after the submission of the application to AIA) any future life coverage applications submitted by him to other insurers.

(c) On 5 May 2017, Crawford International Pte Ltd ("Crawford") (the loss adjusters appointed by various insurers to investigate the claims lodged after the insured's death) released an interim report stating that there was, so far, no evidence of Cheryl having deliberately concealed from insurance agents

4 *Tan Yi Lin Cheryl v AIA Singapore Pte Ltd* [2021] SGHC 130 at [50], [53] and [59], where the trial judge accepted each of AIA's defences and thereafter decided against Cheryl.

and financial advisors the facts concerning the different policies issued by multiple insurers for coverage on her husband's life.

(d) Written statements from other insurance agents (such as Shirley who was an agent with Aviva Ltd ("Aviva")) were also presented by Cheryl to indicate that her husband had made the necessary disclosures.

B. Holding of the Appellate Division of the High Court

19.9 In what was essentially a contest of the witnesses' credibility, the High Court (Appellate Division) agreed unreservedly with the trial judge's finding that Cheryl was not a truthful witness because of her flagrant deceit that was manifest on many other occasions (such as under-declaring on oath the size of her husband's estate in the application for the Grant of Probate in addition to lying in AIA's death claim form that her husband did not have any other insurance policies). Returning to the occasion of Aik completing the application form for covering his client's life, both first instance and appellate courts thus had difficulty in believing that there was no fraudulent misrepresentation here as well.

(1) Intermediary's role

19.10 The High Court (Appellate Division) concluded that the objective evidence did not lend support to Cheryl's assertion that during the period from 7 May 2014 (when the application form was completed) to 30 June 2014 (when the life policy was issued) Aik had been informed about his client's other life policies. What could be confirmed during the cross-examination proceedings were that Cheryl did mention her husband's investment policies (but not his life policies) to Aik at the time of application and that much later (perhaps a year after AIA's life policy had been approved) Aik happened to hear from Cheryl about the existence of another $1m life policy taken out by his client with Prudential Assurance Company Singapore Pte Ltd ("Prudential"). Instead, the WhatsApp messages between Cheryl and Shirley on 26 October 2016 clearly showed that not only was Aik oblivious of the other six life policies, but Cheryl had also actively taken measures to prevent Aik from finding out about any of them. Equally telling was the point-blank question posed by Aik on 9 October 2016 asking Cheryl whether her husband had any Prudential policies; it could be inferred from Aik's enquiry then that he did not know about the existence of the two policies issued by Prudential on 31 March 2014 and 23 May 2014 to cover his client's life.

19.11 Citing the appellate decision in *National Employers' Mutual General Insurance Association Ltd v Globe Trawlers Pte Ltd*[5] ("*Globe Trawlers*"), the High Court (Appellate Division) ruled that Aik's knowledge could not be imputed to AIA if he (as alleged by Cheryl) was indeed aware of the other life policies. Although Aik was officially engaged by AIA as a financial services consultant, he took on the role of a scribe for his client when entering all the particulars in the application form and should thus be deemed as acting as an agent of the insured (rather than the insurer) while temporarily performing this scribal function as part of his overall service. Furthermore, the insured could not simply push the blame to the agent for any scribal mistakes spotted much later during the processing of a claim: the insured would still be held responsible because he ought to have checked for inaccuracies or omissions before signing the application form that the agent had helped to complete in order to spare him the hassle and inconvenience of having to do so.

19.12 Even if Aik had indeed offered the advice (as also alleged by Cheryl) that there was no need to disclose existing policies and pending applications, the High Court (Appellate Division) agreed with the defence put forward by AIA that there was no basis to suggest that he had the apparent authority to bind the insurer. This was because AIA had intentionally inserted in the application form an express declaration that the insurer would not be bound by any statement or agreement which the agent had made in the process of soliciting or taking the application.

(2) Proving inducement

19.13 After dismissing as lies Cheryl's assertions of her husband having mentioned the existing policies and pending applications to Aik who then advised that these facts need not be disclosed, both first instance and appellate courts had no issue with the grounds of non-disclosure and misrepresentation raised by AIA when seeking to deny liability. Hence, the first basis tendered by Cheryl for filing the appeal – that there was no fraudulent misrepresentation on the part of her husband – was soundly rejected as being baseless.

19.14 Under common law, there is a need to additionally consider the requirement of inducement that was introduced by the House of Lords in the landmark case of *Pine Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[6] ("*Pine Atlantic*") which stipulated that the non-disclosure and/or misrepresentation must also have induced the insurer into accepting the risks or entering the contract on the prescribed terms. For this

5 [1991] 1 SLR(R) 550.
6 [1994] 2 Lloyd's Rep 427.

reason, Cheryl tendered – as the second basis for filing the appeal – the counterclaim that her husband's misrepresentation had not induced AIA to grant the life policy.

19.15 Ho (whom AIA appointed as Head of New Business) was consequently called upon to testify before the court. He attested that the insured's annual income and insurance history were material to the underwriter who would not have accepted the risks if the total amount of coverage (including both existing policies and pending applications) exceeded the limit imposed by AIA for any particular individual. According to the Income Multiple Table compiled for the AIA Underwriting Guidelines, the limit for Cheryl's husband was specified to be 30 times of his annual salary – consistent with what other insurers in Singapore would prescribe for an insured in the same age bracket of 20 to 40 years. Based on this working norm, the total life coverage permitted for Cheryl's husband should not exceed $2,250,000. Since AIA did not receive any information on the coverage figures in the undisclosed policies and applications, the underwriter would have been induced by the non-disclosure and misrepresentation to grant the $1m coverage. If Aik had been aware (as alleged by Cheryl) of the other policies and applications, the total coverage of $6,250,000 would have activated alarm bells and his client's application could then not be approved by the underwriter because of the $2,250,000 limit stipulated by the Income Multiple Table. Finding no reason to doubt Ho's testimony, the High Court (Appellate Division) thus agreed with the trial judge that AIA had also satisfied the requirement of inducement and was accordingly entitled to deny Cheryl the $1m payout that she had been assiduously scheming for all along.

(3) Probative value of interim investigation findings

19.16 The High Court (Appellate Division) summarily rejected Cheryl's assertion that Crawford's interim findings (which were released on 5 May 2017) were of assistance to her case. First of all, preliminary reports could in no way be viewed as conclusive with regard to the question of whether there was non-disclosure or misrepresentation on the part of the insured; in fact, Crawford had prudently inserted in its interim report a disclaimer that the cloud of uncertainty hanging over Cheryl's insistence that her husband had disclosed his existing policies and pending applications warranted further consideration by each of the insurers which had issued life policies to him. Secondly, such findings by an external party were not binding on the court which remained duty-bound to reach its own conclusions on both deliberate non-disclosure and fraudulent misrepresentation which were issues of law and fact.

19.17 Also mentioned in the same breadth by the appellate judge, albeit fleetingly, was Cheryl's submission of the written statements from

other insurance agents (such as Shirley who assisted Cheryl's husband in applying to Aviva for life coverage) to attest that there was disclosure of the other policies. However, none of them had been called to testify as witnesses and what was asserted in the statements presented by Cheryl in support of her appeal could therefore not be cross-examined in court.

C. Further remarks

19.18 Insurance law has evolved separately from contract law in that there exist doctrines peculiar to insurance that are absent for general contracts. Of relevance to the insurance dispute between Cheryl and AIA is the *uberrima fides* doctrine (which has hitherto not been extended to contract law) because a higher duty is expected of the parties to an insurance contract than of parties to most other contracts.[7]

19.19 Unlike normal contracts, an insurance contract requires both insurer and insured to demonstrate the utmost good faith,[8] a breach of which entitles the innocent party to the elective remedy of avoidance. The chief manifestation of this (supposedly reciprocal) duty is the pre-contractual duty that has all too often been foisted only on the insured to disclose information material to the risks as well as not to misrepresent any of the material facts during the negotiation stage of the contract formation. For too long a time, this rule had attracted severe criticism for operating harshly against the insured because the test originally adopted to ascertain that this duty had been breached was whether a prudent insurer would consider the undisclosed information to be material for the evaluation of the risks to be insured against.[9] Many had since lambasted this single-pronged test for pegging the threshold of materiality at an unacceptably low level.[10] According to this original test,

---

7 See *Carter v Boehm* (1766) 3 Burr 1905.

8 See Hwee Ying Yeo, "Duty of Disclosure in General Insurance Contracts" [1989] MLJ xlviii.

9 See *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485 and *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's LR 476. See also Hwee Ying Yeo, "Recent Developments in Materiality Test of Insurance Contracts" [1995] Sing JLS 56.

10 Even the UK Law Commissions noted that for quite a while "there is general recognition that the law is overly harsh" with "the rules governing what consumers need to tell insurers … complex and confusing"; see United Kingdom, The Law Commission and the Scottish Law Commission, *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation* (Cm 7758, December 2009) at para 2.59. See also Rob Merkin & John Lowry, "Reconstructing Insurance Law: The Law Commissions' Consultation Paper" (2008) 71(1) MLR 95 as well as John Lowry & Philip Rawlings, "'That Wicked Rule, That Evil Doctrine …': Reforming the Law on Disclosure in Insurance Contracts" (2012) 75(6) MLR 1099. For a comparative survey on reforms since undertaken, see Hwee Ying Yeo & Y Chia,

(cont'd on the next page)

any fact would be deemed material so long as it had some effect on the mind of a prudent insurer when assessing whether to accept the risk or deciding what premium to charge, even if the fact in question was later dismissed as inconsequential and did not feature at all in the decision-making process. There subsequently appeared to be some judicial change of heart: attempting to ameliorate the worst effects of the *uberrima fides* doctrine, the House of Lords introduced the additional requirement of inducement in the watershed *Pine Atlantic*[11] case where the heavily castigated test was henceforth replaced by what effectively became a two-pronged test – with the first limb requiring (on an objective basis as before) the fact to be technically material to a prudent insurer and the second limb requiring (now on a subjective basis) the particular insurer to have been induced, by the insured's non-disclosure and/or misrepresentation of the material facts, into accepting the risks or entering the contract on the prescribed terms.

19.20 Although this important decision by the House of Lords has been tacitly endorsed by Singapore courts since then, the issue of inducement in insurance law has thus far not been specifically brought before a local court for *ratio decideni* deliberation. While there were two earlier local cases[12] that considered inducement on the side (but their decisions with regard to this matter were *obiter*), it was not until the present dispute between Cheryl and AIA that the local courts were presented with the opportunity to confirm in *ratio decideni* the requirement of inducement (which has generally been conceded to be a positive judicial development in attenuating somewhat the worst excesses of the *uberrima fides* doctrine). Although the case initiated by Cheryl did not at the inception seem extraordinary in that AIA had been able to raise open-and-shut defences for avoiding liability, the first instance and appellate decisions should rightfully be viewed as highly significant in being the very first in Singapore to unambiguously clarify the second limb of inducement in the local insurance jurisprudence.

19.21 As envisaged by the House of Lords, the second limb test typically expected the particular underwriter to give evidence that the insured's non-disclosure or misrepresentation had induced him to accept the risks

"Morphing Duty of Good Faith and Disclosure – Lessons for Singapore" [2018] JBL 425.

11 See para 19.14 above. See also *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116; *Assicurazioni Generali SpA v Arab Insurance Group* [2003] Lloyd's Rep IR 131; and Hwee Ying Yeo, "Of Inducement and Non-Disclosure in Insurance Contracts" (2004) 10 J Int Mar Law 84.

12 See *American Home Assurance v Hong Lam Marine Insurance* [1998] SGHC 399 and *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2008] SGHC 188.

or enter the contract on the prescribed terms. However, the underwriter who actually performed the evaluation of risks associated with Cheryl's husband was not called upon to testify before the court. Instead, AIA arranged for his supervisor, Ho, to explain the Underwriting Guidelines and Income Multiple Table used in-house by all underwriters when processing applications for life coverage. Although Cheryl complained of being prejudiced in not having the right to question the actual underwriter, the High Court (Appellate Division) pointed out that she did not raise any issue at all when Ho was undergoing cross-examination at the trial court and was consequently not entitled to lodge such an objection belatedly on appeal.

19.22 It would have been interesting, for speculative purposes,[13] to wonder what Cheryl could possibly have achieved if she had been able to summon the actual underwriter to testify and thereafter subject him to intense cross-examination. The most fortuitous outcome for her would be for the actual underwriter to admit that he had deviated from AIA's standard underwriting practices and was thus not induced in the process. However, proving this will certainly be an uphill task. AIA had already been in the life assurance business for more than seven decades and nowadays has long-standing underwriting practices with tried-and-tested procedural guidelines that place the company in good stead to remain successful in the highly competitive insurance industry. In any event, Cheryl's husband overwhelmingly busted (by almost three times) the total coverage limit of $2,250,000 imposed by the AIA Underwriting Guidelines; trying to adduce contrary practice to rebut Ho's evidence on the issue of inducement would under the circumstances be extremely challenging for any lawyer engaged by Cheryl to manoeuvre through the web of deceit that she had spun in 2014 (when her husband was taking out life policies with multiple insurers) as well as 2019 (when she lodged multiple death-benefits claims after her husband's death).

19.23 The High Court (Appellate Division)'s decision will be of tremendous assistance to others in the insurance industry. The message is clear: the insurer bears the onus of proving inducement and has in general to call upon the actual underwriter involved in the particular transaction. Nevertheless, the court is also prepared to accept adequately documented underwriting guidelines and properly filed risk evaluation notes as straightforward *prima facie* indicia of inducement. The assumption here, of course, is that the in-house guidelines (as in the example of the AIA Underwriting Guidelines) are methodically followed to the letter with

13 See speculative role play exercised by insurer having to prove inducement in *AXA Versicherung AG v Arab Insurance Group* [2017] 1 EWCA Civ 96. See also *Zurich Insurance plc v Niramx Group Ltd* [2021] EWCA Civ 590.

no possibility of underwriters taking liberties by seeking exceptions or exploiting loopholes. Returning to Cheryl's complaint, the burden would then have shifted to her lawyer to refute such *prima facie* evidence by perhaps offering the counter-factual speculation (mentioned in the preceding paragraph) but then she lost the opportunity to rebut or prove otherwise because of her belated objection.

19.24 Section 18(1) of the Marine Insurance Act 1906[14] is very specific in requiring disclosure of material facts before the contract is concluded. When then is an insurance contract deemed to be concluded? The pre-contractual duty of disclosure ceases only after the submitted application for coverage has been accepted by the underwriter followed by communication of such acceptance to the insurance applicant. As in general contract law, acceptance can be via confirmation (whether written or even oral) or by conduct (whether express or even tacit). In the insurance context, the clearest form of acceptance is when the policy is issued (regardless of whether the document itself has been physically delivered).[15] Since the evidence showed that there had been non-disclosure and misrepresentation of three subsequent polices after Cheryl's husband had applied for AIA's life coverage on 7 May 2014 but before the life policy was issued to him on 30 June 2014, the trial judge deliberately emphasised that "an insurance is concluded when the policy is issued"[16] so as to dispel once and for all any lingering uncertainty regarding the insured's continuing duty to disclose all material changes in the circumstances before contract conclusion on 30 June 2014. The inference then is that the issuance of the policy is an indication of the insurer having accepted the application for coverage; indeed, it is often the clearest sign of acceptance and the communication thereof. Any applicant for insurance in Singapore should thus pay attention to this recent local judgment and recognise that[17] he generally remains under a duty to disclose material information all the way to the conclusion of the contract and the mere completion of the application form does not offer any excuse for him to presume that he is henceforth no longer obliged to continue doing so.

19.25 For the dispute that stemmed from Cheryl's deceit, AIA took the additional step of proving the deceased's fraudulent intention even though at common law the defence would in general apply regardless of the insured's *culpa* or innocence. In this instance, however, AIA did not

14 2020 Rev Ed.

15 See s 21 of the Marine Insurance Act 1906 (2020 Rev Ed) which stipulates that the contract is concluded when the proposal form has been accepted. The term "proposal form" is interchangeably known as "application form" in the insurance context.

16 *Tan Yi Lin Cheryl v AIA Singapore Pte Ltd* [2021] SGHC 130 at [25].

17 In absence of other forms of communication from insurer with regard to acceptance.

really have a choice because Cheryl also sought to rely on the life policy's incontestability clause which would have precluded the insurer from pleading all defences save for either fraud or premium non-payment (but the latter was not applicable here since the insured took pains to ensure timely remittance of his annual premiums to obviate the possibility of any lapse in coverage). The finding of fraud was based on the courts' refusal to believe Cheryl's version of events that occurred during the discussions with Aik at the time of her husband's application. It was thus clear that her inaccurate responses to straightforward questions on incontrovertible facts were intentional and could then be deemed as direct lies – tantamount to fraud as *per* the classic description of *Derry v Peek*[18] where a fraudulent misrepresentation refers to "a false representation [that] has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false".[19]

19.26 The issue of intermediaries also came to the fore because a large part of Cheryl's case centred on the role played by Aik in assisting with her husband's completion of the application form and thereby procuring the life policy with AIA. There were two major aspects to be considered:

(a) Aik's authority to make any representation that might have founded waiver or estoppel; and

(b) which party Aik was acting for when he took upon himself the task of filling up the application form.

19.27 For the first aspect, the trial judge was prepared to ruminate in *obiter* fashion over the counter-factual possibility by assuming, for discussion purposes, that Aik might have represented to his client that there was no need to disclose the life coverage applications already submitted to or intending to take out with other insurers: rightly adopting the conventional principal–agent analysis, the first instance court concluded that Aik was never imbued with the express or even ostensible authority to make such representation.[20] In any event, the application form expressly cautioned that nothing Aik said would bind AIA. This offers a valuable lesson and should serve as ample warning for all insurance applicants to carefully read the proposal forms placed before them and not take at face value whatever agents may say in order to seal deals expeditiously. There

18 (1889) 14 App Cas 337; [1889] UKHL 1. See also *Wee Chiaw Sek Anna v Ng Li-An Genevieve* [2013] 3 SLR 801.

19 *Derry v Peek* (1889) 14 App Cas 337 at 374; [1889] UKHL 1.

20 This is apart from the challenges associated with the concept of the "self-authorising agent"; see *Armagas Ltd v Mundogas SA* [1986] 1 AC 717; *First Energy (UK) Ltd v National Hungarian Bank Ltd* [1993] 2 Lloyd's Rep 194; *Kelly v Fraser (Jamaicas)* [2012] UKPC 25; and *Skandinaviska Enskilda Banken AB (Singapore Branch) v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540.

is scant likelihood that any agent's loose remarks can be held against the insurer for which he is canvassing business.

19.28 For the second aspect, Cheryl's contention still failed – even if Aik had indeed been notified of his client's applications to multiple insurers – because, as iterated by the High Court (Appellate Division), it was trite law that an agent completing an application form was deemed to be acting as the insured's agent (as *per Globe Trawlers*)[21] and any knowledge that Aik might have had of the other life coverage applications could not be imputed to AIA. Actually, this conventional upholding of transferred agency (where an insurer's agent becomes the insured's agent the moment he begins filling in the application form) is at odds with the common perception of most laymen and disadvantages any insurance applicant who naturally presumes that the agent receiving commissions from the insurer ought by this reckoning to be the insurer's agent. The rationale for the rule adopted by *Globe Trawlers* was originally set out in *Newsholme Brothers v Road Transport & General Insurance Co Ltd*[22] ("*Newsholme*") which pointed out that the agent became his client's scribe when filling in an application form for the insured who was, after all, expected to check for mistakes or omissions before signing the completed form. However, the court in *Newsholme* arguably strained itself when deciding to transfer the agency of the intermediary (while filling in a proposal form) from the insurer to the insured; consequently, *Globe Trawlers*'s subsequent readiness to embrace this rule was conceivably a missed opportunity to take another view of the matter (but this time through the lens of task and responsibility). Perhaps future lawsuits involving this particular issue will present the courts with further opportunities to reconsider the question still lingering in the minds of the insured who, unconvinced by the reasoning offered in *Newsholme*, continue to wonder whether insurance agents may in general have the wider authority to receive and transmit information to the insurers that they serve, regardless of whether they have been authorised to complete proposal forms on behalf of their clients.[23]

III. Subrogation

19.29 When awarding contracts with critical benchmarks for progress milestones or completion targets, government agencies have been known to require contractors to place security deposits that, when warranted, may be drawn upon to satisfy any liquidated or other damages arising

21 See para 19.11 above.
22 [1929] 2 KB 356.
23 See Hwee Ying Yeo, "Of Proposal Forms and Receipt of Information – Agency in Insurance Contracts" [1992] MLJ cciii.

from unforeseen contingencies. Since in practice any contractor without deep pockets has to grapple with cash-flow concerns (sometimes on a regular basis), the option that is normally provided in such a contract is to allow an irrevocable and unconditional performance bond (issued by either a bank or an insurer) to be substituted for the security deposit. The core dispute in the second case, *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc*,[24] that has been selected for review in the present chapter relates to the central question of whether the doctrine of subrogation (which insurers are wont to invoke after meeting compensation claims lodged by the insured) is equally applicable to a performance bond which has been issued by a third party not responsible for causing the loss.

A. Facts

19.30 The worldwide mover firm Geometra Worldwide Movers Pte Ltd ("Geometra") was granted a carriage contract in December 2013 by the Government of Singapore ("the Singapore Government") (via the Defence Science & Technology Agency) to ship to a foreign destination certain military cargo packed in multiple containers. Unfortunately, one of these containers fell into the sea during discharge and the equipment contained within sustained some damage. The total loss that resulted from this March 2015 mishap was ascertained to be $200,945.

19.31 In lieu of the security deposit (pegged at 5% of the total contract sum), Geometra dutifully arranged for a performance bond (valid until 18 March 2017) to be issued in January 2014 by Sompo Insurance Singapore Pte Ltd ("Sompo") which undertook to irrevocably and unconditionally pay an amount not exceeding $325,700 to the Singapore Government on receipt of the latter's first demand in writing. Instead of availing itself of this performance bond after the mishap, the Singapore Government chose to turn to its own marine insurance policy which had been issued by Royal & Sun Alliance Insurance plc ("RSA") and received compensation in March 2016 for the full quantified loss. Thereafter, RSA decided to step into the Singapore Government's shoes in order to exercise the subrogation rights available against Sompo.

19.32 On 17 March 2017, the UK-based solicitor Clyde & Co LLP ("C&C) which was engaged by RSA wrote to Sompo for the express purpose of filing a claim on behalf of the Singapore Government. Nearly a fortnight later, however, Sompo replied in no uncertain terms that the

24 [2021] 5 SLR 934.

letter it received from C&C was not a valid demand on the performance bond for the following reasons:

(a) The performance bond was issued by Sompo specifically to the Singapore Government which accordingly was the only party entitled to demand payment on the bond.

(b) By then, compensation was no longer available from the recently expired performance bond which (at the time of Sompo's reply) had still not been called upon by the Singapore Government itself within the specified period of validity.

19.33 In August 2020, the Singapore Government assigned to RSA (via a deed of assignment) all rights of action, claims and/or benefits of all causes of action and rights to sue (in respect of the loss and/or damage to the cargo arising out of and/or in connection with the performance bond) for the purpose of enabling the subrogated insurer to initiate a lawsuit in its own name before the District Court. Not surprisingly, the judgment delivered in May 2021 affirmed that RSA was indeed entitled to exercise its right of subrogation by calling on the performance bond despite Sompo's contention that any such subrogation ought to be only against the party blameworthy for the loss which occurred while Geometra was shipping the containers.

B. Holding

19.34 There were two principal issues raised by Sompo in its appeal against the whole of the trial judge's decision:

(a) whether the letter of demand despatched by C&C to Sompo complied strictly with the terms expressly specified in the performance bond; and

(b) whether the right of subrogation should extend – beyond the insured's rights against the party responsible for the loss and/or damage – to other means by which the insured may seek compensation (such as by calling on a performance bond).

(1) Strict compliance with terms

19.35 Pointing out that the formal requirements of the performance bond entitled only the Singapore Government or its duly authorised agent (including its solicitors) to claim payment, Sompo argued that C&C failed to furnish any evidence of authority (such as a warrant from the Singapore Government or some appropriate proof of subrogation rights) to issue a demand on behalf of RSA's insured client. While agreeing that any demand for payment must be in strict compliance with the terms of

the performance bond (as affirmed by, for example, the Court of Appeal in *Master Marine AS v Labroy Offshore Ltd*[25] ten years ago), the High Court also offered the clarification that the issuer must likewise adhere to what had already been explicitly spelt out instead of taking any liberty to exercise discretion at the time of processing the claim. For this reason, Sompo was reminded that the actual wording of the performance bond did not involve a requirement for the demand to be accompanied by evidence of authority and the proof it belatedly asserted during the appeal as being essential could not be upheld as having been included among the original terms.

19.36 Indeed, the only terms enumerated within the four corners of the performance bond were simply that Sompo's payment would be remitted "upon receipt of the Government's first demand in writing".[26] The so-called C&C letter painstakingly stated that the solicitor engaged by RSA was "acting on behalf of owners of, and those entitled to sue in respect of, the above-referenced Cargo, including subrogated underwriters and the Ministry of Defence of Singapore, being part of the Government of the Republic of Singapore".[27] Another fact taken into consideration was that C&C repeated in the same letter the words "on behalf of the Government of the Republic of Singapore"[28] prior to the demand for payment. Hence, this letter from C&C was found by the High Court to be explicit concerning the authority to make the call on behalf of the Singapore Government. The additional but minor requirement that the demand must be "in writing" had been met as well since the letter prepared by C&C was written on 17 March 2017 (which happened to be the day just before the expiry of the performance bond).

19.37 Attention was also drawn during the appeal to C&C's apparent attempt to secure some form of authorisation after Sompo had summarily rejected as invalid the demand letter it received in March 2017. The evidence adduced by Sompo in support of its contention was the e-mail reply to C&C from the Defence Science & Technology Agency which regretted "that we are unable to provide the letter of authority given the existing right of subrogation under law".[29] However, the High Court

25 [2012] 3 SLR 125.

26 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance Inc* [2021] 5 SLR 934 at [22], as specified by Sompo in cl 1 of the performance bond which it issued to the Singapore Government.

27 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance Inc* [2021] 5 SLR 934 at [11].

28 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance Inc* [2021] 5 SLR 934 at [11].

29 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance Inc* [2021] 5 SLR 934 at [27].

ruled that the e-mail reply did not assist Sompo's case at all because C&C derived authority from RSA which was entitled via the doctrine of subrogation to use the Singapore Government's name in the demand letter despatched to the issuer of the performance bond – even without the insured's express consent for this specific use.

(2) Extent of subrogation

19.38 A major aspect of subrogation is that the insurer, after having performed its obligations under the policy to indemnify the insured for the loss, is entitled to step into the latter's shoes to avail itself of whatever rights that the claimant has against the party at fault for the mishap – whether in contract, tort or statutory duty. While such rights should ordinarily be directed against the tortfeasor or contract breaker liable for causing the loss, the present case before the High Court has amply illustrated that in certain instances it may not be necessarily so.

19.39 The problematic issue encountered here was whether RSA was even subrogated to the Singapore Government's rights in respect of the performance bond. Sompo's insistence that an insurer might only be subrogated to any of the insured's rights against the actual wrongdoer was regrettably based on a single phrase plucked out of context from the following paragraph in *Colinvaux's Law of Insurance*[30] (which actually provided a general summary on the positive aspect of subrogation rights):[31]

> While the negative side of subrogation is generally emphasised by the courts, subrogation has an equally 'positive' side. The insurers are entitled to take over all the rights of the assured, whether in contract or tort, legal or equitable, *against the person responsible for the loss*, and are also entitled to take advantage of any benefit which accrues to the assured that diminishes the loss … [emphasis added]

Focusing emphatically on the phrase "against the person responsible for the loss" found in the text, Sompo argued from the synthesised qualification seemingly embedded in this particular paragraph that RSA could not be subrogated to the Singapore Government's right to call on the performance bond. By no stretch of the imagination ought Sompo (on account of it having provided the requisite security coverage agreed by Geometra before the carriage contract could proceed as planned) to be held responsible for causing the loss that occurred during the carriage of goods by sea. According to Sompo's misguided line of reasoning, RSA

30 Rob Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 12th Ed, 2019).

31 Rob Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 12th Ed, 2019) at para 12-004.

and C&C should direct their subrogation efforts solely against Geometra, which was obviously the party to be blamed for not ensuring that the container which fell into the sea had been properly secured.

19.40 However, RSA's counterpoint was that s 79(2) of the Marine Insurance Act[32] contained no such apparent qualification as intimated by Sompo and an insurer might (according to this specific provision) be "subrogated to all rights and remedies of the insured in and in respect of the subject-matter insured".[33] In addition, the defence counsel rightly drew attention to the text appearing almost immediately after what Sompo had highlighted in *Colinvaux's Law of Insurance*: the same sentence in the cited paragraph went on to also cover the insurer's right "to take advantage of any benefit which accrues to the assured that diminishes the loss".[34]

19.41 The High Court agreed with RSA's apt reference to the more expansive description included in the statutory provision which was singled out in the counterpoint (outlined in the preceding paragraph). Reliance on previous supporting cases such as the following classic judgments was also crucial in the court's decision:

> (a) As noted by the House of Lords in *Lord Napier and Ettrick v Hunter*,[35] the insured is conferred with an equitable interest in rights of action against the third party liable for the loss "to the extent necessary to recoup the insurer who has indemnified the insured person against the insured loss".[36]
>
> (b) As iterated by Brett LJ in *Castellain v Preston*,[37] the doctrine of subrogation in principle entitles the insurer "to the advantage of every right of the assured".[38]

19.42 The linchpin in the present dispute is, simply put, "what the relationship of the performance bond is to the insured loss".[39] After close scrutiny of the facts, the High Court concluded that the performance bond related to the Singapore Government's loss arising from Geometra's breach of the carriage contract, and it was in fact the very same loss that

32 Cap 387, 1994 Rev Ed.
33 Marine Insurance Act (Cap 387, 1994 Rev Ed) s 79(2).
34 Rob Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 12th Ed, 2019) at para 12-004.
35 [1993] AC 713.
36 *Lord Napier and Ettrick v Hunter* [1993] AC 713 at 736.
37 (1883) 11 QBD 380.
38 *Castellain v Preston* (1883) 11 QBD 380 at 388.
39 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc* [2021] 5 SLR 934 at [38], *per* Philip Jeyaretnam JC.

was insured by RSA. The nexus between the loss and the right to call on the performance bond was clearly illustrated by the judge in the following counter-factual scenarios:

> (a) If the Singapore Government had called on the performance bond before lodging an insurance claim, RSA would only have to compensate that portion of the loss not already covered in Sompo's payout.
>
> (b) If the Singapore Government had called on the performance bond after having lodged an insurance claim and received full compensation thereafter, it would then be accountable to RSA for any proceeds that it might subsequently collect from Sompo.

19.43 The right to subrogate was patently obvious in both of these hypothetical scenarios where there was no doubt that the bond payment directly related to and mitigated the loss suffered. In fact, the second hypothetical scenario could even be viewed as resembling what transpired in the present dispute except that it was not the insured but the insurer (stepping into the Singapore Government's shoes) which called on the performance bond. When confronted with the necessity to take this perspective into consideration, the issuer of the performance bond could then not possibly renege on the "irrevocable and unconditional" obligation to pay since subrogation treated the subrogee as the very insured. Also worthy of note is the fact that, unlike what is normally observed in most subrogation cases, the action initiated here was not in the Singapore Government's name (as all rights of action had since August 2020 been assigned[40] to RSA) but the same principles nevertheless obtained.

19.44 Following this line of explication, the High Court was able to reframe the proposition presented by the authoritative *Colinvaux's Law of Insurance* (which both counsel separately cited to support their respective arguments) in the following manner for direct application to Sompo's appeal (which was not unexpectedly rejected):[41]

> The insurer, upon payment to the insured, is subrogated to the insured's right even on a contract (such as a performance bond) that is given not by the person responsible for the loss but by someone else, so long as that contract concerns the subject matter of the insured loss.

40 See *Companie Colombiania de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

41 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc* [2021] 5 SLR 934 at [39], *per* Philip Jeyaretnam JC.

C. Further remarks

19.45 The most significant takeaway in the present case is the High Court's insight on determining whether a certain right held by the insured may be subrogated by the insurer. Sompo's flawed arguments are based on its incomplete interpretation of a single phrase cherry-picked by its counsel from *Colinvaux's Law of Insurance*. Rather, the proper approach suggested judicially in this case is to turn to common law instead of simply ploughing through insurance law textbooks or even relying on the Marine Insurance Act (which incidentally does not really provide an exhaustive statement on the doctrine of subrogation as s 79 merely offers statutory recognition that this common law principle is equally applicable to marine insurance policies). Since common law is clear that an insured should not receive more than full indemnity for his loss and must indeed be prevented from profiting out of the insurance coverage, the juridical basis of subrogation (as explained by Lord Templeman) is that:[42]

> … [the] promises implied in a contract of insurance with regard to rights of action vested in the insured person for the recovery of an insured loss from a third party responsible for the loss *confer on the insurer an equitable interest in those rights of action* to the extent necessary to recoup the insurer who has indemnified the insured person against the insured loss [emphasis added].

Perforce the court's affirmation that the subrogation principle rests on both common law and equity adds welcome clarification to local insurance jurisprudence.

19.46 The typical scenario envisaged by the subrogation doctrine is that the insurer steps into the shoes of the insured (who has already been indemnified) to sue the third party found liable for the damages and/or loss – whether in tort, breach of contract or some statutory duty (as well as some other legal obligation). The third party who actually caused the damages and/or loss will obviously have to bear liability, thereby leading various textbook authors to posit "an apparent qualification concerning those rights of the insured to which the insurer is subrogated … to the effect that those rights are against a person responsible for the insured loss".[43] The twist in the present dispute is that the insurer's exercise of the subrogated rights is not against the directly blameworthy third party (for not taking adequate precautions to forestall the loss which occurred during the sea freight that it had been contracted to arrange) but the issuer of the performance bond. However, the financial institution issuing the performance bond holds no role whatsoever in the events leading to the

42 *Lord Napier and Ettrick v Hunter* [1993] AC 713 at 736.

43 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc* [2021] 5 SLR 934 at [29], *per* Philip Jeyaretnam JC.

damages and/or loss but has always been one step removed as a collateral guarantor waiting on the sidelines to be called into play only when the occasion arises for compensation to be paid.

19.47 According to the High Court, however, the correct stance to adopt in such an instance is to focus on the nexus between the subrogated right and the insured loss rather than rushing to single out the party causing the loss as the sole target for the insurer to pursue subrogation against. Based on this now-clarified approach, the insurer will (after indemnifying the insured) be subrogated to that right which concerns the subject matter of the insured loss. This, in essence, explains why Sompo's misguided conviction that RSA "should be limited to pursuing its subrogation rights against Geometra"[44] holds no merit. The choice of pursuing either Geometra or Sompo rests with RSA and ought not to be dictated by the party that may be adversely affected by the subrogated insurer's preferred option.

19.48 Another important proposition to be distilled from the High Court's judgment is that any right or remedy available to the insured that would have reduced the insured loss (if this right or remedy had been exercised before a claim for indemnification) or, alternately, would yield proceeds that ought to be accountable to the insurer (if this right or remedy had been exercised after a claim for indemnification) can be considered as relating to the insured loss and therefore a right or remedy that the insurer may be subrogated to. When seeking to ascertain the nexus between the subrogated right and the insured loss, the parties should examine the contract between the insured and the third party in order to determine their intention regarding the insured's rights that are available to an insurer intent on subrogating. Returning to the carriage contract, the clause stating that "in the event of any default or breach of any of the obligations by [Geometra] under the Contract, the [Government] may at its sole discretion draw on the Security Deposit or the Performance Bond to satisfy any liquidated or other damages as may become due to the [Government] under the Contract"[45] manifestly confirms that the intention of Geometra when arranging for Sompo to issue the performance bond is to provide the Singapore Government with a fund to draw upon in the event of any insured losses under the contract.

44 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc* [2021] 5 SLR 934 at [41].

45 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc* [2021] 5 SLR 934 at [7] for cl 30.2 of the carriage contract between the Singapore Government and Geometra.

19.49 The High Court's elucidation on the proper approach to adopt is both important and opportune for pointing out that an insurer is entitled to pursue all the rights and remedies of avail to the insured with regard to the loss. For this reason, the insurer is not limited merely to subrogation against tortfeasors or contractual counterparties (as contended in vain by Sompo) but is also able to exercise against third parties those rights that enure to the insured in connection with his loss which must have already been fully indemnified. This judgment sheds much light for all of the following insurance stakeholders:

(a) All insurers will henceforth have fuller assurance of the complete suite of subrogation rights and remedies that they have at their disposal. Although the particular insurer is often not explicitly identified as the party entitled to enforce the insured's rights under the contract, it can remain confident that its subrogation rights are exercisable so long as it is clearly standing in the shoes of the insured.

(b) Every insured ought accordingly to be more mindful of his obligation not to undermine or prejudice the insurer's rights given the expansive extent of the subrogation tentacles that insurers are provided with.[46] In particular, the insured must be cautious about entering into compromises or settlements that undercut the insurer's subrogation rights.[47]

(c) Third parties should henceforth have greater certainty as well by virtue of their foreknowledge of whether they may be called upon to fulfil certain obligations by an insurer who is subrogated to the insured's rights against them.

19.50 Furthermore, the High Court's affirmation that proof of authorisation to act on behalf of the insured need not be furnished (in the absence of any express requirement) is also consistent with the doctrine of subrogation. Hence, the ruling that the Defence Science & Technology Agency's unhelpful e-mail reply to C&C ought to be summarily cast aside as being of no assistance to Sompo is justified, indirectly providing a timely reminder that there is no necessity for the insurer to additionally seek some appropriate form of validation from the insured before subrogation can proceed. In fact, the right of subrogation arises automatically once the insured's loss has been indemnified by the insurer. No other positive act is expected from either the insurer or the insured; in the present dispute, for example, the Defence Science & Technology Agency even chose not

46 See *Phoenix Assurance v Spooner* [1905] 2 KB 753 and *West of England Fire Insurance v Isaacs* [1897] 1 QB 226.

47 In practice, such obligations are often specified in the insurance policies.

to provide C&C (which was engaged by RSA) with a letter of authority for submission to Sompo.

19.51 At first blush, this particular aspect of the High Court's ruling may naturally raise eyebrows. That there is no requirement for evidence of authorisation is, in the eyes of sceptics, a recipe for potential abuse. The increased likelihood of self-authorisation by insurers and agents who claim payment will inevitably place unwelcome burdens on the parties receiving the demands because of the imperative to conduct investigations so as to ascertain whether the claimants' assertions of having been properly subrogated to the insured's rights are justified or falsified. Since the right of subrogation arises by operation of law, however, there is legally no need for either the insured's express consent or some formal stamp of ratification; as a consequence, this powerful right that is automatically accorded to an insurer (after the fulfilment of its obligations) can only be resisted in a court (or tribunal as the case may be). All these seem to run contrary to the nation-wide goal of promoting business efficiency. Nevertheless, the advice offered (as an aside) by the judge to financial institutions issuing performance bonds is that they are in actual fact at liberty to include among the usual terms an additional request to present evidence of authority for those not already identified in the list of designated claimants.[48]

19.52 All in all, the High Court's judgment offers useful lessons for not only those in the insurance industry but also, in particular, the issuers of performance bonds. Indeed, it is surmised that after the appeal Sompo should have instituted various in-house measures to rectify the procedural deficiencies pointed out during the drawn-out proceedings.

48 *Sompo Insurance Singapore Pte Ltd v Sun Alliance Insurance plc* [2021] 5 SLR 934 at [24], where Philip Jeyaretnam JC added the following for (what is apparent from the context) the benefit of Sompo: "[I]f parties intended that that person's authority had to be evidenced in some way, then that stipulation would have been included as a term of the Performance Bond."