# ILAS news

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Registered Office
30 Robinson Road
#02-01 Robinson Tower
Singapore 048546
Tel: (65) 6225 4211
Fax: (65) 6222 8310
Email: admin@crawford.com.sg



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## *Message from the President*

Dear Members,

Welcome to the inaugural issue for the 10th Anniversary of ILAS. It has been a rewarding time for me during the years of my involvement with the Association. I was introduced to the Association by my friend, Wee Jee Kin, who was then practicing in Madhavan & Partners and have not looked back since.

It is the objective of the Association to provide our members with the legal happenings and I sincerely hope this issue will satisfy this objective. Moving forward onto the next decade, it is my vision to bring the Association to the next horizon and to further increase its membership base. Currently the core of the members comes from within the insurance industry and the legal fraternity. We must not forget the insurance practitioners in the commercial world; they too need to be in tune with the current developments of insurance and legal developments.

With change being the constant denominator in the evolving environment, we need to be well equipped with the 4Ws and 1H (What, When, Why, Who and How) which is why Knowledge Management is important. Knowledge is meant to be shared and I intend to tap into the regional network of the Insurance Law Association to unleash this potential. In the pipeline is a regional seminar which is long overdue. I strongly encourage you, my fellow members, to share with us what you would like to hear and see on the regional front. My fellow committee members and I will try our utmost best to see how we can fulfil your requests.

Last but not least it was indeed heartening to see your support and encouragement at the recent ILAS Seminar: "Insurance and the Construction Industry". Thank you once again for your strong support and we look forward to receiving your continued support in the ILAS and all future seminars.

***Patricia Mack***
President
Insurance Law Association, Singapore

# ILAS

## 10TH ANNIVERSARY MESSAGE FROM OUR FOUNDING PRESIDENT

***By Stanley Jeremiah***

I was actually inspired to set up the Insurance Law Association after receiving encouragement from Michael Mendelowitz and John Butler of Barlow Lyde & Gilbert in 1994. They were then active in the umbrella Global insurance law association. 'AIDA'.

I thought that this would be a great idea as we could then organize discussion groups and forums and both learn from the international experts from AIDA as well as each other. I began by canvassing the support of the insurance industry and insurance law practitioners. Initially several showed interest.

Since the association we wanted to register had the word "Insurance" in its name, the Registrar of Societies referred our application to the Insurance Commissioner who then referred it to the various Insurance organisations. Why, I could never understand.

Well, the GIA objected to our registration on the grounds that there were already too many insurance related associations in Singapore and that the GIA sub committees could look into legal issues affecting the insurance industry.

The insurance commissioner's office did not support us but could not give any sound reason for objecting. I persisted with the Registrar of Societies and finally after more than a year of unnecessary delay, the Registrar of Societies registered ILAS.

Due to the GIA opposition to our formation, many insurers and insurance law practitioners fell away from supporting the association. I often felt very much alone in the battle to get the association off the ground. Balu Rao, Susan Lee, Kala Ponnuduray and a few others were persistent in their support and I am ever grateful to them.

When we started, we had absolutely nothing in hand. Mr Tan Kin Lian of NTUC Income gave us $1000 and several others like Mr Russ Soh of Federal Insurance stepped in with $500 each. This gave the association something to fall back on and we were in business.

The whole start up of the association was really held back by an insular mind set and this is something we have to battle against in order to develop ourselves as an insurance and financial services centre.

Soon after the Association was up on its feet, I decided to move to Canada and therefore handed over the reins to the very able Mr Balu Rao who led it for a number of years. We received much help from our Australian counterparts, AILA, for which I am also very grateful. Mr Michael Gill of Philipps Fox has been a good friend and we greatly appreciate his encouragement.

It is good to see the association on a sound financial footing and we hope to see its progress over the coming years.

CHAN HWEE SENG
*Immediate Past President*
*Insurance Law Association Singapore*

I have been involved with the Insurance Law Association since the idea of its formation was first mooted in 1994 by Mr Stanley Jeremiah, who later became the Association's first President. I attended the first gathering consisting of mainly insurers and lawyers that year by chance. I recall walking down Shenton Way that evening and met with a friend in the insurance industry. He was on his way to attend the gathering. He dragged me along to the meeting of which I knew nothing about. I witnessed a passionate group of people set in their minds to form an insurance law association for professionals in the insurance industry to review and discuss changes in the laws of Singapore insofar as they relate to insurance. Infused by their enthusiasm, I did not hesitate in signing up as a member when the Association was eventually formed.

I am indeed honoured to have served in the Central Committee under two Presidents, Mr Stanley Jeremiah and Mr B. Rao. I was President in 2004 and 2005.

The Association has made significant progress in the last ten years not only in terms of its ever increasing membership which comprises individual, corporate and academic, but also its recognition in the legal and insurance circles. The Association has been active in pursuing its objective through organising conferences, workshops and technical forums on topical issues such as motor insurance, insurance fraud, professional negligence and marine insurance all of which have been well received. Through its regular newsletters, the Association has kept its members informed and updated on technical matters and interesting developments that have bearing on the insurance industry. I myself have found the newsletters most helpful in my profession as a loss adjuster.

To further promote the interests of its members, the Association has been collaborating closely with other trade bodies and institutions. A good example is the recent seminar on "Insurance and the Construction Industry" jointly organised by the Association and Singapore Insurance Institute. There are ambitious plans in the pipeline to collaborate with other insurance law associations in the Asia Pacific region.

The success of the Association would not have come about if not for a group of highly dedicated and committed members who wants the Association to stand shoulder to shoulder with other trade bodies in the market place. Despite their tight working schedules and personal commitments, my colleagues in the Central Committee have sacrificed many of their evenings to meet and brainstorm ideas and plans to promote the interests of the Association and its members. Many of these plans and ideas were hatched at regular meetings held at the old Verandah at the Singapore Cricket Club which has become a regular venue. These meetings were never complete without several rounds of drinks and of course the club's famous Samosa, satay and chicken wings! Members also had the opportunity to get together to unwind and talk about the current issues in a casual and relaxed setting.

I am indeed proud to have been a part of the Association all these years and for this I have my friend whom I bumped into in 1994 to thank.

I wish the Association now headed by Ms Patricia Mack many successful years ahead.

# Case Commentary:

## Konkola Copper Mines v Coromin Ltd [2006] EWCA Civ 5

## &

## Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] EWHC 58 (Comm)

### 1. *Konkola Cooper Mines v Coromin Ltd [2006] EWCA Civ 5*

This case addresses conflicts of law issues and demonstrates the English Court of Appeal's ("CA's") willingness in upholding its own jurisdiction. In this case, a third party appealed against the trial judge's decision to allow the third party claim to proceed in the English courts notwithstanding the existence of a foreign exclusive jurisdiction clause.

#### a. *Facts*

Konkola Copper Mines ("KCM"), a Zambian mining company, entered into a local insurance contract with Zambian insurers (the "Zambian insurers") on a named perils basis (the "Zambian policy"). At the same time, KCM entered into a global all risks policy with Coromin Ltd ("Coromin"), as part of the Anglo-American group policy (the "Coromin policy").

On 8 April 2001 an avalanche of rock and mud substantially damaged KCM's mine. KCM brought proceedings in England against Coromin and the Zambian insurers. In order to protect itself against KCM's claim, Coromin made a third party claim against its reinsurers, a group of European underwriters led by Swiss Reinsurance Company (the "reinsurers"), who are presently represented by DLA Piper in London. KCM and the Zambian insurers agreed to stay KCM's action against the Zambian insurers in England and to proceed with the claim against the Zambian insurers in Zambia. As such, KCM maintained separate actions in England against Coromin and in Zambia against the Zambian underwriters.

Coromin's reinsurers then applied to stay the English third party proceedings in favour of proceedings in Zambia. The judge at first instance, Colman J, rejected that application, holding that there was no good arguable case that Zambia, despite the exclusive jurisdiction clause, was the better jurisdiction in which to resolve the issues of cover and ruled as a matter of discretion that it was not in the interests of justice to give effect to the Zambian jurisdiction clause or to stay proceedings.

#### b. *The Appeal*

The reinsurers appealed against Colman J's decision on the grounds that an exclusive Zambian jurisdiction clause governed the reinsurance policy and that the loss was an entirely Zambian-centric issue which would depend on the outcome of KCM's claim against the Zambian insurers in Zambia.

The CA held that it would be wrong to interfere with the trial judge's discretion to refuse a stay of proceedings because such interference required "rare and compelling circumstances"[1] that were not present in this case. The CA also held that it was not right to interfere with the trial judge's discretion not to enforce the Zambian exclusive jurisdiction clause and that it was not in the interests of justice to stay the proceedings.

In particular, the CA allowed the third party between Coromin and its reinsurers claim to proceed in England because it took into account the commercial interests of the parties. The CA was concerned that Coromin's position would be severely prejudiced if Coromin was to be found liable for KCM's all risks claim, but could not in the same trial be entitled to seek to pass it on to the reinsurers or brokers. Had Coromin applied to strike out or stay KCM's claim in England such that there was no bifurcation of claims between England and Zambia, the CA might have taken a different position.

[1] The CA applied the test laid down in Reichnold Norway ASA v Goldman Sachs International (CA) [2001] 1 WLR 173.

#### c. *Implications of this Case*

This case indicates the English appellate court's reluctance to interfere with trial judges' exercise of discretion, because trial judges are placed in a better position to consider the suitability of granting or refusing a stay at first instance.

More importantly, this case also shows the English court's tendency of preferring its own jurisdiction. Practically, the determination of loss might be more appropriately dealt with by a Zambian court. Nonetheless, the CA opined that the critical factor was that KCM's claim against Coromin was an established claim properly

brought in England. It was on that basis that the English court justified upholding its jurisdiction in respect of the third party claim against reinsurers.

2. ***Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] EWHC 58 (Comm)***

This English High Court case clarified the law in three aspects: first, that actual liability needs to be established in order for an insured to recover under a liability policy; secondly, the endorsement of the principles in the [1] *Commercial Union v NRG Victory Reinsurance case* [2] in relation to concurrent foreign proceedings; and thirdly, the rejection of Colman J's decision in the *Lumberman Mutual v Bovis Lend Lease case*. [3]

***a. Facts***

Enterprise Oil Ltd ("Enterprise"), sought an indemnity under a liability policy placed with Strand Insurance Co Ltd ("Strand") (the "liability policy"), in respect of its liability under a settlement agreement with third party dated 11 March 2002 (the "Settlement Agreement"). The Settlement Agreement was entered into following a mock trial jury in a concurrent action in Texas. The Settlement Agreement did not make specific apportionment between the various heads of losses.

***b. The High Court's Decision***

***i. Actual or arguable liability***

Aikens J held that in the absence of express wording to the contrary, Enterprise was covered for loss resulting from actual liability to third parties, not arguable liability, upon the proper analysis of law and facts.

The judge further opined that a settlement agreement was merely a "compromise" of whether or not there was any liability. Consequently, the Settlement Agreement was not to be considered as conclusive evidence of any actual liability in this case. As such, no recovery was allowed under the liability policy.

***ii. Foreign proceedings***

In order to determine whether Enterprise would have been found liable in the Texan proceedings, Aikens J cited with approval the principles in the *Commercial Union v NRG Victory Reinsurance* case. The court's task, therefore, was to step into the shoes of a Texan jury / judge to decide on the issues of liability and quantum in relation to the claim. After examining the evidence, Aikens J found that Enterprise had failed to prove any actual liability under Texas law for the third party claim recorded in the settlement agreement.

This case reinforces the decision in the *Commercial Union* case, in that foreign legal opinion on the likely outcome of any proceedings is irrelevant when determining whether a foreign jury / court would find liability in a particular case. However, as foreign law is a question of fact, the most practical way of determining issues of foreign law is by adducing witness evidence, including legal opinions, as to the application of foreign law. The court will then decide, by applying the principles of that foreign law, whether any liability exists. As such, a distinction needs to be drawn between the reliance on expert evidence to determine applicable foreign laws (which is allowed), as opposed to the reliance on expert evidence to predict the outcome of foreign proceedings (which is prohibited).

[2] Commercial Union Assurance Co plc v NRG Victory Reinsurance Ltd [1998] 2 Llyod's Rep 600.

[3] Lumberman's Mutual Casualty Co v Bovis Lend Lease Ltd [2005] 1 Llyod's Rep 494.

***iii. The Lumberman case***

The most important and controversial part of this case is Aikens J's criticism of Colman J's decision in the *Lumberman Mutual v Bovis Lend Lease case*. In the Lumberman case, Colman J held that an insured cannot recover under a liability policy if a settlement agreement with the third party has not apportioned a specific loss to the insured liability. Further, extrinsic evidence cannot be admitted to establish this liability.

Aikens J rejected Colman J's ruling and held that an insured does not have to identify a sum in its settlement agreement with a third party as representing the quantum of liability for a particular type of loss. This is because the insurer would be free to challenge the insured's liability to the third party, the quantum of the liability and whether the particular liability constitutes a loss covered by the liability policy. Further, from the points of view of law and public policy, to insist on the apportionment of liability in settlement agreements would lead to commercial inconvenience which could discourage the settlement of disputes.

Although this part of the judgment is merely obiter, it nevertheless provides a good starting point for the *Lumberman* case to be challenged in the Court of Appeal in the future. However, until the Court of Appeal makes a ruling, the *Lumberman* case is still good law and insureds who wish to enter into settlement agreements should make sure that their settlement agreements apportion specific sums to different heads of losses under the liability policy instead of stating only a global sum for all liabilities settled.


***Contributed by DLA Piper Rudnick Gray Cary (S) Pte Ltd***

*Contacts:* ***Justyn Jagger***
*Email: justyn.jagger@dlapiper.com*
***Chong Sim***
*Email: chong.sim@dlapiper.com*

# Who owns the ship? When a ship is involved in a dispute, the first question is – who is its owner?

Mary Thomson,
Partner
om.thomson@kennedys.com.hk

Before taking action in a case involving a ship, it is crucial to identify the owner correctly. Suing the wrong party can result in delays, inconvenience and costs or – more seriously – a mistake can extinguish any prospect of success because the claim against the correct party is time-barred or no longer viable.

**Registration**
The first question to be asked is whether the question of ownership is conclusively determined by the entry of ownership in the relevant registry.

To answer this, the logical starting point is section 12B(4) of the Hong Kong High Court Ordinance. The section provides:

"(4) In the case of any … claim … where –

(a) the claim arises in connection with a ship; and
(b) the person who would be liable on the claim in an action in personam… was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may … be brought … against –

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it."

*Tian Sheng No 8* [2000] 3 **HKLRD 49**, conducted by the writer, is the only admiralty case to have reached the Hong Kong Court of Final Appeal on this important point. In *Tian Sheng No 8*, the court adopted the UK approach in *The Evpo Agnic* [1988] 1 *WLR 1090* and held that "owner" in section 12B(4)(b) means the registered owner.

This approach makes sense for two reasons. Firstly, the use and meaning of the word "owner" in section 12B(4)(b) must be contrasted with the use of the words "beneficial owner" in section 12B(4)(b)(i) and (ii). In *The Evpo Agnic*, the Master of the Rolls, Lord Donaldson, said that, where a statute uses different terminology, the basic rule of construction is to presume that a different meaning is intended, particularly where different terminology appears in the same section. So, when construing section 12B(4)(b), it must be assumed that the drafters meant "owner" to mean something other than "beneficial owner" and that "owner" must refer to the registered owner.

Secondly, this way of approaching the question gives certainty to plaintiffs, who can be confident that they have identified the correct party to proceed against.

The Court of Final Appeal in *Tian Sheng No 8* also said that registered ownership is conclusive of beneficial ownership, and it would only be otherwise in a "wholly exceptional case". In *Tian Xiang 2 Hao*[1] , Ince & Co filed an acknowledgement of service of a writ on behalf of a vessel's "owners", arguing that, even though their clients were not registered as owners, they were its beneficial owners and entitled to enter an acknowledgement of service as "owners". But the Court of First Instance and the Court of Appeal disagreed: they said that a beneficial owner could not answer to the description of "owner" and struck out the acknowledgment of service.

**Other jurisdictions**
A similar approach is taken in other jurisdictions. The Malaysian High Court accepts that registration, for all intents and purposes, decides the question of beneficial ownership, with the burden of proof falling on any registered owner arguing that it is not the beneficial owner of a vessel. Singapore, however, has taken a different view and gives the plaintiff the burden of showing that the registered owner is also the beneficial owner. In Australia and New Zealand, the courts say that proprietary rights, rather than registration, determine the question of who owns a vessel – but that a party who is the registered owner of a vessel will have the burden of proving that it is not the beneficial owner.

**Competing registrations**
But how should ownership be determined where the ship is entered in different registries with different owners at the same time? This situation may arise where a ship has been sold and the vendor has failed to ensure that it has been deleted from the original registry.

[1] The case reference is missing from the footnote on the original copy.

The only decided case in Hong Kong on this point is *Blue Bridge, formerly known as Great Power* [2002] HKCFI 1232. Mr Justice Waung distinguished *Blue Bridge* from *Tian Sheng No 8*, where there was no competing registration and the Court of Final Appeal relied on the provisional registration of ownership to determine beneficial ownership.

All things being equal, a permanent registration is to be preferred to a provisional registration because a permanent registration is likely to be better supported by documentation – which is the most relevant question when determining which of two competing registries should be preferred. In Blue Bridge, there were registrations in Cyprus and Belize. The Cypriot registration was supported by the bill of sale – referred to by the judge as "powerful" – while the Belize registration was not.

*Blue Bridge* does not provide any hard and fast rules about resolving competing registrations: it simply indicates factors that are favoured by the Hong Kong court. The circumstances of each case will need to be considered, therefore.

# I spy with a private eye
# Is it legal to carry out surveillance on claimants in EC and common law cases?

Dana Chu
Assistant Solicitor
d.chu@kennedys.com.hk

It is common practice in EC or common law cases for the defendant (or their insurers or legal representatives) to instruct a private investigator to carry out surveillance on the claimant. During the investigation, the private investigator will often record the claimant's activities in video form, and write an accompanying surveillance report. All this material is then sent to the defendant or whoever commissioned it on their behalf. Not surprisingly, such surveillance gives rise to a number of tricky legal questions, which are discussed below.

**The surveillance**

Is the surveillance actually sanctioned by law? The short answer is "no". Currently, there is no legislation in Hong Kong specifically regulating the conduct of surveillance. The nearest legal authority is the Personal Data (Privacy) Ordinance, Cap 486 (the Ordinance), which deals with privacy and the protection of personal data.

In the landmark case of *Eastweek Publisher Ltd and Eastweek Ltd v Privacy Commissioner For Personal Data* CACV 331/1999, Mr Justice Ribeiro referred to the Report on Reform of the Law Relating to the Protection of Personal Data (the Report), which ultimately led to the enactment of the Ordinance. The Report cited four privacy "interests" identified by the Australian Law Reform Commission as follows:

"(a) the interest of the person in controlling the information held by others about him, or 'information privacy' as it is referred to in Europe;

(b) the interest in controlling entry to the 'personal place' or 'territorial privacy';

(c) the interest in freedom from interference with one's person or 'personal privacy'; and

(d) the interest in freedom from surveillance and from interception of one's communications, or 'communications and surveillance privacy'."

Mr Justice Ribeiro continued that the Report makes it clear that it is only concerned with "information privacy" and that "protection of that particular interest is plainly also the aim of the Ordinance". It is certain that the Ordinance was not intended to (and does not) impose any regulations on any other controversial activities, such as surveillance. Consequently, surveillance is legal, provided that it is carried out by lawful means and in a lawful manner. So, for example, the investigator must not trespass on private property or harass the person they are monitoring.

**The surveillance tape**

The next question is whether the obtaining and handling of the surveillance tape are legal. According to the definitions contained in section 2 of the Ordinance, surveillance tape amounts to personal data and is therefore protected by the Ordinance: it counts as a document which contains information relating to the person under surveillance from which that individual's identity can be ascertained.

The Ordinance sets out the law and data protection principles (DPPs) regarding the collection (see DPP 1), retention (DPP 2), use (DPP 3), security (DPP 4), availability of (DPP 5) and access to (DPP 6) personal data. When a private investigator conducts surveillance and prepares a surveillance tape, the person who commissioned the investigator is treated as the principal and the private investigator as their agent in the collection of personal data about the person under scrutiny. It is, therefore, critically important to guard against any breach of the Ordinance or the DPPs when it comes to taping the claimant's activities and using the information collected in this way.

**Taping the defendant**

DPP 1, subsection (1) says that personal data is not to be collected unless it is:

- collected for a lawful purpose;
- necessary or directly related to that purpose; and
- not excessive in relation to that purpose.

The purpose behind collecting personal data in the form of surveillance tape is normally to investigate and detect whether the claimant has exaggerated their loss or injury or has been engaged in some form of employment which they have kept secret. This is a lawful purpose; and the taping is necessary as it will constitute evidence of any wrongdoing by the claimant.

The last requirement, however, can sometimes give rise to problems. For instance, taping a claimant walking about in the street for an hour may well be considered "excessive" if the compensation sought is in respect of an injured hand. In contrast, exactly the same recording may not be "excessive" if the claimant is alleging that, as a result of the injury, they suffer from depression and seldom leave home. Consequently, the excessiveness or otherwise of the taping will depend on the particular circumstances of each case. Generally speaking though, recordings that seriously invade a person's privacy – such as their activities in the bathroom or other intimate behaviour – may be more easily ruled as "excessive" or even "unnecessary".

DPP 1, subsection (2) says that personal data must be collected in a way that is lawful and fair in the circumstances of the case. In Eastweek, the Privacy Commissioner for Personal Data took

the following factors into account when deciding whether a photograph taken by Eastweek of a random woman on the street, which was then published in the magazine without first obtaining the woman's consent, had breached the requirement of fairness:

- A photograph taken as part of "news activities" may be considered a fair means of collection.
- When considering whether an act is news activities, the contents of the article to which the photograph is attached should be taken into consideration.
- It was not unfair not to seek the woman's prior consent as the photographer desired to capture her in a natural pose.
- Taking a photograph without the subject's prior knowledge is unfair unless other circumstances negative the unfairness – for example, where there is (in the Privacy Commissioner's words) "a policy on the taking of adequate measures to ensure that the privacy rights of the individual are subsequently protected", such as covering the person's face when the photograph is published.

From the Privacy Commissioner's analysis, it is clear that the requirement of "fairness" is closely connected to the purpose of the collection (see DPP 1, subsection (1) discussed above) and whether the data subject – that is to say, the person under surveillance – has any prior knowledge of, or consent to, the collection (see DPP 1, subsection (3) discussed below.)

Under DPP 1, subsection (3), the person collecting the data should (either before or at the time they collect the information) take all reasonable steps to ensure that the data subject is explicitly informed of the purpose of the data collection and whether they can choose or are compelled to supply the information required. The only exception to this requirement is if compliance with it "would be likely to prejudice the purpose for which the data [was] collected and that purpose is specified in Part VIII of this Ordinance as a purpose in relation to which personal data [is] exempt from the provisions of data protection principle 6".

Under section 58 (1) of Part VIII of the Ordinance, personal data held for the following purposes (among other things) is exempted from the provisions of DPP 6:

"(a) the prevention or detection of crime;

(b) the apprehension, prosecution or detention of offenders;

…

(d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice…; and

(e) the prevention of significant financial loss arising from …

(ii) unlawful or seriously improper conduct, or dishonesty or malpractice."

As the purpose of the surveillance tape is to prevent the defendant paying higher compensation than necessary to a claimant who is in some way falsifying their physical condition, it falls within the prevention of significant financial loss limb of section 58(1)(e)(ii) above. As it is necessary to record the natural activities of the claimant in order to achieve that purpose, it would prejudice the aim of the surveillance if the claimant had to be informed about the taping either before or at the time it was carried out. Consequently, the investigator is freed from having to do so by the exemption contained in DPP1, subsection (3).

**The use of the surveillance tape**

DPP 3 states that, in the absence of the data subject's consent, the personal data collected must not be used for any purpose other than that for which it was intended to be used at the time of collection or which is directly related to that purpose. A surveillance tape obtained for the reason set out in section 58 (1) (e) above may be used in any EC and/or common law proceedings. However, if it is to be used for any other end, section 58 (2) provides that DPP 3 need not be complied with if:

- the data is to be used for any of the purposes described in section 58(1); and
- following the requirements set out in DPP 3 would probably prejudice the achievement of that purpose.

For example, suppose that a surveillance tape obtained to prevent significant financial loss (as described in section 58(1)(e)) shows some illegal activity by the claimant. It may be used as evidence in any criminal prosecution arising out of that illegal activity (ie for the purpose set out in section 58(1)(b), above).

**Access to the surveillance tape**

Under DPP 6, a data subject may ask a data user to give them access to personal information held by the data user. This provision is relevant in the present context as a claimant may request the disclosure of a surveillance tape which is unfavourable to them but which the defendant had not intended to disclose. This request for disclosure may be refused on the grounds that the tape is exempted from the provisions of DPP6 by virtue of section 58 (1) of the Ordinance.

**The surveillance report**

If the surveillance report contains information such as names, addresses, or photographs from which the claimant's identity can be ascertained, then the surveillance report will be treated as containing personal data and will be protected under the Ordinance. It will also be subject to the same rules and principles relating to the surveillance tape discussed earlier in this article.

However, if it is not possible to ascertain the claimant's identity from the surveillance report unless it is read in conjunction with the surveillance tape, then, arguably, the report itself will not be covered by the Ordinance.

**Summary**

Currently, there is no legislation governing the conduct of surveillance. Any surveillance conducted by legal means for a legal purpose is lawful. A surveillance tape or report obtained for the purpose of detecting whether the claimant in an EC or common law case has exaggerated their condition, or has concealed material information about their current condition, falls within section 58 of the Ordinance. Insurers who commission the surveillance – and the private investigator who conducts it – do not have to inform the claimant either when or before recording the claimant's activities (as normally required by DPP 1) if complying with that requirement would prejudice the very purpose for which the surveillance is being conducted.

# Opening up a Pandora's Box: *Cosmic Insurance Corp Ltd v United Oil Co Pte Ltd*[1]

**Introduction**

The provision – Section 18(b) of the Workmen's Compensation Act[2] ("the Act") has created a number of controversies in the past. The legislative history and the legislative intent of the provision has been a fodder for a number of reported decisions and articles. The "indemnity" nature of the provision and the issue of "faultless" party has proven to be rather complex. The article herein is not intended to revisit the past issues and controversies but rather to discuss yet another controversy triggered by the decisions of District Judge Tan Boon Khai and Justice Woo Bih Li on Appeal in the case of ***Cosmic Insurance Corp Ltd v United Oil Co Pte Ltd*** ( "United Oil").

**The factual matrix**

The Plaintiff is in the business of providing insurance in Singapore and the Defendant is carrying on the business of storing and blending oils, additives and lubricants. The Plaintiff issued a Workman's Compensation Policy to Protec Guards Management Services ("Protec"), who is in the business of providing security guards, escort services and other general services, insuring against all claims payable by Protec by virtue of the Act.

Since August 1999, Protec had been providing the Defendant with a security guard at their factory premises. On 2 November 2000, Protec dispatched one of their employees, Samuel Palraj ("Samuel"), to guard and protect the Defendant's factory premises as the regular security guard at the factory was not available for security duties. Unfortunately, on the very same afternoon, Samuel met with an accident at the factory when a forklift driven by one of the Defendant's servant reversed and collided into him.

As required under the Act, Protec provided an indemnity to the hospital for payment of medical expenses and made various claims against the Plaintiff under the policy. After assessing the claim, the Plaintiff reimbursed Protec an amount of $44,215.45. Later, Samuel withdrew his claim under the Act and proceeded under the common law. The claim was settled out of Court but Samuel did not claim the medical expenses paid by his employer's insurers.

The Plaintiff then commenced this action against the Defendant pursuant to Section 18(b) of the Act for the recovery of the medical expenses paid by Protec on behalf of Samuel as required under the Act.

[1] [2006] S.G.H.C. 85
[2] (Cap. 354, 1998 Rev. Ed.)

**Issues before the Court**

The issues facing the District Judge were as follows:-

i. Whether the employer Protec was faultless;
ii. Whether the insurer Plaintiff is entitled to indemnity for medical expenses under Section18(b) of the Act;
iii. Whether medical expenses amounts to "compensation" under the Act;
Let me set out the actual wording of Section 18(b) of the Act before we proceed further. Section 18(b) reads as follows:-

18. Where any injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof —

(a) […]; and

(b) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called upon to pay an indemnity under Section 17 (3), shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.

**The decision of the District Court**

Before the issue of whether the Plaintiff was entitled to claim indemnity for medical expenses under Section 18(b) of the Act, the Court needs to establish whether there was any fault on the part of Protec. Having heard the evidence of the witnesses involved, District Judge Tan Boon Khai came to the conclusion that the employer was faultless according to the criteria set out in the cases ***Chen Hsin Hsiong v Guardian Royal Exchange Assurance Plc***[3] and ***The Lotus M***[4] .

Next, the District Judge considered the issue of whether the medical expenses amounted to "compensation" for the purposes of Section 18(b) of the Act. In his judgment[5], he concluded that the medical expenses are not compensation under the Act and as such did not allow the Plaintiff's recovery of those expenses. He distinguished the case of ***Commercial Union Assurance Pte Ltd v Chua Kim Bak***[6] ("Commercial Union") where Justice Rajendran held that medical expenses were "compensation" under the Act. However, District Judge Tan Boon Khai gave leave to the Plaintiff to take the matter up to the High Court even though the claim amount was below $50,000.

The District Judge adopted a strict and literal interpretation of the relevant provisions of the Act and came to the conclusion that medical expenses did not constitute compensation under the Act. The relevant provisions are as follows:-

[3] [1994] 2 S.L.R. 92
[4] [1998] 2 S.L.R. 1
[5] [2005] S.G.D.C. 201
[6] [1999] 1 S.L.R. 553

3. —(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the provisions of this Act.

7. Subject to the provisions of this Act, the amount of compensation payable shall be in accordance with the provisions of the Third Schedule.

14. —(3) Where an injured workman is admitted to an approved hospital, the employer shall, in addition to the payment of compensation under this Act, be liable to pay directly to the hospital all fees and charges in respect of that workman and the costs of such medicines and artificial limbs and surgical appliances as are certified by the medical practitioner in charge of the approved hospital to be necessary and which are in fact supplied to that workman.

24. —(1) Subject to the provisions of this Act, the Commissioner shall have power to assess and make an order on the amount of compensation payable to any person on any application made by or on behalf of that person.

(2) The Commissioner shall cause to be served on the employer and the person claiming compensation personally or by registered post a notice stating the amount of the compensation payable in accordance with the assessment made by the Commissioner under subsection (1).

According to the District Judge, Sections 7 and 24 of the Act made it clear that there were two requirements for any payment to qualify as "compensation" under the Act. Firstly, the amount must be payable in accordance with the provisions of the Act and its Third Schedule. Secondly, the Commissioner of Labour must assess such "amounts". In the present case, the Commissioner did not assess the medical expenses. The assessment by the Commissioner was treated by the District Judge not merely as a matter of quantification of the relevant amount, but rather as a definitional matter.

The District Judge had to distinguish the case of ***Commercial Union*** as it was binding on him. He distinguished on the grounds that Justice Rajendran had suggested that the medical expenses in that case had been assessed by the Commissioner, although evidence was produced in that case to show that the Commissioner did not assess the medical expenses.

The District Judge also reached his decision on the further consideration that to allow such recovery would result in double compensation under common law and the Act. This is contrary to Section 18(a) of the Act, which reads as follows:-

18. Where any injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof —

(a) the workman may take proceedings against that person to recover damages and may claim against any person liable to pay compensation under this Act, but he shall not be entitled to recover both damages and compensation;

As mentioned earlier, Samuel had elected not to claim under the Act and decided to pursue a common law claim against the tortfeasor.

**The decision of the High Court**

The Appeal came up for hearing before Justice Woo Bih Li and after hearing submissions and considering the case authorities he affirmed the District Judge's decision and similarly held that the medical expenses was not "compensation" for the purpose of Section 18(b) recovery by the insurers.

Justice Woo's starting point is that Section 18(b) allows a workman to initiate proceedings to claim damages under the common law and to claim compensation under the Act, but not to recover both heads. The authority for this proposition is the case ***Singapore Bus Services Ltd v Lim Swee Pheng & Sons***[7]. Justice Woo noted that Samuel did not claim for the medical expenses under common law and therefore there was no issue of double recovery. As a workman is not entitled under Section 18(a) to recover both damages and compensation, he cannot recover compensation under a head of claim which was omitted from his common law clam. Therefore, Justice Woo felt that all heads of claim must be included in his common law claim and not some under a claim for damages and some under a claim for compensation. To quote Justice Woo: "A fortiori, an insurer cannot recover under Section 18(b) when the workman did not recover under the Act".

As the case of ***Commercial Union*** was not binding on Justice Woo, little emphasis was placed in distinguishing the case. After considering Section 3(1), Section 7 and the Third Schedule of the Act, Justice Woo came to the conclusion that Justice Rajendran was wrong in construing medical expenses as "compensation" under the Act. It was because medical expenses, unlike medical leave wages, were entirely omitted from the Third Schedule of the Act. Since Section 7 provided for the amount of compensation payable to be accordance with the Third Schedule, it would follow that medical expenses do not come within such compensation. He went on to interpret Section 14(3) of the Act and stated that the liability of the employer to pay the hospital directly is in addition to the payment of compensation under the Act. He was of the view that the words "in addition" reinforced the point that medical expenses are not part of the compensation payable under the Act but are additional to such compensation.

Justice Woo agreed that the situation presented at hand requires some form of redress as the insurer is "left out in the cold in respect of such hospitalization expenses" when the injured workman proceeds under common law. This might result in some injustice to the insurers as they might not have direct recourse against the tortfeasor. Thus, Justice Woo felt that some legislative intervention is needed to prevent such injustice.

With regards to the point on assessment by the Commissioner, Justice Woo agreed with the District Judge's position that compensation is payable under the Act only if it is assessed by the Commissioner.

**Analysis of United Oil case**

Let's not forget that the Act in question is known as the "Workmen's Compensation Act". The short title to the Act states that "An Act relating to the payment of compensation to workman for injury suffered in the course of employment". Therefore, it is disturbing to note that a payment made pursuant to the Act, specifically Section 14(3) where the employer/ insurer is obliged to pay the hospital expenses of the injured workman is not construed as compensation. If it is not compensation, it is pertinent to ask what the nature of the payment is and why it is within the scheme of the Act.

If medical expenses (hospital expenses) are not compensation under the Act, an anomaly will be created in the scenario arising from Section 3(5). Section 3(5) reads as follows:-

[7] [1978-1979] S.L.R. 225

3. — (5) An employer shall not be liable to pay compensation in respect of —

(a) any injury to a workman resulting from an accident if it is proved that the injury to the workman is directly attributable to the workman having been at the time thereof under the influence of alcohol or a drug not prescribed by a medical practitioner unless the injury results in the death or permanent incapacity causing a loss of not less than 50% of the earning capacity of the workman; or

(b) any incapacity or death resulting from a deliberate self-injury or the deliberate aggravation of an accidental injury.

This Section is an equitable provision which prevents the workman from claiming compensation if it is proven that he was under the influence of alcohol/ drugs or if the injury arises from deliberate self-injury or deliberate aggravation. But since the decision in the present case has held that hospital expenses are not compensation under the Act, it may lead to a situation where a worker is injured and he is admitted to the emergency department of the hospital, he receives treatment and pursuant to Section 14(3) of the Act, the employer/ insurer is obliged to pay the hospitalization expenses. Even if later it is established that the workman was under the influence of alcohol or deliberately injured himself, the effect of Justice Woo's decision would be that the insurer who provided the workmen's compensation policy cannot rely on Section 3(5) and refuse to pay the expenses. Is this a fair result?

Section 17(1) is useful to a workman who is employed let's say by a sub-sub-contractor in a massive construction project. If he is injured and his direct employers had not taken out a workmen's compensation policy for whatever reason, the workman has recourse against the main contractor. Does this mean that the main-contractor is liable to pay the medical expenses? Because of the reasoning of District Judge Tan and Justice Woo, the main contractor can argue that he is not liable for the medical expenses as they do not fall within the definition of "compensation". Further, why would he want to expose himself to the risk of not being able to recover the medical expenses as an indemnity pursuant to Section 17(3) of the Act from the person who would have been liable to pay in the first place? In the end, the one who really suffers is the poor workman who has to bear the cost of the medical expenses if his direct employer is uninsured and the main contractor rightfully refuses to pay.

It is also a well known fact that the Commissioner does not assess medical leave wages and medical expenses and it is left to the employer/insurer to determine the same and pay the workman. Therefore, in such a situation as far as medical leave wages are concerned where they are not assessed as per present practice, it would appear that the workmen's compensation insurer would not be entitled to commence recovery action against the tortfeasor under Section 18(b) of the Act where they have paid out medical leave wages.

Does this mean that the Commissioner would now start assessing the medical leave wages and medical expenses in order for Section 18(b) to have operative effect? There is no issue with permanent capacity compensation as it is already assessed by the Commissioner and it is clearly intended to be "compensation".

Insurers are now faced with a dilemma when confronted with a recovery action from a fellow workmen's compensation insurer for medical leave wages and medical expenses. Should they allow such recovery in the spirit of Act and for the sake of consistency or should they rely on the literal interpretation as propounded in the present case. The same insurer may find themselves on the other side of the fence and feel the impact of the present case.

Also, it is interesting to note that both Justice Rajendran's decision in ***Commercial Union*** and Justice Woo's decision in the present case are equally binding. Should the same issue arise before a lower Court again, that judge will have the unenviable task of deciding which case to follow. Until such time the Court of Appeal rules on this issue or Parliament steps in to make the necessary legislative amendments as suggested by Justice Woo, this undesirable state of affairs shall remain.

Another potential confusion that can arise is this: If the Commissioner starts to assess medical leave wages and medical expenses, then a injured workman who receives the same and subsequently decides to commence a common law action (after withdrawing his workmen's compensation claim) would technically be barred from doing so by virtue of Section 18(a) as he cannot receive both compensation and damages.

The Plaintiff's counsel drew Justice Woo's attention to the case of ***Lian Teck Construction Pte Ltd v Royal & Sun Alliance Insurance (Singapore) Ltd***[8], where based on similar facts, JC Lee Sieu Kin (as he was then) refused to give leave to the Defendant to appeal against the District Judge's decision to allow the Plaintiff insurer's Section 18(b) claim for medical expenses. However, Justice Woo brushed it aside on the basis that there were no written grounds of decision in that case.

Yet again, we see how the Judges themselves agree to disagree on the issue of whether medical expenses are compensation within the meaning of the Act in order for an insurer to successfully recover the same under Section 18(b).

**Conclusion**

Ultimately, it all depends on whether the Judge wants to adopt a technical or a purposive approach to the interpretation of the Act when deciding on Section 18(b) recovery cases touching on medical expenses and/or medical leave wages. Luckily, there is still a glimmer of hope for the insurers. Insurers need not leave their fate in the hands of the Judiciary, Parliament or the Ministry of Manpower. The General Insurance Association of Singapore can take the lead and reach a consensus to redress the turmoil and close the Pandora's box.

[8] O.S. No. 601712 of 2001.

***Contributed by Mr K. Anparsan***
***Partner***
***Khattar Wong & Partners***

# Seminar on Insurance and the Construction Industry

The ILAS kicked off its new work year by organizing a seminar on Contractor's All Risks *("CAR")* policies in conjunction with SII. With the increasing number of large scale construction projects in the pipeline, the seminar attracted a record number of participants from all sectors of the insurance industry and outside.

The seminar took on a more modern and casual discussion-type approach. A distinguished panel of speakers representing the usual players in a CAR policy were assembled. The speakers were posed a series of interesting questions by the moderator on which they then engaged one another with their frank and open views. It was indeed interesting to note the different perspectives of each player on what one would normally think is a simple issue.

The speakers consisted of Stuart Fairbairn (Contracts Manager of PKDBH JaV), Paul J. Rabitte (Managing Director of Crawford, Vietnam), Andianto Panduwinata (Senior Engineering Underwriter, SwissRe), Chong Sim (Senior Associate DLA Piper Law Firm) and Goh Chye Huat (Country Manager for Singapore, Jardines Lloyd Thomson Pte Ltd). The moderator was Justyn Jagger: a partner of DLA Piper.

One of the highlights of the seminar was learning more about the Defects Exclusions in a CAR policy. Through practical and lively examples, participants were given a very good idea by the speakers of how Defects Exclusions would be interpreted and applied in practice. The different variants of the Defects Exclusions available in the market were also discussed.

Another topic that got the speakers very engaged was the definition and meaning of simple common words in a CAR policy such as *"sudden", "unforeseen" and "damage*".

Although such words appear simple enough, participants were given an idea of the numerous possible interpretations and the problems that could arise in a claim depending on which interpretation one subscribes to.

The "*hottest*" topic for the day came up near the end of the seminar when the moderator asked whether some contractors abuse their CAR policies and treat their insurers as underwriters of the commercial success of the project rather than unforeseen risks. The general consensus at the end was that in a claim arising under a CAR policy, all players should abide by universal principles of fair-play, professionalism and integrity. Players should not look at one another with suspicion and distrust but should instead work together towards a win-win situation for all concerned.

The seminar ended with a call for greater clarity in the CAR policy wording and structure and more professionalism in the claims handling process not just from the insurer's perspective but from every player involved.

The seminar proved to be highly effective in giving the participants a useful insight into the operation of a CAR policy and also facilitated a frank exchange of views amongst the various players in the insurance industry.

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