Lim Keenly Builders Pte Ltd *v* Tokio Marine Insurance Singapore Ltd [2011] SGCA 31

Case Number	: Civil Appeal No 87 of 2010
Decision Date	: 30 June 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Adrian Tan, Ong Pei Ching, Joseph Yeo Zhu Quan, Aziah Hussin (Drew & Napier LLC) and Boo Moh Cheh (Kurup & Boo) for the appellant; Richard Kuek Chong Yeow and Adrian Aw Hon Wei (Gurbani & Co) for the respondent.
Parties	: Lim Keenly Builders Pte Ltd — Tokio Marine Insurance Singapore Ltd

Contract

Insurance

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 3 SLR 1021.]

30 June 2011 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") who had dismissed the appellant's claim for an indemnity from the respondent insurance company under a Workmen's Compensation Policy (see *Mohammed Shahid Late Mahabubur Rahman v Lim Keenly Builders Pte Ltd (Tokio Marine Insurance Singapore Ltd, third party)* [2010] 3 SLR 1021 ("the Judgment")).

2 The issues that arise in this appeal are deceptively simple and centre, in the main, on the concept of *construction* of the contract between the parties. However, as we shall see, the principal difficulty lies in determining the *scope of application* of the insurance policy concerned.

Factual background

The parties

3 Lim Keenly Builders Pte Ltd ("the Appellant") was the main contractor for the design and erection of an industrial building at Tuas South Avenue 3/Tuas Bay Drive ("the Project"). In respect of this Project, the Appellant contracted two policies with Tokio Marine Insurance Singapore Ltd ("the Respondent") on 4 May 2007: a Workmen's Compensation Policy No DWCP07S001548 ("the WC Policy") and a "Contractors' All Risks Policy No DGCR07S004322 ("the CAR Policy").

4 The Appellant was sued by a workman ("the Plaintiff") who had been seriously injured on 5 November 2007 while working at the Project worksite. He had at the time been employed by Utracon Structural System Pte Ltd ("Utracon"), to which the Appellant had sub-contracted post-tensioning works. The Plaintiff alleged that the Appellant had breached various statutory duties as well as its common law duty as occupier of the premises on which the Plaintiff had been injured.

5 The Appellant then brought third party proceedings against the Respondent for an indemnity under the WC Policy and/or the CAR Policy.

6 The Plaintiff and the Appellant reached a settlement on the first day of trial and interlocutory judgment was entered for 95% of the Plaintiff's damages, to be assessed. The trial thus proceeded solely in respect of the Appellant's claim against the Respondent for an indemnity. At trial, the Appellant abandoned its claim based on the CAR Policy, relying solely on the WC Policy.

The WC Policy

How the policy was concluded

7 The WC Policy and CAR Policy were simultaneously arranged and paid for by the Appellant through its insurance brokers, HSBC Insurance Brokers (Singapore) Pte Ltd. [note: 1] This was in line with the main contract for the Project, which required the Appellant to arrange for all necessary insurance policies before the work on the Project could commence, [note: 2] as well as with common industry practice whereby the main contractor typically arranges and pays for both the Contractor's All Risks Policy and Workmen's Compensation policies, for itself as well as on behalf of all its subcontractors. [note: 3] Accordingly, the letter from the Appellant awarding the subcontract to Utracon directed Utracon to "note that the Main Contractor [the Appellant] will be arranging for the Contractors' All Risks Insurance and Workmen's Compensation Insurance for *the whole of the Works*" [emphasis added]. [note: 4]

8 As alluded to above (at [7]), the Appellant arranged for these policies through HSBC Insurance Brokers (Singapore) Pte Ltd, specifically its agent, Mr Lye Meng Swee ("Mr Lye"). According to the Respondent's claims manager, Ms Swee Sow Chin ("Ms Swee"), the industry practice is that when a would-be insured is represented by an insurance broker, the insurance broker is the intermediary between the would-be insured and insurer. [note: 5] Ms Swee also gave evidence that brokers, as insurance professionals, would "have a good understanding of the scope of coverage of the policy as well as the policy terms and conditions and would be able to advise the main contractor and the other insureds under the policy accordingly". [note: 6] This should be borne in mind given that, in the court below, Mr Lye testified that he had understood the scope of the WC policy to be consistent with the construction put forward by the Appellant.

9 Following some email correspondence between Mr Lye and the Respondent's agent, Ms Irina Loo ("Ms Loo"), Mr Lye informed Ms Loo on 30 April 2007 that she could proceed to issue the WC and CAR Policies accordingly, and requested that she send him the cover note to the policies ("the Cover Note"). Upon receiving the Cover Note on 3 May 2007, Mr Lye checked it and noted that the Land Transport Authority ("LTA") was not included as a named insured. According to Mr Lye, the LTA requires that it be named as an insured in insurance policies that covers any works linking a driveway to a public road. [note: 7] He therefore emailed Ms Loo requesting that the Respondent include the LTA as a named insured. This having been done, the WC and CAR Policies were finally issued on 4 May 2007.

The terms of the policy

10 It is common ground that for a claim to be covered by the WC Policy, it had to fall within the WC Policy's Operative Clause ("the Operative Clause"), which provides that: [note: 8] " … if any workman *in the Insured's employment* shall sustain personal injury by accident or disease caused

during the Period of Insurance and arising out of and in the course of his employment by the Insured in the Business", the Respondent will "indemnify the Insured against all sums for which the Insured shall be liable to pay compensation under the Legislation or at Common Law ..." [emphasis added].

11 "Legislation" is in turn defined in the Interpretation Clause of the WC Policy as: [note: 9] "the Workmen's Compensation Act (Cap. 354), amendments and re-enactments thereof and any regulations made thereunder".

12 "[T]he Insured" is defined in the "Name of Insured" Clause as: [note: 10] "Lim Keenly Builders Pte Ltd [and]/or their sub-contractors of all tiers and level [*sic*] as contractor [and]/or M/s Kim Teck Leong (Pte) Ltd [and]/or the Land Transport Authority as principals for their respective rights and interests".

13 M/s Kim Teck Leong (Pte) Ltd is the developer and owner of the Project worksite, and the party which had originally engaged the Appellant. The Land Transport Authority had to be named amongst "the Insured" because the Project involved building a driveway and linking it to a public road.

Parties' submissions

14 The parties' submissions were similar to those canvassed in the court below. In essence, the disagreement between the parties centres on what interpretation ought to be accorded the definition of "*in the Insured's employment*" in the Operative Clause (above at [10]) – in particular, whether the Operative Clause covers a case such as that in the present proceedings, where the plaintiff is employed by one party within the class of Insured ("a co-insured") but is suing *another* co-insured instead of his direct employer (in this case, Utracon).

15 The Appellant's position is that the Operative Clause does cover such cases. In other words, the WC policy covers not only the liability of each contractor to its own employees, but also any liability incurred by one contractor to the employees of any other contractor within the class of what has been described in the WC Policy as "the Insured". In this case, therefore, the WC Policy covers the Appellant's liability to the Plaintiff even though he was employed by Utracon.

16 On the other hand, the Respondent's position is that whilst all levels of contractors, main and sub-contractors alike, fall within the class described as "the Insured" in the WC Policy, there must be a relationship of employment between the *particular* contractor seeking an indemnity under the WC Policy and the particular injured plaintiff. The Respondent accepts that it would have had to indemnify Utracon had the Plaintiff sued Utracon, but it contends that it is not obliged to indemnify the Appellant in respect of its liability to the Plaintiff.

17 To this end, the parties disagree on the effect of three particular features of the WC Policy, as follows:

(a) The "Risk 001" Clause;

(b) Deletions from the "Exceptions" Clause; and

(c) Endorsements attached to the Schedule.

The "Risk 001" Clause

18 The "Risk 001" Clause, which defines the risk insured against, reads as follows: [note: 11]

"Workmen's Compensation (Project)

Insured Employees

Item 001. On all employees of insured and all tiers subcontractors

Contract Wageroll S$1,504,000.00"

19 According to the Appellant, this clause indicates that "insured employees" clearly includes employees of "all tiers subcontractors". The Respondent, however, argues that this clause does not change the scope of the Operative Clause but was, instead, meant to expand the coverage from *workmen* (*viz*, only manual labourers or non-manual labourers with a monthly income not exceeding $1600) to all *employees*.

Deletions from the "Exceptions" Clause

20 The Respondent's standard Workmen's Compensation Policy jacket has an "Exceptions" Clause excluding its liability in respect of various items. Two items were deleted from this in the present WC Policy: [note: 12]

(a) Sub-clause (b): "the Insured's liability to employees of independent contractors engaged by the Insured"; and

(b) Sub-clause (c): "any employee of the Insured who is not a 'workman' within the meaning of the Legislation".

21 The Appellant argues that the deletion of sub-clause (b) was clearly intended to make the Respondent liable in respect of claims brought against the Appellant by its subcontractor's employees, whereas the standard "Exceptions" Clause would have excluded liability for this. The Respondent denies this and argues, instead, that the two sub-clauses had to be deleted to maintain consistency with what it submits to be the effect of Endorsement B, as set out below (see generally [22]–[24]). In any case, the Respondent argues that it is irrelevant to consider the "Exceptions" Clause unless the Appellant can bring its claim within the Operative Clause in the first place, which it cannot do.

Endorsements attached to the Schedule

22 Two rather involved Endorsements are attached to the policy Schedule. Endorsement A reads as follows: [note: 13]

… in the event of any workmen employed by the within Insured or by the Insured's Contractors as referred to in Endorsement B hereon or any dependent of such workmen, bringing or making a claim under any Workmen's Compensation Act Cap 354 for the time being in force in the Republic of Singapore against any officer of the principal for personal injury or disease sustained whilst at work on any Contract covered by the terms and conditions of the within policy which the Insured may be carrying out for the said officer of the principal the Company [the Respondent] will indemnify the said officer or principal against such claim, and any costs, charges and expenses in respect thereof. Provided always that the Company shall be entitled to have the sole conduct and control of all proceedings connected with claims covered by this endorsement. Nothing in the endorsement shall be constructed as affecting the Insured's right to recover damages in any other way under the said legislation.

23 Endorsement B provides as follows: [note: 14]

> … the indemnity herein granted is intended to cover the legal liability of the Insured to workmen in the employment of contractors performing work for the Insured while engaged in the business and occupation in respect of which the within policy is granted but only so far as regards Claims under any Workmen's Compensation Act Cap 354 for the time being in force in the Republic of Singapore.

24 The Respondent argues that Endorsement B specifically extends the WC Policy to cover the liability of the Insured to workmen employed by its sub-contractors, but only in respect of "claims under any Workmen's Compensation Act", and *not* to common law claims such as the one here. Such an extension would not be necessary if the Appellant was correct in arguing that the Operative Clause already covered this. Furthermore, the Respondent argues that it is because of Endorsement B that the two sub-clauses (*viz*, (b) and (c)) above had to be deleted from the "Exceptions" Clause, and the deletions must therefore be read subject to Endorsement B.

25 The Appellant, on the other hand, argues that Endorsements A and B must be read together, and that they apply only to the LTA. In this regard, both Endorsements are stated in Memorandum 3 of the WC Policy to be "applicable to the Land Transport Authority".

The decision below

26 The Judge rejected all the Appellant's arguments as set out above (and which, as mentioned, are reprised in the present proceedings). Instead, he accepted the Respondent's submission that the WC Policy only applies where there is a relationship of employment between the *particular* contractor seeking an indemnity and the particular injured plaintiff. Hence, he dismissed the Appellant's claim.

The issue

27 The only issue before this court, therefore, is whether the WC Policy applies only where a co-insured incurs liability towards its own particular employees, *or* whether it applies regardless of whether liability is incurred towards its own employee or towards *anyone* in the *pool* of individuals *employed by the various co-insured for the purpose of the Project*.

Our decision

An important threshold point

28 Before proceeding to consider the detailed arguments made by the parties to the present appeal, an important threshold point ought to be made at the outset. Given that this appeal turns on the concept of interpretation in general and interpretation of the Operative Clause in particular, the first port of call must obviously be the actual language of the Operative Clause read together with the other relevant clauses. If the meaning of the clause is clear from the language of the clause itself, having regard to the context of the contract (see generally the seminal decision of this court on the principles of contractual interpretation set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029), all other specific arguments purporting to aid its interpretation are unnecessary, *except* where they may demonstrate that the meaning of the clause is not so clear as it appears at first blush.

29 In our view, this point is, in the context of the present appeal, not only an important one but also a crucial one. As we shall see, all the detailed arguments on specific features of the WC Policy,

made by both parties, tended to generate more "heat" than "light". More to the point, we are of the view that a plain reading of Operative Clause read in the context of the WC Policy supports, in and of itself, the Appellant's interpretation. By seeking to buttress his case with more specific and detailed points of construction, the then counsel for the Appellant in the court below regrettably diverted the attention of the court away from the central path which was clear, and which ought to have been the path taken. Instead, all concerned were led on a "detour" that ultimately resulted in the Judge arriving at what, with great respect, was an erroneous destination. Indeed, there is at least a hint in the Judgment itself which acknowledges the commercial purpose of the Operative Clause which, owing to the unscheduled "detour", the Judge was unable to give effect to: in particular, the Judge observed as follows (at [81] of the Judgment):

> ***It appears to me that the defendant and its insurance broker believed that the WC Policy was sufficiently comprehensive to embrace the present indemnity claim. However genuine their belief may be, the task of the court is to construe the terms of the insurance policy in order to determine its scope and whether on its true construction the indemnity claimed by the defendant is payable*** . Unfortunately for the defendant, the WC Policy only responds to indemnity claims brought by any of the Insured in respect of liability incurred at common law or under the Act to its employees. It does not respond to common law claims (as opposed to claims under the Act, which are brought within and covered by the WC Policy as a result of Endorsement B) brought by non-employees against the Insured as occupier of the worksite. ***While this may seem like an anomalous lacuna, as explained by counsel for the Insurer, it is always possible for the defendant or any insured to procure a policy to cover the current situation*** . That could be achieved, for example, by deleting the proviso "*but only so far as regards Claims under any Workmen's Compensation Act Cap 354 for the time being in force*" [emphasis added] from Endorsement B. Obviously there are other ways to arrange insurance to cover the present situation. It is ultimately a question of pricing, *ie*, the premium. [Italics in original; emphasis added in bold italics]

30 In fairness to counsel for the Appellant, however, one of his main arguments did centre on the meaning of the Operative Clause. Nor do we mean to state that all the other points raised by the Appellant were irrelevant or unarguable. Indeed, as we shall see, some of the points were, in fact, consistent with the Appellant's overall case. Nevertheless, the crucial point, in our view, is that a plain reading of the language of the Operative Clause in its proper context would have sufficed to dispose of the central issue in the present proceedings and that at least some of the specific points raised by the Appellant served to cloud this central pathway by way of what may be termed a "legal overkill". It might well have been the case that the Respondent might have raised these precise points as it was, of course, well entitled to do. However, the onus would then have been on *the Respondent* to utilise these points in order to *negative* what would otherwise have been a clear interpretation of the Operative Clause in the Appellant's favour.

31 Be that as it may, as the specific points were raised and argued in some detail by both parties here as well as in the court below, it is of course necessary for us to address them. However, we ought to nevertheless begin at the beginning by looking – first and foremost – at the actual language of the Operative Clause itself in order to ascertain whether, at *that* particular point, a clear result emerges in favour of a particular party's interpretation. As alluded to above, we are of the view that a clear result *does* emerge – a point we deal with in the very next section of this judgment. That having been said, we will nevertheless also proceed to consider the specific points raised in order to demonstrate why they are either consistent with the clear result just mentioned or are, at best, neutral points that do not advance the Respondent's case. With this "road map" in mind, let us now proceed to consider the relevant clauses.

Construction of the Operative Clause

32 Although it has already been referred to above, because of their pivotal significance to the outcome of the present appeal, it would be appropriate to set out the material clauses again, commencing with the Operative Clause, as follows: [note: 15]

> NOW THIS POLICY WITNESSETH that if any workman in *the Insured's employment* shall sustain personal injury by accident or disease caused during the Period of Insurance and arising out of and in the course of his employment by *the Insured* in the Business, the Company will subject to the terms exceptions conditions and warranties, and any memorandum if applicable, contained herein or endorsed hereon (all of which are hereinafter collectively referred to as the Terms of this Policy) indemnify *the Insured* against all sums for which *the Insured* shall be liable to pay compensation either under the Legislation or at Common Law, and will in addition pay all costs and expenses incurred by *the Insured* with the written consent of the Company. [emphasis added]

33 As already alluded to above, also material in the context of the present appeal is the "Name of the Insured" Clause, which reads as follows: [note: 16]

> Lim Keenly Builders Pte Ltd &/or their sub-contractors of all tiers and level [*sic*] *as contractor* &/or M/s Kim Teck Leong (Pte) Ltd &/or the Land Transport Authority as principals for their respective rights & interests. [emphasis added]

34 The Judge commenced his analysis of the Operative Clause in the court below as follows (see the Judgment at [16]–[17]):

> 16 As stated, the defendant must bring its indemnity claim within the Operative Clause in order to succeed in this action, but the main obstacle that stands in the way of the defendant is the undeniable fact that the plaintiff was not in its employment at the time of the accident. Instead, he was employed by Utracon.
>
> 17 The inherent difficulty facing the defendant is self-evident when a plain reading of the Operative Clause is adopted, for it reveals that the term "Insured" must be understood as referring to different entities in order for the defendant's claim to be maintained ...

35 With respect, the opening words of the Judge's analysis (see the Judgment at [16]) appeared to assume the answer to the very issue that was central to the resolution of the proceedings themselves. In fairness, however, to the Judge, perhaps one alternative interpretation is to that he was merely stating (without pronouncing upon) what "the main obstacle" before the Appellant in the court below was, although the phrase "*undeniable* fact" appears to point in the other direction (see the Judgment at [16], reproduced in the preceding paragraph [emphasis added]). Indeed, the Judge proceeded to express, in the next paragraph, the view that "a *plain reading* of the Operative Clause" militated against the construction adopted by the Appellant (see the Judgment at [17], reproduced in the preceding paragraph [emphasis added]). This view is also reiterated towards the end of the Judgment (at [72]).

36 We respectfully differ from the Judge's view. In our view, a plain reading of the Operative Clause does indeed support the Appellant's construction. The Operative Clause does not operate in a vacuum or a hermetically sealed environment. In particular, its interpretation depends on a determination of *who* is (or, as the case may be, who are) "*the Insured*" within the meaning and

scope of the Operative Clause itself. That this is a crucial inquiry is clear because, once "the Insured" is ascertained for the purposes of the Operative Clause, the result of this appeal follows logically therefrom. Put simply, if "the Insured" in the Operative Clause refers, *collectively*, to *all* the contractors (including the Appellant and the Respondent), then the Appellant's construction of the Operative Clause ought to prevail. If, on the other hand, "the Insured" in the Operative Clause refers, instead, *only* to *a single contractor* at any given point in time, then the Respondent's construction of the Operative Clause ought to prevail as the Plaintiff was *Utracon's* employee and the Operative Clause would only operate (as the Respondent itself agreed) to permit *Utracon* (but *not* the Appellant) to be indemnified by the Respondent if it (Utracon) was sued by the Plaintiff.

37 It is clear, in our view, that "the Insured" in the Operative Clause refers, *collectively*, to *all* the contractors. That this is so is evident from *a plain reading of the "Name of the Insured" Clause* (reproduced above at [12] and [33]). Indeed, that clause suggests that *all* the contractors involved in the Project were *to be treated as a single entity* for the purposes of the WC Policy: it names the Insured as "Lim Keenly Builders Pte Ltd &/or their sub-contractors of all tiers and level [*sic*] *as contractor* ..." [emphasis added], *ie*, as a single entity. It is true that the Respondent had argued that there had been a drafting error on its part, and that it had actually intended the "Name of Insured" clause to read, "Lim Keenly Builders Pte Ltd as contractor and/or their subcontractors of all tiers and level[s]" instead, *ie*, that the term "contractor" would apply only to the Appellant and not to it together with its subcontractors as a single entity. [note: 17] However, in interpreting the terms of a written contract, a party's *subjective* assertion that a drafting error was made is irrelevant in the face of the *objective* meaning of the terms concerned. In fact we find such an argument to be even more unacceptable given the circumstances in which insurance contracts are typically drafted: as this court observed in *Tay Eng Chuan v Ace Insurance Ltd* [2008] 4 SLR(R) 95 at [35], albeit in a different context, insurance contracts are invariably drafted and/or vetted by experts to protect the interests of the insurers, and the insured generally have little choice but to accept the terms thereof. In such a context, it does not lie in the mouth of the Respondent to assert that it intended a material clause to read differently from the actual words used, much less to argue that this ought to be the meaning to be ascribed to the clause.

38 We therefore find that the plain meaning of the Operative Clause is such that it does not apply only where there is a relationship of employment between the *particular* co-insured and the injured workman towards whom the co-insured has incurred liability. It is appropriate here for us to address the decision of this court in *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd and other appeals* [1997] 2 SLR(R) 746 ("*Awang bin Dollah*"), which the Respondent relies heavily upon as authority in its favour. We should point out that *Awang bin Dollah* involved a completely different question of interpretation, namely, whether the term "Sub-Contractors' Workers" in that part of the policy defining its coverage included the workers of *sub*-sub-contractors. This court found that it did not and, on that basis, dismissed the appellant's claim against the respondent insurer (see *Awang bin Dollah* at [52]–[58]). The observation of the court, at [59] of its judgment, that the appellant was in any case not entitled to an indemnity because the injured workman was not its own employee, was therefore purely *obiter dicta*. Even so, it is *obiter dicta* that may not apply in the context of the present appeal. While the Judge noted that the operative clause in *Awang bin Dollah* was materially identical to the Operative Clause here, with respect, that does not (in and of itself) take us far without establishing the class of insured to which the operative clause in *Awang bin Dollah* applied. The policy in *Awang bin Dollah* explicitly covered only the main contractor and "3 General Labourers (Sub-contractors' Workers)" – the unusual narrowness of which was commented upon by the court at [55]. This is quite unlike the expansive language of the "Name of Insured" Clause in the WC Policy in the present appeal and its definition of the insured risk as being "*on all employees of insured and all tiers subcontractors*" [emphasis added] (see the "Risk 001" Clause reproduced above at [18]).

39 Indeed, it fully accords with the commercial purpose of the WC Policy that the Operative Clause treats the contractors of all levels as a single entity. As the Appellant has argued, the Project would (necessarily and practically) involve not only the main contractor (*viz*, the Appellant) but numerous other sub-contractors (of whom Utracon was one) as well; it was essential that the WC Policy cover liability towards *all* employees of *all* the contractors involved in the Project (especially since, in the nature of things, the work on the Project would, in the nature of things, entail a fair amount of "crossover" interaction amongst the various contractors and employees). In a related vein, the Appellant also noted in its case, as follows: [note: 18]

> The WC Policy was to insure the Appellant on the basis of the Project as a whole. The Project's contract value was $7,520,000.00 and the contract wageroll was $1,504,000.00. This wageroll is calculated at 20% of the contract value of $7,520,000.00, and was *meant to cover the wages of subcontractors of all tiers*. [emphasis added]

It would make eminent practical sense for the policy concerned to have been taken out by the Appellant (who was the main contractor) on behalf of itself as well as *all* the other sub-contractors (which would be covered by the phrase "of all tiers and level[s]" in the "Name of the Insured" Clause). Indeed, this is borne out by undisputed facts. As noted above (at [7]), the main contract for the Project required the Appellant to arrange for all necessary insurance policies before the work on the Project could commence. [note: 19] The letter from the Appellant awarding the subcontract to Utracon directed Utracon to "note that the Main Contractor [the Appellant] will be arranging for the Contractors' All Risks Insurance and Workmen's Compensation Insurance for *the whole of the Works*." [emphasis added]. [note: 20] According to the evidence of the Respondent's own claims manager, this was in line with common industry practice, whereby the main contractor typically arranges and pays for both the Contractor's All Risks Policy and Workmen's Compensation policies for itself as well as on behalf of all its subcontractors. [note: 21]

40 In this regard, it is strange to imagine that the parties intended the application of the WC Policy to depend on so technical a distinction as whether the injured Plaintiff chose to sue the Appellant or Utracon, and on what cause of action he therefore chose to invoke (which is the gist of the Respondent's case). This is especially so when we consider that the full commercial context of the WC Policy includes its interaction with the Contractors' All Risks Policy (the "CAR Policy") issued by the Respondent to the Appellant at the same time in respect of the same Project. This is a dimension which was unfortunately not explored in the proceedings below because the Appellant abandoned its reliance on the CAR Policy, but it is one that we find significant. In this regard, we find that *an examination of the interplay between the CAR Policy and the WC Policy buttresses the interpretation of the Operative Clause as established above*. The CAR Policy insures, *inter alia*, against "Third Party Liability", including accidental bodily injury or illness to third parties "occurring in direct connection with the construction or erection" of the Project and "happening on or in the immediate vicinity of the site". [note: 22] We have already noted in the preceding paragraph that it was for the Appellant to make the necessary insurance arrangements for itself and its subcontractors *comprehensively*. If the Appellant's liability towards employees of its sub-contractors was already covered under the CAR Policy, the Respondent's restrictive interpretation of the Operative Clause might have been more tenable. However, the CAR Policy excludes "liability consequent upon ... bodily injury or to [*sic*] illness of employees or workmen of the Contractor(s) or the Principal(s) or any other firm connected with the project ... or members of their families". [note: 23] The plain language of this exclusionary clause precludes the application of the CAR Policy in *any* situation in which an employee of any level of sub-contractor is injured.

41 This is probably the reason why the Appellant abandoned its reliance on the CAR Policy in the court below. Of course, as we have already noted, the subjective intention of one party, without more, is irrelevant to contractual interpretation. However, the fact that the CAR Policy unambiguously excludes *all* types of liability with respect to *all* cases concerning injury to employees does appear, in our view, to lend weight to the inference that parties understood this category to be dealt with somewhere else, *ie*, under the WC Policy. Indeed, we found the Respondent's pleadings in the proceedings below to be rather strange in so far as they denied that the WC Policy applied to this case, and then denied liability under the CAR Policy as well, solely on the basis of the WC Policy. [note: 24]

42 Of course, there is the second possible conclusion that the parties did not intend to cover *at all* any tortious liability the Appellant might incur towards the employees of its subcontractors in the course of the Project. Put simply, the Appellant would be indemnified under the WC Policy for liability to its own employees (and similarly, each subcontractor for liability to its own respective employees), and under the CAR Policy for liability to "pure" third parties, but that its recourse with regard to liability to employees of its subcontractors would fall into a "legal black hole" situated somewhere between these two policies. We find this to be extremely unlikely in light of the commercial context we have already discussed above. Most significantly, this would imply that the parties intended that *whether or not a given case falls within this "legal black hole" depends completely on the choice and actions of a third party who is unlikely to be even addressing its mind to any issue of insurance between the Appellant and Respondent in the first place*. With respect, we cannot imagine that the parties had intended this to be the cornerstone of the legal obligations between them. We cannot envisage that the main contractor arranged and *paid for* insurance coverage for its subcontractors but intended to leave its own liability uncovered upon a contingency dictated solely by the prerogative of the injured plaintiff. We find it equally implausible that the Respondent, being fully aware of this commercial and practical context, understood them to be doing so. It is also significant that the insurance broker concerned understood there to be no such "legal black hole", especially given the Respondent's claims manager's own testimony that such insurance brokers are intermediaries between would-be insurers and insured, and are insurance professionals with "a good understanding of the scope of coverage of the policy as well as the policy terms and conditions" (see above at [8]).

43 In summary, it is clear that the plain language of the Operative Clause, read together with the "Name of the Insured" Clause achieved the very purpose which the Judge envisaged the parties to the present proceedings to have contemplated (as expressed in the Judgment at [81]). Why, then, did the Judge feel compelled to arrive at a different interpretation of the Operative Clause? In this regard, it is only appropriate that we examine the Judge's specific reasons for rejecting the construction we have taken of the Operative Clause (see generally the Judgment at [40]–[54]).

44 The first specific reason is one which we can deal with simply, *viz*, that the construction the Appellant had argued for "is an extremely strained interpretation" because there is no express clause as such (see the Judgment at [40]). With respect, the "Name of the Insured" Clause is not being relied on in and by itself, but is, rather, being read *together with* the Operative Clause in *an integrated and holistic* fashion which also takes into account the *intention* of the parties themselves. Viewed in this light, the plain meaning of the Operative Clause is, in our view, clear and clearly supports the Appellant's construction of that clause.

45 The second specific reason given is that, in "the absence of plain wording to such effect", the Appellant's construction of the Operative Clause ought not to be given effect to as "[the] result is so manifestly contrary to established principles of tort law that it is inconceivable that it can be achieved via an inadequately-drafted definition clause" (see the Judgment at [41]). With respect,

however, the issue is not one relating to tort law as such but, rather, the *contractual agreement* between the parties in an insurance contract.

46 The third specific reason appears, at first blush, to be the most persuasive one, and is the one that the Judge relied on at some length (see the Judgment at [42]–[54]). This reason is that "the interpretation argued by the defendant [*viz*, the Appellant] requires the defendant and Ultracon to be treated as one joint entity, *viz*, the "contractor" and that "[t]this implies that the WC Policy is, on the defendant's interpretation, a joint policy rather than a composite policy" (see the Judgment at [42]). The Judge, however, was of the view that the WC Policy is a *composite* policy. Specifically, the Judge rejected the Appellant's argument that the dichotomy between joint and composite policies only applies in the context of property insurance (see the Judgment at [52]–[53]).

47 We agree that the Appellant's confinement of the dichotomy to property insurance is without merit. With respect, however, it appears that the dichotomy itself was fundamentally misunderstood in the proceedings below – this being one instance of the legal "detour" that we alluded to earlier at [29]. The dichotomy between joint and composite policies does *not* go towards *defining* each party's insured interests. Rather, *it goes towards establishing when an insurer can avoid its obligations against an innocent co-insured because of misconduct on the part of another co-insured*, such as fraud or breach of a condition to notify the insurer of certain developments (see, for example, The Honourable Desmond Derrington QC & Ronald Shaw Ashton, *The Law of Liability Insurance* (2nd Ed, LexisNexis, 2005) at para 2-404). For example, in the oft-cited English Court of Appeal decision of *General Accident Fire and Life Assurance Corporation, Limited, and another v Midland Bank, Limited, and Others* [1940] 2 KB 388, the fact that the policy was a composite one went towards the conclusion that that fraud on the part of one co-insured did not affect the insurer's obligations to all the other co-insured. The Judge rightly established (see the Judgment at [43]–[44]) that the test for distinguishing between the two is the nature of the co-insured's interests (*ie*, whether they are joint or separate). However, the Judge and the parties do not appear, with respect, to have appreciated that such a test inherently requires one to *first* determine what the insured interest of each party is. *Only then* can one decide whether these interests are joint or separate. The Judge's approach (and the approach the parties have taken) has therefore, again with respect, *inverted the logic* of the entire process of analysis. The Judge looked to the dichotomy between joint and composite policies to determine what the Appellant's insured interest is (*ie*, whether it extends to liability to sub-contractor's employees). *However*, this was the very issue to be decided in the court below (and on appeal), and one which the dichotomy just mentioned does not aid in resolving. The Hong Kong Court of First Instance decision of *The New India Assurance Company Limited v Dewi Estates Limited & Others* [2009] HKCU 1403 provides a useful illustration of the approach that ought to be taken. In that case, in a factual matrix very similar to that in the present appeal, the court *first* determined the extent of each co-insured's interests insured under the policy *before* analysing what this meant for the policy in terms of whether it was joint or composite. The dichotomy between a joint policy and a composite policy is, by definition, a *subsequent* step in the reasoning or analysis, and, even then, a subsequent step that is only relevant if the insurer is seeking to avoid its obligations on the basis that one co-insured has breached the terms of the policy concerned. That is not the case here. Therefore, we find that the dichotomy between a joint policy and a composite policy is a "legal red herring" in the context of what needs to be decided in the context of the present appeal.

48 In the circumstances, therefore, we find that an analysis of the Operative Clause demonstrates that the WC Policy applies where a co-insured incurs liability towards anyone in the pool of individuals employed by the various co-insured for the purposes of the Project, and not only when a co-insured incurs liability towards its own employees. If the analysis in this part of the judgment had been adopted in the court below, that would have sufficed to dispose the proceedings, albeit in the opposite direction. However, a number of other (more specific) arguments were canvassed. As we

have noted above, this was unfortunate as they served to obscure – rather than illuminate – the path to what ought to have been, in our view, the correct legal result. Nevertheless, as these arguments were canvassed in some detail both here and in the court below, we now turn to consider them *seriatim*.

Other specific arguments

The "Risk 001" Clause

49 As already noted above (at [19]), the Appellant argues that the "Risk 001" Clause (reproduced above at [18]) indicates that "insured employees" clearly includes employees of "all tiers subcontractors". The Respondent, however, argues that this clause does not change the scope of the Operative Clause but was, instead, meant to expand the coverage from *workmen* (*viz*, only manual labourers or non-manual labourers with a monthly income not exceeding $1600) to all *employees*.

50 In the court below, the Judge rejected the Appellant's argument. In his view, the Appellant's argument was "at odds" with its own evidence given by Mr Lye, who was formerly the Senior Manager of HSBC Insurance Brokers (Singapore) Pte Ltd, and was (it will be recalled) the insurance broker who arranged the WC Policy on behalf of the Appellant (see above at [8] and the Judgment at [59]). He agreed, instead, with the Respondent's argument and concluded as follows (see the Judgment at [59]):

> [T]he "Risk No 001" Clause was inserted to expand the definition of a "workman"; it did not otherwise change the scope of the Operative Clause – in particular, by modifying the concept of "employment".

51 On appeal, the Appellant argued that Mr Lye had merely been giving his personal opinion and that his evidence had been wrongly admitted in contravention of s 95 of the Evidence Act (Cap 97, 1997 Rev Ed). This argument is, with respect, not very persuasive. In any event, even if the Appellant's argument with respect to the "Risk 001" Clause is rejected, this is merely a neutral factor in so far as its overall case is concerned. The rejection of this argument, on the other hand, certainly does not advance the Respondent's case, especially since it does not detract from the construction we arrived at in the preceding part of this judgment.

Deletions from the "Exceptions" Clause

52 To recapitulate, the Appellant had argued that Exceptions (b) and (c) (see above at [21]) had been deleted in order to extend the scope of the Operative Clause to include coverage for the Appellant's liability for claims made by employees who were not its own but who were, rather, employees of other sub-contractors (such as the situation here where the Plaintiff was the employee of Utracon, who was the sub-contractor).

53 The Appellant's (related) argument that legal effect ought to be given to such deletions is a sound one. The main argument itself – as briefly summarised in the preceding paragraph – does appear (in contrast to the argument centring on the "Risk 001" Clause) to be supported by the oral testimony of Mr Lye. Further, and looking at the individual clauses themselves, the deletion of what were in substance constraints on the responsibility assumed by the Appellant does appear to suggest that the Operative Clause ought to be read more broadly so as to include coverage for the Appellant's liability for claims made by employees of other sub-contractors (which would include the claim by the Plaintiff against the Appellant in the context of the present proceedings). Put simply, we are of the

view that this particular argument tends to *support* the Appellant's construction of the Operative Clause (read especially with the "Name of the Insured" Clause) and, at the very least, does not assist the Respondent's (contrary) construction of the same.

Endorsements attached to the Schedule

54 Again, the parties' arguments are set out above at [24]–[25]. This is the only specific argument that militates strongly against the interpretation of the Operative Clause we have adopted above, and relates to the Endorsements attached to the Schedule. According to the Respondent, Endorsement B specifically extends the WC Policy to cover the liability of the Insured to workmen employed by its sub-contractors, except that this is limited to "claims under any Workmen's Compensation Act" and *not* to common law claims. Such an extension, so the Respondent's argument goes, would be redundant if the Appellant was correct in arguing that the Operative Clause already covered this and common law claims as well. Therefore, if the Respondent is correct in arguing that Endorsement B does apply to the entire class of Insured in the WC Policy, this necessarily militates against the interpretation of the Operative Clause which we have adopted above. The Appellant, however, argues that Endorsements A and B must be read together, and that they apply only to the LTA.

55 Endorsement A clearly applies only to the LTA because it refers to "the principal", a point not challenged by the Respondent. What is less clear – and this is a question the Judge, with respect, failed to address – is whether Endorsement B is a stand-alone clause or is co-dependent with Endorsement A. Endorsement A contains the statement "as referred to in Endorsement B hereon", suggesting that the two are co-dependent. However, where Endorsement B refers to "the indemnity herein granted", it is not clear whether "herein granted" refers to the WC Policy as a whole or to the indemnity specifically granted in Endorsement A. Despite, however, the ambiguity in the language of the Endorsements themselves, we find that the overwhelming evidence demonstrates that the two Endorsements must be read together and as only applying to the LTA. The first reference to Endorsements A and B in the WC Policy, in the attached memoranda, provides in parenthesis that the Endorsements are "applicable to the Land Transport Authority". [note: 25] In the proceedings below, the Appellant's insurance broker gave evidence that Endorsements A and B are required by the LTA in all Workmen's Compensation Policies relating to works linking a driveway to a public road, [note: 26] and that insurance policies covering works not involving the LTA typically do not include Endorsements A and B. [note: 27] Crucially, when the Judge queried the Respondent's counsel, Mr Richard Kuek, whether Endorsements A and B are specific clauses stipulated by the LTA and "more or less drafted" by the LTA, Mr Kuek had answered that they were indeed so, according to his own understanding. [note: 28] It was also notable that Mr Lye's evidence was that Endorsements A and B may not be necessary if LTA was not involved. [note: 29] The Respondent's contention, however, was that, albeit having been inserted on the requirement of the LTA, the Endorsements must be read objectively to refer to all the Insured and not just the LTA. However, the Respondent had no answer to the Judge's question as to why (as stated above) the attached memoranda indicated the Endorsements A and B as "applicable to the LTA"; if the Insurer was right that, notwithstanding that the Endorsements were inserted as a requirement by the LTA, they applied to other parties once they were indeed inserted, then merely inserting the Endorsements would have been sufficient, without stipulating that they were "applicable to the LTA". In our view, therefore, Endorsements A and B are confined to the LTA and do not affect the interpretation of the Operative Clause which we have adopted above.

A summary and conclusion

56 It is clear that none of the specific arguments considered above negatives or detracts from the

construction we have arrived at in the first part of this judgment and which results from a plain reading of the Operative Clause (read together with, especially, the "Name of the Insured" Clause). Indeed, as we have seen, some of these arguments actually *support* the construction we have arrived at. Finally, we would also like to note that the Appellant also sought to rely on s 17 of the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) (now s 17 (as amended) of the Work Injury Compensation Act (Cap 354, 2009 Rev Ed)). However, in view of our findings above, this issue is moot and we therefore say no more about it.

Conclusion

57 For the reasons set out above, the appeal is allowed. We will hear the parties further on costs and consequential orders.

[note: 1] Affidavit of Evidence-in-Chief ("AEIC") of Swee Sow Chin at para 19 in Appellant's Core Bundle ("ACB"), p 79.

[note: 2] *Ibid*, p 20.

[note: 3] *Ibid*, p 79.

[note: 4] *Ibid*, p 33.

[note: 5] AEIC of Swee Sow Chin at para 47 in the Record of Appeal ("ROA") vol III Part C ("ROA(3C)"), p 680.

[note: 6] *Ibid*.

[note: 7] Affidavit of Lye Meng Swee at paras 17–20, *ibid*, pp 572–573.

[note: 8] ACB, p 7.

[note: 9] *Ibid*, p 21.

[note: 10] *Ibid*, p 3.

[note: 11] *Ibid*, p 3.

[note: 12] *Ibid*, p 10.

[note: 13] *Ibid*, p 6.

[note: 14] *Ibid*.

[note: 15] *Ibid*, p 7.

[note: 16] *Ibid*, p 3.

[note: 17] Respondent's Case, para 91.

[note: 18] Appellant's Case, para 106.

[note: 19] ACB, p 20.

[note: 20] *Ibid*, p 33.

[note: 21] *Ibid*, p 79.

[note: 22] Section II, CAR Policy, *ibid*, p 97, (Tab 20).

[note: 23] *Ibid*.

[note: 24] Third Party's Defence to Defendant's Statement of Claim at para 17 in the ROA vol II, (Tab 17). See also the AEIC of Swee Sow Chin at para 39 in the ROA(3C), (Tab 25).

[note: 25] ACB, p 5.

[note: 26] AEIC of Lye Meng Swee in ACB, p 104.

[note: 27] Cross-examination of Lye Meng Swee, ROA vol III Part D, p 939 at lines 7–9.

[note: 28] *Ibid*, p 923 at lines 24–32.

[note: 29] *Ibid*, p 923 at line 13.