B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd [2007] SGHC 126

Case Number : DA 50/2006

Decision Date : 03 August 2007

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Philip Ling (Peter Low Partnership) for the appellant; Eu Hai Meng (United Legal Alliance LLC) for the respondent

Parties : B-Gold Interior Design & Construction Pte Ltd — Zurich Insurance (Singapore) Pte Ltd

Insurance – General principles – Claims – Contractors' all-risks policy – Scope of all-risks policy – Rules of interpretation – Whether damage arising from insured risk covered by operative clause of policy – Whether exclusion clauses in policy excluding liability of insurer – Circumstances where court will intervene to deny efficacy of exclusion clause in policy

3 August 2007

Andrew Ang J:

1 This was an appeal by B-Gold Interior Design & Construction Pte Ltd ("the appellant") against the decision of the district judge made on 13 November 2006 dismissing the appellant's claim in a third party action against Zurich Insurance (Singapore) Pte Ltd ("the respondent") – the third party in DC Suit No 2126 of 2004 ("the main action").

2 At the conclusion of the hearing, I allowed the appeal. I now give my reasons.

Background

3 The plaintiff in the main action was MediaCorp Pte Ltd ("MediaCorp"), a broadcasting company.

4 The appellant (the first defendant in the main action) was in the business of interior design services and general building construction and upgrading work whereas the respondent (the third party in that action) was in the business of general insurance.

5 By a contract in writing on 27 September 2002 ("the Contract"), the appellant was engaged by MediaCorp as term contractor in respect of repair and renovation works at the latter's Caldecott Broadcast Centre. The Contract was for a period of two years from 1 October 2002 to 30 September 2004 ("Period of Cover"). The contract works entailed routine maintenance, repairs, minor additions and alterations to MediaCorp's property upon receipt of instructions from MediaCorp from time to time.

6 The Contract required the appellant, before commencement of work, to take out policies of insurance insuring MediaCorp, the appellant and sub-contractors in the following terms:

> 18 INSURANCE GENERALLY
>
> The Contractor shall before commencement of any work under this Contract ensure that there is in force policies of insurance indemnifying MediaCorp, the Contractor and all sub-

contractors against damage to persons and property, for Workmen's Compensation and fire. All policies shall be retained by the S.O. who shall on request and without charge supply the Contractor with a copy.

19 DAMAGE TO PERSONS AND PROPERTY

19.1 Injury to Persons

The Contractor shall be liable for and shall indemnify MediaCorp in respect of any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or by reason of the execution of the works provided that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor, his servants or agents.

19.2 Injury or Damage to Property

The Contractor shall be liable for and shall indemnify MediaCorp in respect of any liability, loss, claim or proceedings arising under any statute or at common law in respect of any injury or damage whatsoever to or any property real or personal arising out of or in the course of or by reason of the execution of the works provided that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor, his servants or agents. …

7 As required by the Contract, the appellant took out a Contractors' All Risk Policy of Insurance dated 23 September 2002 ("the Policy") with the respondent.

8 The events leading to the appellant taking out the Policy with the respondent is of some significance. Accordingly, I set out the same in some detail based on the affidavit evidence of the appellant's witnesses. (It was agreed between counsel for the parties that the affidavits of evidence-in-chief of their respective witnesses would be admitted without cross-examination. This was on the bases set out in [21] below.)

9 The Policy was taken out by one of the appellant's directors, Yeo Hong Seng ("Yeo") with the assistance of one Willy Lee ("Lee") who was a general insurance agent with the American International Group ("AIG"). Lee had been serving and attending to the insurance needs of the appellant since 1985. The appellant took out personal, fire, Workmen's Compensation and other general insurance policies with AIG through Lee. Lee was assisted by his wife, Jacqueline, who would normally be the one to liaise on his behalf with Yeo.

10 Some time in late August 2002, Yeo contacted Jacqueline requesting Lee to arrange for the necessary insurance coverage required under the Contract. At the same time, Yeo faxed across a copy of the Contract documents. Through Jacqueline, Lee informed Yeo that the scope of his services in AIG did not include arranging for insurance policies of the kind required under the Contract and suggested that Yeo look for the necessary coverage from other insurance companies. Yeo, however, did not know which companies offered such insurance coverage and requested Lee's help.

11 Lee then contacted one Manfred Long ("Long"), an ex-colleague in AIG who had since joined the respondent, to ask if the respondent could provide the kind of coverage required. Long replied in the affirmative. Lee then faxed to Long the Contract documents which he had received from Yeo. Thereafter, as a goodwill gesture, Lee acted gratis as a facilitator between the appellant and the

respondent on the terms of the insurance policy.

12 Lee faxed a note to Long in which he informed Long that the insurance coverage requested was a contractors' all risks ("CAR") policy. Lee averred that in that note he also requested from Long the latter's professional advice on the appropriate insurance coverage to be given to the appellant under the Contract.

13 Long subsequently reverted over the phone to advise that the respondent was able to offer the insurance coverage required by the appellant, and the appellant then took out the Policy with the respondent.

14 None of the above was controverted by the respondent. (Instead, the respondent contested the claim purely on the basis of its construction of the terms of the Policy.) For purposes of this appeal, I therefore proceed on the basis that the facts deposed to are true.

15 MediaCorp subsequently instructed the appellant to carry out spalling concrete repair works on the ceiling of the air handling unit ("AHU") room located on the 4th storey of MediaCorp's television building; in turn, on 19 March 2003, the appellant engaged Regius Engineering Pte Ltd ("Regius Engineering") as its sub-contractor to carry out the spalling concrete repair works. Regius Engineering was the second defendant in the main action.

16 However, on 21 March 2003 a fire broke out at the AHU room. As a result of the fire, one of the AHUs was damaged. Further, water used to put out the fire had cascaded down through the air supply ducting and through the porous ceiling tiles to the 1st, 2nd and 3rd floors of the television block, resulting in damage to MediaCorp's production equipment, studios and electrical control cabinets ("the Damage" – such expression including the damage to the AHU room and the AHU).

17 A report prepared by MediaCorp's consulting scientist and engineers concluded that the fire was caused by "smokers' materials discarded by the subcontractors Regius Engineering Pte Ltd who were working to repair spalled concrete at the ceiling of the AHU room".

18 Consequently, MediaCorp commenced proceedings against the appellant and Regius Engineering in respect of the Damage. Although interlocutory judgment was entered against Regius Engineering in default of entering an appearance, no further action was taken by MediaCorp against Regius Engineering. However, the case as between MediaCorp and the appellant proceeded to trial (*ie*, the main action) and the district judge found the appellant to be in breach of its contract with MediaCorp and of its common law duty to take reasonable care for the safety of MediaCorp's property. This led to the third party proceedings by the appellant against the respondent under the Policy.

The relevant Policy provisions

19 The relevant provisions of the Policy were as follows:

(a) Total Premium:

$2,575 including Goods and Services Tax.

(b) Name of Insured:

B-Gold Interior & Construction Pte Ltd as Contractor and/or Media Corporation as Principal for their respective rights and interest.

(c) Contract Period:

From 1 October 2002 to 30 September 2004 plus 12 months maintenance period.

(d) Location of Risk: Caldecott Broadcast Centre.

(e) Section I – Material Damage:

The Company hereby agree with the Insured that if at any time during the period of cover the *items or any part thereof entered in the Schedule* shall suffer any unforeseen and sudden physical loss or damage from any cause, other than those specifically excluded, in a manner necessitating repair or replacement, the Company will indemnify the Insured in respect of such loss or damage as hereinafter provided by payment in cash, replacement or repair (at their own option) up to an amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in ant [*sic*] one event the limit of indemnity where applicable and not exceeding in all the total sum expressed in the Schedule as insured hereby. [emphasis added]

(f) Provision Applying to Section I:

Memo 1 – Sums Insured:

It is a requirement of this insurance that the sums insured stated in the Schedule shall not be less than for

Item 1 *the full value of the contract works at the completion of the construction*, inclusive of all materials, wages, freight, customs duties, dues and materials or items supplied by the Principal;

Items 2 & 3 *the replacement value of construction plant, equipment and construction machinery*; which shall mean the cost of replacement of the insured items by new items of the same kind and same capacity;

and the Insured undertakes to increase or decrease the amounts of insurance in the event of any material fluctuation in wages or prices provided always that such increase or decrease shall take effect only after the same has been recorded on the Policy by the Company.

If, in the event of loss or damage, it is found that the sums insured are less than the amounts required to be insured, then the amount recoverable by the Insured under this Policy shall be reduced in such proportion as the sums insured bear to the amounts required to be insured. Every object and cost item is subject to this condition separately.

[emphasis added]

(g) Schedule to Section I:

Permanent & temporary work including all materials to be incorporated therein.

(h) Section II – Third Party Liability:

The Company will indemnify the Insured up to but not exceeding the amounts specified in the

Schedule against such sums which the Insured shall become legally liable to pay as damages consequent upon

a) accidental bodily injury or illness of third parties (whether fatal or not),

b) *accidental loss of or damage to property belonging to third parties*

occurring in direct connection with the construction or erection of the items insured under Section I and happening on or in the immediate vicinity of the site during the Period of Cover.

In respect of a claim for compensation to which the indemnity provided herein applies, the Company will in addition indemnify the Insured against

a) all costs and expenses of litigation recovered by any claimant from the Insured, and

b) all costs and expenses incurred with the written consent of the Company,

provided always that the liability of the Company under this section shall not exceed the limits of indemnity stated in the Schedule.

[emphasis added]

(i) Special Exclusions to Section II:

The Company *will* not indemnify the Insured in respect of

1. the deductible stated in the Schedule to be borne by the Insured in any one occurrence;

2. the expenditure incurred in doing or redoing or making good or repairing or replacing anything covered or coverable under Section I of this Policy;

3. …

4. liability consequent upon

a) …

b) loss of or damage to property belonging to or held in care, custody or control of the Contractor(s), the Principal(s) or any other firm connected with the project *which or part of which is insured under Section I, or an employee or workman* of one of the aforesaid;

[emphasis added]

Third party proceedings

20 At the trial, both the appellant and the respondent agreed to dispense with cross-examination of the witnesses, and their respective affidavits of evidence-in-chief were, accordingly, admitted by the court.

21 On the part of the appellant, its agreement to do so was on the basis that the respondent

accepted that at the time the appellant took out the Policy it was not told specifically by the respondent that it had a choice to extend the scope of the Policy. In turn, in consideration of the respondent dispensing with cross-examination, the appellant agreed not to rely on misrepresentation or breach of duty by the respondent. As a result, the bone of contention between the parties in the third party action, and in the present appeal, was as to the proper interpretation and construction of the Policy and whether it covered the damage caused to MediaCorp's property for which MediaCorp had obtained judgment against the appellant in the main action.

22 At the end of the trial, the district judge dismissed the appellant's claim in the third party action against the respondent on the grounds that the Damage was not covered under Section I and that even though the Damage was *prima facie* covered under Section II, Special Exclusions 2 and 4(b) thereto exonerated the respondent from indemnifying the appellant.

The issues

23 Accordingly, the issues in the present appeal may be framed thus:

(a) whether the Damage constitutes material damage under Section I of the Policy; and

(b) even though such damage was *prima facie* covered under Section II of the Policy, whether Special Exclusions 2 and 4(b) to Section II applied so as to exclude the respondent from indemnifying the appellant.

Whether the Damage was *covered* under Section I

24 At the outset, it should be stated that an all-risks policy does not literally cover all risks. As the Court of Appeal pointed out in *Siang Hoa Goldsmith Pte Ltd v The Wing On Fire & Marine Insurance Co Ltd* [1998] 2 SLR 777 at 783, 784:

> 20. … whilst there was no dispute that the policy was an all risks policy … this did not in fact mean that all possible risks, both foreseeable and unforeseeable, were covered under the policy. We found useful guidance in *The Law of Insurance* by Malcolm Clarke (2nd Ed, 1994), where the author stated, at p 388:
>
> > All risk cover does not mean cover literally against all risks … [T]here is usually a contractual limit: an all risks policy usually contains an express exception [of] particular risks …
>
> …
>
> 22 In our opinion, first and foremost, in determining the precise ambit of an all risks policy, one must first have regard to the terms and conditions contained within the policy and the construction of those terms and conditions thereof.

25 A CAR policy is no different in this respect. The learned district judge referred to a passage in Mr Justice Derrington's textbook, *The Law of Liability Insurance* (Butterworths, 1st Ed, 1990) at p 525 where it was stated:

> Because the statutory requirements as to workers' compensation and compulsory motor vehicle personal injury cover set the terms of the respective policies required under the relevant Acts, the contractor's all risks policy usually cannot be acceptable as a substitute for them and accordingly does not pretend to do so. So where it is described as a contractor's all risks policy

> the title is somewhat misleading in that it does not cover all risks involved in the insured's activities. This type of policy covers a variety of insurable interests including the contractor's interest in the works under construction, and also the contractor's public liability. …
>
> It is virtually standard that the contractors all risks policy, as with most public risk policies, contains an exception relating to workers' compensation legislation, liability to employees in damages for personal injury arising in the course of the employment, and liability generally for personal injury in connection with any motor vehicle.

In that same edition, after describing the usual principal characteristics of such a policy, the learned writer then observed that:

> As in every other insurance, the terms of the policy are almost completely open to agreement, so that cover may be obtained by the insured as desired.

A little further down at p 526 the learned writer continued:

> While the contractor will require cover over the contract works for which he usually remains liable until completion and a fixed period after completion, he will also require cover for his liability to the owner or third parties for any injury or loss caused by them. Similarly the owner will need cover for damage to his property and for his liability to third parties caused by the works and for which he may be held liable.

26 Commonly, the risks insured in respect of loss of or damage to the property insured is referred to as "Material Damage" while the indemnity for the contractor's liability for damages consequent upon injury to or illness of third parties or loss of or damage to property belonging to third parties occurring in connection with the contract works is titled "Public Liability".

27 Elaborating upon "Material Damage", Mr Justice Derrington stated at p 530:

> The property insured consists of the permanent and temporary works erected in performance of the particular contract, the materials brought onto the contract site for the purposes of the contract and constructional plant and equipment.

It should be noted that insurance cover against loss of or damage to the owner's property does not fall under this head. Instead, as Mr Justice Derrington points out at p 536, it falls under "Public Liability". As the learned writer explains:

> **Public Liability**
>
> In addition to cover against loss of the works, a contractor's policy also provides for an indemnity against liability to damages as in the normal public risk policy. Of course, modifications of the extension of this cover can be and frequently are made. Because liability to employees of the particular insured is usually excluded from such a policy, the principal areas of possible liability under this cover relate to injuries to employees of other parties to the contract or to members of the public, and damage to property consisting of other than the works, other property of the owner, or of neighbouring occupiers. An exclusion which is sometimes made is in respect of property forming the subject of the insured contract.
>
> A distinction must be made between the two types of indemnity to which reference has been made. The indemnity in the first part is a policy on property, pure and simple. It is not in part an

indemnity against liability to the third parties.

28 In the present case, material damage and public liability are covered in Sections I and II respectively. Section I of the Policy specifically covers "*items or any part thereof entered in the Schedule*" and as noted at [19(g)], what was entered in the Schedule was "*Permanent & temporary work including all materials to be incorporated therein*".

29 Counsel for the appellant, Mr Philip Ling, submitted with regard to the phrase "permanent & temporary work" that the works carried out by the appellant were only temporary in nature and that the existing permanent structures, items and objects in Caldecott Broadcast Centre came under the rubic "permanent work". Accordingly, Mr Ling contended that the AHU room and the AHUs in that room were covered under Section I of the Policy.

30 I found Mr Ling's interpretation of Section I to be untenable. The Schedule to Section I is clear. "[P]ermanent & temporary work" refers to work to be erected pursuant to the Contract and "materials to be incorporated therein" refers to all materials brought onto the contract site for incorporation into the works. As such, it is clear that the Damage was not within the description in the Schedule to Section I and therefore not within the coverage provided by Section I.

Whether cover under Section II excluded by Special Exclusion 2

31 Section II deals with third party liability or public liability, *ie*, insurance against liability which may be incurred by the contractor in the course of his operations.

32 Given that, as I have found, the damage is not covered under Section I, the only recourse available to the appellant is by showing that Section II applies. As stated above, Section I deals with property described in the Schedule whereas Section II concerns third party liability with respect, *inter alia*, to "accidental loss of or damage to property belonging to third parties occurring in direct connection with the construction or erection of the items insured under Section I". Since the Damage caused by fire sparked by the negligent disposal of cigarette butts had occurred in the course of the spalling concrete repair works, there is no gainsaying that the particular loss in the instant appeal would fall within Section II in the absence of any applicable exclusion. Accordingly, the question is whether Special Exclusions 2 and/or 4(b) apply. It should be noted that both provisions appear to be standard printed clauses despite their appellation.

33 In the instant case, Special Exclusion 2 excludes from the scope of Section II any loss or damage which is covered *or coverable* under Section I. As I have found that the loss or damage was not covered under Section I, the issue is whether the Damage was *coverable* under Section I.

34 It is instructive to refer to "Memo 1 – Sums Insured" in the Policy set out in [19(f) *supra*].

35 Memo 1 is a standard provision in the respondent's CAR policy. Strangely, nowhere else in the Policy is there any reference to Items 1, 2 or 3 in the Memo. The purpose of Memo 1 is clear: the insured is required to insure the subject matter of the insurance up to its full insurable value on pain of being unable to seek indemnity in full if he fails to do so. It also indicates by inference what the insurers contemplate as being insurable items under the Schedule to Section I. Thus, in addition to the contract works (including materials, wages, freight, customs duties, dues and materials or items supplied by the Principal), construction plant, equipment and machinery are *coverable* under Section I. Memo 1 certainly does not contemplate that MediaCorp's property within the description of the Damage above could be included within the Schedule to Section I.

36 In the court below, the district judge found that although the physical premises on which the contract works took place and items (other than the contract works) within the premises were *not covered* under Section I, there was nothing to preclude the parties from contracting so as to include them within the scope of Section I; *ie*, the items which were damaged were *coverable* under Section I. In arriving at her decision, the learned district judge relied on Mr Justice Derrington's general statement (earlier quoted) that "[a]s in every other insurance, the terms of the policy are almost completely open to agreement, so that cover may be obtained by the insured as desired". Accordingly, she found the appellant to be precluded by Special Exclusion 2 from using Section II to claim an indemnity from the respondent.

37 In my view, the learned district judge misapplied what was, after all, a trite statement as to the ability of parties to an insurance contract to agree to the terms of the policy. Taking her reasoning to its logical conclusion, the cover in Section II would be rendered practically worthless since it will always be open to the insurer to invoke Special Exclusion 2 on the basis that anything and everything is coverable under Section I. That surely cannot be.

38 As noted above, cover in respect of loss or of damage to the owner's property would typically fall under "Public Liability" (*ie*, Section II) than under "Material Damage" (*ie*, Section I). Indeed, but for the question whether any Special Exclusion applied, loss of or damage to MediaCorp's property would be covered under Section II of the Policy as worded. There is no question of Section I being extended to provide such cover. Moreover, for the reason already given in para 35 above, in the context of the Policy, "coverable" must mean coverable as contemplated by the Policy and, in particular, by Memo 1.

39 In conclusion, despite the truism that in general an insurer and its insured are free to agree on the scope of any insurance policy, the fact remains that what the insurer contemplated as being insurable under the Schedule to Section I is limited to Items 1 to 3 mentioned in Memo 1. Accordingly, I hold that the Damage was not *coverable* under Section I. Therefore, Special Exclusion 2 does not apply.

Whether Special Exclusion 4(b) applied to Section II

40 I move on to Special Exclusion 4(b) to Section II which excludes:

> 4. liability consequent upon
>
> a) …
>
> b) loss of or damage to property belonging to or held in care, custody or control of the Contractor(s), the Principal(s) or any other firm connected with the project *which or part of which is insured under Section I*, or an employee or workman of one of the aforesaid;
>
> [emphasis added]

41 Mr Ling contended that the words "which or part of which is insured under Section I" in Special Exclusion 4(b) qualified the word "property" so that liability under Section II is excluded if the loss of or damage to property is covered under Section I. As such, Mr Ling submitted that since the Damage in question is not covered under Section I, there is no room for the application of Special Exclusion 4(b).

42 In my view, Mr Ling erred in his interpretation of the quoted words. The words "which or part of

which is insured under Section I" describe the *project* (*ie*, the repair works) as opposed to the property. Reading the quoted words in the manner suggested by Mr Ling would render unintelligible the phrase "an employee or workman of one of the aforesaid" following thereafter.

43 It is to be noted that the same words qualifying "project" appears in Special Exclusion 4(a) which reads:

> [B]odily injury to or illness of employees or workmen of the Contractor(s) or the Principal(s) or any other firm connected with the project which or part of which is insured under Section I, or members of their families.

44 Mr Ling's interpretation was rejected in the court below on the ground that it rendered Special Exclusion 4(b) otiose. Instead, the district judge found that Special Exclusion 4(b) was intended to exclude any indemnity in respect of loss of or damage to property owned or possessed by the appellant, MediaCorp or any other firm involved in the project being insured under the Policy. Accordingly, since the damaged property belonged to MediaCorp, Special Exclusion 4(b) precluded the appellant from seeking indemnity under Section II.

45 In finding in the respondent's favour with regard to the applicability of Special Exclusions 2 and 4(b), the district judge referred to the evidence of the respondent's witness Ang See Hwee (which she noted had not been controverted) that the exclusion clauses were –

> [T]he usual industry practice as it is incumbent on the insured, if they wish to have the said coverage on the said items, to specifically declare and have them covered under Section I of the policy instead of invoking section II, which clearly does not and was never intended or contemplated to cover the said risk.

46 Without belabouring the point, suffice it to say that for the reasons I gave earlier, Memo 1 precludes the suggestion that MedicCorp's property was coverable under Section I. The appropriate place to cover the said items was Section II. The fact that clauses similar to Special Exclusions 2 and 4(b) are common in practice is no answer. The Special Exclusions will have to be construed in the context of the Policy as a whole including the Schedule and Memo 1.

47 That aside, I do accept that, read literally, Special Exclusion 4(b) does appear to exclude any liability for loss of or damage to MediaCorp's property. However, when one considers that the appellant's taking out of the Policy was to comply with its obligation under cll 18 and 19 of the Contract and that this was known to the respondent (a copy of the Contract documents having been sent to Long as deposed to by Lee), such an outcome would be unjust.

48 In *Carlingford Australia General Insurance Ltd v EZ Industries Ltd* [1988] VR 349 ("*Carlingford Australia*"), a dispute arose between the parties as to the operation of an exclusion clause in the said insurance policy. The question was whether an exclusion clause in a contract of insurance between the appellant insurer and the respondent operated to relieve the insurer of liability to indemnify the respondent against claims by the plaintiff's longshoremen for personal injury as a result of unloading a cargo of lead concentrates. Although each of the longshoremen wore the usual protective equipment, they were injured by the dust settling on their faces and hands and by their inhalation of the dust.

49 As set out by the trial judge in *Carlingford Australia* (unreported, 8 August 1986), the relevant provision of the insurance policy read as follows:

> [The insurers will indemnify the respondent] [f]or the ultimate net loss in excess of the retained

limit hereinafter defined, which the Insured shall become legally obligated to pay as damages by reason of the liability imposed upon the Insured by law; or assumed by the Insured under contract or agreement because of:- Personal Injury, (b) Property Damage, (c) Advertising Liability, as defined herein and caused by an occurrence.

The exclusion clause in question read:

> This policy shall not apply:- (a) … (i) To Personal Injury or Property Damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is caused by a sudden unexpected and unintended happening.

50 The Supreme Court of Victoria by a majority upheld the trial judge's finding that the exclusion clause did not apply. Gobbo J found that the exclusion clause was capable of excluding any liability in relation to any release of any liquid or vapour. He added that it was irrational and unjust in the context of the policy and the ambiguity created by the wide and vague words of the exclusion clause to exclude claims based on, for instance, mere escape of any liquids upon land or any vapours in the atmosphere.

51 I quote from p 352 of Gobbo J's judgment the following passage:

> It was said that it was not to the point that the effect of the clause might be so wide as to entirely deprive an insured handling a whole range of substances capable of causing pollution discharges of any meaningful cover under its indemnity policy. *It was said that if the clause was not ambiguous then its apparently very wide meaning had to be given effect to, no matter that this was unexpected and would be capable of leaving very little covered in respect of a major part of the insured's activities*.
>
> In my view *this is not a legitimate approach to construction of an insurance policy exclusion clause*. Where the effect given to the *language used is such as to do violence to the policy as a whole and produce a both unexpected and irrational result, then there is in fact uncertainty and some ambiguity created*. In such a situation, ordinary principles as to resolution of ambiguities come into play. …
>
> *In these circumstances it is, in my view, proper to treat the clause as being ambiguous in its language*. It is not necessary that an exhaustive definition be attempted that overcomes possible irrational and unjust effects, any more than one should set the outer limits of the clause on the basis of giving it the widest possible operation.
>
> [emphasis added]

In the result, the Supreme Court of Victoria held the exclusion clause to be inoperable.

52 Another instance in which a provision in a policy might be ignored for inapplicability arises where a standard printed clause in a contract runs counter to the object or subject matter of the insurance. In *Home Insurance Co of New York v Victoria Montreal Fire Insurance Co* [1907] AC 59, a decision of the Privy Council on appeal from the Supreme Court of Canada, a contract of reinsurance was effected by pasting a printed slip providing for such reinsurance on to a form of a policy applicable to an original insurance. Save for one condition in the form of policy, it was undisputed between the

parties that the remaining conditions in the form of policy were totally inapplicable to a reinsurance contract. That exception was a condition providing that the right to bring an action on the policy was limited to 12 months after the date of the loss.

53 Apart from its context, that condition would have been applicable, but the Privy Council held that having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to reinsurance, that condition had also to be regarded as inapplicable. Whereas such a clause was reasonable in the original policy, it could not apply where the insured was unable to sue until the direct loss was ascertained between parties over whom he had no control.

54 Yet another instance in which a clause in an insurance policy was held to be inapplicable is found in a decision of the English Court of Appeal in *Hydarnes Steamship Company v Indemnity Mutual Marine Assurance Company* [1895] 1 QB 500. I gratefully adopt the headnotes in the law report as follows:

> By a policy of marine insurance, partly in writing and partly in print, it was declared, in a part of the policy which was in writing, that the insurance was upon "freight of meat at and from Monte Video" to any ports in the River Plate, including the Boca, and thence to the United Kingdom, and that the underwriters should be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel. By a subsequent clause of the policy it was declared that the assurance should commence "upon the freight and goods or merchandize on board from the loading of the said goods or merchandize on board the said ship or vessel at Monte Video." The name "Monte Video" in this clause was in writing, the rest of the clause being in print. After the arrival of the ship at Monte Video on her outward voyage, she proceeded to the Boca, where a cargo of meat was ready for shipment; but her refrigerating machinery then broke down so completely as to render it necessary to abandon the design of loading the meat. At the date of the policy it was known to both underwriters and assured that meat never was and could not be loaded at Monte Video in consequence of the absence of appliances for freezing the meat at that port:-
>
> *Held* (reversing the decision of Wills J.), that, the words in the clause defining the commencement of the risk with regard to the loading of the goods being absolutely inapplicable under the circumstances of the case, they must be rejected, and therefore the policy attached, although no meat was ever loaded on board the ship.

It would be useful to refer to the judgment of Lopes LJ at 507 for its succinct reasoning:

> The question is whether the risk had attached. It was said, on the one hand, that it had never attached, because no meat ever was loaded on board the ship. It was said, on the other hand, that it had attached, because the refrigerating machinery broke down after the vessel had left Monte Video, and before she finally sailed from Buenos Ayres. The question depends on the construction of the policy, which like any other document must be construed as far as possible according to the ordinary meaning of the words used, having regard to the circumstances which existed at the time when the contract was made. In this case it was well known to both parties to the contract that no frozen meat ever was loaded at Monte Video. It was also clear that, as soon as the vessel finally sailed with the meat on board, the freight would no longer be at risk, except in the event of the ship's not arriving, because by the terms of the contract the freight was to be earned on the arrival of the ship, even though the meat should have had to be jettisoned. Therefore, what the assured especially required to be protected against was the loss of the freight, not by a peril of the sea, but by the breaking down of the refrigerating machinery during the period which elapsed between the ship's arrival at Monte Video and her final sailing on

her voyage to England. The very object of the insurance was to cover that period. That being so, the insurance is expressed to be upon "freight of meat valued at 3000/, warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel … at and from Monte Video ... to any port or ports in the United Kingdom." If it had stopped there I should imagine there would have been no difficulty in construing the words. The difficulty arises from a subsequent part of the policy, which is mainly in print, and which states that "the assurance aforesaid shall commence upon the freight and goods or merchandize on board thereof from the loading of the said goods or merchandize on board the said ship or vessel at Monte Video." It is argued that the meaning of that clause is that the risk was not to attach until the frozen meat had been loaded. But it appears to be impossible to give it that meaning, because it is admitted that all parties knew that frozen meat could not be loaded at Monte Video, which is the place mentioned in the clause. This clause, as it stands, is clearly inconsistent with the previous part of the policy. The question is which portion of the policy is to take effect. It appears to me that we must give effect to the earlier part, and reject so much of the subsequent printed clause as refers to the loading of the said goods or merchandize on board the said ship or vessel, as being inapplicable to the state of things which existed. Rejecting those words, the effect is that the insurance is on freight, and is to commence at and from Monte Video. Upon this construction of the policy all difficulty disappears.

55 In the present case, the uncontroverted evidence shows that the respondent had been told that the appellant required a CAR policy and that the coverage was required for the purposes of the Contract with MediaCorp. A copy of the Contract was furnished to the respondent. Clauses 18 and 19 of the Contract required the appellant to take out insurance for the benefit of MediaCorp, the appellant and sub-contractors against liability or lost arising, *inter alia*, from damage to any property in the course of or by reason of the works where the same was due to any negligence, omission or default of the appellant or any sub-contractor. The respondent did not, at any time prior to the issue of the Policy, say that they were not prepared to provide such cover.

56 Despite those circumstances, the Policy issued by the respondent retained a standard exclusion in print [namely, Special Exclusion 4(b)] which, if it were to apply, would deny the very cover which the appellant required under the Contract. Against the genesis of the Policy, such a result would be contrary to all sense of justice and fair play.

5 7 Commercial morality must perforce temper the unrelenting quest for profit; the more so with respect to insurers whose *raison detre* is their provision of indemnity against the vicissitudes of life or the vagaries of fortune and where (in the absence of agreement or legislation to the contrary) utmost good faith underlies the relationship between the parties.

58 The operative clause providing insurance cover is typically drafted in broad and general terms and then made more precise by a number of exceptions or exclusions dealing with distinct areas where the cover is not intended to apply. It goes without saying that the wider the exclusion, the narrower the cover. Unfortunately, those responsible for drafting insurance contracts for the insurer sometimes (but thankfully, rarely) seem to forget the *sine qua non* of the contract and put in unreasonably wide exclusions.

59 Where the effect of any such exclusion is to take away the very essence of the cover thus leading to an absurdity, the courts will intervene to deny the exclusion clause its efficacy.

60 Equally, where the insured has relied upon the insurer to provide cover for a specific purpose made known to the insurer prior to the issue of the policy without the latter's demurrer and yet a

standard printed exclusion clause takes away precisely such cover, the court will be failing in its duty if it does not intervene in such a situation even if, sans such reliance, the exclusion clause might not quite aptly be described as giving rise to an absurdity.

61 In the case before me, taking into account the genesis of the Policy, I held Special Exclusion 4(b) to be inoperable.

Conclusion

62 In the result, I allowed the appeal and ordered that the decision of the court below be set aside. I further declared that the respondent was liable under the Policy to indemnify the appellant against all sums, including costs and interest, for which the appellant was liable under the main action to pay to MediaCorp, less the excess of $3,500 and ordered that such sums be paid by the respondent to the appellant. Finally, I gave costs in the appeal and below to the appellant to be taxed unless agreed.