19. INSURANCE LAW

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I. Introduction

19.1 2022 and 2023 saw several novel issues in insurance law being considered by the Singapore Courts. The four decisions selected for discussion in this review chapter range from the District Court, the General Division of the High Court ("General Division") and the Court of Appeal and each offer valuable lessons for insureds and insurers alike.

II. Business interruption clauses and COVID-19

19.2 The Court of Appeal decision in *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd*[2] ("*QBE Insurance v Relax Beach*") is significant for local insurance jurisprudence as it is the first case before an appellate court in Singapore on the interpretation of insurance contracts with business interruption clauses and addressing issues of causation in business interruption claims involving infectious disease in the context of the COVID-19 pandemic (that, as we know, had led to widespread lockdowns). It is a pity that no written grounds had been issued for the first-instance decision by the General Division, and that the Court of Appeal ultimately did not have to decide on the merits of the appeal because the appellant insurers withdrew their appeal a day before the scheduled hearing. Nonetheless, the decision is still considered noteworthy given the Court of Appeal's brief remarks canvassing their

1 The authors would like to thank Lim Le-Si, Alicia for her invaluable assistance with this SAL Ann Rev chapter. The authors remain solely responsible for all omissions, inaccuracies and errors in this review.
2 [2023] 2 SLR 655.

preliminary views on the merits of the appeal, having had the benefit of reviewing the parties' extensive written submissions.

19.3 Notwithstanding that the only live issue to be determined by the Court of Appeal was the issue of costs, the court found it appropriate to set out their initial views on the merits of the appeal despite its discontinuance. The Court of Appeal provided two key reasons for doing so.[3] First, that the merits of the appeal were relevant to the exercise of the court's discretion in awarding costs, especially when considering indemnity costs. Second, that the issues raised in the appeal potentially touched on important questions of wider interests to the insurance community, pertinently since the decision in proceedings below had been "widely reported in the mainstream media and had garnered significant attention in the market".[4]

A. Factual background

19.4 The factual matrix of the dispute is uncomplicated and was uncontested. The respondent insured (Relax Beach Co Ltd, the "Insured") owned and operated a luxury hotel in Phuket (the "Insured Premises") and submitted a claim under its policy ("Policy") issued by the appellant insurers (the "Insurers") for apparent business interruption losses resulting from the COVID-19 pandemic.

19.5 The two salient clauses of the Policy whose interpretation formed the crux of the dispute between parties were the infectious disease extension (the "IDE") and the notifications clause ("Notifications Clause").

19.6 The IDE provided that the cover under the Policy would be engaged where there had been closure of the whole or part of the Insured Premises by an order of a public authority as a result of an outbreak of an infectious or contagious disease. The Court of Appeal noted, in particular, the nature of the IDE being a composite peril clause owing to how it "requires successive elements to be satisfied before a claim can be made (these being, business interruption loss arising from closure of the Insured Premises, by order of a public authority, as a result of an outbreak of a notifiable infectious or contagious disease)".[5] The IDE is reproduced below:[6]

3 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [45].
4 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [33].
5 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [7].
6 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [7].

> **87. INFECTIOUS DISEASE MURDER AND CLOSURE**
>
> Notwithstanding anything contained in the within policy to the contrary including but not limited to the "material damage proviso" the Policy is extended under Section 2 to include **loss directly from interruption of or interference with the business** carried on by the Insured at the premises i**n consequence of**:
>
> (i) **Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease or consequent upon defects in the drains and/or other sanitary arrangements at the premises**.
>
> (ii) Murder or suicide occurring at the premises.
>
> (iii) Injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the premises.
>
> (iv) Threat of violent damage to the premises and/or injury to person therein.
>
> [emphasis in original]

19.7 The Notifications Clause required the Insured to notify the Insurers of any claim that arose and, pertinently, to provide additional particulars of the claim in order to be entitled to be indemnified thereunder. The Notifications Clause is reproduced below:[7]

> **7. NOTIFICATION OF CLAIMS**
>
> On the happening of any loss … the Insured shall forthwith give notice thereof in writing to the Insurer(s) and **shall (within thirty (30) days after such loss … or such further time as the Insurer(s) may in writing allow**), at the Insured's own expense, **deliver to the Insurer(s) a claim, in writing containing as particular an account as may be reasonably practicable of** the several articles or portions of property loss, destroyed or damaged and of **the amount of loss**, destruction or damage thereto, having regard to their value at the time of the loss, destruction or damage, together with details of any other insurances on any property hereby insured.
>
> The Insured shall use due diligence and do and concur in doing all things reasonably practicable to minimise any interruption of or interference with the Business to avoid or diminish the loss and **shall also deliver** to the Insurer(s) a statement in writing of any claim certified by the Insured's auditor, with all particulars and details reasonably practicable of the loss and **shall produce and furnish** all books of accounts and other business books, invoices, vouchers and **all other documents, proofs, information, explanations and other evidence and facilities as may reasonably be required for investigation and verification**

7 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [8].

> **of the claim** together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. [*ie,* '**Second Condition**']
>
> No claim under this Policy shall be payable unless the Insured has complied with the terms of this condition.
>
> [emphasis in original]

19.8 The circumstances leading up to the Insured's claim for business interruption losses may be summarised as follows:[8]

> (a) On 2 April 2020, the Phuket Governor ("Governor") ordered the complete closure of all hotels in Phuket given the increase in COVID-19 cases (the "Closure Order").
>
> (b) On 7 April 2020, the last guests vacated the Insured Premises, which was then closed until further notice.
>
> (c) On 26 May 2020, the Insured notified Insurers of a claim under the Policy.
>
> (d) On 27 May 2020, in response to the Insurers' request for further information, the Insured stated among other things that there had *not* been any outbreak of COVID-19 at the Insured Premises.
>
> (e) On 29 May 2020, the Insurers wrote to the Insured highlighting that since there was no outbreak of COVID-19 at the Insured Premises, cover under the IDE was not triggered. Insurers then requested the Insured furnish further information (within 21 days) to support the claim for their consideration, failing which the Insurers "shall close [their] file accordingly".[9]
>
> (f) Following the 29 May 2020 letter, the Insurers received no further information from the Insured.

19.9 Almost a year later, on 31 March 2021, the Insured commenced proceedings in the General Division after the Insurers refused to retract their rejection of the claim, seeking a declaration that the Insured had a valid claim under the Policy for business interruption losses suffered in respect of the Insured Premises and that the Insurers were liable to indemnify them in respect of such business interruption losses in accordance with the terms of the Policy.

8 See *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [9]–[15].

9 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [14].

19.10 Notably, it was revealed for the very first time in the Insured's supporting affidavit for the proceedings that a hotel employee, "Mr K", had tested positive for COVID-19 sometime around 26 March 2020. This particular fact was not previously disclosed to the Insurers.

19.11 A critical implication of the foregoing fact was that a COVID-19 infection did occur at the Insured Premises just days before the Closure Order was announced by the Governor.

19.12 Indeed, the Insured's legal case was predicated on how Mr K's singular case of COVID-19 on the Insured Premises was sufficient to trigger the Insurers' liability under the IDE. The Insurers' defence, on the other hand, comprised two prongs: first, the Notifications Clause (which was a condition precedent to its liability) was not complied with; second, that not all the elements of the IDE had been made out.

19.13 The General Division judge found in favour of the Insured.[10] In particular, the judge disagreed with Insurers' contention that the claim had not been validly notified as required by the Notifications Clause, finding that the Insured was only required to give notice of the "happening of any loss, destruction or damage".[11] Accordingly, the failure to notify the Insurers of Mr K's infection, being an underlying cause of such loss, was immaterial. The General Division judge was also of the opinion that the Insurers had summarily rejected the Insured's claim on 29 May 2020 and its requests for further information when read in context were really requests for the Insured to further justify the validity of the claim and were not requests for details of loss suffered.

19.14 On the issue of whether liability was triggered under the IDE, the General Division judge was of the view that Mr K's infection had, "more likely than not", "formed part of the statistics" informing the decision of the Governor to impose the Closure Order even though there was no direct evidence that Mr K's case "was specifically and individually considered by the Governor in making the Closure Order".[12] In this regard, the General Division judge found that Mr K's infection was one of the many concurrent causes (the other causes being other COVID-19 cases occurring outside the Insured Premises) of the Closure Order. Accordingly, the General Division judge was satisfied that the causal link between Mr K's case on the Insured Premises and the Closure Order had

10 The General Division judge's key findings are summarised at [19]–[24] of *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655. There are no written grounds for the General Division judge's decision.

11 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [20].

12 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [24].

been established and the Insurers' liability under the IDE had thus been triggered. The Insurers appealed.

B. Findings of the Court of Appeal

19.15 In providing its preliminary views of the merits of the appeal, the Court of Appeal disagreed with the General Division's holdings on both the Notifications Clause and the IDE.

19.16 On the first issue of compliance with the Notifications Clause, having proceeded from the assumption that Mr K's infection caused the Insured's losses to come within the scope of the IDE, the Court of Appeal was of the preliminary view that the Insured had breached the Notifications Clause when it failed to inform the Insurers of Mr K's infection at the Insured Premises, and highlighted in particular that the Notifications Clause in the Policy required the Insured to provide "all other information, explanations and other evidence … as may reasonably be required for investigation and verification of the claim". The Court of Appeal observed that if Mr K's infection were to constitute an "outbreak" of infectious or contagious disease at the Insured Premises, then "it was a necessary part of any notification of loss … that the existence of Mr K's case occurring at the Insured Premises be notified to the [Insurers]".[13] The Court of Appeal substantiated its reasoning by turning to the underlying commercial purpose of such a condition precedent, which is to enable insurers to "investigate and ascertain the *bona fides* of the claim within a reasonable time of the loss, take steps to mitigate the consequences and to preserve the evidence where necessary".[14]

19.17 Before delving into the second issue of whether the loss came within the scope of the IDE so as to trigger the Insurers' liability, the Court of Appeal found it apposite to reiterate that the parties' commercial risk allocation as encapsulated in the language used in the terms of the Policy "must be given careful consideration".[15] On this note, the Court of Appeal disagreed with the General Division's finding that Mr K's sole infection at the Insured Premises could constitute an "outbreak" under limb (i) of the IDE when a plain and commonsensical meaning of the term "outbreak" contemplates the infection of *more than one person*. Accordingly, an increase from zero to one infected person arguably would not be considered an "outbreak".

13 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [49].
14 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [48] and [49].
15 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [54].

19.18 The Court of Appeal further considered that even if Mr K's lone infection was presumed to qualify as an "outbreak", it was "problematic"[16] for the General Division to opine that Mr K's infection may be regarded as one of the many concurrent causes of the Closure Order. The Court of Appeal was also of the view that the General Division's reasoning on causation presented other difficulties with regards to the Closure Order being an insured risk under the Policy in the first place. By treating Mr K's case as one of many concurrent causes (together with more general COVID-19 statistical figures in Phuket, including cases of infection outside the Insured Premises) of the Closure Order, the Closure Order would not be an insured peril under the Policy, given that limb (i) of the IDE requires the Closure Order to be a result of an "outbreak" that had occurred "at the premises" and would thus not include cases occurring outside the Insured Premises. Overall, and based on the language chosen by the parties in the IDE, the Court of Appeal was of the preliminary view "that it did not cross the parties' minds that a nationwide lockdown due to a global pandemic, combined with just one case on the Insured Premises, would be a covered event"[17] and would thus not have intended for the IDE to operate in the manner as asserted by the Insured.

C. Further remarks

19.19 The Court of Appeal's remarks on the underlying intention of the Notifications Clause provides welcomed clarity to local insurance jurisprudence *vis-à-vis* the effect of claims notification clauses which are commonly found in insurance policies and typically made a condition precedent to insurers' liability under the policy. The *dicta* in *QBE Insurance v Relax Beach* is the first clear affirmation from a Singapore court on common law principles as to what constitutes proper notice and, in particular, that an insured ought to include details in a notification to the insurer that would "enable the [insurer] to properly investigate the validity of the claim and decide whether the insured peril had occurred",[18] which would include facts said to give rise to the underlying insured risk. Bearing in mind the purpose of such claims notification clauses (which is to enable the insurer to investigate the claim),[19] it naturally follows that notifications should include relevant information that would allow the insurer to take steps to meet the claim by preparing and obtaining appropriate evidence for that purpose.

16 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [55].
17 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [57].
18 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [49].
19 See *Law Relating to Specific Contracts in Singapore* (Steven Chong ed-in-chief & Cavinder Bull gen ed) (Sweet & Maxwell Asia, 2nd Ed, 2016) at para 9.12.17, as cited in *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [49].

19.20 The Court of Appeal's view accords with the English position on claims notification clauses. It has been observed by the English courts that, while a precisely formulated claim with full details is not required for the purposes of complying with claims notification clauses, the details which are required in any particular situation depend "upon the particular contractual wording, the function of the notification and the commercial context".[20] This contextual approach seems to be applied in *QBE Insurance v Relax Beach*, where the Court of Appeal placed a particular emphasis on the express provision within the Notifications Clause that required the "provision of all other information, explanations and other evidence … 'as may reasonably be required for investigation and verification of the claim'".[21] The Court of Appeal also attached significance to the request for "further information to support the … claim for [the Insurers'] consideration"[22] set out in the 29 May 2020 letter. Taking the foregoing facts together, the Insured ought to have furnished the Insurer with particulars of the loss and, crucially, information about Mr K's COVID-19 infection which (according to the Insured) would have brought their claim within the scope of the IDE by satisfying the requirement of an outbreak of a notifiable infectious or contagious disease at the Insured Premises. By failing to do so, the Insured was in breach of the Notifications Clause and the Insurers would be entitled to repudiate liability for the claim.

19.21 We then turn to consider the Court of Appeal's substantive views on the IDE, which at first blush may have been surprising to some (and especially to the Insurers, who withdrew their appeal on the eve of the scheduled hearing) in light of the relatively recent perceived triumph for the policyholders in the landmark decision of the UK Supreme Court (the "UKSC") in *Financial Conduct Authority v Arch Insurance (UK) Ltd*[23] ("*FCA Test Case*"). The *FCA Test Case* concerned the construction of certain business interruption provisions in insurance policies and was heard against the backdrop of significant business interruption losses suffered due to the COVID-19 pandemic. It is only upon closer scrutiny of the IDE that the observations of the Court of Appeal on trite principles of contractual interpretation – that one must "pay close attention to the precise words used in the contract to ascertain the meaning that the parties intended"[24] – ring especially true. While there appear to be similarities between the structure of the IDE (which required the loss to

20 See *Merrill Lynch International Bank Ltd v Winterthur Swiss Insurance Co* [2007] 2 All ER (Comm) 846 at 871, citing A/*S Rendal v Arcos Ltd* [1937] 3 All ER 577 at 580.

21 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [48].

22 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [14].

23 [2021] UKSC 1.

24 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [1].

arise from the *closure* of the Insured Premises as a result of the outbreak of *disease*) and the "hybrid clauses" (*ie*, composite peril clauses which combine the main elements of disease and prevention of access clauses) considered in the *FCA Test Case*,[25] one key difference is the choice of the word "outbreak" in the IDE (which, in the Court of Appeal's view, as stated above, contemplates more than one infection). This did not feature in any of the "hybrid clauses" considered in the *FCA Test Case*. By contrast, the disease limbs of the "hybrid clauses" contained references to "a notifiable human disease manifesting itself at the Premises" and "*an occurrence* of a notifiable infectious or contagious disease" [emphasis added][26] – language which suggests that merely a singular case would suffice to trigger liability under the relevant policies. Accordingly, the issue of the number of COVID-19 infections *vis-à-vis* the application of the "hybrid clauses" was immaterial in the *FCA Test Case*. As an aside, it would have been intriguing to consider as a hypothetical what the acceptable numerical threshold ought to be in order for a series of COVID-19 infections to be considered an "outbreak".

19.22 As to the causative link between the Closure Order and Mr K's COVID-19 infection (or lack thereof), the Court of Appeal had described the General Division's treatment of Mr K's case as "one of the many concurrent causes of the Closure Order" (which we will refer to as the "Concurrent Causation Theory") as "problematic".[27] It is a pity that the Court of Appeal was restricted to providing its preliminary views on the merits of the discontinued appeal and that we do not have the benefit of knowing the Court of Appeal's expanded reasons underlying its scepticism *vis-à-vis* the Concurrent Causation Theory. Based on the very limited commentary on the Concurrent Causation Theory in *QBE Insurance v Relax Beach*, it would appear that the Court of Appeal's position is in conflict with that of the UKSC. In the *FCA Test Case*, the UKSC was satisfied that a single case of disease or a relatively small number of cases of disease occurring within the policy-specified radius of the insured premises would have been sufficient to satisfy the causal connection required by the policies, such that each case of disease is an equally effective cause of the government measures and subsequent business interruption. In arriving at this view, the UKSC attached significance to how parties to the insurance contracts "may be presumed to have known that some infectious diseases – including potentially, a new disease (like SARS) – can spread rapidly, widely and unpredictably" and thus, that it would be "obvious that an outbreak of an infectious disease may not

25 See *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [96].
26 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [96].
27 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [55].

be confined to a specific locality".[28] Accordingly, the UKSC was of the view that:[29]

> … no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all cases of disease would necessarily occur within the radius. *It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision.* [emphasis added]

19.23 Based on the foregoing, the effect of any closure mandated by the UK Government would plainly be "indivisible"[30] and therefore the question of whether such closure was caused by an insured peril is "an all or nothing one".[31] The UKSC's reasoning is particularly compelling given that in a global pandemic situation, a public authority or government's response must presumably be made holistically and in light of all of the cases of disease which have taken place in that country (and not just in a particular locality). It would have been interesting to see how the Court of Appeal might have altered its preliminary views, had the Insured managed to prove with direct evidence that Mr K's particular case had indeed been considered by the Governor when he made the decision to issue the Closure Order.

19.24 That being said, the Court of Appeal further stated that even if they were to accept the Concurrent Causation Theory, it was not clear how this would translate to the Closure Order being an insured risk under the Policy given that there would have been cases occurring outside the Insured Premises – crucially, the Policy had called for the "outbreak" to occur "at the premises". Indeed, the wording in the Policy was unlike the "hybrid clauses" considered in the *FCA Test Case* in that the outbreak of disease itself is expected to be localised and to take place at the Insured Premises, whereas the "hybrid clauses" provided for the "occurrence" of the disease to take place and the disease to "manifest" within the prescribed radius of the insured premises, thereby leaving room for the inference that the outbreak of disease could be widespread and take place *outside* of the policy-prescribed radius.

28 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [194].
29 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [194].
30 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [201].
31 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [201].

19.25 Once more, it all boils down to fundamental principles of contractual interpretation where, as noted by the Court of Appeal, "[t]ext and context are of first importance".[32] The supposed divergence of views between the Court of Appeal and the UKSC on whether insurers' liability for the business interruption losses claimed for was ultimately triggered may thus be explained by the differences in the actual wording of the policies in question. Therefore, the important (albeit clichéd) lesson to take away for insureds going forward is to be careful to ensure that the specific wordings used in their insurance policies do indeed cover the exact risks that they wish to seek protection for.

III. Liability insurance and entering into reasonable settlements with third parties

19.26 The second case selected for review is the 2022 case of *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd*[33] ("*SYT Consultants v QBE Insurance*"). While there were multiple issues of fact and law ventilated in this decision, this chapter focuses on the General Division's observations and holdings with respect to the scope of the indemnifying clauses of the policy in question and how they shape the type of settlements that are covered under the policy. What is particularly noteworthy is the General Division's observations on the reasonableness of settlements with third parties under circumstances where there is an intention to subsequently claim for indemnity of sums paid under such settlements pursuant to a liability insurance policy.

A. Factual background

19.27 The defendant insurer had insured the plaintiff under a professional indemnity insurance policy (the "PI Policy") against legal liability for any breach of professional duty by the plaintiff in its supply of professional engineering services to third parties. The plaintiff had been engaged by a builder to prepare the requisite documents for certain engineering works for a construction project. Over the course of the construction project, damage was caused to two neighbouring properties, resulting in claims being mounted against the builder and developer of the construction project by the owners of the properties. These claims were eventually settled, however the developer and builder in turn brought claims against the plaintiff for breach of their contractual duties and/or duty of care under common law.

32 *QBE Insurance (Singapore) Pte Ltd v Relax Beach Co Ltd* [2023] 2 SLR 655 at [57].
33 [2022] SGHC 251.

19.28 Upon receiving a letter from the lawyers of the developer and builder containing allegations of the aforementioned breaches, the plaintiff notified the defendant insurer of the potential claim. Following a series of correspondence between parties and the defendant insurer's investigation of the claim, the defendant insurer wrote to the plaintiff to convey its decision to decline coverage under the PI Policy.

19.29 Proceedings were later commenced by the developer and builder against the plaintiff for breach of contract and/or negligence. The plaintiff subsequently entered into a consent judgment at 100% liability in the sum of approximately S$3m as damages plus interest (the "Consent Judgment"), pursuant to a settlement agreement that the defendant insurer was not party to (the "Settlement Agreement").

19.30 The plaintiff then brought the present suit against the defendant insurer to seek coverage pursuant to the PI Policy in respect of its liability under the Consent Judgment. Among others, the defendant insurer argued that it was entitled to deny the plaintiff's claim as the PI Policy did not cover the plaintiff's liability under the Consent Judgment. Crucially, the plaintiff had not demonstrated the Settlement Agreement to be reasonable.

B. Findings of the General Division

19.31 The General Division found in favour of the defendant insurer's argument that the PI Policy did not respond to the plaintiff's claim. This argument is rooted in the construction of, among others, cll 2.1 and 3.2 of the PI Policy, which the defendant insurer submitted when read together and on a proper interpretation would oblige the insured seeking to be indemnified in respect of liability pursuant to a settlement agreement to establish that the settlement entered into was reasonable.

19.32 The aforementioned clauses are reproduced as follows:[34]

> **2. COVER**
>
> 2.1. **Civil Liability**
>
> **We** will pay **You** or on **Your** behalf for:
>
> 2.1.1. any legal liability to pay **Compensation**; and
>
> 2.1.2. any costs and expenses awarded against **You**;

34 *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 at [15].

> arising from any civil liability resulting from a **Claim** for breach of professional duty in the conduct of **Your Business** provided that the **Claim** is first made during the **Period of Insurance** and reported to **Us** during the **Period of Insurance** or, where applicable, during the extended reporting period.
>
> …
>
> **3. SCOPE OF COVER**
>
> This **Policy** covers **Your** civil liability, which includes liability for:
>
> …
>
> 3.2 **Contractual Liability (Tort Liability)** – **Claims** arising from a breach of contractual obligations or a duty of care to provide professional services in the conduct of **Your Business**, but this does not extend to cover any liability assumed by **You** under any express warranty, guarantee, representation, hold harmless agreement, indemnity contract or similar agreement unless such liability would attach in the absence of any such agreement.
>
> [emphasis in original]

19.33 As a preliminary matter, the General Division was of the view that the "legal liability to pay Compensation" was distinct from and was required to arise from "civil liability". To prove its claim, the plaintiff must thus overcome the hurdle of establishing that "civil liability" had precipitated its obligation to pay "Compensation" pursuant to cl 2.1 of the PI Policy.

19.34 The hurdle presented by cl 2.1 dovetails with cl 3, which sets out the types of civil liability the PI Policy covers. On this, cl 3.2 of the PI Policy excludes coverage for "any liability assumed by [the plaintiff] under any express warranty, guarantee, representation, hold harmless agreement, indemnity contract or similar agreement *unless such liability would attach in the absence of any such agreement*"[35] [emphasis in original]. On a plain reading, cl 3.2 excludes coverage for "agreements where a party has voluntarily taken on or takes on a liability that may not otherwise exist as a matter of law"[36] – such as due to a breach of contract or negligence.

19.35 Therefore, for the PI Policy to respond, the payment under the Consent Judgment pursuant to the Settlement Agreement cannot have been voluntarily assumed by the plaintiff. Cast in a slightly different light, this would mean that, in order to satisfy the requirements in

35 *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 at [43].

36 *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 at [44].

cll 2.1 and 3.2, the plaintiff must show that the liability to pay moneys under the Consent Judgment would have attached in the absence of the Settlement Agreement.

19.36 To do so, the General Division held that the plaintiff must show "actual, as opposed to arguable, tortious liability"[37] and that the yardstick for this is reasonableness. Expressing a preference for a more nuanced and pragmatic approach over a strict and mechanical approach of requiring the plaintiff to prove the elements of the tortious claim on a balance of probabilities, the General Division held that the plaintiff need only show that the settlement agreement was a reasonable one.

19.37 In determining whether or not a settlement agreement was reasonable, the General Division adopted and applied the nonexhaustive list of relevant considerations set out by the Court of Appeal in *Britestone Pte Ltd v Smith & Associates Far East, Ltd*[38] ("*Britestone*"), which was a decision made in a slightly different context where the issue was whether one could hold an upstream defaulting party for a settlement amount that had already been agreed with the injured party. Notably, the seven factors which the General Division chose amongst the list of factors in *Britestone* to set out in its judgment are as follows:[39]

> (a) the duration or period of negotiations as well as their general content;
>
> (b) whether the negotiations were conducted *bona fide*;
>
> (c) the assessment which could properly be made at the time of settlement of the prospects of success or failure of the claim based on materials then available;
>
> (d) the availability of and/or reliance on legal advice or expert advice taking into account considerations of cost and time;
>
> (e) whether the settlement amount has been paid, and, if so, how and when;
>
> (f) the bargaining strengths of the parties involved in the settlement, taking into account (among other things) alternative means by which the dispute could have been concluded; and
>
> (g) whether, in the round, the settlement figure was objectively assessed and properly calibrated against the context of the entire factual matrix.

37 *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 at [49].
38 [2007] 4 SLR(R) 855.
39 *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 at [52].

C. Further remarks

19.38 *SYT Consultants v QBE Insurance* serves as a general cautionary tale for insureds of liability policies to refrain from waltzing into settlement agreements with third-party claimants with the expectation of being guaranteed an insurance payout. That being said, we note that the General Division's findings ultimately turned on the particular manner in which cll 2.1 and 3.2 were worded. Had the insuring clause been phrased differently and more broadly, the General Division may not have arrived at the conclusion that the settlement had to be in respect of the insured's *actual* liability and thus needed to be reasonable. The crucial and time-worn lesson for insureds to take away, once again, is to read the exact terms of their insurance policies carefully to ensure that their claims are indeed covered and not to assume that amounts incurred in respect of third-party liability in excess of the deductible will automatically be borne by their insurers.

19.39 For this particular PI Policy, the requirement that the settlement had to be reasonable and arise from actual liability in order for the policy to respond was not immediately apparent on the face of the policy wording, especially to lay persons who may not regard the words "arising from civil liability" with any special significance. It would therefore be prudent for insureds to nonetheless obtain legal advice on the merits of a third party's claim, before eagerly entering into any negotiations with the third party to stave off the claim in a bid to avoid negative publicity that may come with court proceedings.

19.40 While the General Division had found on the facts of the case that the defendant insurer was not aware of any settlement (despite the plaintiff's contention that the defendant insurer knew but did not object to the settlement), it would be interesting to consider how the outcome of this case might have been different had the defendant insurer consented expressly to the Settlement Agreement. Ostensibly, the insurer's express consent could potentially amount to a waiver or an estoppel that would then preclude it from declining coverage on the basis that the settlement was unreasonable. Given that most liability policies include clauses requiring their insureds to seek the prior consent of their insurers before entering into settlements, such a fact scenario is not beyond imagination. However, this remains to be tested by the courts; until then, insureds may wish to err on the side of caution to ensure that their settlements are nonetheless reasonable, if so required by the wording of their liability policies.

19.41 On this note, it is also curious why the General Division did not include the factors of "whether there was an opportunity accorded to the third party/ultimate payor to be involved in the negotiations" and "whether

there was a positive reception of complaints by the third party/ultimate payor" which had been set out in *Britestone* decision.[40] It is not clear whether this was a deliberate omission but in any event, we note that the list of relevant considerations set out in *SYT Consultants v QBE Insurance* is not meant to be exhaustive.[41] Like express consent provided by an insurer, the active involvement of an insurer in negotiations (such as by providing a mandate for an acceptable settlement range) might arguably, in a similar vein, preclude the insurer from subsequently repudiating liability on grounds that the settlement was unreasonable.

IV. Contribution by co-insurers in cases of double insurance

19.42 Finally, we turn to consider two district court cases which were decided within two months of each other. Interestingly, despite the uncanny similarities between the factual matrices in *EQ Insurance Company Ltd v Lonpac Insurance Berhad*[42] ("*EQ Insurance v Lonpac Insurance*") and *AXA Insurance Pte Ltd v Great Eastern General Insurance Limited*[43] ("*AXA Insurance v GEGI*"), the district judges presiding over these cases had arrived at what appears to be diametrically opposed decisions.

19.43 It is noted that the unsuccessful plaintiff insurer in *EQ Insurance v Lonpac Insurance* had made an appeal and subsequently withdrew the same. There is, however, no publicly available information as to whether the unsuccessful defendant insurer in *AXA Insurance v GEGI* had, in light of the findings of the District Court in *EQ Insurance v Lonpac Insurance*, filed an appeal.

A. Factual background

(1) EQ Insurance v Lonpac Insurance

19.44 The salient facts of *EQ Insurance v Lonpac Insurance* are as follows.

19.45 Both the main contractor and subcontractor of a construction project at 6 Eu Tong Sen Street had in place work injury compensation insurance policies. The plaintiff insurer, EQ Insurance Co Ltd ("EQ Insurance"), issued a policy to the subcontractor while the defendant insurer, Lonpac Insurance Bhd ("Lonpac Insurance"), issued

40 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [54].
41 *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 at [52].
42 [2023] SGDC 206.
43 [2023] SGDC 267.

a policy to the main contractor. The subcontractor was an insured party under both policies.

19.46 On 8 March 2019, while carrying out painting works at the project, the subcontractor's employee suffered a work-related injury. The injured employee commenced a suit against his employer, the subcontractor, on 15 November 2019. EQ Insurance then appointed solicitors to act for the subcontractor.

19.47 On 25 March 2020, EQ Insurance wrote to Lonpac Insurance to inform them of the suit commenced by the injured employee and asked if they intended to take over conduct of the subcontractor's defence.

19.48 Lonpac Insurance's solicitors wrote to EQ Insurance on 2 December 2020, stating that Lonpac Insurance first became aware of the accident when they received EQ Insurance's letter of 25 March 2020, which was some 12 months after the accident. Lonpac Insurance repudiated liability for the accident primarily for breaches of conditions precedent found in the policy it issued to the main contractor arising from the lack of timely notice of the accident.

19.49 While EQ Insurance's policy contained a noncontribution clause providing among other things that indemnity under its policy "does not cover any death or injury by accident or disease which is insured by or would, but for the existence of this Policy, be insured by any other policy or policies",[44] Lonpac Insurance's policy did not contain a similar noncontribution clause and instead provided that "it is hereby declared and agreed that this policy is a primary policy".[45]

19.50 EQ Insurance then commenced court proceedings against Lonpac Insurance seeking, among other things, indemnity and/or contribution to sums paid out by it in respect of the subcontractor's liability to the injured employee.

(2) AXA Insurance v GEGI

19.51 The background facts of *AXA Insurance v GEGI* (which was decided about two months after the decision in *EQ Insurance v Lonpac Insurance*) may be summarised as follows.

19.52 Both the main contractor and the subcontractor of a dwelling house construction project at Daisy Avenue had in place work injury

44 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [16].
45 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [17].

compensation insurance policies. The plaintiff insurer, AXA Insurance, had insured the subcontractor while the defendant insurer, Great Eastern General Insurance Limited ("GEGI"), had insured the main contractor. The subcontractor was an insured party under both policies.

19.53 On 17 August 2019, an employee of the subcontractor was injured while carrying on works at the project. The injured employee then brought a claim under the Work Injury Compensation Act.[46] On 20 February 2020, the Ministry of Manpower issued a notice of assessment of compensation ("NOA") stating, among other things, the compensation due to the injured employee. The injured employee's employer, the subcontractor, was identified as the "employer" and AXA Insurance was identified as the "payer" under the NOA.

19.54 It was not disputed that neither the subcontractor nor main contractor ever formally gave notice to GEGI of the accident pursuant to a condition precedent under its policy to give notice within ten days of having knowledge of the accident that may give rise to a claim.

19.55 Both AXA Insurance's and GEGI's policies contained noncontribution clauses which were worded in virtually the same terms. It was not disputed that the noncontribution clauses would cancel each other out with the net effect that, *prima facie,* both insurers would have to share liability equally.

19.56 AXA Insurance subsequently commenced court proceedings against GEGI to seek contribution for the sums paid by it for and on behalf of the subcontractor in respect of the compensation to the injured employee.

B. Findings of the District Court

19.57 While the District Court decided in favour of the plaintiff insurer in *AXA Insurance v GEGI,* it had dismissed the claim for contribution by the plaintiff insurer in *EQ Insurance v Lonpac Insurance.* Given the similar background facts of both cases, it is striking that the views of the district judges who decided these cases appear to be at odds with each other.

46 Cap 534, 2009 Rev Ed.

(1) EQ Insurance v Lonpac Insurance

19.58 In *EQ Insurance v Lonpac Insurance,* the District Court agreed with Lonpac Insurance's argument that it was contractually entitled to disclaim liability under its policy and was therefore not required to contribute to the injured employee's claim. On this, it found favour with the approach promulgated in the UK Privy Council decision of *Eagle Star Insurance Co Ltd v Provincial Insurance Plc*[47] ("*Eagle Star*"), that contribution ought to be determined in accordance with the extent of the insurers' respective liabilities to the person insured under their respective contracts of insurance as assessed at the time of judgment. It disagreed with EQ Insurance's contention that the obligation to contribute ought to be assessed at the time of loss such that an insurer who had not been notified of loss could not rely on that breach of condition precedent to disclaim liability and escape an equitable duty to contribute – which was the proposition put forth in the English High Court case of *Legal and General and Drake Insurance plc v Provident Insurance plc*[48] ("*Legal and General*").

19.59 The District Court in *EQ Insurance v Lonpac Insurance* arrived at its decision based on precedent and principle. In respect of "precedent", the District Court relied on *obiter* comments of the Singapore High Court in the 2005 case of *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Ltd*[49] ("*QBE v Winterthur*"), in which "Andrew Ang JC expressed a clear preference for the position of *Eagle Star*"[50] and also the *obiter* comments of a higher English appellate authority, the English Court of Appeal in the 2006 case of *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd*[51] ("*Bolton*"), where a preference was expressed for the reasoning in *Eagle Star* over the position in *Legal and General*.[52]

19.60 As a matter of "principle", the District Court adopted the reasoning expressed in *Bolton* that an insurer is "entitled to say that he has only agreed to issue on certain terms and he ought to be able to rely on that position not only against his insured but also as against a coinsurer".[53] It held that "[w]here an insurer is not liable under its contract of insurance because of a breach of condition precedent to liability, then liability *simply*

47 [1994] 1 AC 130.
48 [2004] 2 WLR 530.
49 [2005] 1 SLR(R) 711.
50 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [43].
51 [2006] 1 WLR 1492.
52 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [44].
53 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [44] and [48].

does not arise at all under the contract"[54] [emphasis added]. Accordingly, it was unclear to the District Court "why the insurer that is contractually entitled to disclaim liability should nevertheless be made responsible for a part or even all of the loss".[55]

19.61 The District Court was further of the view that applying the approach in *Eagle Star* achieves a just outcome on the facts of the case for two reasons: first, that Lonpac Insurance's repudiation of liability arose out of the "natural operation"[56] of the contractual terms of the policy at the time of the loss and there was no allegation that Lonpac Insurance had acted deliberately or in bad faith to avoid liability; second, that if liability was to be assessed at the time of the loss instead, this would lead to an absurd outcome where Lonpac Insurance would have to bear complete liability for the insured employee's claim due to the existence of the noncontribution clause in EQ Insurance's policy, despite not being contractually liable for it due to the breach of the condition precedent.[57]

(2) AXA Insurance v GEGI

19.62 By comparison, the District Court in *AXA Insurance v GEGI* disagreed that GEGI could not be liable on the basis that it was not notified of the accident involving the injured employee, where notification of potential claims was a condition precedent to GEGI's liability under its policy, and found that GEGI was liable to contribute to the sums paid by AXA Insurance.

19.63 Having considered the decisions of *Eagle Star*, *Legal and General* and *QBE v Winterthur,* the District Court was of the view that GEGI's position was "unsupported by authority, insofar as it suggests that [GEGI]'s liability is contingent upon compliance with the notice requirements existing in [GEGI's policy]".[58] In this regard, the District Court observed that none of the aforementioned decisions "turned on the view that a failure to comply with a notice requirement, even one which was a condition precedent, would suffice, on its own, to defeat a contribution claim by an insurer against his coinsurer".[59]

54 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [48].
55 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [48].
56 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [55].
57 *EQ Insurance Company Ltd v Lonpac Insurance Berhad* [2023] SGDC 206 at [54]–[58].
58 *AXA Insurance Pte Ltd v Great Eastern General Insurance Limited* [2023] SGDC 267 at [102].
59 *AXA Insurance Pte Ltd v Great Eastern General Insurance Limited* [2023] SGDC 267 at [97].

19.64 In respect of GEGI's argument that it was prejudiced by being deprived of any opportunity to investigate or participate in the handling of the injured employee's claim and consequently being bound by an outcome over which it had no control or influence, the District Court concluded that the factual evidence showed that AXA Insurance had written to the main contractor about two months after the accident to request the identity of its insurer and to remind the main contractor to inform them of the claim by the injured worker, and it was the "knowing failure"[60] of GEGI's own insured to notify it which prevented it from being informed of the injured worker's claim. Any prejudice that might have been suffered was thus not a consequence of AXA Insurance's unreasonable behaviour that could "tilt the 'balance of equity' in favour of denying contribution".[61]

C. Further remarks

19.65 Given the seemingly conflicting decisions of the District Court in *EQ Insurance v Lonpac Insurance* and *AXA Insurance v GEGI*, it remains to be seen which position would prevail if and when tested by a higher court. With respect, it is not clear why the District Court in *AXA Insurance v GEGI* chose to disapply the general principles underpinning the approach to determining whether a co-insurer is required to contribute, as expounded on in *Eagle Star* (which the Singapore High Court in *QBE v Winterthur* explicitly expressed a preference for[62]). This is notwithstanding that the factual matrix of *QBE v Winterthur* was slightly different from that of *AXA Insurance v GEGI,* in that it was uncertain on the facts of *QBE v Winterthur* whether the defendant insurer could be said not to be liable under the terms of its own policy, whereas it was clearly established in *AXA Insurance v GEGI* that the defendant insurer was not liable under the terms of its own policy owing to a breach of condition precedent.

19.66 Additionally, while the District Court's decision in *AXA Insurance v GEGI* appears to be rooted in how GEGI's argument on noncompliance with the policy's requirement for notice was "unsupported by authority",[63] it would have been interesting to know if the District Court agreed in substance with the principles of ensuring fairness and equity amongst co-insurers, which were concepts that featured strongly

60 *AXA Insurance Pte Ltd v Great Eastern General Insurance Limited* [2023] SGDC 267 at [121].

61 *AXA Insurance Pte Ltd v Great Eastern General Insurance Limited* [2023] SGDC 267 at [128].

62 *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Ltd* [2005] 1 SLR(R) 711 at [36].

63 *AXA Insurance Pte Ltd v Great Eastern General Insurance Ltd* [2023] SGDC 267 at [102].

in the English Court of Appeal's reasoning in the decision of *Legal and General*.[64]

19.67 As for the District Court's decision in *EQ Insurance v Lonpac Insurance*, given that whether or not an insurer receives notice of a potential claim depends on whether its insured gives such notice, it would be entirely in the insured's control which insurer ends up on the hook in a case of double insurance and where notice of a claim is a condition precedent to liability. This state of affairs, upon a closer examination, potentially gives rise to a misalignment of interests in construction-related claims where it is common for there to be a contractors' all-risks insurance policy procured by the main contractor for the project (which would cover its subcontractors), in addition to and apart from the subcontractor's own insurance policy. In such situations, it might be in the interests of an insured subcontractor to only notify claims to the project insurer and not to their own insurer, so as not to affect their claims history and insurance premiums, which would be to the disadvantage of the main contractor's insurer who is consequently deprived of the benefit of sharing liability with the co-insurer. This is a commercial risk that insurers would have to manage, which may be difficult if they are unaware of the existence of another policy to begin with.

64 As canvassed in detail at [32]–[58] of *AXA Insurance Pte Ltd v Great Eastern General Insurance Limited* [2023] SGDC 267.