MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Dr. Badariah Sahamid, JCA; Mary Lim, JCA

Best Re (L) Limited v China Pacific Property Insurance Co Ltd

Citation: [2018] MYCA 174 **Suit Number:** Civil Appeal No. S-02(IM)-1746-08/2017

Date of Judgment: 18 May 2018

Litigation & court procedure – Summary judgment – Whether the issues identified merited a full trial – Principles applicable to the entry of summary judgment – Whether the issue raised solely a question of law – Whether there was a triable issue – Burden of proof – Whether the judge had erred in the exercise of discretion when applying the principles related to the entry of summary judgment

JUDGMENT

[1] The respondent's application for summary judgment was allowed by the High Court. Upon due consideration of the grounds of judgment, the submissions of learned counsel and the records of appeal, we allowed the appellant's appeal finding that the learned Judge had erred in the exercise of discretion when applying the principles related to the entry of summary judgment.

Background

[2] The respondent is an insurance company while the appellant is a reinsurance company. From 2010 to 2012, the parties entered into three separate reinsurance agreements in relation to the motor insurance business of the respondent's branch at Shanghai, specifically in relation to the brands of Ferrari and Mesarati. These three agreements are collectively referred to as the "Shanghai Agreements".

[3] In 2012, the parties entered into two more reinsurance agreements for its branch at Beijing, but this time in relation to the additional brands of Bentley, Rolls-Royce and Lamborghini. These agreements are collectively referred to as the "Beijing Agreements".

[4] The respondent claimed that the terms of the two sets of agreements were "generally similar" to each other, citing that the salient express terms of the two agreements are:

i. the reinsurance share of the defendant shall be 60%;

ii. Pan Asia Insurance Ltd shall act as the intermediary and that it is agreed and understood between the parties that all premiums paid to Pan Asia Insurance Ltd is deemed paid to the appellant; and

iii. the statement of accounts shall be submitted or declared by the respondent on a quarterly basis within 30 days after the close of each quarter. The appellant must provide confirmation on the statement of accounts within 15 days of receipt, and the respondent must settle its premiums within 60 days after receiving the confirmed statement of accounts from the appellant.

[5] The respondent claimed that it was an implied term of the two sets of agreements and/or the parties had a mutually accepted course of conduct that the mode of settling the premium payable by the respondent to the appellant and the payment of indemnity by the appellant to the respondent was according to a "Settlement Mode" as described at paragraphs 8 and 18 of the Statement of Claim in that:

i. on a quarterly basis, the respondent would submit a statement of accounts to the appellant setting out the premium (inclusive of commission) and indemnity payable by the respective parties;

ii. the appellant would confirm that statement of accounts and convey its confirmation to the respondent;

iii. if the premium, inclusive of commission due from the respondent to the appellant is greater than the sum of indemnity due from the appellant to the respondent, the respondent will set that sum off with the indemnity and pay the appellant the offset balance, or net due; and

iv. if the sum of indemnity is greater than the premium (inclusive of commission) due from the respondent to the appellant, then the appellant will similarly set off the indemnity from the premium (inclusive of commission) and pay the respondent the net due.

[6] The respondent claimed that the Settlement Mode had been adopted from 2010 to the 3rd quarter of 2012. During this period, the premium (inclusive of commission) had always been greater than the indemnity due from the appellant to the respondent. As such, the respondent had been paying the appellant, or its intermediary, Pan Asia Insurance Ltd, the net due.

[7] The respondent claimed that it had paid a total of USD4,709,820.11 under the Shanghai Agreements and a total of USD818,710.36 under the Beijing Agreements.

[8] Towards the end of 2012, the respondent decided not to renew both sets of agreements for 2013 after discovering that the appellant's credit rating had been downgraded. According to the respondent, it was "wary of the defendant's financial status". Both sets of agreements expired on 31.12.2012.

[9] The respondent claimed that although it was no longer obliged to pay any premium, the appellant remained liable to indemnify the respondent for settled claims that it made after 31.12.2012 under those policies issued on or before 31.12.2012. The respondent calculated that the appellant was obliged to pay the net due sum of USD3,457,616.75 under the Shanghai Agreements, and the net due sum of USD855,988.33 under the Beijing Agreements, a total sum of USD4,313,605.08.

[10] On 20.5.2014, the respondent sent a High Value Motor Reinsurance Agreement Claims Payment Request to the appellant. Despite meeting up with the appellant, providing the appellant documents requested, indicating to the appellant that it was willing to assist in providing any further information that the appellant required, and sending reminders, the appellant failed, neglected and/or omitted to pay the respondent the net sum due.

[11] The appellant sought proof of payments or receipts with respect to insured persons under the original policies or translation of documents pertaining to the original policies as a prerequisite to settlement of the net due under both sets of agreements. Through its counsel, the respondent ceased negotiations for an amicable solution to the dispute claiming that the appellant knew or ought to have known that the same were not required under both sets of Agreements nor was it the Settlement Mode between the parties. The suit was then filed.

[12] After service of the Statement of Claim, and the appellant had entered an Appearance, the respondent filed an application for summary judgment. In the affidavit filed in support of the application, the respondent averred that the appellant had no defence to its claim; this is in compliance with the requirements of Order 14(2) of the **Rules of Court 2012**. The burden then shifts to the appellant to raise a triable issue.

[13] The learned Judge pointed out that the Defence was "brief", raising only three issues:

i. that the appellant’s share of the reinsurance of 60% was “not normal and imprudent”;

ii. a denial that Pan Asia Insurance Limited has the authority to act on its behalf or that it has any authority to bind the appellant;

iii. that because of the respondent’s duty ‘of utmost good faith’, the respondent was under a duty to make full and complete disclosure of the breakdown and material details of the claims that it had settled, that the claims were properly settled under the respondent’s policies, and that material declaration had been made pertaining to the risks and claims.

Decision of the High Court

[14] After correctly identifying the applicable legal principles, that the burden was on the appellant to show that there were triable issues given that the respondent had met the preliminary requirements for entry of judgment summarily, the learned Judge found that none of the three issues as identified above merited a full trial.

[15] In respect of the first two issues, the learned Judge found that since the appellant had not denied

executing the five reinsurance agreements, that it was "clearly stated in the agreements" the reinsurance share of the appellant; that "it is clearly stated" in those agreements that the "Intermediary" is Pan Asia Insurance Brokers Limited; and because of the presence of a "Special Clause" where all premiums paid to Pan Asia "are deemed ...paid to Best Re (L) Ltd", these issues are "no triable issue". In respect of the first issue, the learned Judge further found that nothing further could be gained by going to trial with the tenuous defence that it was "not normal" or "imprudent". As for the second issue, the learned Judge also examined a letter dated 1.5.2011 [exhibit "P-12" in the respondent's affidavit-in-reply] to fortify his view that the issue does not merit trial.

[16] The learned Judge identified the third issue as the "major contention of the defendant to resist the summary judgment application", that under clause 14 of the original policies "which run into hundreds, an insured person was obliged to provide "all relevant proof and information" to support his or her claim to the plaintiff who is the original insurer". There were 452 claims under the Shanghai Agreements and 61 claims under the Beijing Agreements. The appellant had sought production of all the documents or information that were provided by the insured persons or the claimants under the original policies in support of their claims from the respondent, the original insurer.

[17] This was resisted by the respondent on several grounds; namely that both sets of Agreements do not require the production of documents or proof of claim in respect of the settlement under the original policies. Those Agreements instead provide for a "pay as may be paid" in the case of the Shanghai Agreements and a "follow the settlement" clause under the Beijing Agreements.

[18] The learned Judge was of the view that the third issue or defence posed two questions, that is to say:

i. whether clause 14 which obliges the original insured persons to provide documents for loss verification is incorporated into the reinsurance contracts;

ii. the legal effect of "pay as may be paid" and "follow the settlement" clauses.

[19] The learned Judge agreed with the respondent's counsel that the determination of these two questions "is eminently a matter of construction that does not necessitate a full trial", citing **Bank Negara v Mohd Ismail & Ors** [1992] 1 MLJ 400 in support. The learned Judge then proceeded to consider and determine the two questions, forming the view that the appellant's pleas "can be addressed as a matter of law". A substantial part of the grounds of judgment [paragraphs 38 to 59] concerned the learned Judge's deliberations on these two questions and finally a determination of the third issue in the respondent's favour. With that determination, the learned Judge concluded that no triable issue meriting a full trial had been raised; consequently, the respondent's application was allowed and summary judgment was entered against the appellant for the sums prayed.

Decision of the Court of Appeal

[20] We are aware that the learned Judge applied the observations of the majority decision in **Bank Negara v Mohd Ismail & Ors**, where Mohamed Azmi SCJ said:

> "Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O 14. If the legal point is understood, and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment merely because the question of law is at first blush of some complexity and therefore takes a little longer to understand."

[21] The appellant had argued that under the terms of both Agreements, the terms and conditions of the original policies apply to claims settlement; the original policies being comprehensive motor insurance policies. Since an insured person under the original policies would have been required under clause 14 of the original policies to provide complete and relevant proof and information and confirm with the respondent the nature and reason for the accident [it being a motor insurance policy], the appellant was entitled to require the same from the respondent for verification purposes. The appellant argued that the respondent was obliged to provide to the appellant the same information provided by the original insured to substantiate their claims under the original policies.

[22] This contention was rejected by the learned Judge on the ground that *"commonsense would dictate that not every clause in the original policy can be incorporated into the reinsurance contracts"*; that *"indiscriminate wholesale incorporation of clauses from one contract to another in some circumstances would not be practical and hinder the commercial activity in question"*; that the "as per original policy" clause in the reinsurance agreements cannot be read in isolation. A holistic reading conducted against the backdrop of the reinsurance business revealed that it would be "absurd" for the appellant to insist on verifying every single claim settled in a full trial; to require the production of say, the original driving licence and permits of hundreds of insured persons in China; or to say that the appellant, who is Labuan based has a right to conduct hundreds of inspections and investigations in China.

[23] The cases of **Pine Top Insurance Co Ltd v Unione Italians Anglo Saxon Reinsurance Co Ltd** [1987] 1 Lloyd's Rep 476; **HIH Casualty & General Insurance Ltd v New Hampshire Co & Ors** [2001] 2 All ER (Comm) 39 were relied on by the learned Judge to support his view that the expression "terms as original" in reinsurance contracts do not mean that every term of the original policy is carried arbitrarily and without modification into the reinsurance contract; that relevancy, commonsense, and consistency between the original and reinsurance contracts weighed in as well; that the appellant's requirement for production of documents and information was without merit.

[24] It was also the view of the learned Judge that because of the time frames under which the settlements pursuant to both sets of Agreements had to be made, 30 days from submission of the quarterly account statement for the Shanghai Agreements and 15 days for the Beijing Agreements, it would be impossible for the appellant to individually investigate every single claim within that short time period available under the reinsurance agreements. The effect of all this is that clause 14 of the original policies is not incorporated into the reinsurance agreements.

[25] The learned Judge had further rejected the third issue as a triable issue on the basis that the respondent's duty to make full disclosure under the principle of "utmost good faith" in insurance

contracts, as a matter of law, is only a duty to make an honest claim-see **AXA Affin General Insurance Berhad v ALW Car Workshop Sdn Bhd** [2017] 2 MLJ 101. In short, the learned Judge found that the respondent did not owe any duty to supply all documents and information requested by the appellant.

[26] With respect, we disagree. Having carefully examined the issues, especially the third issue, the factual matrix and the particular agreements under consideration, we are of the firm view that the third issue is not a pure question of law. While the issue will certainly involve a construction of the Shanghai Agreements, the Beijing Agreements and even an examination of the terms and conditions of the original policies that the respondent had issued to the claimants, that construction cannot be undertaken without reference to the facts.

[27] The reinsurance agreements are in substance agreements of indemnity. Under the Shanghai Agreements and the Beijing Agreements, for which the respondent is obliged to pay the appellant premiums, the appellant will indemnify the respondent for claims paid out by the respondent to the insured persons under the original policies for motor insurance issued by the respondent.

[28] The respondent's claim stems from the respondent's contention that it is an implied term of both the Shanghai Agreements and the Beijing Agreements that the parties will settle the payment of premium that the respondent had to pay the appellant and the indemnity that the appellant has to pay the respondent, by way of a certain mode, referred to as a "Settlement Mode". Alternatively, the respondent alleged that this Settlement Mode was a mutually accepted course of conduct adopted by the parties from 2010 to the 3rd quarter of 2012-see paragraphs 8 and 18 of the Statement of Claim. These paragraphs are denied by the appellant.

[29] Given that the respondent's claim is based on an implied term and an alleged "mutually accepted course of conduct", it is quite clear that this is a matter of evidentiary proof that may only be properly examined and evaluated at a full trial; and not summarily.

[30] Furthermore, the facts that would be relevant to the construction of clause 14 of the original policies and its incorporation into both sets of Agreements would involve an examination of the alleged course of conduct, and how documents and information in support of the claims have been or are to be dealt with. In any case, the appellant's requirement that the documents produced under the original policies be produced to the appellant for the purpose of verification of the settlements made by the respondent, and the amounts of such settlements, are not unreasonable or far-fetched. We do not see how such a request to verify settlements may be considered to be irrelevant, bereft of commonsense or even inconsistent with the terms of the reinsurance agreements and those of the original policies. As it stands, there is indeed, clause 14 which refers to the production of such documentation and information.

[31] We further note that the authorities relied on by the learned Judge were not cases decided under similar principles and circumstances, where the pronouncements were made in applications for summary judgments. Those views were expressed in distinctly different conditions and circumstances, and those circumstances warrant closer scrutiny.

[32] The decision in **Pine Top v Unione Italiana** was made in relation to a protestation to refer a dispute to arbitration; while the English Court of Appeal's decision in **HIH Casualty v New Hampshire** was in relation to an appeal from a determination on preliminary issues. It will be seen that in **HIH Casualty**, Rix LJ expressed at paragraphs 8 and 9 of his judgment, much reservation and disquiet at having to provide his views on the preliminary issues posed as *"there was nothing which can be regarded as a matter of fact, securely found. Any factual matter referred to has a sort of provisional quality"*. In the early part of his judgment, Rix LJ also indicated that he could *"barely provide an answer"* to some of the questions that he had posed as the appeal arose on preliminary issues as to the construction of the insurance and reinsurance policies involved without a trial in which the facts of the case had been investigated.

[33] Be that as it may, the conclusions reached by the Court of Appeal in **HIH Casualty** were after a full hearing on an agreed process of determination by preliminary issues. That process, obviously, is entirely different from the summary process under Order 14 of the **Rules of Court 2012** where a successful contested application, results in the entry of judgment.

[34] Even the view of the Court of Appeal expressed in **AXA Affin General Insurance** [*supra*] on the duty of the insured to observe utmost good faith, arose in an appeal after a full trial, where witnesses were examined and documentary evidence evaluated. On the question of whether the law recognize a continuing duty of utmost good faith over and above the obvious duty to comply with the express and implied terms of the insurance contract, applying the House of Lords' decision in **Manifest Shipping** [*supra*], the Court of Appeal answered the question in the affirmative:

> [30] Consequently, when a claim for indemnity is made under an insurance policy, the insured is expected to observe utmost good faith in making the claim. Indeed, it has been held that the duty not to make fraudulent claim and not to make a claim in breach of the duty of utmost good faith is an implied term of the policy (**Smith v Queen Insurance Co** (1886) 12 NBR (1 Han) 311).

[35] In an application for summary judgment, ultimately, the test is to see whether the defence pleaded raises any *bona fide* issue or that there is a fair defence raised. The Court should not be answering the issues on the merit, relying on affidavit evidence, as was the case here.

[36] In the dissenting judgment of Gunn Chit Tuan SCJ, it was observed that:

> The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the **Rules of the High Court 1980**. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (**Malayan Insurance (M) Sdn Bhd v Asia Hotels Sdn Bhd; Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd**). It was held in the well-known House of Lords' case of **Jacobs v Booth's Distillery Co** that a complete defence need not be shown. The defence need only to show that there is a triable issue or question or that for some other reason there ought to be a trial, and

leave to defence ought to be given, in fact, even though the defence is not clearly established, but only reasonably probability of there being a real defence, leave to defend should be given (**Manger v Cash**).

[37] Those principles enunciated by Gunn Chit Tuan SCJ remind that summary judgment should only be entered in the "virtually uncontested or uncontestable cases". The process should never be used to shut out a defendant such as the appellant.

[38] It is quite clear that the issues raised by the appellant are not only reasonable and fair, the issues are *bona fide*. Both the Shanghai Agreements and the Beijing Agreements do indeed provide that the terms and conditions of the original policies are to apply to the reinsurance agreements. Whether and how the request of the appellant for the supply of documentation and information is to be met is a matter to be addressed at trial, particularly as the claim arose after the respondent decided not to renew both reinsurance agreements for the reasons cited in its Statement of Claim.

[39] Had the application been one to try the identified issues as preliminary issues under Order 34 of the **Rules of Court 2012**, or where the Court was disposing the case on a point or question of law under Order 14A, the situation would have been quite different. As it is, this was an application for summary judgment where although the learned Judge had identified the applicable principles correctly, his lordship had plainly erred in the application of those principles to the given factual circumstances and the pleaded Defence. The learned Judge had also erred in his exercise of discretion. Not only are the issues identified not fit for summary disposal; neither is the claim. The issues are clearly triable and the appellant should not be shut out from defending the claim on the issues pleaded in its Defence.

[40] In addition, we took the view that the factual matrix of the case as well as the law requires the trial court to consider the provision of Order 14 rule 3 of the **Rules of Court 2012**. In the instant case, this was not done. Under this provision, the Court has wide discretion not to allow the respondent to enter summary judgment if the Court, for some other reason, takes the view that there ought to be a trial of either the whole or a part of the claim as held by Hamid Sultan bin Abu Backer JCA in the case of **John Lo Fah v FACB Resorts Berhad** [2007] 4 MLJ 685. Support for the proposition is found in a number of cases and to name a few are as follows: (i) **Concentrate Engineering Pte Ltd v UMBC Bhd** [1990] 3 MLJ 1; (ii) **Ngai Heng Book Binder Pte Ltd v Syntax Computer Pte Ltd** [1988] 2 MLJ 205; (iii) **Miles v Bull** [1969] 1 QB 258; and (iv) **Peninsular Land Development Sdn Bhd v K Ahmad** [1970] 1 MLJ 149 [See ***Janab's Key To Civil Procedure***, 5th edition]. The failure of the Court on its own motion to take cognizance of Order 14 rule 3 of the **Rules of Court 2012**, in our view, has compromised the integrity of the decision making process, thereby requiring the judgment of the High Court to be set aside *in limine.*

[41] We, therefore, unanimously allow the appeal with costs in the cause. We set aside the decision of the learned Judge and order that the case be set down for an early trial.

Dated: 18 May 2018

Signed

MARY LIM THIAM SUAN
Judge
Court of Appeal, Putrajaya
Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Rules of Court 2012, Order 14 rule 3, Order 14, 14(2), 14A, 34

JUDGMENTS REFERRED TO:

AXA Affin General Insurance Berhad v ALW Car Workshop Sdn Bhd [2017] 2 MLJ 101

Bank Negara v Mohd Ismail & Ors [1992] 1 MLJ 400

Concentrate Engineering Pte Ltd v UMBC Bhd [1990] 3 MLJ 1

HIH Casualty & General Insurance Ltd v New Hampshire Co & Ors [2001] 2 All ER (Comm) 39

John Lo Fah v FACB Resorts Berhad [2007] 4 MLJ 685

Miles v Bull [1969] 1 QB 258

Ngai Heng Book Binder Pte Ltd v Syntax Computer Pte Ltd [1988] 2 MLJ 205

Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149

Pine Top Insurance Co Ltd v Unione Italians Anglo Saxon Reinsurance Co Ltd [1987] 1