China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)
[2005] SGHC 40

Case Number : OS 1272/2004

Decision Date : 28 February 2005

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong JC

Counsel Name(s) : Edwina Fan (Kelvin Chia Partnership) for the plaintiff; M Ramasamy and Hemalatha Silwaraju (William Chai and Rama) for the defendant

Parties : China Insurance Co (Singapore) Pte Ltd — Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)

Evidence – Admissibility of evidence – Parol evidence rule – Defendant insurer seeking to adduce affidavit evidence to show that coverage under its policy dissimilar to that of plaintiff insurer's policy – Whether such evidence admissible – Sections 93, 94 Evidence Act (Cap 97, 1997 Rev Ed)

Insurance – General principles – Contribution and average – Plaintiff insurer and defendant insurer having common insured under separate insurance policies – Plaintiff insurer claiming defendant insurer legally obligated to contribute towards any payment made by plaintiff to common insured – Whether doctrine of double insurance applicable

28 February 2005

Andrew Phang Boon Leong JC:

Introduction and facts

1 These proceedings involve two insurance companies. The plaintiff claims against the defendant for contribution under the doctrine of double insurance.

2 The factual background is relatively straightforward.

3 BT Engineering Pte Ltd ("BT") procured a Workmen's Compensation – Industrial Risks Policy from the defendant for the period 1 April 2002 to 31 March 2003. This policy was later extended to include Keppel Shipyard ("Keppel") as well.

4 BT subsequently obtained a Workmen's Compensation Policy from the plaintiff for the period 19 April 2002 to 19 July 2002. This particular policy was intended to cover work to be done on board two vessels situated at Keppel (the *FPSO Falcon* and *FPSO Brasil*, respectively). It also embraced both BT and Keppel as the insured.

5 On or about 22 June 2002, one of BT's employees, Sim Cheng Soon ("the employee"), was involved in an accident whilst working on board one of the two vessels referred to in the preceding paragraph – the *FPSO Falcon*. The employee subsequently commenced proceedings against both BT and Keppel for damages arising from his personal injury.

6 The plaintiff does not dispute that it is liable under its policy to indemnify both BT and Keppel in the personal injury claim should the employee succeed in his action. The claim has yet to be resolved. Not content with awaiting the outcome of the claim, the plaintiff initiated these proceedings to obtain a declaration that the defendant is legally liable to indemnify the plaintiff to the extent of

50% of any amount which the plaintiff is liable to pay BT and Keppel apropos their potential liability to the employee in the personal injury claim. The plaintiff based its claim to such contribution under the doctrine of double insurance.

A preliminary point

7 As the personal injury claim was still in progress, I queried counsel about the pressing need for the present action. Counsel for the plaintiff replied that the present proceedings had been initiated in order to preclude any assertion that it had waived its right of contribution *vis-à-vis* the defendant. Counsel for the defendant, in turn, accepted that there were no procedural impediments to adjudicating on the contribution claim before the personal injury claim had been resolved.

8 In the circumstances, I proceeded to hear arguments with regard to the relevant legal issues.

The legal issues

9 As adverted to at the outset, the main issue in these proceedings was whether or not there was a situation of double insurance, which would entail a legal obligation on the part of the defendant to contribute towards any payment made by the plaintiff to BT and Keppel.

10 The broad principles underlying double insurance in general and the requirement for contribution thereunder in particular are not controversial.

11 In *Insurance Law in Singapore* (Butterworths Asia, 2nd Ed, 1997), Professor (now Justice) Tan Lee Meng observes at p 488, as follows:

> An insurer cannot look towards another insurer for contribution towards a loss unless the latter has covered the same insured against the same risk which has materialised.

12 And, in *Principles of Insurance Law* (Butterworths, 5th Ed, 2000), Assoc Prof Poh Chu Chai observes at p 805, as follows:

> To constitute double insurance, the second or subsequent insurance policies taken out by an insured must cover substantially the same risk as the first policy. The mere fact that there is an incidental or some overlap between two or more insurance policies taken out by an insured will not by itself constitute double insurance.

13 Again, it is observed by the same author (at p 1177):

> An insurer's right to seek contribution from another insurer only arises if there is double insurance, namely, where the risk insured and the person insuring are the same.

14 Counsel also helpfully cited a number of cases illustrative of these general principles, for example, the oft-cited English Court of Appeal decision of *North British and Mercantile Insurance Company v London, Liverpool, and Globe Insurance Company* (1876) 5 Ch D 569.

15 It bears mentioning at this juncture that counsel for both parties accepted the fact that there was no "non-contribution clause" involved on the facts of the present case. Where there is such a clause, it will operate to exclude or limit, as the case may be, the amount of contribution otherwise claimable, assuming that a situation of double insurance can be established in the first instance: see, for example, the Singapore High Court decision in *Liberty Citystate Insurance Pte Ltd v AXA Insurance*

Singapore Pte Ltd [2001] 2 SLR 593.

16 Turning to the facts of the present case, it should be noted at the outset that it was assumed throughout by both parties' counsel that the plaintiff's and the defendant's policies covered the same insured.

17 What was at issue in the present case, however, was the question whether the plaintiff's policy covered the *same* subject matter and risk as the defendant's policy. This was, in fact, common ground between counsel.

Counsel's arguments

The plaintiff's arguments

18 Counsel for the plaintiff, Ms Fan, argued that the plaintiff's policy indeed covered the same subject matter and risk as the defendant's policy. She premised her case on a construction of the relevant documents themselves. In particular, she argued that the defendant's policy was broad enough to cover the same subject matter and risk as that contained in the plaintiff's policy. She pointed to the defendant's policy where there was a reference to "any other place in Singapore" as part of the description of the place or location of the insured which was covered under the policy. Hence, counsel argued, the coverage under the defendant's policy could not be confined to BT's fabrication yard but must also have covered the vessel on which the employee had been injured.

19 Ms Fan also contended that the defendant's policy did not contain a clause which excluded work on board ships. Hence, the defendant's policy must have concurrently covered the more specific risk which also constituted the subject matter of the plaintiff's policy.

20 However, counsel for the plaintiff did have one major difficulty. The defendant denied that the coverage was similar. This was expanded upon in all three affidavits filed by Low Hwee Huan, Gay Siew Fong and Margaret Tan, who were, respectively, the Assistant General Manager (Underwriting) of the defendant, a director of BT, and a senior broking executive with Newstate Stenhouse, the insurance brokers/agents for BT. The general thrust of these affidavits was as follows. The defendant's policy, it was asserted, only covered industrial – as opposed to marine-related – risks. In particular, the defendant's policy excluded risk relating to work upon vessels – specifically, with respect to the project to fabricate modules on the two vessels mentioned in [4] above from 19 April 2002 to 19 July 2002 ("the specific project"). The defendant, in fact, communicated this to BT who duly sought additional coverage for the specific project by way of another insurance policy. Margaret Tan sourced for quotations from two other insurers, American International Group and the plaintiff, respectively. The plaintiff's quotation was found more attractive and upon BT's instructions, additional coverage solely for the specific project was obtained from the plaintiff.

21 It may now be seen why counsel for the plaintiff sought vigorously to exclude these affidavits from evidence. If those facts were accepted, it would follow that the subject matter and risk covered by the defendant's and plaintiff's policies were quite different. Indeed, according to this affidavit evidence, the sole purpose for obtaining the plaintiff's policy was due to the fact that insurance coverage for the specific project was not covered under the existing policy with the defendant.

22 Counsel for the plaintiff sought to rely upon s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) to argue that evidence from the above-mentioned affidavits was inadmissible. Section 94 is, of course, one of the provisions in the Evidence Act which embodies, in statutory form, the parol evidence rule, and reads as follows (illustrations omitted):

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

23 Although counsel's arguments appeared persuasive at first blush, I was not persuaded, upon closer analysis, that the affidavit evidence was inadmissible. In particular, I was not persuaded that s 94 of the Evidence Act applied to the facts of the instant case.

The defendant's arguments

24 Counsel for the defendant, Mr Ramasamy, adopted an altogether different tack. Not surprisingly, his focus was on the relevance and admissibility of the affidavit evidence. However, it is important to note that this was not the only plank of his argument. He also dealt with the documents as well. Like counsel for the plaintiff, he also compared the language utilised in the plaintiff's as well as the defendant's policies – arriving (again, not surprisingly) at a diametrically opposite conclusion instead.

25 In particular, counsel for the defendant argued that the defendant's policy was an annual policy whilst the plaintiff's policy was a specific policy intended to cover solely the specific project. In further support of this argument, counsel pointed to the fact that the defendant's policy was described as "Workmen's Compensation – Industrial Risks" and did not cover marine-related risks. This,

he further argued, met the argument of plaintiff's counsel to the effect that the defendant's policy did not contain a clause which excluded work on board ships.

26 I should pause here to note that I was also shown a sample policy which had been issued by the defendant, where marine-related risks were also incorporated and which ineluctably demonstrated the fact that the defendant did describe policies pertaining to marine-related risks differently. It is significant that counsel for the plaintiff did not object to the tendering of this sample policy which, whilst by no means conclusive, was positively helpful in illuminating the defendant's argument with respect to this particular point. I note, however, that this particular sample policy was issued more recently, although it did not appear to be the case that this specific policy only represented a more recent development in so far as the defendant was concerned; nor did counsel for the plaintiff contend otherwise.

27 Counsel for the defendant further argued that the premium rates charged by the defendant for its policy were based on 3% of the estimated wage roll. This, he stated, was the normal premium rate for workmen's compensation industrial risks; where, on the contrary, if the policy was also intended to cover marine-related risks (which included work on board ships), the rate, Mr Ramasamy argued, would have been higher, constituting some 5% of the estimated wage roll. To support this, he referred to assertions in Low Hwee Huan's affidavit.

28 Mr Ramasamy argued further that the affidavit evidence supported his argument that the insured had to procure a policy from the plaintiff simply because the defendant's policy did not cover marine-related risks.

The court's findings

The main issue

29 Were the subject matter and risk covered by the plaintiff's and the defendant's policies the same? If so, there will be a situation of double insurance, under which the defendant will come under a legal obligation to contribute to the plaintiff, assuming that the latter has, in fact, to indemnify the insured. If not, there would of course be no such obligation to contribute.

30 I have already set out both counsel's arguments in some detail. Looking, first and foremost, at the documentary evidence, it is amply clear that, on a plain and reasonable construction of the documents themselves, the risks covered in, respectively, the defendant's and the plaintiff's policies were different. Although counsel for the plaintiff did attempt to point to some general language in the defendant's policy (see [18] above), I agree with counsel for the defendant that there were more persuasive factors which supported his arguments. These included the different headings of the respective policies (see [25] above). More importantly, the coverage of the plaintiff's policy was extremely specific. Indeed, the coverage was for the very project in which the employee was injured (see [25] above). This lends support to the defendant's argument to the effect that there was a need for the insured to take out an *additional* policy from the plaintiff simply because the existing policy (issued by the defendant) did not cover the risk entailed within the specific project in which the employee was injured.

31 Although a plain construction of the documentary evidence alone adequately supports the defendant's case, the affidavit evidence referred to at [20], [27] and [28] above conclusively determined, in my view, the case in the defendant's favour as it was relevant, admissible and persuasive. Further, even assuming that a comparison of the policies alone was insufficient to determine the case in the defendant's favour, the admission of the affidavit evidence would have

clearly done so. This is why, as already noted, counsel for the plaintiff was at pains to argue that such evidence ought to be excluded as extrinsic evidence under the parol evidence rule in general, and s 94 of the Evidence Act in particular. Section 94 of the Evidence Act, however, did not apply to the fact situation here. The phrase "as between the parties" in s 94 clearly precluded its application to the present fact situation. That this is so is acknowledged in all the leading textbooks: see, for example, *Sarkar's Law of Evidence*, (Wadhwa and Company, 15th Ed, 1999), vol 1 at pp 1273, 1309–1312 as well as 1319, and *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis Butterworths, 17th Ed, 2002), vol 3 at pp 3230, 3247–3248, 3333–3334, 3339–3340 and 3381–3382. Indeed, a literal, albeit reasonable, reading of s 94 itself will demonstrate amply that the provision does not apply to fact situations such as the present where both parties are essentially strangers to each other's contracts/policies.

32 However, it did not follow that counsel for the defendant could then admit the abovementioned affidavits without further let or hindrance. Indeed, in my view, although s 94 of the Evidence Act was inapplicable to the instant facts, s 93 was relevant. The material part of s 93 itself reads as follows:

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

33 Unlike s 94, s 93 is of more general application or coverage. Indeed, before s 94 can be invoked, the fact situation must necessarily fall within the more general ambit of s 93 in the first instance.

34 As the leading textbooks point out, s 93 deals with the *exclusiveness* of documentary evidence, whilst s 94 deals with the *conclusiveness* of documentary evidence: see, for example, *Sarkar's Law of Evidence*, ([31] *supra*) at pp 1267 and 1309. In the Malaysian High Court decision of *Datuk Tan Leng Teck v Sarjana Sdn Bhd* [1997] 4 MLJ 329, Augustine Paul JC (as he then was) elaborated (at 344) thus:

> [Section 93] means what it says. It applies to any matter which is required by law to be reduced to the form of a document. Consequently, there can be absolutely no dispute that it applies to both bilateral and unilateral and dispositive and non-dispositive documents. On the other hand section 94, having described the documents to which it applies including the documents encapsulated by the phrase in question [*viz* "when the terms … have been proved according to section 93 …"], goes on to say, in its operative part, that '… no evidence of any oral agreement or statement shall be admitted *as between the parties to any such instrument or their representatives in interest* …'. (Emphasis added.) Thus the phrase, as it appears in [s 94], is explicitly qualified by the words emphasized. The words '… as between the parties to any such instrument or their representatives in interest …' clearly and crisply connote in crystalline terms that the documents contemplated by [s 94] are bilateral and dispositive in nature.

35 This view is, in fact, not only consistent with the language of ss 93 and 94 but is also embodied within the leading textbooks which the learned judge indeed also refers to in some detail (and see, in so far as the latest editions are concerned, *Sarkar's Law of Evidence*, [31] *supra* at pp 1309–1315 and *Sir John Woodroffe & Syed Amir Ali's Law of Evidence*, [31] *supra* at pp 3333–3334 and 3338–3340).

36 The insurance policies in the present case are clearly non-dispositive documents and do not, as I have already held, come within the purview of s 94 of the Evidence Act. However, having regard to the principles briefly set out above, they do come within the ambit of s 93 of the same Act which, as we have already seen, is much broader in scope.

37 If, however, s 93 applies in the present fact situation, does it then preclude the admission of the evidence from the above-mentioned affidavits? As I have already held above, a construction of the documentary evidence alone would lead me to rule in favour of the defendant, although admission of the affidavit evidence would seal the case, as it were, for the defendant. The issue which arises here is one that raises, simultaneously, a much broader issue – what is the precise relationship between ss 93 and 94 of the Evidence Act on the one hand and the common law on the other? This issue, put in relation to the more specific perspective of the facts in the instant case, raises the question: Are there one or more common law exceptions which apply in order to permit admission of the affidavit evidence in spite of the presence of s 93 of the Evidence Act?

38 It is necessary to deal with the general issue first. If, on construction and principle, ss 93 and 94 of the Evidence Act are exhaustive inasmuch as they preclude any introduction of the common law whatsoever, that is an end to the matter in so far as the facts of the present case are concerned. This would, indeed, be *a fortiori* the situation here simply because s 93 itself does not (unlike s 94, which is inapplicable on the present facts) contain the more significant exceptions as such.

39 That many exceptions to the parol evidence rule exist at common law is undoubtedly the case. As we have already seen, it is equally clear that the parol evidence rule in the Singapore context is embodied, in the main at least, within ss 93 and 94 of the Evidence Act (and compare *Tan Hock Keng v L & M Group Investments Ltd* [2001] 4 SLR 428, especially at [11], *per* Rajendran J, reversed in part in [2002] 2 SLR 213, but not on this particular point). This being the case, one has to bear in mind that the general starting point is that established principles pertaining to codes, of which the Evidence Act is an illustration, generally prohibit the introduction of common law rules: see the oft-cited decisions of *The Governor and Company of The Bank of England v Vagliano Brothers* [1891] AC 107 and *Jayasena v R* [1970] AC 618. However, it appears to be the case that where the code concerned is itself silent with regard to the specific issue(s) or point(s) in question, the common law rules do continue to be relevant and even applicable: see *PP v Yuvaraj* [1969] 2 MLJ 89 and *Shaaban v Chong Fook Kam* [1969] 2 MLJ 219.

40 More importantly, in the specific context of the Evidence Act itself, s 2(2) should be noted, which reads as follows:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

41 It would appear, therefore, that the common law exceptions to the parol evidence rule, in so far as they are *consistent* with the provisions of the Evidence Act, continue to be applicable. This leads, however, to a second – and related – difficulty.

42 The exceptions, particularly the provisos to s 94 of the Evidence Act, are, on closer analysis, in fact *inconsistent* with a few of the common law exceptions.

43 To take but one example, the common law exception relating to collateral contracts allows terms in the collateral contract which are *inconsistent* with those contained in the main agreement to override terms contained in the main agreement itself. While there are divergences within the English

case law itself, the fact remains that cases which embody this principle do exist and are widely cited and applied: see, for example, the oft-cited English High Court decision of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 (though compare the Australian position: see J W Carter and D J Harland, *Contract Law in Australia* (LexisNexis Butterworths, 4th Ed, 2002) at para 613, where reference is made, *inter alia*, to the leading Australian High Court decision of *Hoyt's Proprietary Limited v Spencer* (1919) 27 CLR 133).

44 However, s 94(b) is clearly at variance with the common law rule stated in the preceding paragraph and would therefore appear to prevail over it (though compare that with s 94(d)). Nevertheless, this proposition does not appear to be clearly established within the local case law: compare, for example, the Malaysian decisions of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, especially at 19, and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, especially at 233. Yet another possible approach was adopted in the (also Malaysian) decision of *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220 (especially at 229). It would appear that the situation is still not settled, although, in this regard, the Singapore Court of Appeal decision of *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 at [21] acknowledged the basic controversy and, whilst not expressly stating that the position adopted in *Tan Swee Hoe Co Ltd v Ali Hussain Bros*, which endorsed the more liberal common law position, was wrong, tended, in the final analysis, to endorse the literal language in s 94(b) to the contrary (see also the Singapore Court of Appeal decision of *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 especially at 226 and *per* Belinda Ang Saw Ean JC (as she then was) in the Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439, especially at [126] to [131]). However, as we shall see in a moment, this particular issue, arising from inconsistency between the common law position and ss 93 and/or 94 of the Evidence Act, does not arise on the facts of the present case. I therefore refrain from expressing any concluded opinion. This is, in my view, all the more advisable as the expression of a view is best effected – and more easily understood – where the explication is done in relation to an actual fact situation, rather than in an abstract vacuum. However, as I shall point out below, this may be but one symptom suggesting *overall legislative* reform. Be it as it may, what *is* clear is that any legislative reform will not only have to take into account the general relationship between ss 93 and 94 of the Evidence Act and the common law, but also set out the precise details of any such reform where there is a difference between these two spheres in particular situations, such as that just considered.

45 Returning to the facts of the present case, I am of the view that having regard to the reasoning set out in [39] to [41] above, there is no reason in principle why one or more common law exceptions should be excluded if they do, in fact, otherwise apply to the present facts *and* are *not inconsistent* with ss 93 and 94 of the Evidence Act.

46 I have in mind, in particular, the well-established common law principle to the effect that extrinsic evidence is admissible to aid the court in establishing the factual matrix which, in turn, would help the court in construing the contract(s) concerned. This is embodied, *inter alia*, in the following oft-cited statement of Lord Wilberforce in the House of Lords decision of *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997:

> I think that all of their Lordships are saying, in different words, the same thing – what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an

objective setting in which the contract is to be construed.

47 The following observations by Staughton LJ in the English Court of Appeal decision of *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127 at 133 are also apposite:

> It is now, in my view, somewhat old-fashioned to approach such a problem [here, as to whether or not it was permissible to refer to a slip as an aid to interpretation of the reinsurance contract] armed with the parol evidence rule, that evidence is not admissible to vary or contradict the words of a written contract. The modern approach of the House of Lords is that, on the positive side, evidence should be admitted of the background to the contract, the surrounding circumstances, the matrix, the genesis and aim. Almost every day in these Courts there is a contest as to what comes within that description. As Lord Wilberforce said in *Reardon Smith Line Ltd v Hansen-Tangen* … the expression "surrounding circumstances" is imprecise. But so to some extent is "matrix", if I may say so, although it is a picturesque metaphor. It may well be that no greater precision is possible. The notion is what the parties had in mind, and the Court is entitled to know, what was going on around them at the time when they were making the contract. This applies to circumstances which were known to both parties, and to what each might reasonably have expected the other to know.

48 Finally, reference ought to be made briefly to the views of Lord Hoffmann in the leading House of Lords decision of *Investors Compensation Scheme Ltd v West Bromwich Building Society*, somewhat curiously, perhaps, reported in the first volume of the *Weekly Law Reports* (at [1998] 1 WLR 896), where the learned law lord observed, *inter alia*, at 912–913 as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

49 Indeed, both the last-mentioned decisions were cited by Cresswell J in the relatively recent English High Court decision of *BP Plc v GE Frankona Reinsurance Ltd* [2003] 1 Lloyd's Rep 537 at 548–549. The position is also well-summarised in secondary literature by, for example, *MacGillivray on Insurance Law* (Sweet & Maxwell, 10th Ed, 2003) at para 11-27, where it is observed thus:

> In gathering the intention of the parties from the words in the policy and incorporated documents, the wording is not to be construed in isolation. Evidence may be adduced of the background to the contract, so that the court can appreciate its genesis and purpose, and the facts of which the parties were both aware when making it.

50 Reference may also be made, generally, in the local context, to the Singapore Court of Appeal decisions of *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443 and *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379.

51 Returning to the present case, it is clear that the affidavit evidence in the present case does, in fact, aid in establishing what the factual matrix is. It might be argued by counsel for the plaintiff that the principle presently considered is only applicable in situations where the relevant contract(s) are ambiguous. I do not think that this is necessarily the case, for any aid to construction which does not add to, vary or contradict the relevant documents ought to be permitted. But, even assuming that ambiguity is a pre-requisite and that it does not exist in the present case, then assuming, *ex hypothesi*, that the documents are in fact clear, that clarity, as I have already held, favours the *defendant* instead of the plaintiff. If, however, it is assumed that ambiguity exists, then it is clear that the affidavit evidence in question ought, in my view, to be admitted in order to clarify the factual matrix and aid the court in construing the insurance policies concerned – in particular the scope and purpose of the plaintiff's policy. Looked at in this light, it is clear that the affidavit evidence (as counsel for the plaintiff in fact appeared to acknowledge) points clearly in favour of the defendant.

52 I have hitherto proceeded on the assumption that the common law principle presently being considered as well as applied is one of the *exceptions* to the parol evidence rule. It might, however, be equally well argued, in my view, that this principle is not really an exception to the parol evidence rule as such, but is, rather, simply a logical and commonsensical legal principle that courts ought to apply as a matter of course – if nothing else, because in the real world, one cannot divorce the application of the relevant legal principles from the context in which they must necessarily operate. However, the case law does seem to indicate that this principle is more an exception rather than an independent rule (see, for example, *per* Lord Wilberforce himself in another House of Lords decision in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261). Nevertheless, as the Law Commission of England and Wales ("the Law Commission") itself pointed out, there is a difference between utilising parol evidence to *interpret* documents, as opposed to using such evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of a written contract (see The Law Commission*, Law of Contract – The Parol Evidence Rule* (Law Com No 154, 1986) ("the 1986 Report on parol evidence") at para 1.2, and noted, *inter alia*, by Beldam LJ in the English Court of Appeal decision of *Youell v Bland Welch & Co Ltd* ([47] *supra*). More importantly, the Law Commission was of the view – and adopting an approach even more ostensibly radical than that explored in the present paragraph – that all the exceptions to the parol evidence rule "are, in reality, examples of situations in which the parol evidence rule, as we believe it to be, could never apply", as "[t]he issues raised in such cases are issues of general contractual validity and enforceability, to which the parol evidence rule has no application" (see the 1986 Report on parol evidence at para 2.31). To drive home the point, the Law Commission concluded its views on the issue thus (*ibid*):

> Viewed more broadly, … we see the cases which are said to be exceptions to the parol evidence rule as being independent of that rule. They are instances of the application of other rules of law which are to be applied to contracts, whatever form those contracts may take.

53 It might be appropriate to note at this juncture that s 94(f) of the Evidence Act (see [22] above) might, arguably at least, be a possible analogue of the common law principle just considered (compare, for example, the Singapore High Court decision of *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 2 SLR 308, especially at [3]–[7], *per* Lee Seiu Kin JC (as he then was); though compare, in turn, the Singapore Court of Appeal decision of *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639 at 651–653). It is clear, however, that s 94(f) will only come into play when there is some latent ambiguity in the contractual document itself: see the

Singapore Court of Appeal decisions in *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 ("*Citicorp Investment*") and *Tan Hock Keng v L & M Group Investments Ltd* [2002] 2 SLR 213. This may cause possible problems in correlating the provision with the existing common law principles: see, in particular, *Citicorp Investment*, especially at [56]–[68] and Daniel Seng Kiat Boon, "Another Clog on the Construction of Contracts? The Parol Evidence Rule and the Use of Extrinsic Evidence" [1997] Sing JLS 457, especially at 471–473 and 481–482. What is clear, however, is that s 94(f) is not applicable to the present fact situation (see [31] and [36] above).

54 Another possible – and closely related – exception to the parol evidence rule at common law relates to the admissibility of extrinsic evidence to identify the subject matter of an agreement: see, for example, *L Schuler AG v Wickman Machine Tool Sales Ltd* ([52] *supra*) *per* Lord Wilberforce at 261, as well as the Australian Privy Council decision of *Bank of New Zealand v Simpson* [1900] AC 182. In the present case, there was much debate as to what subject matter and risk the plaintiff's and the defendant's policies covered. Looked at in this light, the extrinsic affidavit evidence was more than enlightening.

55 In summary, having regard both to the construction of the plaintiff's and the defendant's policies as well as to the admissible affidavit evidence, I find that the subject matter and risk covered by both these policies were not the same and that there was therefore no situation of double insurance and, consequently, no legal obligation on the part of the defendant to contribute to the plaintiff should the plaintiff have to indemnify both BT and Keppel in the event that the former's employee succeeds in his action against them. In other words, the defendant succeeds with regard to the main – indeed, only substantive – issue before this court in the present case.

56 However, the present case did raise in the process difficulties with respect to the parol evidence rule in general and ss 93 and 94 of the Evidence Act in particular. These difficulties are symptomatic of a broader problem – and it is to this problem that I now turn.

Difficulties with the parol evidence rule

57 Although it was possible (fortunately, in my view) to decide the present case without being *unduly* hampered by any excessive constraints of the parol evidence rule, the direction and content of argument in the present case with regard to ss 93 and 94 of the Evidence Act more than hint at more general difficulties. These difficulties are not only inherent within the provisions themselves and in their relationship with each other, but also relate to the precise relationship (if any) between the aforementioned provisions on the one hand and the common law on the other. Indeed, issues in both these areas were considered in the present case. But this is just the tip of the proverbial iceberg. Indeed, the broader question that has been raised centres on whether or not these provisions ought to be reconsidered and amended – or, on a more radical approach, even abrogated – in the light of the many other potential difficulties that might arise in the practical sphere. At the most general level, it is wise to bear in mind that it is necessary for the Singapore legal system to aspire constantly to even greater heights in so far as the administration of justice is concerned.

58 Whilst it is true that the distinction between procedural and substantive law ought not to be drawn too starkly, the above-mentioned provisions do clearly fall within the former category. Looked at in this light, any inherent quality within the sphere of procedural law that hinders the attainment of substantive justice is, in my view, the very antithesis of the enterprise of the law itself. Rules of procedure and evidence are, in other words, necessary in order to furnish an orderly structure that aids the court in its quest for truth, and a just, as well as fair, result. To the extent, therefore, that the parol evidence rule (as embodied in the local context within ss 93 and 94 of the Evidence Act) may be utilised as instruments to exclude what, on a commonsensical view, ought to be admissible

and relevant evidence, and thereby hinder the attainment of a fair and just result, a measure of reform may be necessary. Such reform must, of course, be effected by the Legislature, although, as we have seen in relation to the facts of the present case, there is the further issue as to whether or not – and, if so, to what extent – the common law exceptions to the parol evidence rule continue to be applicable in any event. This last-mentioned issue is itself a substantive one that might also be amenable to possible legislative reform.

59 I must pause at this juncture, however, to re-emphasise the point made earlier to the effect that rules of procedure and evidence are necessary in order to provide an orderly structure for all concerned in the administration of justice. In other words, I must not be taken as advocating the total absence of rules and principles – here, with regard to the parol evidence rule. It is clear that the rule does serve a practical function – and an important one at that. To take but one illustration of a number of similar observations, Chang Min Tat FJ, in the Malaysian Federal Court decision of *Tindok Besar Estate Sdn Bhd v Tinjar Co* ([44] *supra*) observed at 233, with regard to the respondent's contention that parol evidence ought to be admitted because "not all the terms had been incorporated in the agreement", thus:

> If this contention so generally stated and understood had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law.

60 Prof M P Furmston also pertinently observes, in *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths LexisNexis, 14th Ed, 2001) at p 135 that:

> [T]he 'parol evidence' rule … can, within its proper limitations, be regarded as an expression of the objective theory of contract, that is, that the court is usually concerned not with the parties' actual intentions, but with their manifested intention.

61 In so far as the future is concerned, the main concern is whether, and if so, how, the parol evidence rule within the Singapore context might be amended in a way that would make it an even more effective legal tool, whilst simultaneously eschewing any applications of the rule that would produce a contrary result, *viz*, injustice owing to legalistic technicality. To this end, and in order to achieve a balance between realising the aims as well as ideals of the parol evidence rule on the one hand, and to avoid unnecessary pitfalls from its application on the other, there already exist a number of developments in other jurisdictions which could aid the local Legislature should it be minded to consider the issue of possible reform.

62 To take but a few examples, both the Ontario Law Commission (in its *Report on Amendment of the Law of Contract* (Toronto, Ministry of the Attorney General, 1987) at ch 8) and the British Columbia Law Reform Commission (in its *Report on Parol Evidence Rule* (LRC 44, December 1979), <http://www.bcli.org/pages/publications/lrcreports/reports(html)/Lrc44text.html> (accessed 21 February 2005)) recommended abolition of the parol evidence rule. So did the Law Commission of England and Wales in its earlier working paper in 1976 (see *Law of Contract – The Parol Evidence Rule* (Working Paper No 70, 1976)), although it later recommended that the rule be neither amended nor abolished (see the 1986 Report on parol evidence ([52] *supra*)). Another extremely specific variation, or modification, rather, can be seen in s 4 of the New Zealand Contractual Remedies Act 1979. The local position is, as we have seen, further complicated by the fact that the parol evidence rule is statutorily embodied – in the main, at least – in ss 93 and 94 of the Evidence Act.

63 As already mentioned, however, the task of reform is outside the remit of the courts. It is, nonetheless, hoped that some clarification might be forthcoming by way of reform in the foreseeable future.

Conclusion

64 I should like to conclude by commending both counsel for the lucid and persuasive presentation of their respective arguments. Although we operate within an adversarial system which, by its very nature, mandates counsel on each side advocating, as persuasively and as fearlessly as possible, their arguments on behalf of their respective clients, this can – indeed, ought – to be achieved within a framework of what, for want of a better term, I would classify as professional courtesy and common decency. Put in simpler terms, one can disagree and yet not be disagreeable. The clash of arguments that is supposed to result in the emergence of the light of truth must not degenerate so that more heat than light issues. Looked at in a practical light, where there is the (hopefully, merely occasional) descent into a less than agreeable situation, not only is the legal system in general sullied by such unseemly conduct but the court is also hindered in ascertaining what the true facts are and, hence, in arriving at a fair and just decision. I am therefore pleased to note that counsel in the present case conducted themselves in a manner that was both exemplary as well as helpful to the court.

65 Despite the enthusiasm and rigour with which counsel for the plaintiff presented her arguments, I was, unfortunately, unable to accept her arguments for the reasons set out above. In the circumstances, I dismissed the plaintiff's application with costs.

66 The present case also raised weightier issues of much broader import and significance. More specifically, the various issues and difficulties raised with respect to the parol evidence rule in general, and the interpretation as well as application of ss 93 and 94 of the Evidence Act in particular, have, in turn, raised the more general question as to whether or not the time is now appropriate for a re-examination of these provisions with a view to possible reform. I have indicated a sample of the specific difficulties as well as the possible need for legislative reform. I can do no more than this. As I have already mentioned, reform of these provisions is outside the purview of the courts. However, it is legitimate, in my view, to raise these various issues for a number of reasons. First, the parol evidence rule originated from the common law. Secondly, the courts must interpret and/or apply ss 93 and 94 of the Evidence Act. Thirdly, the difficulties lie not just within the provisions themselves and in the relationship between them but also in the relationship between these provisions and the common law (the last-mentioned branch of law being one which is administered by the courts). It is therefore hoped that the appropriate bodies might consider reform of this very problematic rule as embodied within equally problematic statutory provisions in the not too distant future.

Plaintiff's application dismissed.