IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 251

Suit No 376 of 2021

Between

SYT Consultants Pte Ltd

… *Plaintiff*

And

QBE Insurance (Singapore) Pte Ltd

… *Defendant*

JUDGMENT

[Insurance — Liability insurance — Professional indemnity]
[Building and Construction Law — Architects, engineers and surveyors — Duties and liabilities]

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SYT Consultants Pte Ltd
v
QBE Insurance (Singapore) Pte Ltd

[2022] SGHC 251

General Division of the High Court — Suit No 376 of 2021
Kwek Mean Luck J
17–19 May, 27 June, 29 August, 22 September 2022

07 October 2022 Judgment reserved.

Kwek Mean Luck J:

Introduction

1 Consent judgment in the sum of $2m was entered against an engineering company. In this suit, the engineering company seeks to recover that sum from its insurers pursuant to a professional indemnity insurance policy.

2 The insurer's position is that it is entitled to deny coverage under the insurance policy because the threshold condition for triggering coverage has not been met, and the engineering company has breached the conditions of the insurance policy by acting dishonestly and failing to co-operate with the insurer in its investigation of the claim.

Facts

The parties

3 The plaintiff is SYT Consultants Pte Ltd. It is a firm of consultants, principally in the business of engineering, architecture and project management.[1] The defendant is QBE Insurance (Singapore) Pte Ltd, a company principally in the business of insurance and reinsurance.[2] Pursuant to a professional indemnity insurance policy (the "Policy"), the defendant insured the plaintiff against legal liability for any breach of professional duty by the plaintiff in its supply of professional engineering services to third parties.[3]

4 Mr Ng Dick Young ("Mr Ng") is a director of the plaintiff. He has been a registered professional engineer ("PE") since 1995.

Background facts

5 This dispute arises from a construction project for the erection of four units of two-storey detached dwelling houses ("the Project"). The developer of the Project was Link (THM) Prestige Homes Pte Ltd (the "Developer"). Exclusive Design Construction Pte Ltd (the "Builder") was the main building contractor appointed by the Developer for the Project.[4]

6 The plaintiff was engaged by the Builder to prepare the necessary documents for calculating and designing the Earth Retaining or Stabilizing

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[1] Statement of Claim ("SOC") at para 1; Affidavit of Evidence in Chief of Mr Ng Dick Young ("Ng's AEIC") at para 2.

[2] SOC at para 2.

[3] SOC at para 3.

[4] SOC at paras 4–5.

Structures ("ERSS") for the Project. The plaintiff was also to make the necessary submissions and obtain the necessary approval for the ERSS works from the Building and Construction Authority ("BCA"). Mr Ng was appointed the Qualified Person ("QP") for the ERSS works for the Project. As QP for the ERSS works, Mr Ng had to design and supervise the ERSS works, as well as to monitor the excavation works to mitigate and reduce any ground movement when they were carried out.[5]

7 In the course of the Project, damage was caused to two neighbouring properties, No. 1 Greenleaf Lane and No. 3 Greenleaf Lane (the "Two Properties"). The owners of the Two Properties brought claims against the Builder and the Developer in respect of the damage caused to their properties (the "Damage").[6] On 22 March 2018 and 30 June 2018, the Developer and the Builder reached settlement agreements with each of the owners of the Two Properties. Pursuant to these settlement agreements, the Developer and the Builder agreed to pay to the sum of $820,000 to the owners of No. 1 Greenleaf Lane, and $1,450,000 to the owners of No. 3 Greenleaf Lane. Under the latter settlement agreement for No. 3 Greenleaf Lane, the Developer and Builder also agreed to carry out stabilisation works for the damaged property.[7]

8 On 11 January 2018, the defendant was first informed by the plaintiff's insurance brokers of a potential claim by the plaintiff. The plaintiff had received a letter from the lawyers of the Developer and the Builder two days earlier, alleging that the plaintiff and Mr Ng were in breach of their contractual duties

5 SOC at paras 6–7.

6 SOC at para 10.

7 SOC at paras 12–13.

and/or were negligent in causing damage to the Two Properties.[8] A series of correspondence between plaintiff, defendant, and the defendant's lawyers at the time, Dentons Rodyk & Davidson LLP ("DRD") then ensued, in which the defendant gathered information about the plaintiff's claim. The defendant also engaged an expert, Mr Kenneth James Patterson-Kane ("Mr Patterson-Kane"), to investigate the plaintiff's claim. Mr Patterson-Kane provided the defendant with two reports dated 20 July 2018 and 24 July 2018 respectively.[9] On 6 August 2018, the defendant wrote to the plaintiff to communicate its decision to deny coverage under the Policy. The defendant explained that the findings in Mr Patterson-Kane's reports, and the failure of the plaintiff to co-operate in the investigation of the claim, had led it to conclude that cll 6.5 and 7.7 of the Policy had been breached.[10]

9 On 18 April 2019, the Developer and the Builder commenced a suit against the plaintiff and Mr Ng for, *inter alia*, breach of contract and/or negligence in causing the Damage ("Suit 417").[11]

10 In their defence filed in Suit 417, the plaintiff and Mr Ng denied liability to the Developer and the Builder.[12] The defendant was brought in as a third party to Suit 417 on 8 May 2019.[13] The parties in Suit 417 then took part in a mediation on 3 March 2020 ("the Mediation").

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8 AEIC of Shirlene Carol Fernz Ak Vincent ("Ms Vincent's AEIC") at paras 7–9.

9 Ms Vincent's AEIC at paras 19 and 20.

10 8AB 3–4.

11 SOC at para 14.

12 1AB 202.

13 SOC at para 15.

11 On 8 October 2020, the plaintiff and Mr Ng entered into a consent judgment, whereby they consented to pay the Developer and the Builder the sum of $3,010,264.53 plus interest and costs ("Consent Judgment").[14] The Consent Judgment was entered into pursuant to a Settlement Agreement ("Settlement Agreement"). The Settlement Agreement was signed by Mr Ng on behalf of himself and the plaintiff. The defendant was not a party to the Settlement Agreement. Etiqa Insurance Pte Ltd ("Etiqa"), the insurer for the Builder and the Developer, was a party to the Settlement Agreement.[15]

12 The Settlement Agreement is dated on its face 3 March 2020. However, the correspondence from the plaintiff's previous lawyers shows that as of 26 August 2020, the Settlement Agreement had only been signed by Mr Ng and had not been signed by the other parties. Mr Ng confirmed in his testimony that the Settlement Agreement was backdated, but he was unable to give a clear answer as to when it was actually reached.[16]

13 The Settlement Agreement contained the following key terms:

> 1. [The Plaintiff and Mr Ng] consent to Final Judgment being entered against them in [Suit 417] at 100% liability in the sum of $3,010,264.53 as damages plus interest. However, [the Developer and the Builder] consent to the stay of execution of this Judgment as against [the Plaintiff and Mr Ng];
>
> 2. [The Developer and the Builder] agree to take over conduct of the matter in terms of recovery to continue proceedings

[14] SOC at para 16.

[15] 1AB 263–264.

[16] 17 May 2022 Transcript, p 108 lines 3–13; p 111 lines 8–11.

> against [the Defendant] for indemnity under [the Policy] ("QBE Proceedings")..."
>
> 3. The Defendants agree to cooperate with the Plaintiffs in the QBE Proceedings;
>
> 4. Etiqa to bear the costs of the QBE Proceedings

The Policy

14 The plaintiff seeks coverage from the defendant pursuant to the Policy, in respect of its liability under the Consent Judgment. The plaintiff is seeking the sum of $2m, rather than the full sum of around $3m, because $2m is the maximum coverage under the Policy.[17] I now set out the relevant terms of the Policy.[18]

15 Clauses 2 and 3 of the Policy provide the situations in which cover will be provided to the plaintiff:

> **2. <u>COVER</u>**
>
> 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**;
>
> 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**

[17] SOC at para 21.

[18] 1AB 124–147.

> and reported to **Us** during the **Period of Insurance** or, where applicable, during the extended reporting period.
>
> …
>
> **3. <u>SCOPE OF COVER</u>**
>
> 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.
>
> …

16 Clause 6 sets out certain exclusions to the coverage under the policy. The relevant exclusion in this case is contained in cl 6.5:

> **6. <u>Exclusions</u>**
>
> **We** will not pay for:
>
> …
>
> 6.5. **Intentional Acts (Fraudulent, Dishonest and Criminal Acts and Statutory Breaches)**
>
>> 6.5.1. any **Claim** directly or indirectly arising out of, in consequence of, or contributed to by an actual act or omission by **You** or **Your Employees**, contractors or consultants which was fraudulent, dishonest, malicious or criminal; and
>>
>> 6.5.2. any liability arising directly or indirectly out of, in consequence of, or contributed to by any wilful breach of any statute, regulation, contract or duty by **You** or **Your Employees**, contractors or consultants.

> …

17 Clause 7 then details the conditions of the policy. The relevant conditions to this case are contained in cl 7.7 and 7.13:

> **7. <u>Conditions</u>**
>
> …
>
> 7.7. **Claims Cooperation** – **You** will provide **Us** with all information and assistance that **We** may reasonably require to investigate and/or defend any **Claim** and/or circumstance.
>
> …
>
> 7.13 **Not to Admit, Negotiate or Repudiate – You** will not admit, negotiate or repudiate any **Claim**, fact and/or circumstance. **We** will not be liable for any **Claim**, fact or circumstance and/or any costs and expenses incurred without **Our** prior written consent. Provided that **You** comply with this condition, **We** shall not unreasonably withhold or delay any such consent.

18 Finally, cl 8 contains definitions for the terms that were used in the preceding clauses. The following are of note:

> …
>
> 8.1. **Claim** – means:
>
>> 8.1.1. the receipt by **You** of any written or verbal notice of demand for **Compensation** made by a third party against **You**;
>>
>> 8.1.2. any writ, statement of claim, summons, application or other originating legal or arbitral process, cross-claim, counter-claim or third or similar party notice served upon **You**.
>
> 8.2. **Compensation** – means monies paid or agreed to be paid by judgment, award or settlement for civil liability and/or costs

> of non-monetary civil relief, including any costs awarded against **You**.
>
> …
>
> 8.16. **You, Your, Yours** – means:
>
> > 8.16.1. the **Named Insured**;
> >
> > 8.16.2. any person who is, during the **Period of Insurance**, a principal, partner or director of the **Named Insured** but only in respect of work performed while a principal, partner or director of the **Named insured**;
> >
> > 8.16.3. any person who is, during the period of insurance, an **Employee** of the **Named Insured** but only in respect of work performed while an **Employee** of the **Named Insured**;
> >
> > …
>
> …

Issues to be determined

19 The plaintiff submits that it is entitled to coverage under the Policy, and that no exclusions apply.

20 The defendant submits that it is entitled to deny coverage to the plaintiff for three reasons:

> (a) The Policy does not cover the plaintiff's liability under the Consent Judgment when cll 2.1, 3.2 and 8.2 of the Policy are read together. This is because the plaintiff has not shown that the Settlement Agreement is reasonable, in that the plaintiff would have been liable for at least as much as the settlement amount even in the absence of a settlement, or shown that the settlement reasonably reflected the plaintiff's arguable liability to the Developer and Builder.[19]

[19] Defendant's Closing Submissions ("DCS") at para 99.

(b) The exclusion under cl 6.5 of the Policy applied because the Plaintiff's liability directly or indirectly arose out of, in consequence of, or was contributed to, by a dishonest omission and/or wilful breach of duty by Mr Ng.[20]

(c) The plaintiff breached cl 7.7, which is a condition precedent to coverage, when it failed to provide the Defendant "with all information and assistance that [the defendant] may reasonably require to investigate and/or defend any Claim and/or circumstance."[21]

21 I will deal with each of these contentions by the defendant as separate issues.

22 The plaintiff also submits that, in the event the court finds in favour of the defendant on any of these three issues, the court should recognise that there is public policy or public interest that weighs in favour of the plaintiff, which would militate against the defendant's exercise of its right to repudiate liability under the Policy.[22] I will deal with this submission as the fourth issue.

Issue 1: Does the Policy cover the plaintiff's liability under the Consent Judgment?

23 The defendant first submits that the plaintiff's liability under the Consent Judgment is not covered by the Policy and that when cll 2.1, 3.2 and 8.2 are read together, it is clear that the liability under the Consent Judgment does not fall within its scope of coverage.[23] The defendant argues that the

---

[20] DCS at para 178.

[21] DCS at para 250.

[22] Plaintiff's Reply Submissions ("PRS") at para 24.

[23] DCS at para 99.

plaintiff has failed to show that the Settlement Agreement was reasonable, in that the plaintiff would have been liable for at least as much as the settlement amount even in the absence of the Settlement Agreement, or that the Settlement Agreement reasonably reflected the plaintiff's arguable liability to the Developer and Builder.

24 The plaintiff's response is three-fold. First, this contention was not pleaded by the defendant.[24] Second, there is no express or implied term in the Policy which required the Consent Judgment to be reasonable for coverage under the Policy.[25] Third, in any case, the defendant was a party to Suit 147 and took part in the mediation, but did not object to the Settlement Agreement.[26]

The pleading objection

25 I will deal first with the plaintiff's objection that this contention was not pleaded by the defendant. It is well established that pleadings need only contain material facts. In *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1994] 3 SLR(R) 823 at [26], the Court of Appeal held (citing *In re Vandervell's Trusts (No 2); White v Vandervell Trustees Ltd* [1974] Ch 269): "It is sufficient for the pleader to state the material facts. [The pleader] need not state the legal result." In *Sharikat Logistics Pte Ltd v Ong Boon Chuan and others* [2011] SGHC 196 at [8], the court held that "[a] Statement of Claim must set out material facts, not opinion, and not evidence."

26 Whether the Policy covers the liability in respect of which the plaintiff seeks recovery is not a material fact. It involves the legal interpretation of the

24 Plaintiff's Closing Submissions ("PCS") at paras 17–19.

25 PCS at paras 21–24.

26 PCS at para 20.

various clauses of the Policy. There is therefore no need for this to be pleaded. The plaintiff itself has pleaded cll 2.1, 3.2 and 8.2 of the Policy at para 3 of its statement of claim ("SOC"). The defendant's position at para 6 of the defence is that para 3 of the SOC is not admitted. The plaintiff has also stated at para 21 of the SOC that it was entitled to be indemnified under the Policy against the Consent Judgment. In response, the defendant did not admit to this paragraph and put the plaintiff to strict proof thereof.[27] The defendant is therefore not precluded from making the argument that, on the proper interpretation of cll 2.1, 3.2 and 8.2, the plaintiff has not shown that it is entitled to coverage under the Policy. The legal burden of establishing that it is entitled to coverage under the clauses of the Policy, and establishing para 21 of the SOC, remains on the plaintiff.

27 In any case, the defendant made clear *prior to trial* that it would be making this legal submission. It did so in its Lead Counsel's Statement and at a Judge-led Pre-Trial Conference a month before the trial. The plaintiff did not raise any objections then. The defendant also made this submission in its written opening statement filed a week before the trial and again in its oral opening statement on the first day of trial.[28]

28 It cannot be said that the plaintiff was truly caught by surprise by this contention. The plaintiff was clearly aware of the defendant's position at least a month before the trial. If the plaintiff needed to adduce evidence to respond to this argument, it had the opportunity to do so. But it chose not to.

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[27] Defence at para 20.

[28] Defendant's Opening Statement at para 7(a); 17 May 2022 Transcript at p 9 lines 1–32.

The requirements of the Policy

29 I will deal next with the substantive issue of whether the Policy covers the plaintiff's liability under the Consent Judgment. The first aspect of this inquiry is to determine, through an interpretation of the Policy's clauses, what the plaintiff must show to establish coverage under the Policy.

Parties' submissions

(1) Defendant's submissions

30 The defendant submits that cll 2.1, 3.2 and 8.2 of the Policy, when read together, require that the insured party seeking coverage in respect of liability pursuant to a settlement agreement, show that the settlement was reasonable.[29] The defendant has two positions on what is a reasonable settlement.

31 The defendant's primary position is that the Policy requires the plaintiff to show that the Settlement Agreement is reasonable, in that the plaintiff would have been liable to the Developer and Builder even in the absence of the Settlement Agreement for at least as much as the settlement amount.[30]

32 In the defendant's submission, the analysis starts with cl 2.1, which states: "[defendant] will pay [plaintiff] … for … any legal liability to pay Compensation … *arising from any civil liability* resulting from a Claim for breach of professional duty in the conduct of [plaintiff's] Business" [emphasis added].

[29] DCS at paras 28–29.

[30] DCS at para 53.

33 Cl 8.2 defines "Compensation" as including monies agreed to be paid by judgment. Thus, the reference to "Compensation" in cl 2.1 would also include the plaintiff's liability under the Consent Judgment.

34 However, "Compensation" in cl 2.1, is distinct from the "civil liability" which it must arise from. Thus, the "Compensation" (liability under the Consent Judgment) in cl 2.1 must arise from "civil liability" in order to satisfy cl 2.1. The defendant relies on *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] EWHC 58 (Comm) ("*Enterprise Oil"*) to support its submission that the reference to "civil liability" in cl 2.1 means that the plaintiff must establish in these proceedings that it would have been liable to the Builder and Developer in Suit 417 for at least the amount of the Settlement Agreement.

35 In *Enterprise Oil,* the insured brought a claim against its insurer in respect of a tortious claim against it by a third party. The insured had settled the third party's claim. The court held at [27] that "in order to claim under a liability policy where the insured has *settled* the claim of the third party, the insured still has to demonstrate that it was or would have been liable to the third party" [emphasis in original]. On a construction of the relevant clause of the policy, the court found that the insured could not simply rely on the fact of the settlement agreement to demonstrate either liability or that the amount of settlement was reasonable. Thus, the insured had to establish that it would have been under an actual liability to the third party in respect of the alleged tort, for an amount at least that of the settlement agreement: *Enterprise Oil* at [195]. The relevant clause in *Enterprise Oil* (see [17]) provided that the insurer covered:

> … all sums which the Insured may be obligated to pay by reason of liability imposed on the Insured by law or assumed under Contract or Agreement (written or oral) or otherwise*, on account of personal injury and/or bodily injury and/or loss of life and/or loss of and/or damage to tangible property, (including loss of use*

> *following physical loss of or damage to property or persons)* arising out of an occurrence occurring during the period of this Policy, all in connection with the Offshore/Marine and/or waterborne and/or airborne operations of the Insured wheresoever occurring.
>
> [emphasis added]

The defendant argues that "on account of personal injury" in the emphasised portion above was equivalent to "arising from any civil liability resulting from a Claim for breach of your professional duty in the conduct of Your Business" in cl 2.1.[31]

36 The defendant also refers to clause 3.2 which states that the Policy does not cover liability arising from a duty of care to provide professional services in the conduct of the plaintiff's business, 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". The defendant submits that the Consent Judgment is based on the Settlement Agreement, which is an agreement by which the plaintiff assumed liability by consenting to 100% liability in Suit 417. The defendant contends that the plain words of the carve-out in cl 3.2 are, on a proper construction, wide enough to encompass the Settlement Agreement and Consent Judgment.[32]

37 The defendant's secondary position is that a proper construction of cl 2.1 of the Policy requires the plaintiff to show that the settlement was reasonable, in that it reasonably reflected the plaintiff's arguable liability to the Developer and Builder – even if short of showing that it would have been 100% liable.[33]

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31 DCS at para 31.

32 DCS at paras 50–51.

33 DCS at para 54.

38 The defendant relies on the Court of Appeal's decision in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") for the principles governing whether a settlement agreement is reasonable in this regard. The Court of Appeal held at [1] and [41]:

> 1. … when a party intends to rely on a settlement as a basis to recover a claim in damages against an upstream defaulter in a liability chain, the courts have to strike an appropriate balance between upholding settlements and assessing the reasonableness of "imposing" a settlement on the ultimate payor, who may not strictly be privy to that settlement. It cannot be right for defaulting parties to be invariably bound by settlements which they are not privy to and have not been consulted about, particularly if liability is still an issue to be resolved.
>
> …
>
> 41. … The broad principle at play is that the claimant must prove its actual loss and, to this extent, the courts adopt the pragmatic approach that if the settlement is reasonably reached and reasonable in nature, the amount agreed therein will be regarded as accurately reflecting the actual loss suffered by the downstream claimant. Indeed, the criterion of "reasonableness" permeates the judicial inquiry as to whether a settlement agreement can be relied upon against an upstream defendant as accurately reflecting the actual losses suffered by a downstream claimant, and the predominant factor taken into account by the courts in assessing reasonableness appears to be whether legal advice was undertaken."

(2) Plaintiff's submissions

39 The plaintiff's main response is that the Policy covers liability under the Consent Judgment for the following reasons:[34]

(a) Clause 8.2 of the Policy covers "monies paid or agreed to be paid by judgment, award or settlement for civil liability … against [the plaintiff]." This would include liability under the Consent Judgment.

[34] PCS at paras 22–23.

(b) A consent judgment is not a liability assumed "under any express warranty, guarantee, representation, hold harmless agreement, indemnity contract or similar agreement", and therefore cl 3.2 does not apply.

(c) There is no express or implied term in the Policy which requires any settlement agreement reached by the plaintiff to be reasonable before coverage under the Policy is engaged.

My decision

40 Clause 8.2 of the Policy defines "Compensation" as "monies paid or agreed to be paid by judgment, award or settlement for civil liability … awarded against [the plaintiff]" (see [18] above). This would include the plaintiff's liability to pay monies to the Developer and Builder under the Consent Judgment.

41 However, cl 2.1 of the Policy does not simply state that the defendant will indemnify the plaintiff against any "Compensation". Clause 2.1 states that the defendant will cover "any legal liability to pay Compensation …. *arising from any civil liability resulting from a Claim for breach of professional duty in the conduct of [the plaintiff's business]* …" [emphasis added] (see [15] above). I agree with the defendant that on a proper construction of cl 2.1, the "legal liability" to pay "Compensation" is distinct from the "civil liability" which it must arise from.

42 Thus, to be covered under cl 2.1, the liability to pay monies under the Consent Judgment must arise from "civil liability". It is insufficient for the plaintiff to point to the Consent Judgment as being covered by cl 8.2 to seek coverage under the Policy. The sum that the plaintiff was required to pay the

Builder and Developer under the Consent Judgment is simply the "Compensation" that the plaintiff must pay. To fulfil clause 2.1, the plaintiff must also establish that civil liability gave rise to its obligation to pay "Compensation".

43 Clause 3 sets out the types of civil liability that the Policy covers. The plaintiff's claim is made in respect of "Contractual Liability (Tort Liability)", defined in cl 3.2 as liability arising from a "duty of care to provide professional services in the conduct of [the plaintiff's] Business". Pertinently, cl 3.2 further states that coverage does not extend to 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*" [emphasis added] (see [15] above). Thus, where liability is *assumed* pursuant to a "similar agreement" within the meaning of cl 3.2, that liability will only be covered, if it would have attached in the absence of that agreement.

44 The plaintiff asserts that a Consent Judgment is not a "similar agreement" for the purposes of cl 3.2. However, it does not explain why that is so. Nor does it explain why the Settlement Agreement is not such a "similar agreement".[35] I am unable to agree with the plaintiff. The agreements listed in cl 3.2, such as "express warranty", "guarantee", "representation" or "indemnity contract", are essentially agreements for one party to indemnify another. They are wide enough to cover agreements where a party has voluntarily taken on or takes on a liability that may not otherwise exist as a matter of law. This is what the Settlement Agreement is. On its plain words, cl 3.2 could thus include all means by which the plaintiff voluntarily assumes liability, such as by way of a

35 PCS at para 23.

settlement agreement. I find that the Settlement Agreement falls under cl 3.2 as a "similar agreement".

45 This reading is reinforced by cl 7.13 of the Policy, which states that the plaintiff will not admit, negotiate, or repudiate any claim, fact and/or circumstance, and that defendant will not be liable for any claim, fact or circumstances and/or costs and expenses without the defendant's prior written consent. This makes clear that the defendant will not cover any liability which is assumed by the plaintiff, including by way of settlement agreement, unless it consents to such assumption.

46 I hence find that the plaintiff's liability to pay monies under the Consent Judgment was assumed pursuant to a "similar agreement" under cl 3.2. Therefore, as per cl 3.2, the plaintiff must show that this liability to pay monies under the Consent Judgment would have attached in the absence of the Settlement Agreement. Otherwise, the plaintiff will not have satisfied the requirement in cl 2.1 that compensation must arise from civil liability to be covered.

47 The question which follows is, what does it mean to prove that the liability to pay monies under the Consent Judgment would have attached in the absence of the Settlement Agreement? The defendant's primary position is that the plaintiff must show that the settlement is reasonable, in that it would otherwise have still been liable (even in the absence of a settlement) for at least as much as the settlement amount. The defendant's alternative position is that the plaintiff must show that the settlement was reasonable in that it reasonably reflected the plaintiff's arguable liability to the Developer and Builder, even if short of showing that it would have been 100% liable.

48 In my view, neither of the defendant's positions have satisfactorily addressed the question. I make two points about what I find must be proven by the plaintiff.

49 In my analysis, the plaintiff must show actual, as opposed to arguable, tortious liability. The primary reason for this is the wording of cl 3.2. The clause excludes civil liability arising from agreements unless "such liability *would* attach in the absence of any such agreement". Notably, it does not refer to "liability [that] *could* attach ...". This makes it clear that to satisfy cl 3.2, the plaintiff must establish that it was under an actual liability independent of the Settlement Agreement. Simply proving that there was an arguable liability would not suffice for the purposes of cl 3.2. This interpretation of cl 3.2 is also in line with the general principle of insurance law, whereby "liability insurance provides an indemnity against actual established liability, as opposed to mere allegations": John Birds, Ben Lynch & Simon Paul, *MacGillivray on Insurance Law: Relating to all Risks other than Marine* (Sweet & Maxwell, 15th Ed, 2022) at para 28-006.

50 However, the fact that the plaintiff must show actual liability does not necessarily mean that the plaintiff must show, on a balance of probabilities, that every element of the tortious claim has been established and that damages would be at least as much as the settlement amount. Instead, the court's holding in *Britestone* at [41] provides guidance on how the plaintiff could go about establishing such actual liability. Admittedly, *Britestone* concerned a different context. There, the issue was whether the settlement amount in an agreement between the plaintiff and a third party could be recovered from the defendant as losses for breach of contract. The court laid down the principle that if a settlement is reasonably reached and reasonable in nature, the amount agreed

therein will be regarded as accurately reflecting the actual loss suffered by the downstream plaintiff. The court described this approach as pragmatic.

51 In my view, a similarly pragmatic approach should be adopted when interpreting cl 3.2 of the Policy. Where an insured has settled a claim for alleged professional negligence, in order to satisfy cl 3.2 and show that the liability would have attached in the absence of the settlement agreement, the insured can simply establish that the settlement agreement was reasonable. While the insured could also prove reasonableness by proving on a balance of probabilities that his own professional negligence would have led to liability in the amount of the settlement sum, that would not be the only manner of proving reasonableness.

52 Thus, in my judgment, in determining whether the settlement agreement is reasonable for the purposes of cl 3.2, the non-exhaustive list of relevant considerations set out by the court in *Britestone* at [54] would be relevant. This includes (amongst others):

(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.

53 In my view, the above considerations set out by the Court of Appeal in *Britestone* provide for a more nuanced and comprehensive analysis of whether the settlement reflects actual liability, as compared to a more narrow and mechanical requirement that the insured show on a balance of probabilities that he would have been liable for at least as much as the settlement amount. This also avoids the potentially difficult and awkward situation whereby an insured has to establish on a balance of probabilities each element of *his own liability*. As such, I have interpreted cl 3.2 in this way.

54 To summarise, to show that cl 3.2 and 2.1 have been satisfied and that it is entitled to coverage, the plaintiff must show that the Settlement Agreement was reasonable, whether by establishing its tortious liability on a balance of probabilities or in accordance with the considerations from *Britestone*.

Applicability of Hartford Insurance

55 For completeness of analysis, I will examine the applicability of the Court of Appeal's decision in *Hartford Insurance Co (Singapore) Ltd (formerly known as The People's Insurance Co Ltd) v Chiu Teng Construction Pte Ltd* [2002] 1 SLR(R) 152 ("*Hartford Insurance*"). The respondent there, Chiu Teng Construction Co Pte Ltd ("Chiu Teng"), was the main contractor of a housing development. Some of the houses were damaged due to works carried out by

Brentford Construction (S) Pte Ltd ("Brentford"). Brentford went into liquidation. Chiu Teng brought a claim against Brentford and obtained interlocutory judgment against it with the consent of the Official Receiver. An assessment of damages was then conducted, with witnesses called on behalf of Chui Teng to give evidence. The Official Receiver chose not to participate in the assessment. Judgment was granted in favour of Chiu Teng against Brentford for a certain judgment sum.

56 Brentford was insured by the appellant, Hartford Insurance Co (Singapore) Ltd ("Hartford"), and was indemnified against "such sums which Brentford shall become liable to pay as damages" consequent upon accidental loss or damage to property belonging to third parties occurring in direct connection with the construction or erection works carried out by Brentford. After obtaining judgment against Brentford, Chiu Teng then commenced proceedings against Hartford for that judgment sum, stepping into the shoes of Brentford pursuant to s 1(1) of the English Third Parties (Rights against Insurers) Act 1930. In those proceedings, Hartford argued that the judgment sum against Brentford was not binding on them, and that Chiu Teng should prove all over again the quantum of their loss. Both the High Court and the Court of Appeal rejected this argument. The Court of Appeal stated in *Hartford Insurance* at [27]–[29] that:

> We do not think it should make a difference whether the judgment obtained against the insured is after a trial or on admission, so long as notice was given to the insurer to defend the claim of the injured third party if it wished. … It is absurd to require an insured to contest a claim, or the quantum thereof, if he does not have any basis to contest it.
>
> … we agree with the approach taken by the Outer House, which broadly followed the opinion expressed by Mellish LJ in *Parker v Lewis* (see [10] above). It said [2001 SLT 347 at [9] and [10]]:

> Where the insurer, on the other hand, forms the view that he is not liable to indemnify his insured, then he still has at least two options. The first is to refuse or withdraw cover in respect of any defence to the pursuer's action. In that event, if the pursuer proceeds with his action and secures decree against the person thought to be insured, the amount of the decree will be determinative of the liability of the insured to the pursuer unless and until that decree is reduced on the grounds of, for example, fraud or collusion. The insurer cannot normally re-open the question of the amount of the liability in circumstances where he has declined to enter the process and fund the defence to the action or has withdrawn his instructions and funding in the course of the action. The question of liability between the pursuer and the insured has to be litigated in an action between those two parties and a decree in that action has to be seen as a final determination of that liability so long as the decree stands unreduced.
>
> The second option is for the insurer to offer to instruct the defence to the action but make it clear ab ante, or at least as soon as possible, both to the pursuer and the insured, that his position is to remain that he is not liable under the policy.

The choice is entirely for the insurer. If it chooses not to intervene, then, if a judgment is obtained against the insured, it would have to indemnify the insured if the policy defences pleaded by it should fail. …

57 On the face of these remarks, a question arises whether the fact that the plaintiff had obtained the Consent Judgment was itself sufficient to entitle it to coverage under the Policy. The plaintiff did not cite *Hartford Insurance* in its opening statement or in any of its written submissions. After closing and reply submissions were filed, parties were invited to provide their views on the impact, if any, of *Hartford Insurance* at [27]–[29] on their case.

58 Having considered parties' further submissions, I agree with the defendant that *Hartford Insurance* does not assist the plaintiff in this case.

59 First, the language of the indemnifying provisions in *Hartford Insurance* and the Policy here is wholly different. The Court of Appeal in *Hartford Insurance* recognised that the issue of whether the insured succeeded was ultimately a question of the specific contractual obligations, holding at [24] that:

> … As we see it, *the real point is one of contract*. The question to ask is, following from the first judgment, is there a sum which Brentford is legally liable to pay to Chiu Teng as damages. The answer is a definite yes. The wording of the policy is clear: the insurer (Hartford) shall indemnify the insured (Brentford) against such sums which Brentford shall become legally liable to pay as damages. …
>
> [emphasis added]

60 In *Hartford Insurance,* the indemnifying provision could be seen to be broader than that in the present case. Hartford was to indemnify Brentford against "such sums which Brentford shall become legally liable to pay as damages": *Hartford Insurance* at [23]. In contrast, cl 2.1 of the Policy provides that the defendant will pay the plaintiff for "any legal liability to pay Compensation … arising from any civil liability resulting from a Claim for breach of professional duty in the conduct of Your Business", and cl 3.2 provides that coverage of civil liability "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 added]. Thus, there is a significant differentiation between the relevant indemnifying provisions in *Hartford Insurance* and the Policy.

61 Second, in contrast to the case in *Hartford Insurance* where the insured did not contest its liability, the plaintiff and Mr Ng did and continued to believe that independent of the Settlement Agreement, they were not responsible for the Damage. The evidence on this is set out at [67]–[71] below. The evidence before

the court, evidence which was brought solely for the purposes of this suit, is that there was no objective basis for the plaintiff and Mr Ng to consent to the 100% liability for Suit 417 that they assumed under the Settlement Agreement and Consent Judgment.

62 The observation in *Hartford Insurance* at [27] that "[w]e do not think it should make a difference whether the judgment obtained against the insured is after a trial or on admission, so long as notice was given to the insurer to defend the claim of the injured third party if it wished" also does not assist the plaintiff.

(a) In *Hartford,* there was no dispute over liability and the quantum of damages was arrived at after an assessment of damages involving witnesses. In this case, Suit 417 was never judicially determined because the Developer, the Builder, the plaintiff and Mr Ng reached a private settlement amongst themselves on both liability and quantum (which Ng effectively admitted was a settlement of convenience). It is not clear that such a situation fell within the contemplation of the Court of Appeal in *Hartford Insurance*.

(b) Moreover, the observations at the start of [27] should be read with the further statements in [27], where the court also observed that "It is absurd to require an insured to contest a claim, or the quantum thereof, if he does not have any basis to contest it." In other words, the observation that a judgment obtained after a trial is the same as a judgment obtained on admission, was made in reference to an admission where there is no basis to contest a claim.

(i) In its response to queries from the court on *Hartford Insurance*, the plaintiff submitted that it was absurd for it to contest the claim in Suit 417 when it did not have any basis to

contest it, as the Developer and the Builder had strong evidence against it and the defendant's expert reports disclosed that the plaintiff was negligent. It was thus submitted that the plaintiff had no ground, basis or evidence to refute such reports and evidence. However, such a submission is completely unsupported by the evidence in this case, and is in fact, contradicted by the evidence of plaintiff's only witness, Mr Ng, which I will return to below.

(ii) In this case, by Mr Ng's evidence, the plaintiff had a basis to contest the claim in Suit 417. However, the plaintiff and Mr Ng decided not to contest the claim, despite his view that they were not liable, because, on Mr Ng's evidence, he lacked the time and money to fight the claim (see below at [71]).

63 While *Hartford Insurance* at [27]–[29] did not contemplate a case as the present, where both liability and quantum were settled, this was the fact scenario that was before the Court of Appeal in *Britestone*. While *Britestone* did not arise specifically in the context of a claim by an insured against the insurer, it did set out an approach to strike the appropriate balance between the competing interests of safeguarding a party against unreasonably settled third party claims, and ensuring that cases which have been settled need not be re-litigated. I have found the approach in *Britestone* helpful, and have thus applied it above.

64 In summary, for the above reasons, I do not find that *Hartford Insurance* applies to the present case.

Would the plaintiff have been liable to the Developer and Builder in Suit 417 in the absence of the Settlement Agreement?

65 I turn next to the question, whether on the evidence, the plaintiff would have been liable to the Developer and the Builder in Suit 417, in the absence of the Settlement Agreement. As per [54] above, the question can alternatively be framed as whether the Settlement Agreement was reasonable.

Parties' submissions

(1) Defendant's submissions

66 The defendant relies on the following evidence in support of its submission that the plaintiff's liability would not have attached in the absence of the Settlement Agreement.

67 In Suit 417, the plaintiff denied all liability to the Builder and the Developer.[36] Even in Suit 376, the plaintiff has taken the position that other parties were liable for the Damage. Mr Ng's evidence is that:

(a) Although the Owners received compensation from the Developers, the monies received were not used for extensive repairs. As such it was inevitable that damage was caused by ground settlement when the 2nd Phase continued in 2015.[37]

(b) The Damage was mainly attributable to the installation of sheet piles done in accordance with step 2 of the ERSS sequence.

[36] 1AB 202.

[37] Mr Ng's AEIC at para 10.

"[The Builder] also assumed responsibility for the damage" caused to the Two Properties.[38]

(c) Any omission by the Builder from the ERSS was minor and limited to the omission of the installation of raking struts, which did not cause or contribute to the Damage since the rear boundary wall is a brick wall which does not take lateral weight.[39]

(d) Mr Ng suspects that even though there was a stop work order, "there were any [*sic*] further excavation works happening at the Project Site, which in turn caused the cracks at 1 Greenleaf Lane and 3 Greenleaf Lane".[40]

(e) If the RTO was alive, he could have testified that the plaintiff could not have been at fault because the ERSS Plan complied with BCA requirements.[41]

(f) The Project also "involved various other parties including ERSS Consultants who were on site to check the Works".[42] ERSS Consultants were the plaintiff's subcontractors.

(g) It cannot be said that the plaintiff is the sole cause or 100% at fault for the Damage.[43]

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[38] Mr Ng's AEIC at para 23.

[39] Mr Ng's AEIC at para 24, 27, 30.

[40] Mr Ng's AEIC at para 34.

[41] Mr Ng's AEIC at para 41.

[42] Mr Ng's AEIC at paras 42–43.

[43] 17 May 2022 Transcript p 35.

68 Mr Ng's evidence that at the very least, the Builder contributed to the Damage, is supported by the findings of the defendant's expert, Mr Patterson-Kane. Mr Patterson-Kane's assessment is that the over-excavation of the soil by the Builder was the initial cause of the Damage, and that was made worse because of ineffective diagonal struts and lack of raking struts at the rear boundary wall of the Two Properties.[44] In other words, Mr Patterson-Kane's finding is that, at the least, the Builder was partially responsible for the Damage.

69 In addition, Mr Ng accepted that the plaintiff had not:

(a) offered any explanation or provided any evidence as to why there was a complete turnaround from denying all liability in its defence in Suit 417 to accepting 100% liability in the Settlement Agreement;[45]

(b) provided evidence that the plaintiff or Mr Ng would likely have been found liable in Suit 417;[46]

(c) shown it would likely have been liable in Suit 417 for at least as much as $3m (the amount in the Settlement Agreement);[47] or

(d) shown that the settlement agreement was a reasonable one.[48]

70 In fact, Mr Ng confirmed in cross-examination that he did not believe that he and the plaintiff were liable to the Developer and the Builder:[49]

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44 8AB 215.

45 17 May 2022 Transcript at p 51 lines 23–27.

46 17 May 2022 Transcript at p 52 lines 1–5.

47 17 May 2022 Transcript at p 52 lines 16–21.

48 17 May 2022 Transcript at p 52 lines 22–29.

49 17 May 2022 Transcript p 41 lines 12-17.

> Q: Would it be fair for me to say, Mr Ng, that you and SYT actually denied all liability to the developer and the builder in your defence, correct?
>
> A: Yes.
>
> Q: And both SYT and yourself truly believe you were not liable to the builder and EDC, correct?
>
> A: Yes.

71 When asked why he entered the Settlement Agreement and consented to the Consent Judgment, Mr Ng replied:[50]

> Q: So what was your understanding of what Clause 2 [of the Settlement Agreement] is meant to capture?
>
> A: To help the developers to recover the money.
>
> Q: … why do you consent to the judgment.
>
> A: Because in my personal capacity, I don't have the resources in terms of time for money without the backing of the insurance company to fight myself. So---so I judged it and I make a decision to accept the settlement agreement.

72 The defendant submits that the above is direct evidence from Mr Ng that the Settlement Agreement was *not* entered into because he considered there to be a genuine liability on the part of himself and the plaintiff.

73 The defendant finally submits that Mr Ng's evidence explains certain unusual features in the Settlement Agreement, which are set out below:

(a) Clause 1: The Developer and Builder consent to the stay of execution of the Consent Judgment, as against plaintiff and Mr Ng, with no end date specified for the stay.

50 17 May 2022 Transcript at p 48 line 32 to p 49 line 1, and p 106 lines 26–32.

(b) Clause 2: The Developer and Builder agree to take over conduct of the matter in terms of recovery, which is to continue proceedings against the defendant for indemnity under the Policy. The plaintiff's lawyers in Suit 376 are the lawyers who represented the Developer and Builder in Suit 417.

(c) Clause 3: The plaintiff and Mr Ng agree to cooperate with the Developer and Builder in the proceedings against the defendant.

(d) Clause 4: Etiqa, the insurers of the Developer and Builder, are to bear the costs of the proceedings against the defendant.

(2) Plaintiff's submissions

74 The plaintiff responds that liability under the Consent Judgment would attach even in the absence of the Settlement Agreement, as it was undisputed that the plaintiff was negligent and/or breached the contract with the Builders in respect of the ERSS works for the Project.[51]

75 In its written submissions, the plaintiff referred to findings in a report by a Mr Ng Soon Hua to support its claim that the plaintiff was negligent.[52] However, the plaintiff did not call Mr Ng Soon Hua to give evidence.

My decision

76 The plaintiff's reliance on the report by Mr Ng Soon Hua was misplaced. The plaintiff called Mr Ng as its one and only witness. Importantly, his evidence as set out at [67]–[71] above contradicts the plaintiff's submission that liability

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51 PCS at para 23.

52 PRS at para 6.

under the Consent Judgment would have attached in the absence of the Settlement Agreement.

77 Mr Ng's evidence in both Suit 417 and Suit 376 is that the plaintiff was not at fault for the Damage, and that at the least, the Builder and other parties contributed to the Damage. This evidence is consistent with the evidence of Mr Patterson-Kane as noted at [68] above. Critically, Mr Ng also testified that he and the plaintiff actually denied all liability to the Developer and the Builder, that they truly believed that they were not liable to the Builder and Developer, and that he entered the Settlement Agreement, not because he assessed that he or the plaintiff was likely be found liable in Suit 417, but to help the developers recover the money and because he did not have resources to "fight" the claim without the backing of the defendant (see [71] above). Returning to the factors set out in *Britestone* at [54], there has been no evidence provided that showed that the Settlement Agreement was reasonable. There is no evidence on the content of the negotiations, whether they were conducted *bona fide*, or the assessment made then of the prospects of the success of the claim. On the evidence before me, it could not be said that the settlement figure was objectively assessed and properly calibrated against the context of the entire factual matrix. Far from it, the evidence shows the contrary.

78 Consequently, I find that the plaintiff has not proven that liability under the Consent Judgment would have attached in the absence of the Settlement Agreement. As I have determined above, this is a requirement for coverage under cl 3.2 read with cl 2.1 of the Policy.

79 I would add that I do not find merit in the plaintiff's submission that the defendant ought to have objected to the Settlement Agreement, either at the point of mediation or when Consent Judgment was entered.[53]

80 The unchallenged evidence of Ms Shirlene Carol Fernz Ak Vincent ("Ms Vincent"), Claims Litigation Manager of the defendant, is that all the defendant knew at the end of the mediation was that it was unsuccessful, that is, there was no *prima facie* settlement. The defendant was neither privy to how the settlement terms came about, nor could it assume what the settlement terms were in the absence of a fully signed settlement agreement.

81 I also agree with the defendant that as it had already denied coverage by the time of the Consent Judgment, it was not for the defendant to object to the Consent Judgment or advise the plaintiff, which was duly represented legally, on how to deal with the claims from the Developer and Builder.

82 As this is a threshold issue for the plaintiff's claim, the claim fails on this basis alone. For completeness, I nevertheless examine the other two issues raised by the defendant.

Issue 2: Was there a breach of cl 6.5?

83 The defendant also submits that the plaintiff is not entitled to coverage because:

(a) the claim against the plaintiff arose out of, or was contributed to by, an omission by Mr Ng that was dishonest (cl 6.5.1 of the Policy); or

[53] PCS at para 20.

(b) the plaintiff's liability arose out of, or was contributed to by, a wilful breach of duty by Mr Ng (cl 6.5.2 of the Policy).

Parties' submissions

Defendant's submissions

84 The defendant relies on *Griffin Travel Pte Ltd v Nagender Rao Chilkuri and others* [2014] SGHC 205 ("*Griffin Travel*") at [410] and [412] for the meaning of "dishonesty". The court in *Griffin Travel* noted that the plain and ordinary meaning of dishonesty was "deceitfulness shown in someone's character or behaviour". As for wilfulness, the defendant submits that "… the person responsible for wilful misconduct knows and appreciates that it is wrong conduct on his part in the circumstances to do or omit to do a particular thing, or acts with reckless carelessness, not caring what the results of his carelessness may be": *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 2 SLR(R) 897 *("Marine Centre Holdings*") at [22].

85 Annex C Forms were forms that the Builder, QP(S) (Mr Ng in this case) and QP(Geo)(S) were to complete and submit to BCA, before moving to the next construction stage under the ERSS plans. Section B2 of the Annex C Forms provided two option boxes for Mr Ng to tick:[54]

(a) One box stated: "We are satisfied that the constructed ERSS is fully in accordance with the approved plans. We hereby grant approval for the builder to proceed to the next construction stage …".

[54] 6AB 1.

(b) The other box stated: "There are changes to the approved plan, which in our opinion do not require a re-design of ERSS. We hereby grant approval to the builder to proceed to the next construction stage …".

86 In this case, the Builder had not installed raking struts before commencing excavation. This was a deviation from the approved ERSS plans. Even though Mr Ng could have indicated in the Annex C Forms that there were changes to the approved plan by ticking the second option, he did not do so.

87 The QP(S) was also required to inform BCA on a monthly basis the results of monitoring the ground movements at the site using Annex E Forms. In none of the Annex E Forms that were electronically completed and signed by Mr Ng, or their covering letters which were also digitally signed by Mr Ng, did he raise that the Builder had deviated from the approved ERSS plans by failing to install raking struts. This was despite the fact that the Annex E Forms required him to confirm that the works were built in accordance with BCA approved plans.[55]

88 The defendant submits that:

(a) Mr Ng's failure to identify the deviation from the ERSS plans in the Annex C Forms (particularly the first Annex C Form dated 7 October 2015), as well as the Annex E Forms and covering letters, was a dishonest omission. Mr Ng knew that he was falsely declaring the fact that the works were fully in compliance with the approved ERSS plans, but despite this, chose to do so anyway.

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[55] DCS at paras 153–160.

(b) Mr Ng's failure to identify the deviation from the ERSS plans in the Annex C Forms, as well as the Annex E Forms and covering letters, was a wilful breach of duty. Mr Ng was under a duty to complete the forms truthfully and accurately, given the confirmations required to be given by him. Notwithstanding so, he declared falsely that the works were fully in compliance with the approved ERSS plans, knowing that it was wrong to do so and without caring what the results of his conduct may be.

89 The defendant also relies on Mr Patterson-Kane's expert reports. In total, he provided three reports: an Expert Report on Damage to 1 & 3 Greenleaf Lane dated 22 February 2022 ("the 1st Report"), an Expert Report on Damage to 1 & 3 Greenleaf Lane dated 20 July 2018 and a Confidentiality Report on the QP for the ERSS at Greenleaf Road and Greenleaf Drive dated 24 July 2018 ("the 3rd Report"). Specifically, the defendant relies on Mr Patterson-Kane's critique of Mr Ng's actions at para 7.3 of the 1st Report and para 5 of the 3rd Report.[56]

90 At para 7.3 of the 1st Report, Mr Patterson-Kane stated that while Mr Ng's failure to issue instructions to the Builder to cease and rectify non-compliances could be classified as simply negligence, the failure to notify BCA of such non-compliances was a breach of regulations under the Building Control Act 1989 (2020 Rev Ed) (the "BC Act") and was therefore dishonest.[57]

91 At para 5 of the 3rd Report, Mr Patterson-Kane stated that:[58]

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56 DCS at paras 132–133.

57 AEIC of Mr Kennth James Patterson-Kane ("Mr Patterson-Kane's AEIC") at p 53.

58 8AB 168.

(a) Mr Ng carried out a consistent series of actions and inactions, which "can only have been intentional attempts to hide the Builder's breaches of the approved ERSS from BCA".

(b) Mr Ng's reason for doing so "could only be to be [*sic*] reduce the costs of the ERSS, and perhaps also its construction period, so that [Mr Ng] would be favourably viewed by the Builder, with the hope that this would result in future engagements".

(c) In doing so, Mr Ng, "performed his supervision duties incompetently, unprofessionally and dishonestly".

92 During cross-examination, Mr Patterson-Kane explained that where he referred to Mr Ng being "dishonest", at para 7.3 of the 1st Report and para 5 of the 3rd Report, he considered that the word "illegal" would better convey what he meant.[59] He later clarified during re-examination he would use both "dishonest" and "illegal" (to the extent there was a breach of the BC Act regulations) to classify the actions taken by Mr Ng.[60]

Plaintiff's submissions

93 The plaintiff cites, *inter alia*, *AIC Ltd v ITS Testing Services (UK) Ltd (The "Kriti Palm")* [2007] 1 Lloyd's Rep 555 at [258] which referred to Devlin J's remarks (in *Armstong v Strain* [1951] 1 TLR 856) that for an action of deceit, there must be knowledge in the narrow sense that the defendant is fully conscious of the facts, and conscious knowledge of falsity must always amount to dishonesty. The plaintiff also cites *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 which accepted at [52]–[53]

[59] 19 May 2022 Transcript at p 52 lines 22–29.

[60] 19 May 2022 Transcript at p 54 lines 21–25.

(albeit in a different context), the test from *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 which provides that dishonesty is established where: the party's conduct was dishonest by the ordinary standards of reasonable and honest people; and the party realised that by those standards his conduct was dishonest.

94 The plaintiff also relies on Mr Ng's evidence that his failure to report or his supervision of works were not done in a manner that was dishonest or a wilful breach of duty. Mr Ng explained that:

(a) BCA officers regularly came to the site of the Project to ensure that work was done in accordance with the approved drawings, yet they did not require the Builder or the plaintiff to rectify any breaches.[61]

(b) Any deviation by the Builder from the approved ERSS plans in not putting in raking struts before excavation was minor.[62] While he could have ticked the second box in Section B2 of the Annex C Forms indicating that there were changes to the approved plan, he did not do so as he regarded the deviation to be minor.[63]

(c) The Damage could not have been avoided even if he had informed BCA about this deviation. This is because the raking struts rested on a boundary wall, which was a non-structural wall. They would thus not have any effect on stabilising the neighbouring Two Properties. In fact, the plaintiff subsequently made further submissions to BCA for the omission of the installation of raking struts, which were approved on

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61 Mr Ng's AEIC at paras 9 and 41.

62 Mr Ng's AEIC at para 24.

63 17 May 2022 Transcript at p 68 lines 8–14.

7 March 2019. Two accredited checks also confirmed that the raking struts were not necessary.[64] This supported his view that the deviations were minor.

95 The plaintiff also submits that it would be against the business purpose of the Policy (as a professional indemnity policy) for cl 6.5 to be read such that coverage can be denied as long as there is a dishonest omission which contributed to the claim.[65] The plaintiff states that it took up the Policy to protect itself from breach of professional duty in the course of practice. It is against the business purpose of the Policy for cl 6.5 to be read such that coverage can be denied as long as there is a dishonest omission which contributed to the claim.

My decision

96 To start, I find the plaintiff's submission on the interpretation of cl 6.5 to be without merit. It is trite law that the starting point in contractual interpretation is to look to the text of the contractual document: *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]. What the text of cl 6.5 states, is plain and clear. It excludes coverage where there is "any Claim directly or indirectly *arising out of*, in consequence of, *or contributed to by* an actual act or omission by You or Your Employees, contractors or consultants which was fraudulent, dishonest …" [emphasis added].

97 Moreover, the court may have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction*

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64 Mr Ng's AEIC at paras 27–30.

65 PRS at para 14.

Pte Ltd [2008] 3 SLR(R) 1029 at [125], [128] and [129]. What the plaintiff is seeking to impute here is not a context that is relevant to the interpretation of cl 6.5, but simply the plaintiff's apparent subjective intent in taking up the Policy. At the same time, it is a key part of the commercial context that an insurer sets out, at a particular price, what it is willing to insure and the conditions for coverage. Such conditions are contained in the Policy, which the plaintiff agreed to.

98 I turn next to whether cl 6.5 was breached on the facts. The undisputed facts are that Mr Ng was aware that the Builder did not install raking struts before proceeding with excavation, and that he could have indicated in the Annex C Forms or the Annex E Forms and their covering letters that there was deviation from the ERSS plans but did not do so.

99 The question is whether, in light of the above facts, Mr Ng was not just negligent or incompetent, but dishonest or committed a wilful breach of duty. Based on the authorities cited by both the plaintiff and defendant, it is clear that dishonesty requires some level of subjective appreciation that what one is doing is wrong. An examination of what Mr Ng himself believed at the time is therefore necessary.

100 Mr Ng's evidence is that he genuinely believed that the absence of raking struts prior to excavation was a minor deviation from the ERSS plans that did not need to be reported. His evidence is that the deviation was minor and would not cause the Damage, as the raking struts would have rested on the boundary wall, which was a non-structural wall.

101 Mr Patterson-Kane disagrees with Mr Ng's assessment and testified that the boundary wall was also a retaining wall, even if it was only a brick wall.[66] However, there is nothing in any of Mr Patterson-Kane's reports or testimony that points to the conclusion that Mr Ng's view is one that cannot possibly have been genuinely held. No further evidence was led by either party, beyond the bare contrasting opinions of Mr Patterson-Kane and Mr Ng, on whether the boundary wall was indeed a retaining wall or a non-structural wall, and on the effect of either being true. While the defendant submits that Mr Ng's evidence is not reliable because he did not carry out an independent and objective test to verify this,[67] neither did Mr Patterson-Kane.

102 At para 2(3) of the 3rd Report, Mr Patterson-Kane listed the following possibilities as to why Mr Ng did not indicate the deviation from the ERSS Plan in the Annex C Forms:[68]

(a) Mr Ng did not notice that the raking struts over the drain had not been installed. He considered this to be possible, but unlikely.

(b) Mr Ng's level of understanding of the design may been such that he believed that the raking struts were only a precaution to be true.

(c) Alternatively, Mr Ng may have invented that claim for possible use as an excuse if queried by BCA.

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66 19 May 2022 Transcript at p 18 lines 3–12.

67 DCS at para 127.

68 8AB 167.

At para 2(4) of the 3rd Report, Mr Patterson-Kane stated that he had "no definite conclusion" on the issue. On the stand, he acknowledged that these possibilities were just speculations.[69]

103 Moreover, Mr Patterson-Kane's assessment of the cause of the Damage, set out at para 6.3.2 of the 1st Report, was that the initial cause of Damage was the over-excavation of the soil by the Builder, and that this was made worse by the Builder's ineffective diagonal struts and the lack raking struts.[70] On his assessment, it appears that the absence of the raking struts was not a major cause of the Damage. Thus, Mr Patterson-Kane's assessment somewhat supports Mr Ng's evidence that the absence of the raking struts was a minor deviation. Consequently, Mr Ng's evidence that he genuinely believed that there was no need to report the minor deviation in the Annex C Forms, remains objectively plausible, even in light of Mr Patterson-Kane's expert evidence.

104 Further, Mr Patterson-Kane's critique of Mr Ng set out at [91]–[92] above, is focused on Mr Ng's *actions* in choosing not to report any deviations from the ERSS plans, thereby contravening regulations under the Building Control Act. It is clear that Mr Patterson-Kane was not making a comment on whether Mr Ng honestly held the belief that there was only a minor deviation from the ERSS plans. In any event, a comment by Mr Patterson-Kane in that regard would carry little weight given that it would have been made without any actual evidence of Mr Ng's intentions and knowledge at the time.

105 Taking into consideration the testimony of Mr Ng and Mr Patterson-Kane, I find that Mr Ng genuinely believed that the absence of raking struts was

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[69] 19 May 2022 Transcript at p 23 lines 12–15.

[70] 8AB 139, 19 May 2022 Transcript at p 52–53.

a minor deviation and that hence he did not need to indicate such deviation in the Annex C Forms, or the Annex E Forms and their covering letters. As per *Marina Centre Holdings* at [22], wilful misconduct is where a person "*knows and appreciates that it is wrong conduct on his part* in the circumstances to do or omit to do a particular thing". It follows from my finding on Mr Ng's genuine belief, that he clearly did not appreciate that he was doing something wrong. Nor could he have been acting deceitfully such that he can be said to have been dishonest: *Griffin Travel* at [410] and [412]. I thus find that the defendant has not proved that Mr Ng was dishonest or in wilful breach of duty in failing to indicate the deviation from the approved ERSS plans. Accordingly, cl 6.5 was not breached.

Issue 3: Was there a breach of cl 7.7?

106 The defendant finally submits that the plaintiff breached cl 7.7 of the Policy, which requires the plaintiff to provide the defendant with "all information and assistance" that the defendant "may reasonably require" to investigate or defend a claim.

Parties' submissions

Defendant's submissions

107 The defendant's case is that the main non-cooperation was the plaintiff's failure to respond to the defendant in respect of queries and requests for information and documents relating to the deviation from the ERSS plans, which would have been material to the assessment of the plaintiff's claim on the Policy.

108 Ms Vincent testified that there were a number of instances where the plaintiff and Mr Ng were not cooperative in providing information and assistance that was reasonably required to investigate and defend the claim. These instances were set out in a letter dated 5 October 2018 from the defendant to the plaintiff, where the defendant provided its reasons for denying coverage to the plaintiff.[71]

(a) During a meeting between Mr Ng, the defendant and DRD on 25 June 2018, DRD requested a detailed chronology of all of the works that were carried out onsite for the Project, accompanied by photographs as well as commentary for each photograph. Mr Ng sent DRD a document via e-mail dated 1 July 2018 (the document was subsequently revised on 9 July 2018). However, it was not clear from Mr Ng's e-mail and document whether he was of the view that there were any deviations from the approved ERSS plans.

(b) On 26 June 2018, DRD sent a query to Mr Ng on the sequence of works with reference to a site photograph. There was no response to this e-mail, so DRD sent further reminders on 29 June 2018 and again on 5 July 2018. Mr Ng only responded on 9 July 2018 and merely stated that "The photo shown is localized excavation in accordance with approved drawings". He did not answer the question that was asked of him, which was whether the work done complied with the sequence specified in the ERSS plans (which required the raking struts to be completed before the excavation works for the basement could commence).

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[71] 8AB47–52.

(c) DRD on 18 May 2018 requested Mr Ng to provide the date when a certain figure in the plaintiff's 6 October 2015 Annex E covering letter was taken. This was never provided despite reminders.

(d) When asked about the removal of the two raking struts which had been erected across the drain to the rear boundary wall of No. 1 Greenleaf Lane, Mr Ng informed the defendant and DRD that he had not been consulted on this removal. A document contradicting Mr Ng's account was pointed out to Mr Ng by DRD on 2 July 2018, but he never responded to this e-mail.

109 Ms Vincent explained that the information, documents and assistance that the defendant requested through DRD were needed to fully investigate the plaintiff's claim and evaluate the plaintiff's and/or Mr Ng's potential liability. This had a bearing on matters such as the appropriate strategy to deal with the potential claim as well as the reserves which needed to be set aside. In this regard, the defendant needed to assess how and to what extent coverage under the Policy was engaged. The plaintiff and Mr Ng's failure to provide the defendant with all information and assistance (reasonably) required impeded the defendant from doing so.[72]

110 Ms Vincent's evidence was unchallenged on the stand.

111 Ms Vanessa Tok ("Ms Tok"), formerly a partner of DRD, also testified for the defendant. She was the lawyer at DRD who was handling the plaintiff's potential insurance claim. She was typically the person who communicated with Mr Ng on behalf of DRD. She testified that DRD had queried and sought

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[72] Ms Vincent's AEIC at paras 30–31.

information from the plaintiff from January 2018 onwards, but Mr Ng did not co-operate. For instance:

(a) In an e-mail dated 5 June 2018, she had asked whether Mr Ng was "involved in the decisions to, (i) put up the props; and (ii) remove the props thereafter". The question was framed to elicit a straightforward "yes" or "no" answer. However, Mr Ng skirted the question and stated that "The props were the mitigation method initiated by the previous contractor to prevent the boundary wall from further tilting. And I believe it's the present contractor who removed it due to its obstruction to their sheetpile installation works". DRD were left no clearer as to whether Mr Ng was involved in the decision.[73]

(b) On 5 July 2018, Ms Tok sent two e-mails to Mr Ng to follow up on her earlier e-mails of 26 June 2018, as Mr Ng had not yet responded to a majority of the queries in those e-mails. As of 5 July 2018, there were three separate e-mails that DRD had sent to Mr Ng with outstanding and unanswered requests for information and documents, dated 26 June 2018 (12.08pm), 26 June 2018 (12.29pm) and 2 July 2018 (3.02pm). Mr Ng replied by e-mail dated 9 July 2018. However, his reply still did not address the recurring theme of the questions DRD had asked, which was whether the work done had complied with the sequence specified in the approved ERSS plans (*ie*, that raking struts were to be completed before excavation works for the basement could commence), or if there were any deviations from the ERSS plans in this regard.[74]

[73] AEIC of Tok Xiu Xian Vanessa ("Ms Tok's AEIC") at para 50(1).

[74] Ms Tok's AEIC at paras 67–73.

112 The above evidence of Ms Tok was unchallenged on the stand.

113 The defendant submits that the fact that Mr Patterson-Kane was able to issue his report does not detract from the plaintiff's failure to comply with cl 7.7. The information was sought not just for Mr Patterson-Kane but also for the defendant to assess the plaintiff's potential liability in Suit 417. Moreover, Mr Patterson-Kane's issuance of his reports did not mean that the plaintiff had provided all the information needed. Mr Patterson-Kane simply had to work within the confines of what was provided, and what was provided was lacking.

114 The defendant submits that cooperation by the plaintiff with the defendant is a requirement to claim coverage. As a matter of construction, cl 7.7 of the Policy is necessarily a condition precedent of coverage of the claim. Were this not the case, there would be circumstances where the defendant would not be able to reasonably investigate and defend the claim, but would still be required to provide coverage to the party inhibiting that investigation and defence.[75]

115 The defendant relies on *Shinedean Ltd v Alldown Demolition (London) Ltd (in liquidation) and another* [2006] 1 WLR 2696 ("*Shinedean*"). There, a co-operation clause involving an obligation to render "all necessary information and assistance to enable the [insurer] to settle or resist any claim or to institute proceedings" was held to be a condition of indemnification under the policy. The court observed at [19] that the interest of the insurers in respect of a co-operation condition lies in their entitlement "to have co-operation and relevant information in good time to be able to assess their potential liability and to take

75 DCS at para 188.

appropriate action. Appropriate action could, importantly in some cases, include deciding to take control of the defence of the case".[76]

Plaintiff's submissions

116 In response, Mr Ng testified that the plaintiff had to vacate its work premises around June 2018 and an engineer in charge of the project had resigned on 16 May 2018. This resulted in inevitable delays even with the plaintiff working over the weekends to gather the documents requested by DRD.[77]

117 The plaintiff submits that the defendant was not deprived of any opportunity to investigate since Mr Patterson-Kane was able to complete investigation and prepare report.

118 The plaintiff also submits that even if there was a breach of cl 7.7 of the Policy, the defendant is not entitled to deny coverage to the plaintiff and Mr Ng under the Policy. The plaintiff argues that cl 7.7 is not a condition precedent going to the root of the Policy contract, as the actual consequences flowing from a breach of cl 7.7 do not deprive the innocent party of substantially the whole benefit of the Policy, such that breach entitles the innocent party to terminate the contract: *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413.[78]

My decision

119 The plaintiff's response to the defendant's allegation of non-co-operation was not to challenge the defendant's evidence but to argue that the

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[76] DCS at para187.

[77] Mr Ng's AEIC at para 50.

[78] PCS at para 66.

non-co-operation was reasonable or justified. Mr Ng explained that he was having difficulties in providing DRD with the information that was requested. However, as rightly pointed out by the defendant, his evidence does not adequately explain the plaintiff's failure to provide information and documents for a period of about two months, nor does it explain Mr Ng's failure to answer the straightforward queries posed by DRD directly.

120 Mr Ng's evidence on the stand also supports the defendant's case on this issue:

(a) Mr Ng accepted that he did not directly answer Ms Tok's e-mail dated 5 July 2018 referred to at [111(b)] above. He accepted that he and the plaintiff avoided answering DRD's queries on whether there were deviations from the approved ERSS plans.[79]

(b) He accepted that he did not confirm whether struts were put in before the Builder commenced excavation.[80]

(c) When the defendant's counsel put to Mr Ng that many of the queries posed to him by DRD for information or documents were left unanswered by him, he did not deny it but replied "no comments".[81]

(d) When DRD's 2 July 2018 e-mail was put to him, he accepted that there is no document showing him responding to their query on whether the plaintiff gave approval for the removal of the two raking

79 17 May 2022 Transcript, p 92 lines 21–25.

80 17 May 2022 Transcript, p 92 lines 6–12.

81 17 May 2022 Transcript, p 92 lines 13–20.

struts. He agreed that that this was another example of him not following up or responding to DRD.[82]

(e) Mr Ng stood by his testimony in his AEIC where he said that he and the plaintiff duly provided all the relevant documents and information to the defendant. He explained that he took a technical point of view while DRD had a different line of thought which he did not appreciate at that time.[83]

(f) However, when it was put to Mr Ng that contrary to what he stated in his AEIC, he had failed to provide *all* relevant information and documents necessary for the defendant to defend the claim threatened by Developer and Builder, Mr Ng agreed.[84]

121 As Mr Ng's concessions on the stand are a key part of the evidence on this issue, I set out the exchange in full below:[85]

> Q: Yes. Now, the record will speak for itself, Mr Ng. The documents that have been disclosed in this suit, in this case will speak for themselves, so I don't need to take you through all the documents and all the queries that were raised. But I'm going to put to you that there were many queries that were raised by Dentons Rodyk on behalf of both QBE and the expert that they had engaged, many queries, requests for confirmations, information and documents, which were unanswered by you. Do you agree?
>
> A: I have no comment, because---yah.
>
> Q: And on the pertinent question as to whether there were deviations by the builder from the approved ERSS plans,

82 17 May 2022 Transcript, p 97 lines 23–32.

83 17 May 2022 Transcript, p 94 lines 8–26.

84 17 May 2022 Transcript, p 94 line 27 to p 95 line 4.

85 17 May 2022 Transcript, p 92 lines 13–25; 17 May 2022 Transcript, p 94 line 27 to p 95 line 4.

again, both you and SYT not just did not answer this question but avoided answering this pertinent and direct question at the material time. You agree?

A: Yes.

…

Q Now, I'm going to put to you QBE's case, Mr Ng. QBE's case is that contrary to what you set out at para 47 sub-paragraph (2), you actually failed to provide all relevant information and assistance that QBE and/or Dentons reasonably required to investigate and/or defend their claim which was threatened by the builder and the developer at the material time, you can either agree or disagree?

A: I agree, yah

Q: You agree with that?

A: Yah.

Q: In all fairness, do you agree with that?

A Yah.

122 In light of the above evidence, I find that the plaintiff had not provided the defendant with all the information and assistance that it may have reasonably required to investigate and/or defend the claim. The plaintiff hence breached cl 7.7.

123 The next question is whether cl 7.7 is a condition precedent to coverage of the claim under the Policy. While the defendant relies on the observations in *Shinedean* at [19], they were made in the context of a policy that contained a term stating that "[n]o claim under this policy shall be payable unless the terms of this condition have been complied with" (see *Shinedean* at [26]). There is no language to this effect in cl 7.7 or in cl 7. In section [2.2] of Poh Chu Chai, *General Insurance Law* (LexisNexis, 2009) ("*General Insurance Law*"), the learned author states that if an insurer wishes to disclaim liability when an insured is in breach of a policy term, the term has to be stipulated to be a

condition precedent to the insurer's liability. Apart from labelling a term as a condition precedent, a term may be construed as a condition precedent if it is stated that a breach takes away all policy benefits. Thus, a term stipulating that all policy benefits are forfeited if there is a failure to comply with the term suffices to make it a condition precedent. Another variation is to stipulate that the insurer's liability does not arise until after the term is complied with by the insured. There is no language in cl 7.7 or cl 7 that utilises any of such variations or language of similar effect to indicate that cl 7.7 is a condition precedent.

124 In its further submission, the defendant submits that Ian Enright, Robert M Merkin, *Professional Indemnity Insurance Law* (Sweet & Maxwell, 2nd Edition, 2007) ("*Professional Indemnity Insurance Law*") (at paras 15-031 to 15-032) supports the interpretation of cl 7.7 as a condition precedent. As para 15-030 is also relevant, I include it below:

> **Co-operation.** There is authority that certain terms will imply an obligation of cooperation:
>
> …
>
> It is common for professional indemnity policies to contain express conditions concerning co-operation by the insured in the defence of the third party claim against the insured which forms the basis of the insured's claim for indemnity under the policy. *These provisions will usually be drawn as conditions precedent to the insurer's liability to provide an indemnity.* A number of examples are provided below:
>
> > …
> >
> > (2) The insured will give to the insurer in relation to the insurer's defence or settlement of any claim against the insured, all such information and assistance as the insurer may reasonably require.
> >
> > …
> >
> > (4) The insured shall give all such information, co-operation and assistance as underwriters may require.
>
> …The legitimacy of any request by the insurer for information or assistance must always be considered against the particular

> wording of the policy provision, when the purpose of such provisions will have a bearing on the proper construction. Thus, a condition that the insured shall co-operate with insurers and their appointed representatives "in the investigation and assessment of any loss and/or circumstances giving rise to a loss". The clause must be intended to bear some relationship to the ordinary course of claims handling and investigation, and the purpose of putting insurers in a position where they can make a sensible judgment regarding any proposal made to settle or compromise or admit liability. The requirements of the clause must extend at least to the determination of the nature, scope and amount of any loss and whether it falls under the policy cover. It would also extend to investigation of a potential breach of warranty directly related to the loss, and possibly to investigation of a misrepresentation related to the circumstances later give rise to the loss.
>
> [emphasis added]

125 The defendant submits that the second and fourth example in the passage above are materially similar to cl 7.7 and that therefore this excerpt from *Professional Indemnity Insurance Law* supports the interpretation of cl 7.7. as a condition precedent.

126 I am unable to agree with this. In my view, it is clear on a reading of the text cited by the defendant that the learned authors of *Professional Indemnity Insurance Law* were listing examples of conditions of co-operation, rather than examples of conditions of co-operation that were stipulated to be conditions precedent. When the authors stated that "these provisions will usually be drawn as conditions precedent to the insurer's liability to provide an indemnity", they were simply stating that the following examples of conditions, as a matter of practice, would typically *also* be stipulated to be conditions precedent when they were found in insurance contracts. The learned authors were not stating that the examples contained language which would render them as conditions precedent.

127 The only part of the Policy that defendant relies on as a stipulation that cl 7.7 is a condition is precedent is what it states to be the preamble to the Policy. This part of the Policy states, "WE WOULD REMIND YOU THAT YOU MUST DISCLOSE TO US, FULLY AND FAITHFULLY, THE FACTS YOU KNOW OR OUGHT TO KNOW, OTHERWISE YOU MAY NOT RECEIVE ANY BENEFITS FROM YOUR POLICY" (the "Reminder").

128 I note that the Reminder is not actually in "The Preamble" of the Policy. "The Preamble" is actually cl 1 of the Policy.[86] The Reminder is instead set out on the page before cl 1, on what appears to be a welcome page, after the following words:

> QBE INSURANCE (SINGAPORE) PTE LTD welcomes you as a policyholder and we take this opportunity to recommend that you thoroughly examine this Document which sets out the limitations and benefits of the insurance. Please store it in a safe place.
>
> Should you have any query, please contact your Registered Agent/Broker or our QBE office, especially if the insurance is not completely in accordance with your intentions.

129 It is thus unclear if the Reminder was intended to be part of the Policy terms. Even if it was, the Reminder does not set out what is required of the insured, in the clear terms that cl 7.7 does. Nor does it firmly indicate that a breach would result in the forfeiture of the benefits of the policy, as it only mentions that the insured "may not receive any benefits" from the Policy. Consequently, I find that the Reminder is insufficient to support the reading of cl 7.7 as a condition precedent.

130 The defendant also submits that what is truly determinative of whether a clause is a condition precedent is the substantive underlying rationale for the

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[86] 1AB 125.

clause, rather than the label that is placed on it. In support of this proposition, the defendant relies on *Diab v Regent Insurance Co Ltd* [2007] 1 Bus LR 915 ("*Diab*") and *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) plc* [2018] 4 WLR 93 ("*Denso*") in which the courts discussed the substantive rationale for co-operation clauses when determining if they were conditions precedent.[87]

131 I do not find *Diab* and *Denso* to support the plaintiff's case that cl 7.7 is to be regarded as a condition precedent. In both cases, there was clear language in the relevant clauses that stipulated them to be conditions precedent. As discussed earlier, such language is missing in cl 7.7.

(a) In *Diab*, Condition 11 provided that "No claim under this Policy shall be payable unless the terms of this condition have been complied with." The Privy Council at [14] stated: "The condition is expressed as one that has to be complied with before any claim becomes payable and their Lordships find the categorisation of condition 11 as a condition precedent easy to accept."

(b) In *Denso*, condition 7 provided that "No claim under this Policy shall be payable unless the terms of this condition have been complied with." The court in *Denso* stated at [40]: "On this issue it seems to me that [the insurer] is correct and that in the light of the wording and context of this ATE Policy the terms relied on are capable of being conditions precedent."

132 In other words, the exposition of rationale behind the co-operation clauses in *Diab* and *Denso* took place from the starting position that the

[87] Defendant's Submissions on cl 7.7 at para 26.

language of the relevant conditions supported its construction as a condition precedent. That the courts also undertook an examination of the rationale does not mean that the substantive rationale for the clause becomes the determinative question. Rather, the fact that the courts undertook such an examination follows from the widely accepted principle which the learned author of *General Insurance Law* set out at para 2.2 in the following manner:

> [i]f an insurer wishes to disclaim liability when an insured is in breach of a policy term, the term has to be stipulated as a condition precedent to the insurer's liability … [a]t the same time, it has to be recognised that the mere labelling of a term as a condition precedent does not automatically make the term a condition precedent even though it is a strong indication of the insurer's intention.

133 In other words, while the mere labelling of a term as a condition precedent does not automatically make the term a condition precedent, there should be, in the first place, sufficient in the language of the condition to provide a strong indication of the insurer's intention that the clause is to be regarded as a condition precedent. Without such language, the subsequent discussions on the commercial rationale behind the clause that the defendant highlighted would not even be engaged. This can be seen also in *The Directors of the London Guarantee Co v Benjamin Lister Fearnley* (1880) 5 App Cas 911, which the defendant cites, pointing to Lord Blackburn's discussion of the rationale of a proviso (at 916-917) when determining whether it was a condition precedent. In the section cited by the defendant, Lord Blackburn concluded that "[he was] obliged to come to the conclusion that the intention must have been what [he had] last stated, and that *it is sufficiently expressed* to have the effect of making this a condition precedent" [emphasis added]. Earlier, he had stated that "[a]ll agree that the question is, what is the intention to be collected from the words." Thus, it cannot be any clearer that the starting point in an inquiry as to whether

a clause is a condition precedent is the objective intention as expressed in the words of the policy.

134 Thus, I find that cl 7.7 was not a condition precedent. There is nothing in cl 7.7 or in the Policy as a whole that can be said to stipulate cl 7.7 to be a condition precedent.

135 For the reasons set out above, I find that while the plaintiff was in breach of cl 7.7, it was not a condition precedent. The defendant is hence only entitled to damages arising from the breach of cl 7.7. It is however, not part of the defendant's pleaded case that it is entitled to damages against the plaintiff for the breach of cl 7.7. I will hence not make any orders for damages arising from the breach of cl 7.7.

Issue 4: Does public policy or public interest militate against the defendant's right to repudiate liability under the Policy?

136 The plaintiff submits that even if the court finds in favour of the defendant on any of the three issues previously discussed, the court should nevertheless recognise that there are considerations of public policy or public interest that weigh in favour of the plaintiff, and militate against the defendant's exercise of its right to repudiate liability under the Policy.[88]

137 Before addressing the substantive merits of this submission, I make two observations. First, the plaintiff is not suggesting that the Policy should be voided or rendered unenforceable for reasons of public policy. Instead, the plaintiff is seeking to enforce the Policy on public policy grounds. Second, the plaintiff is not suggesting that public policy considerations should be taken into

[88] PRS at paras 23–24.

account when interpreting the various clauses of the Policy. Rather, the plaintiff's submission is that the court should determine the suit based on public policy considerations *despite* the proper interpretation of the contract leading to the opposite outcome.

138 There is no legal basis whatsoever for the plaintiff's submission. The plaintiff refers to three authorities: *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*"), *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 ("*ACB*") and *UKM v Attorney-General* [2019] 3 SLR 874 ("*UKM*"). None of these authorities support the plaintiff's submission in any way.

139 *Ting Siew May* only stands for the proposition that "[a] court [may] hold that a particular contract is void and unenforceable as being contrary to public policy because of the *wider public interest*" [emphasis in original]: at [24]. It does not stand for the opposite proposition that a party may enforce a contract in a manner contrary to the proper interpretation of the contractual clauses because it would be in the public interest to do so.

140 *ACB* only stands for the proposition that public policy has a role to play in regulating the types of damages recoverable in a civil claim. In fact, the court noted at [53] that the role that policy plays in the law of contract outside the defence of illegality was limited.

141 The passages cited by the plaintiff from *UKM* were remarks made by the court about how public policy should be taken into account *where there was a statutory basis for the court to take public policy into account*: at [103]. Amongst other considerations, the court in *UKM* noted at [97] that s 3(1) of the Adoption of Children Act (Cap 4, 2012 Rev Ed) (the "Adoption Act"), which

conferred on the court a general discretion, must have had the purpose of enabling the court to consider any public policy which may be relevant to any aspect of the institution of adoption. This was because adoption is the very institution which the Adoption Act has established and seeks to regulate. In stark contrast, the plaintiff has not identified any legal basis, whether arising from common law, contractual principles or statute, to take public policy into account in the context of contractual rights generally. Nor has the plaintiff established any basis for its specific submission that the Policy should be enforced despite its proper contractual interpretation.

142 Given the above, there is no need for me to address the substance of the plaintiff's public policy argument. Nevertheless, I touch on it in brief to show that substantively, it is also completely without merit.

143 First, the plaintiff argues that "because insured and third parties are reliant on [coverage under a professional liability policy] to manage their risk in commercial dealings and business relations with insureds, there is clear potential for harm to the wider commercial ecosystem and stakeholders if it is subjected to repugnant outcomes or standards especially once given weight of law through precedents set by the Court."[89] The plaintiff submits that a degree of exclusion and demarcation of coverage, while permissible in order for an insurer's business to remain commercially viable, must only be allowed within reasonable limits.[90] The plaintiff then submits that the defendant's positions on the three substantive issues in the suit were repugnant and injurious to the public interest in professional indemnity insurance.[91]

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[89] PRS at para 39.

[90] PRS at para 46.

[91] PRS at para 52.

144 The plaintiff did not provide any evidence to support any of their speculative policy assertions. Neither has the plaintiff provided any explanation or authority for what it considers "reasonable limits" to an insurer's ability to include contractual exclusions. The plaintiff asserts that allowing the defendant to rely on its contractual rights can be detrimental to the common good that comes from professional liability insurance, but it does not address the other side of the policy equation, namely the impact on the provision of insurance if insurers are not entitled to rely on what has been determined to be their contractual rights.

145 The second "policy" relied on by the plaintiff is the special status afforded to mediated settlement agreements. This argument also fails to point to any contravention of public policy. The plaintiff refers to remarks in parliament by the then Senior Minister of State for Law, Ms Indranee Rajah, in support of the Mediation Bill (Bill No 37/2016), where she explained the policy behind strengthening the enforceability of mediated settlement agreements.[92] However, this policy is irrelevant to the plaintiff's case. A finding that cl 3.2 applies to settlement agreements does not affect the *enforceability* of the settlement agreement between Builder and Developer with the plaintiff.

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[92] PRS at para 71.

Conclusion

146 For the foregoing reasons, I dismiss the plaintiff's claim. Parties are invited to submit their written submissions on costs, within seven days of this judgment.

Kwek Mean Luck
Judge of the High Court

Eu Hai Meng and Alicia Chia Si Min (Civic Legal LLC) for the plaintiff;
Ramesh s/o Selvaraj, Daniel Seow Wei Jin and Jonathan Kenric Trachsel (Allen & Gledhill LLP) for the defendant.