QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Pte Ltd [2005] SGHC 11

Case Number : OS 565/2004

Decision Date : 24 January 2005

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Michael Eu (ComLaw LLC) for the plaintiff; K Anparasan (Khattar Wong and Partners) for the defendant

Parties : QBE Insurance (International) Ltd — Winterthur Insurance (Far East) Pte Ltd

Contract – Breach – Sub-contractor insured by main contractor's insurer (plaintiff) and own insurer (defendant) – Whether plaintiff's own conduct amounting to breach of terms in alleged agreement – Whether defendant discharged from performing obligations in alleged agreement by virtue of plaintiff's breach

Contract – Contractual terms – Express terms – Sub-contractor insured by main contractor's insurer (plaintiff) and own insurer (defendant) – Plaintiff alleging term of agreement that defendant agreeing to contribute to claim of sub-contractor – Whether agreement between plaintiff and defendant existing

Equity – Estoppel – Promissory estoppel – Sub-contractor insured by main contractor's insurer (plaintiff) and own insurer (defendant) – Whether plaintiff's silence amounting to representation relied upon by defendant to its detriment – Whether plaintiff estopped from relying on alleged agreement

Insurance – General principles – Contribution – Sub-contractor insured by main contractor's insurer (plaintiff) and own insurer (defendant) – Doctrine of contribution in cases of double insurance – Whether equitable to apply doctrine of contribution under the circumstances

24 January 2005

Andrew Ang JC:

1 This was an originating summons taken out by QBE Insurance (International) Limited ("QBE") against Winterthur Insurance (Far East) Pte Ltd ("Winterthur") for a declaration that Winterthur is liable to contribute 50% (or such sum or percentage as may be assessed by the court) towards meeting the claim of a common insured.

The facts

2 QBE had issued a workmen's compensation policy ("the QBE policy") on 2 March 2001 to IRE Corporation Ltd ("IRE Corporation"). The insured was described as:

> I.R.E. Corporation Ltd as contractor and all levels of their sub-contractors and/or their nominated/designated sub-contractors and Sembawang Town Council as principal F.T.R.R.

3 IRE Corporation was the main contractor of the Sembawang Town Council's re-roofing project in Woodlands ("the Project"). It had sub-contracted the supply, erection and dismantling of scaffolds for the Project to one Lye Soon Woh trading as Lye Soon Woh Scaffolding Work ("LSW Scaffolding").

4 Winterthur had issued a workmen's compensation policy ("the Winterthur policy") to LSW Scaffolding.

5 On 24 August 2001, one Ng Yeok Onn ("the Injured Workman"), a workman in the employ of LSW Scaffolding, was injured in an accident at the site of the Project in the course of his work for LSW Scaffolding.

6 On 17 August 2002, the Injured Workman brought an action in Suit No 965 of 2002 ("the Proceedings") against LSW Scaffolding (as first defendant) and IRE Corporation (as second defendant) alleging, *inter alia*, negligence, breach of duty as occupier and/or as employers.

7 The chronology of events after the issuance of the Writ is as follows:

(a) On 27 August 2002, the Injured Workman's lawyers, M/s Sim Mong Teck & Partners ("SMT & Partners"), forwarded a letter to LSW Scaffolding and another to IRE Corporation giving them notice of the issuance of the Writ against them;

(b) On 30 August 2002, IRE Corporation forwarded the said letter from SMT & Partners and the Writ dated 17 August 2002 to QBE;

(c) On 31 August 2002, IRE Corporation submitted a claim form under the QBE policy to QBE;

(d) On 3 September 2002, QBE instructed M/s ComLaw LLC ("ComLaw") to enter appearance on behalf of IRE Corporation. ComLaw lodged the Memorandum of Appearance on the same day; and

(e) On 4 September 2002, Winterthur notified QBE that LSW Scaffolding had forwarded a copy of the Writ to it and asked whether QBE would be taking over the conduct of the defence of LSW Scaffolding.

8 On 10 September 2002, the claims manager of QBE, one Stephen Chua Lai Soon ("Chua"), spoke with Winterthur's claims manager, Mrs Corina Tay ("Mrs Tay"). The parties disagree as to what transpired between their respective claims managers in the conversation.

9 QBE's version of the conversation, as recounted by Chua in his affidavit of 10 September 2004, was as follows:

(a) QBE would instruct ComLaw to enter an appearance and take conduct of the proceedings on behalf of LSW Scaffolding;

(b) QBE and Winterthur would contribute towards the claim, including legal costs, against LSW Scaffolding;

(c) ComLaw would address the issue as to which policy (namely, the QBE policy, the Winterthur policy or both) *vis-à-vis* LSW Scaffolding, was invoked; and

(d) If it was later established that only the Winterthur policy should respond in respect of the liability of LSW Scaffolding, Winterthur could appoint solicitors to take over from ComLaw the conduct of LSW Scaffolding's defence.

10 QBE further alleged that the aforesaid agreement between the two claims managers was relayed to ComLaw who recorded the same in their letter dated 10 September 2002 to Winterthur with a copy to QBE. Winterthur, on the other hand, denied that there was any agreement between Mrs Tay and Chua as to Winterthur contributing towards the claim.

11 In her affidavit filed on behalf of Winterthur on 21 September 2004, Mrs Tay denied that she had agreed that Winterthur would contribute or otherwise be responsible for payment of any part of the Injured Workman's claim. She added that there was no reason for her to do so pending further investigation. Winterthur had not instructed solicitors at that time. She had reserved Winterthur's position on policy liability.

12 That being so, she saw no difficulty in allowing QBE to instruct solicitors to defend both the insured defendants (LSW Scaffolding and IRE Corporation) in the Proceedings. Therefore, when Chua suggested that QBE instruct its solicitors to enter appearance for LSW Scaffolding in the Proceedings and take on conduct of the matter on behalf of LSW Scaffolding pending further investigation, she agreed.

13 Since QBE relied on the letter dated 10 September 2002 written by its solicitors ComLaw to Winterthur as proof that Winterthur had agreed to contribute towards payment of the Injured Workman's claim, the letter is set out below in full:

> We act for QBE Insurance (International) Ltd.
>
> We have been instructed by our clients' Mr Steven Chua, pursuant to his conversation with your Ms Corina Tay today, to enter appearance for the 1st Defendant [LSW Scaffolding] and to attend the PTC tomorrow for both Defendants.
>
> Meanwhile, we will be addressing the issue of whose Policy liability vis-à-vis the 1st Defendant is invoked after perusing both yours and our clients' Policies and Schedules in this matter. If it is later established that your Policy will respond in respect of the 1st Defendant's liability, then you can appoint solicitors to take over from us the conduct of the 1st Defendant's defence.

What is immediately obvious is that there is not a word in the letter regarding the alleged agreement to contribute. It is also clear that it had not been resolved whose policy was engaged. QBE's solicitors (ComLaw) had undertaken to consider whose policy liability *vis-à-vis* LSW Scaffolding was invoked. Finally, ComLaw had agreed that if it was later established that the Winterthur policy would respond in respect of LSW Scaffolding's liability, then Winterthur could appoint its own solicitors to take over conduct of LSW Scaffolding's defence.

14 In Mrs Tay's fax of the same date (10 September 2002) to Chua, she had confirmed the morning's telephone conversation in which Chua had agreed to instruct ComLaw to represent Winterthur's insured at the pre-trial conference "pending further investigations by both ourselves". In the same fax, she had forwarded a copy of the policy issued by Winterthur and requested a copy of the QBE policy and a copy of an investigation report on the accident. She received no response. She therefore wrote on 16 October 2002 to ComLaw asking for the documents requested. At the same time, she notified ComLaw that as Winterthur's insured had "breached the policy condition", Winterthur had reserved its rights under the policy. Still, there was no response from ComLaw.

15 On 1 November 2002, Winterthur sent a reminder enclosing its fax of 10 September 2002. There was again no response. Finally, on 30 December 2002, Mrs Tay wrote to ComLaw as follows:

> We refer to our fax dated 1.11.02 enclosing copy of our fax dated 10.9.02 to your client, QBE.
>
> To-date, we received no response from you. In view thereof, we shall take it that the claim from the Plaintiff shall be responded under your client's workmen's compensation policy and that they

are also defending the 2nd [sic] Defendant, Lye Soon Woh.

We await your response within 7 days from the date of this letter failing which we shall take it that the foregoing is accepted by your client and we shall treat the matter as closed.

Even then, she received no response. She therefore assumed that QBE had accepted liability for both IRE Corporation (the main contractor) as well as for LSW Scaffolding. She also considered the matter as closed.

16 On 12 March 2004 (some 15 months after Winterthur's last letter to them of 30 December 2002), ComLaw finally wrote to Winterthur saying that they had perused both policies and were of the view that both operated to cover the action brought by the Injured Workman and that equal contribution should be made by QBE and Winterthur. QBE sought confirmation from Winterthur that it would make contribution of 50% towards the claim (including legal costs). Finally, it threatened legal action unless it heard favourably from Winterthur within two weeks.

17 It emerged that two days before sending this letter, ComLaw had consented to interlocutory judgment being entered against LSW Scaffolding and had also negotiated for the Injured Workman to discontinue the action against IRE Corporation (QBE's insured). Winterthur had not been consulted in regard to this. In fact, ComLaw had concluded the litigation without reference to Winterthur at all, whether in the filing of the Defence or the consent to interlocutory judgment.

18 In these circumstances, Winterthur declined to confirm that it would contribute and QBE then took out the originating summons herein.

19 At the hearing before me, counsel for QBE produced a claim memo ("the memo") allegedly written by Chua on 10 September 2002 containing notes of the conversation with Mrs Tay on the same day. The note included this entry:

If any contribution from Sub-Contractors Winterthur will respond + contribute on liability accordingly. Have informed Ms Chua Li Suan of ComLaw LLC of this arrangement.

Strangely, although Chua had affirmed an affidavit on 10 September 2002, he had not mentioned the existence of the memo. Instead, reliance had been placed by him and by another deponent, Hong Heng Kum (in the latter's affidavit of 24 May 2004 on behalf of QBE), solely on the letter of 10 September 2002 written by ComLaw to Winterthur. Why was the memo not even alluded to earlier? It came from out of the blue, as it were, at the hearing and was not verified by an affidavit. No explanation was offered why it had not been produced earlier. Although no objection was taken by counsel for Winterthur in regard to the lack of verification, I had reservations about the evidentiary value of the document. In view of the stout denial by Winterthur that they had agreed to contribute, I did not regard the failure by Winterthur's counsel to object to the production of the memo as an admission of the truth of the contents thereof. Indeed, QBE's counsel conceded that the claim based on the alleged agreement was very weak. Upon a review of all the evidence before me, I found that there was no agreement between the parties to share liability for the Injured Workman's claim.

20 Winterthur's counsel submitted that even if there was an agreement, by its conduct QBE had represented to Winterthur that it accepted sole responsibility for LSW Scaffolding's liability and that, Winterthur having acted upon such representation to its detriment, QBE was estopped from resiling from this representation.

21 QBE, through its solicitors, had conducted the defence as though it was the only party liable.

It completely ignored Winterthur's correspondence of 10 September, 16 October, 1 November and 30 December, all of 2002. It settled the defence in the Proceedings without consulting Winterthur and, worst of all, consented to interlocutory judgment against LSW Scaffolding without seeking Winterthur's agreement. Besides, in consenting to judgment, it had also negotiated the discontinuance of the action against QBE's own insured, IRE Corporation.

22 Despite having undertaken in their letter of 10 September 2002 to address "the issue of whose Policy liability vis-à-vis the 1st Defendant is invoked after perusing both yours and our clients' Policies and Schedules", ComLaw did not revert to Winterthur on this issue at all until after consent judgment had been entered some 15 months later. Had they reverted timeously to say that the Winterthur policy was engaged, Winterthur may well have appointed its own solicitors to take over conduct of LSW Scaffolding's defence (as envisaged in ComLaw's said letter of 10 September 2002). Winterthur would then have been able to consider independently whether liability should fall on the main contractor (IRE Corporation) or the sub-contractor (LSW Scaffolding) and, if both, in what proportions.

23 To my mind, the only conduct which Winterthur could be said to have relied upon was the total lack of response, especially after Winterthur's last letter of 30 December 2002, which expressly called for a response failing which Winterthur would take it that:

(a) QBE would be responding to the Injured Workman's claim under QBE's policy and would be defending LSW Scaffolding; and

(b) the matter was closed so far as Winterthur was concerned.

Winterthur wrote as it did because in ComLaw's letter of 10 September 2002 they had said that they would be "addressing the issue of whose Policy liability vis-à-vis the 1st Defendant is invoked after perusing both yours and our clients' Policies and Schedules in this matter".

24 Whilst mere silence or inaction would not ordinarily suffice, where there is a duty to speak, silence may amount to a representation: *Greenwood v Martins Bank, Limited* [1933] AC 51 at 57. As noted in *Halsbury's Laws of Singapore*, vol 9(2) (LexisNexis, 2003) at para 110.277, n 6, this case has been cited with approval in many Singapore cases including *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* [1999] 4 SLR 626, *Tacplas Property Services Pte Ltd v Lee Peter Michael* [2000] 1 SLR 637 and *Everbright Commercial Pte Ltd v AXA Insurance S'pore Pte Ltd* [2000] 4 SLR 226. In this instance, a reply from ComLaw was clearly called for.

25 Winterthur alleged that in reliance upon this conduct, it did not seek to resist the Injured Workman's claim or otherwise defend LSW Scaffolding to limit its liability or seek to repudiate the policy which it had issued. *Halsbury's Laws of Singapore* ([24] *supra*) states at para 110.277:

> The doctrine of promissory estoppel is classically stated in two well-known passages. The first of these is that 'it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties'.[1]

> The second passage is that 'if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time [has] elapsed, without at all events placing the parties in the same position as they were before'.[2]

It seems to me all the requirements for a promissory estoppel are met in this case. There being no way of putting the parties back in their status quo *ante*, QBE is now permanently estopped.

26 It seems to me there is a more fundamental reason why QBE should fail in its claim under contract. On its contention, the 10 September 2002 letter from ComLaw to Winterthur incorporated the terms of the contract between QBE and Winterthur.[3] It was therefore a term of the contract that ComLaw was to "address the issue of whose policy liability vis-à-vis [LSW Scaffolding] was invoked" after perusing both policies. It was also a term of the contract that Winterthur could appoint solicitors to take over conduct of LSW Scaffolding's defence if it was established that Winterthur's policy "will respond" in respect of LSW Scaffolding's liability. (It was contended on QBE's behalf that Winterthur could take over LSW Scaffolding's defence provided *only* Winterthur's policy was to respond. To my mind, this would be an unwarranted addition of the word "only". By reason of the *contra proferentum* rule, any ambiguity in this regard must be resolved in Winterthur's favour).

27 By its conduct described in [21] and [22] above, QBE had breached the terms of the agreement between itself and Winterthur. By reason of this breach, Winterthur lost the opportunity to consider independently whether liability should fall on IRE Corporation or LSW Scaffolding and, if both, in what proportions. Winterthur was therefore entitled to treat itself as discharged from having to perform its side of the bargain, *ie*, to bear 50% of LSW Scaffolding's liability *vis-à-vis* the Injured Workman.

28 Apart from alleging an agreement to share liability, QBE also proceeded on an alternative basis: that where there is double insurance the doctrine of contribution applies as between the insurers. According to *MacGillivray on Insurance Law* (Sweet & Maxwell, 10th Ed, 2003) at para 23-1:

> [T]he doctrine of contribution was evolved, apparently by Lord Mansfield, who held that in marine insurance an insurer who paid more than his rateable proportion of the loss should have a right to recover the excess from his co-insurers, who had paid less than their rateable proportion. The same general principles of liability and contribution have been held to apply to fire insurance and, liability insurance.

In the words of Lloyd LJ in *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] QB 887 ("*Legal and General*") at 891–892:

> [T]he right of contribution is based not in contract, but on what has been said to be the plainest equity, that burdens should be shared equally. … For well over two centuries the right of contribution has been enforced, and the same principles applied, not only between co-insurers, but also between co-obligors in various other branches of the law, notably in the case of co-sureties …

29 In the case before me, at first blush, it appeared that the doctrine was applicable as between the parties, given that both policies covered the liability of LSW Scaffolding and that despite alluding to a breach of condition, Winterthur did not appear to have taken any steps to repudiate liability *vis-à-vis* its insured. However, the conduct of QBE led me to conclude that it would be inequitable to require Winterthur to so contribute.

30 In this connection, as a statement (which is set out in [33] below) by Lloyd LJ in *Legal and General* might be thought to be favourable to QBE, I shall deal with the same.

3 1 *Legal and General* was a case also concerning the right of contribution between co-insurers. The plaintiff, who had insured the driver of a motor car and had settled a claim brought by a third party injured by the driver, discovered that the driver was also insured by the defendant. The plaintiff brought an action against the defendant claiming a 50% contribution from it as co-insurer. The defendant refused to pay as the insured had failed to notify it in time of the accident. Under the terms of the policy, this afforded the defendant a defence to the claim by the insured.

32 The trial judge gave judgment for the plaintiff, holding that the fact that the driver had only claimed on the plaintiff's policy while neglecting to notify the defendant did not absolve the defendant from liability to contribute 50% towards the amount paid by the plaintiff. The appeal by the defendant was on this issue as well as on a fresh ground not relevant to the present case.

33 The Court of Appeal by a majority held that the insured's failure to give notice after the accident did not affect the plaintiff's right to contribution, the relevant time for consideration being the date when the accident occurred (at which time the defendant was still potentially liable to the insured subject to a claim being made timeously) and not the date when the plaintiff sought contribution from the defendant (at which time it had become clear that the defendant would not be liable to the insured by reason of the latter's failure to give notice). In so doing, the Court of Appeal overruled *Monksfield v Vehicle and General Insurance Company Ltd* [1971] 1 Lloyd's Rep 139 ("*Monksfield*") (an oft-cited authority which had stood for more than two decades) in which, on somewhat similar facts, Judge Graham Rogers of the Mayor's and City of London Court had rejected the plaintiff's claim reasoning, at 141, as follows:

> In my view it cannot be an equitable result that an insurance company which had no notice of an accident, had no say in the handling of the claim, and for whom, to quote the words of the Master of the Rolls in *Farrell's case*, there was no opportunity "to investigate the rights or wrongs of it", should be called upon to make a contribution in a case in which it would quite clearly have had the right to repudiate if the claim had been brought under the terms of its own policy. The defendants are entitled to take advantage of the conditions in their policy and are in my view not liable for contribution.

In *Legal and General*, Lloyd LJ at 895 declared:

> I do not find this reasoning convincing. The fact that a co-obligor has no "say in the handling of the claim" has never been an answer to a claim for contribution, whether in the field of insurance, or in any of the other fields in which the equitable doctrine prevails. As to the right to repudiate, this would, as I have said, have been a good defence to a claim for contribution if the assured had been in breach of condition *prior* to the loss. The failure to distinguish between breaches of condition prior to the loss, and a breach of condition subsequent to the loss by failing to give notice in time, vitiates, if I may respectfully say so, the judge's conclusion. So I would hold that *Monksfield's* case was wrongly decided.

On the face of it, this might serve as a riposte to similar objections raised by Winterthur in the present case. However, two observations may be made in this regard.

34 Firstly, doubt has been cast in turn on the correctness of the decision of the Court of Appeal in *Legal and General* by the Privy Council decision soon thereafter in *Eagle Star Insurance Co Ltd v Provincial Insurance Plc* [1994] 1 AC 130 ("*Eagle Star*"). Secondly, even if *Legal and General* was

correctly decided, the factual background in the case before me is significantly different from the context in which Lloyd LJ made his assertion.

35 In *Eagle Star*, the Privy Council had to deal with similar issues on an appeal from the Court of Appeal of the Bahamas. The facts were closely similar to those in *Legal and General* except that the first insurer, while being liable to the third party claimant under the relevant motor vehicle insurance statute, was not liable to the insured as the policy had been cancelled before the accident. The first insurer claimed against the second insurer a full indemnity on the basis that the second insurer was solely liable since the first insurer's policy had been terminated whereas the second insurer's policy was still extant at the date of the accident. The second insurer contested the claim arguing that it had not been notified of the insured's claim and therefore was entitled to repudiate contractual liability although it remained statutorily liable. It argued that as both insurers were liable under statute, they should contribute equally towards the claim.

36 The Privy Council upheld this argument, declining to follow the majority in *Legal and General*. It also did not agree with the Court of Appeal in *Legal and General* that *Monksfield* had been wrongly decided, choosing instead to give it a ringing endorsement. This, to my mind, undermines the authority of Lloyd LJ's statement quoted in [33] above. The editors of *MacGillivray on Insurance Law* ([28] *supra*) have indicated a preference for the Privy Council advice over the decision of the Court of Appeal (see para 23-27 thereof). I am of the same view.

37 In my view, therefore, Judge Rogers' statement in [33] above remains valid. Admittedly, it cannot be said with any certainty that Winterthur would have had the right to repudiate if the claim had been brought under the terms of its own policy. The fundamental point, however, is that Winterthur had been denied the opportunity to consider whether as between IRE Corporation and LSW Scaffolding, any liability attached to the latter. Contribution presupposes a common liability.

38 I move on to my second observation. Even if *Legal and General* was correctly decided, the factual background in the case before me is significantly different from the context in which Lloyd LJ made his assertion as set out in [33] above. Firstly, unlike in *Legal and General* where the plaintiff was unaware of the policy issued by the defendant, in our case QBE knew of the policy issued by Winterthur practically from the time a claim was made on the QBE policy. Secondly, whereas in *Legal and General* the common insured's liability was not in doubt, in the case before me, it had first to be determined whether liability should fall on LSW Scaffolding (the common insured) or on IRE Corporation (QBE's insured). If it was established that IRE Corporation was solely liable, no question of contribution would arise. Even if both LSW Scaffolding and IRE Corporation were liable, the question of apportionment of blame between them would have to be decided with Winterthur contributing only to the liability apportioned to LSW Scaffolding (unless Winterthur had grounds for repudiating liability). In these circumstances, for QBE to remain silent, to withhold pleadings from Winterthur and to consent to judgment against LSW Scaffolding without consulting Winterthur, was wholly unreasonable. In such a case, the balance of equity came down clearly in favour of Winterthur.

39 I therefore dismissed QBE's application with costs.

---

[1] *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 at 448, HL, per Lord Cairns LC.

[2] *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268, CA (Eng), per Bowen LJ.

[3] See para 14 of QBE's written submissions