Du Zhao Di (Suing as Committee of the Person and Estate of Jiang Hui Ping) v Lee Chee Yian (Mayban General Assurance, intervener)
[2007] SGHC 88

Case Number	: Suit 230/2007, SUM 1683/2007
Decision Date	: 30 May 2007
Tribunal/Court	: High Court
Coram	: Mohamed Faizal AR
Counsel Name(s)	: Magdelene Loh (Characterist LLC) for the Applicant; Defendant / Respondent absent; Rai Mahendran Prasad (Comma & Rai) for the Insurers / Intervener
Parties	: Du Zhao Di (Suing as Committee of the Person and Estate of Jiang Hui Ping) — Lee Chee Yian (Mayban General Assurance, intervener)

30 May 2007

Assistant Registrar Mr Mohamed Faizal:

Introduction

1 The matter that was before me had been in relation to an application for an interim payment of $100,000 that had been taken out by one Ms Du Zhao Di ("the applicant"), under Order 29, Rule 11(1)(c) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("the Rules"), acting *qua* Committee of the Person and Estate of her husband, one Mr Jiang Hui Ping ("Jiang"), a 41-year-old Chinese National who had, till he met with an untimely accident on 23 December 2006, been working in Singapore as a construction worker.

2 The relevant parts of O 29 r 11 of the Rules reads as follows:

> **11.** — (1) If…the Court is satisfied —
>
> …
>
> (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are 2 or more defendants, against any one or more of them,
>
> the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.
>
> (2) No order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories:
>
> (a) a person who is insured in respect of the plaintiff's claim; or
>
> (b) a person whose means and resources are such as to enable him to make the interim payment.

3 At the conclusion of the proceedings before me, I allowed the application for an interim payment to be made against the defendant. Given that a considerable number of issues in relation to the interpretation of O 29 r 11 of the Rules had been canvassed during the course of the proceedings that took place before me, issues that do not, at first blush, appear to have been determined *hitherto* in a domestic forum, it would be of some utility to articulate in writing the considerations that I had in making the above order.

4 Nonetheless, before considering the substantive legal issues that arose for consideration in this application, so as to put such ensuing discussion in its appropriate context, it would be useful to preface such analysis with an articulation of the series of events that led to this application. It is therefore to this I first turn.

The facts

5 Given the very nature of the subject matter that it deals with, it should be of little surprise that tort law has, since time immemorial, enjoyed a lore-encrusted reputation for tossing up depressing and distressing accounts of human fragility, pain and suffering. This has invariably meant that arbiters of such matters are often necessarily forced to determine and interpret the applicability of the law against an extremely gloomy backdrop of sad and unfortunate events.

6 The facts that formed the foundation of the application that was before me here, unfortunately, did not represent any exception. That said, the facts were relatively straight-forward and can be gleaned from the police report dated 24 December 2006 ("the police report") that had been filed by Mr Lee Chee Yian ("the defendant"). According to the police report, the defendant had been travelling in his motor vehicle ("the car") along Hougang Avenue 3, at or about 2000 hrs on the evening on 23 December 2006, when he realised that he had lost his way. He then decided to stop at a bus stop near Defu Lane to seek assistance. As the bus stop was located on the passenger's side of the car, the defendant opened the driver's car door so as to exit the vehicle to approach the persons at the bus stop to seek directions. Unbeknownst to the defendant, however, Jiang was cycling along the said road behind the defendant's car and collided into the open door of the car, with the impact of the collision causing Jiang to be flung off his bicycle and losing consciousness. An ambulance that arrived some time later conveyed him to Changi General Hospital.

7 According to a letter tendered into evidence that had been written by Dr Charles Seah ("Dr Seah"), a Senior Registrar (Neurosurgeon) in the Department of Surgery at Changi General Hospital, two operations were conducted on Jiang to stabilise his condition. It would be unnecessary to traverse in full, the operations that were conducted on him: suffice it to say that though the operations saved his life, they did little to improve Jiang's medical condition given the severe brain damage that he suffered as a result of the collision. As such, not only does Jiang remain in a vegetative state, but Dr Seah was of the opinion that even if he recovered, he would be bed-ridden for the rest of his life and would require a permanent care-taker to meet his daily needs. To exacerbate matters, Jiang was also diagnosed with having an unsound mind and would therefore be permanently unable to handle work.

8 Sometime early this year, the applicant obtained the leave of the High Court to be appointed as Jiang's Committee of Person and Estate. The applicant then commenced an action against the defendant in relation to the accident, *qua* Committee, claiming damages of some $386,000 ("the substantive action"). In the interest of completeness, I should add that the claim in the substantive action can be conveniently broken down into the following constituents: general damages for injuries (at $180,000), loss of earnings (at $80,000), cost of domestic care ($66,000) and cost of future medical expenses ($60,000).

9 As is common practice in relation to such claims, Mayban General Assurance Berhad ("the insurers"), who, at the time, had a third-party motor-vehicle insurance policy ("the insurance policy") with the defendant that would indemnify him *vis-à-vis* any claim by Jiang in relation to injuries sustained as a result of the accident, proceeded to enter an appearance on behalf of the defendant (in accordance with the terms of the insurance policy) so as to conduct his defence in the substantive action. In the interim, motivated no doubt by the pressing need for funds to continue Jiang's treatment (he was lying comatose in the hospital) and to cover the family's living expenses that would have to be expanded before the conclusion of the substantive action, the applicant filed this application to seek an interim payment of $100,000 to tide the family over and to engage domestic care on his behalf.

10 That however, does not constitute the end of this story: symbolic of the characteristic mid-story twist that is invariably omnipresent in any tragedy, when I first heard the application on 30 April 2007, I was informed by the insurers that they had repudiated liability on the insurance policy three days earlier (i.e. 27 April 2007) due to the defendant's non-cooperation in the preparation to the defence of this application and the substantive action. According to counsel for the insurers, Mr Mahendran Prasad Rai ("Mr Rai"), they had been forced to take such a draconian step as they had been unable to competently prepare for his defence as he had been completely uncontactable for an extended period of time. Though he was not able to confirm this, Mr Rai informed me that whatever precious little he knew of the defendant's whereabouts was that he appeared to be overseas on work-related matters.

11 In light of the above events, Mr Rai took the view that he was no longer in a position to act on behalf of the defendant. I was in full agreement with Mr Rai – he had, after all, been instructed by the insurers in the matter. Upon the insurers' repudiation of the insurance contract (though I stress I make no determinative finding as to the efficacy of such repudiation in law), the insurers, and by extension, Mr Rai, had no duty, nor indeed legal right in the absence of a retainer with the defendant, to represent the defendant (and/or to negotiate any settlement) in either the application before me or the substantive matter: see *United Oriental Assurance Sdn Bhd v Ng King See* [1987] 2 MLJ 264 at 265 – 266.

12 In this connection, while counsel for the applicant, Ms Magdelene Loh ("Ms Loh"), accepted that the insurer could no longer act for the defendant, she was of the view that the matter should not be adjourned at that juncture given that she had complied with all the procedural requirements in her client's application for an interim payment in that the application had been served on the counsel on record for the defendant at the time of such service (namely Mr Rai). While I fully appreciated her motivations in canvassing such an argument (in the light of her client's need for an expeditious conclusion to this application), I was nonetheless not prepared to continue hearing the matter at that stage as I harboured considerable doubts as to the propriety of continuing with the hearing there and then, in the absence of giving the defendant an opportunity to be heard. So as to ensure that any further actions that I took in relation to the matter would not be perfunctory, I adjourned the matter so as to facilitate for the effecting of the service of the summons on the defendant in his personal capacity. Numerous adjournments followed, before the matter was eventually heard again by me on 22 May 2007.

13 When the application came before me again on 22 May 2007, the defendant was once again absent, though Ms Loh informed me that service of the necessary documents had, by then, been effected on him and that all the necessary procedural requirements had been adhered to. Notwithstanding his absence, however, the application on 22 May 2007 did not proceed unopposed: instead, before the commencement of the hearing on 22 May 2007, the insurers applied, *via* another summons, to, *inter alia*, be added as interveners to the action under O 15 r 6(2) of the Rules. Such

an application was, in the circumstances, hardly surprising: notwithstanding their purported repudiation of the insurance contract, it was accepted that the insurers would, as a result their statutory obligations under the Motor Vehicles (Third Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) ("the Act"), nonetheless be liable to satisfy any judgment that would eventually be obtained by the applicant. As it was readily apparent to me that the insurers clearly had a legitimate interest in the action by reason of the liability that is imposed on them by legislation to make good any amount that is obtained by the plaintiff in any ensuing award, I allowed their application to intervene in the matter.

The Parties' Arguments

14 Moving on to the application proper, the applicant's contention is a simple one – namely that in the light of the fact that her action was a claim for $386,000 and that since she would no doubt recover more than $100,000 in the substantive action, there was no reason *not* to grant an interim payment order. The insurers, on the other hand, submit that no such interim payment order should be made. Stripping their arguments of its verbiage, the insurers essentially canvassed three reasons as to why such an interim payment ought not be granted. These can be conveniently summarised as follows:

(a) That O 29 r 11(2) of the Rules has not been satisfied insofar as both limbs of the said provision must be satisfied before any order for an interim payment should be made;

(b) That even if only one limb of O 29 r 11(2) of the Rules needs to be satisfied, that the defendant had not been "insured" for the purposes of O 29 r 11(2)(a); and

(c) That, in any event, even if the above arguments do not gain currency with me, that the quantum that was being sought by the applicant, *i.e.* $100,000, was excessive and should be revised downwards.

15 Having set out the pith of the protestations of the insurers against any order for an interim payment, I propose to deal with each protestation *seriatim*. Nonetheless, before doing so, I should highlight that any analysis of the protestations of the insurers at this relatively early juncture would be putting the cart before the horse, for the protestations would only be of legal relevance if, in fact, O 29 r 11(1)(c) of the Rules had been made out. Put another way, if the applicant was unable to show me that her application was one that fell within O 29 r 11(1)(c) of the Rules, her application must fail *in limine*, whatever the merits of the insurers' respective protestations. As such, it would be of significant utility to first undertake the prefatory discourse of whether O 29 r 11(1)(c) of the Rules has been made out.

Whether Order 29 rule 11(1)(c) has been made out

16 The law in relation to the requirements that had to be satisfied *vis-à-vis* any application under O 29 r 11(1)(c) of the Rules is trite and is of no dispute. Given that an interim payment constitutes, for all intents and purposes, the imposition of liability before a full determination of the merits underlying such a matter, the standard that must be met by a plaintiff before a court should grant such payment is not that the belief that the claim is *likely to succeed*, but the belief that the claim *would, in fact, succeed* and be likely to garner substantial damages: see, in this respect, Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis: Singapore, 2006) at para 29/11/4 and *British and Commonwealth Holdings PLC v Quadrex Holdings Inc* [1989] QB 842. While the burden of proof is, admittedly, not a low one, I should add that such burden need only be made out on the civil standard of proof, *i.e.* on the balance of probabilities: see *Sherman Lehman v Maclaine Watson* [1987] 1 WLR

480 at 489, *per* Lloyds LJ.

17 Given the interlocutory nature of the application, however, I should stress that it would be imperative not to approach the matter as if the matter that was before me had experienced the rigours of a substantive trial. As Hobhouse J noted in the unreported English decision of *Sankyo Kaium Kabushiki Kaisha v Opia* (Unreported, 16 November 1983):

> This conclusion has to be arrived at as an exercise of judgment at an interlocutory stage on the evidence appropriate to an interlocutory hearing looking forward to the trial. *On the one hand it cannot be a rehearsal of an actual trial and on the other hand it cannot impose so high a standard of proof on the plaintiff that the court can conceive of no other possible outcome than judgment for the plaintiff. The court has simply to ask itself is it satisfied that that will be the outcome of the trial*.
>
> [emphasis added]

18 With the above considerations firmly in mind, in ascertaining whether the claim would succeed and be likely to garner substantial damages, it was necessary for me to consider two discrete, though interlinked, matters: first, whether the facts, as the applicant canvasses, was to be believed, and second, whether, if so, such a factual matrix would mandate the conclusion that the applicant's claim would, in fact, succeed in the substantive action and be likely to garner substantial damages. To commence analysis, though brief mention should be made of the fact that none of the parties before me would be able to prove as a matter of fact that the events that took place was as alleged by the applicant, given that the defendant was absent and Jiang's condition militates against him giving testimony as to the events that transpired, I had little reason to disbelieve the version of events that was put forth by the applicant (as reproduced in [6] above). Indeed, it did not escape my attention that the applicant's version of events had been wholly predicated on the defendant's own police report that detailed what had transpired – in that context, I had little reservations about dismissing, as nothing more than fanciful, any suggestion that the rendition of events would be coloured by any desire to boost the applicant's chance of success. In the premises, especially when seen in the context of the lack of any protestation on the part of the insurers in relation to the veracity of the rendition of the events as propounded by the plaintiff, I saw no reason not to accept the plaintiff's version of what transpired *in toto*.

19 The next question that necessitates resolution would be whether, on the basis of the above factual matrix, it would follow that the claim would, in all likelihood, succeed. In my view, this has to be answered in the positive. It is trite that a driver owes a duty of care to all road users, and to that end, a driver is expected to take reasonable care to avoid causing damage to other persons: see Walton *et al*, *Charlesworth & Percy on Negligence*, 11th ed (Sweet & Maxwell: London, 2006) at para 9–192. As far as I can tell (from the police report), it would appear that the collision had occurred as a direct result of the defendant's act of stopping in the middle of the road (albeit at a bus stop) and his sudden opening of the car door on the street. In that context, I found it difficult to conceive of a situation in which the defendant would be able to escape being liable for a considerable apportionment of the ensuing liability. At best, it could be canvassed that Jiang was himself contributorily negligent, but even then, it did not appear to be likely that the court that eventually hears the substantive matter would arrive at the conclusion that Jiang should bear a considerable apportionment of fault.

20 Of course, if he had attended the hearing before me, it was open to the defendant to highlight the existence of circumstances that could well serve to mitigate his culpability (for example, his blinker lights may have been switched on or he may have given a hand signal to warn traffic that

was behind him), but given his absence, I saw no reason to hypothesise in a vacuum in his favour – a defendant fails to attend a hearing at his own peril and there would, I think, be no basis for the court to act as an advocate on his behalf. Indeed, to hypothetically canvass every single defence and expect the applicant to overcome each such possibility would be anomalous for that would be tantamount to setting a higher threshold for a plaintiff to meet than if, in fact, the defendant had attended. In any event, I should stress that in relation to the validity of an action under O 29 r 11(2) (c) of the Rules, the existence of contributory negligence was, generally speaking, immaterial. As one academic treatise (Nicola Solomon *et al*, *Personal Injury Litigation*, 10th ed, (Sweet & Maxwell: London, 2002)) astutely notes (at 152):

> The mere fact that there may be substantial contributory negligence by the claimant is irrelevant. As long as the end result (i.e. the damages after deducting contributory negligence) is a substantial award, then the claimant is entitled to an interim payment.

21 Of course, I was fully aware that the existence of contributory negligence was nonetheless something which I had to take into account in relation to the quantum to be awarded, a matter that would be discussed later (see [48] below). Reverting back to the analysis under this head however, in the result, I was satisfied that if and when the action proceeded to trial, the applicant would be able to obtain judgment against the defendant for substantial damages. Insofar as this was the case, I was of the view that, on the balance of probabilities, O 29 r 11(1)(c) of the Rules had been made out.

22 That, however, does not represent the end of the analysis, for it was common ground between the parties that my discretion to allow for the interim payment on the basis of the satisfaction of O 29 r 11(1)(c) of the Rules would still be circumscribed by the requirement for the simultaneous satisfaction of O 29, r 11(2) of the Rules. Nonetheless, while the parties were *ad idem* on the *applicability* of O29, r 11(2), they were divided as to the *import* that should be accorded to it. In this connection, as I already alluded to earlier (see [14] above), Mr Rai raised two issues *apropos* the interpretation of O 29 r 11(2) for my determination: first, whether an order for an interim payment could be made if only one limb of O 29 r 11(2) of the Rules was satisfied, and second, whether O 29, r 11(2)(a) of the Rules was made out on the facts of this case. I will proceed to consider each matter in turn.

Whether Order 29 rule 11(2) should be conjunctive or disjunctive

23 The first issue that fell for my determination had been the question of whether the two limbs of O 29 r 11(2) of the Rules of Court are conjunctive or disjunctive. Put another way, is the satisfaction of both limbs of O 29 r 11(2) of the Rules a prerequisite to the making of an order under O 29 r 11(1)? I should stress that this point is by no means moot: as counsel for the applicant herself conceded, if indeed she needed to satisfy both limbs of O 29 r 11(2), her application would be bound to fail for she had no evidence whatsoever to suggest that the defendant was "a person whose means and resources are such as to enable him to make the interim payment".

24 Though this question does not appear to have been considered determinatively in the domestic context, I am singularly unimpressed by any suggestion on the part of the insurers that both limbs of O 29 r 11(2) of the Rules have to be satisfied before an interim payment should be granted. Indeed, quite to the contrary, I am of the unflinching view that it cannot be seriously canvassed that one would be required to satisfy both limbs of O 29 r 11(2) before an interim payment would be allowed. That the matter is really too clear for argument can be discerned on three separate levels: on a literal reading of the said provision, a purposive reading of the same and by seeking recourse to case law that can be gleaned from English authorities in relation to the equivalent provision in

England.

25 On a literal approach, even a superficial analysis of the nomenclature of the *chapeau* of O 29 r 11(2) of the Rules would appear to afford only one realistic conclusion – namely that an order cannot be made if the defendant does not fall *within one* of the following categories. Read closely, O 29 r 11(2) clearly emphasises that an order cannot be made if a defendant does not fall *within one* of the pre-defined categories – as a matter of interpretation, it must be clear that the corollary would equally apply: if a defendant *does fall* within one of the categories (*i.e.* the defendant "is insured" and/or a person of means and resources), an interim payment order can be made. Indeed, that this appears to be the only reasonable interpretation would appear to be corroborated by the use of the word "or" (as opposed to "and") at the tail-end of O 29 r 11(2)(a). In that context, it was unsurprising that a local text proffers the suggestion that, "[orders] for interim payments may only be made…if the defendant is insured in respect of the claim *or* has the means and resources to make such payment": see *Practitioners' Library – Assessment of Damages: Personal Injuries and Fatal Accidents* (LexisNexis: Singapore, 2005).

26 Such an understanding of the provision is further fortified when recourse is sought to a purposive interpretation of the said provision. Even on a cursory perusal, it was clear beyond peradventure that the provision's *raison d'etre* would be to act as a judicial sieve to ensure that interim payments are only made in situations where payment would be realistically foreseeable. When viewed in that light, one could see the merits behind the creation of two discrete requirements that operate separately: if a person had deep pockets, any order could be satisfied notwithstanding the absence of an insurance policy; similarly, if a person was of more modest means, he would nonetheless be able to satisfy any order for an interim payment if he had an insurance policy that would indemnify him in relation to any such payment. The motivations underlying the provision, however, became immediately obfuscated the moment one attempted to read the requirements conjunctively – simply put, there appeared to be no apparent logic behind mandating that a defendant be simultaneously insured as well as a person of means and resources to satisfy the interim payment. Indeed, tellingly, when I questioned Mr Rai as to the purpose of O 29 r 11(2) of the Rules if I accepted his interpretation, he was unable to proffer any reasonable explanation, except to suggest that such a reading would be what a literal interpretation must necessarily afford (though, for reasons already discussed earlier (see [25] above), I am of the view that a literal interpretation would, in fact, mandate the opposite conclusion). As such, even on a purposive approach, the more persuasive view must surely be that the two limbs of O 29 r 11(2) had to be read disjunctively.

27 In the absence of any domestic jurisprudence on point, I am further assured of the rectitude of the interpretation that I adopted *vis-à-vis* O 29 r 11(2) of the Rules by the approach that had been adopted by English jurisprudence. I should stress that English jurisprudence on point was particularly instructive given the proximity of English legislation with that of the Act. Order 29 r 11(2) of the Rules of Supreme Court 1965 (UK) ("the UK provision") reads as follows:

> (2) No order shall be made under paragraph (1), in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely:
>
> (a) a person who is insured in respect of the plaintiff's claim;
>
> (b) a public authority; or
>
> (b) a person whose means and resources are such as to enable him to make the interim payment.

28 I should add that the slight departure of UK provision from the domestic equivalent, in the form of an additional limb that caters for "a public authority", represents the statutory response to the decision of *Powney v Coxage* (The Times, 8 March 1988) ("*Powney v Coxage*"), a matter that I will return to at the conclusion of my decision (see [52] below). Such a bifurcation between the respective legislations, however, would be immaterial for the purposes of the present discourse, for the existence of an additional limb in the UK provision does not detract from any consideration of whether the three limbs of the UK provision should be read disjunctively or conjunctively. In this regard, it appears trite that the UK legislation has long been held to be read disjunctively insofar as only one limb needs to be satisfied before an interim payment can be made: see *Sharp v Pareria and another* [1998] 4 All ER 145. Given the consonance of such an interpretation with the purpose underlying the said provision, I saw no reason to depart from such an interpretation when interpreting the domestic provision.

29 Drawing the various thread of analyses together, it was clear to me that the only reasonable interpretation to be afforded to O 29 r 11(2) would be that it had to be read disjunctively, namely that the satisfaction of either limb would be sufficient to allow me to make the order. For the foregoing reasons, I rejected Mr Rai's suggestion that both limbs of O 29 r 11(2) had to be *simultaneously* satisfied before I could grant an order of an interim payment against the defendant.

Whether the defendant was "insured" for the purposes of O 29 r 11(2)(a)

30 At the risk of reiteration, Ms Loh conceded at the commencement of the hearing before me that she was not able to prove the satisfaction of O 29 r 11(2)(b) of the Rules. In that respect, the sole question that arises for my determination *vis-à-vis* O 29 r 11(2) of the Rules relates to the satisfaction, or otherwise, of the first limb (i.e. O 29 r 11(2)(a)) of the said provision. Stripped to its essence, the question appears, at first blush, to be a relatively simple one – is the defendant someone who "is insured in respect of the plaintiff's claim"?

31 Unsurprisingly, in relation to this matter, both counsel once more adopted diametrically opposing stances. Mr Rai, citing the decision of *Powney v Coxage*, canvasses the view that the defendant was not "insured" for the purposes of O 29 r 11(2)(a) of the Rules as the insurers had repudiated the insurance contract with the defendant by the time the matter came before me for determination. In retort, Ms Loh insisted that the even if the insurance contract had been validly repudiated, the defendant would still be "insured in respect of the plaintiff's claim", though she did not to proffer any authorities that would serve to augment her arguments.

32 At first blush, when one analyses the phraseology inherent in O 29 r 11(2)(a) of the Rules *in vacuo*, an argument of some force can be made to suggest that the defendant does indeed fall outside the intended ambit of the provision. Order 29 r 11(2)(a) of the Rules allowed for interim payments to be made against a defendant "who *is* insured in respect of the plaintiff's claim." The usage of the present tense, as was the case with O 29 r 11(2)(a), might appear to suggest that an arbiter should take into account the current status of the defendant – *i.e.* whether the defendant "is insured" at the time at which the order for an interim payment is being contemplated. As Mr Rai pointed out, strictly speaking, if the insurance contact had been successfully repudiated (though I should reiterate that I had arrived at no determinative finding on that point) before the matter came before me for my determination, by the time the matter arose for my determination, the defendant could not be said to be insured in respect of the plaintiff's claim for the purposes of O 29 r 11(2)(a) of the Rules.

33 Nonetheless, on closer inspection and deliberation, I was of the view that Mr Rai's argument should gain little currency, for it operated on the false premise that such repudiation would have

efficacy in relation to an action brought by an injured third party. Insofar as the applicant was concerned, such a breach of the insurance contract on the part of the defendant that would afford repudiation can only operate *inter partes* and not *omni partes*. Put another way, there was no doubt that, so far as the applicant was concerned, the first defendant was covered by a valid policy of insurance, for it is conventional wisdom that "conditions precedent to liability and conditions subsequent avoiding liability cannot be used in respect of claims by a third party in respect of injury or death which has been caused by the injured tortfeasor": see Goh-Low Soen Yin *et al*, "Insurance Law", *Articles on Singapore Law* (24, 2005). For that reason, if, in fact, the term does attempt to impinge upon the rights of third parties (such as the applicant here), it must necessarily be held to be void (at least *vis-à-vis* the third party), for such a term would be the quintessential form of term that would fall foul of s 7(1) of the Act, which reads as follows:

> Any condition in a policy or security issued or given for the purposes of this Act providing that *no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall be of no effect in connection with [claims in respect of bodily injury or death].*
>
> [emphasis added]

34 Therefore, shorn of a detailed discourse (for which, see, in general, Poh Chu Chai, *Law of Life, Motor and Workmen's Compensation Insurance*, 6th ed (LexisNexis: Singapore, 2006) at 552), I was of the view that the insurers would, by virtue of the above reasoning, be treated, so far as the applicant was concerned, as insurers with a duty to indemnify the defendant in respect of the claim. No reliance can be had to the purported repudiation for the purposes of any action that had been commenced by a third party, since such third party could not, in law, be burdened by the ramifications of such a term that may otherwise be binding on the parties *inter partes*. As such, it was not open for the insurers to argue that there had been repudiation since such repudiation was predicated upon the efficacy of a term that had no effect *vis-à-vis* the applicant.

35 Lest it be suggested that I was fashioning a novel exception that derogates from a *literal reading* of O 29 r 11(2)(a) of the Rules, I should stress that support for such a conclusion can be found in English jurisprudence. In this regard, I found it surprising that neither party attempted to bring to my attention the unreported English Court of Appeal decision of *O'Driscoll v Sleigh and Another* (Unreported, 20 November 1984) ("*O'Driscoll*"), given its apparent determination of the very point that was being canvassed at length by the parties before me. The case facts therein warrant brief recital: the plaintiff there had been a passenger in a bus that was owned by the second defendant. The plaintiff was injured as a result of the bus having to brake suddenly due to the first defendant's motor-car losing a wheel (and thus skidding across the road). It was not in dispute that the first defendant had no means to make an interim payment personally, but an application for interim payment was made on the basis that his motor insurance covered his liability in relation to the accident. The insurers of the first defendant in that case took the position (as had the insurers in the case before me) that, as a result of certain clauses within the insurance policy that had been breached by the first defendant, they would not be required to indemnify him. On the back of such a factual matrix, it was suggested by counsel for the insurers there that the Court should not grant an order for interim payment, for the net result of the above events was that the first defendant would no longer be "a person who is insured in respect of the plaintiff's claim".

36 In rejecting such a contention, Griffiths LJ observed that the argument being canvassed by the insurer predicated itself on the fallacious assumption that the object of the said provision was to accord protection to a *defendant* who would be unable to meet an interim payment (since he might

have to repay the insurers). Instead, Griffiths LJ observed that the true principle that is engaged by O 29 r 11(2) of the Rules would be ensuring that interim awards are only made in cases where there was a real likelihood of the award being paid, so as to avoid the incurring of unnecessary costs. Accordingly, the test, under O 29 r 11(2)(a) of the Rules, was not whether the insured would be liable to his insurers, but *whether the insurer would be obliged to meet any interim award* – if the insurer was obliged to meet any such award, it would follow that from the perspective of a plaintiff, the defendant would be, for all intents and purposes, "insured" for the purposes of O 29 r 11(2) of the Rules.

37 From the brief discourse above, it should be apparent that the legal principles that are engaged in that case are on all fours with the matter that was before me. In that context, though Griffith LJ's observations in *O'Driscoll*, just as is the case with any observations made in cases in other jurisdictions, were not binding on me, I saw no reason not to adopt his jurisprudential approach, which is not only intrinsically sound, but laudably avoids giving leaden feet to the *raison d'etre* of O 29 r 11(2) (which is the result a literal reading would appear to arrive at) by ensuring that insurers are not able to surreptitiously collude with defendants to frustrate any application for an interim payment by agreeing between themselves to repudiate an insurance agreement.

38 In the interest of completeness, I should highlight that there was no merit in Mr Rai's suggestion that *Powney v Coxage* supported his position. A close look at the case facts therein would bear this out. *Powney v Coxage* involved an application for an interim payment in respect of an injury sustained by the plaintiff as a result of a road accident. The plaintiff had commenced an action against both the *uninsured* driver of the vehicle that had collided with him and against the Motor Insurers Bureau ("MIB"), with the latter being included as a defendant as a result of its agreement with the government to satisfy judgments against uninsured drivers in personal injury actions. It was canvassed on behalf of the plaintiff there that the UK equivalent of O 29 r 11(2)(a) of the Rules had been satisfied since the uninsured driver was, for all practical purposes, "indemnified" by the MIB. In rejecting such a contention, Schiemann J had observed as follows:

> …the driver was not insured as the term is normally understood and, in my judgment, it is not permissible to treat him, as I was urged to do, as insured for the purposes of Rule 11(2) because the Motor Insurers Bureau was in effect, as it was put, indemnifying him. *I reject this submission. I do not think that on any analysis the Motor Insurers Bureau can be regarded as indemnifying him. On the contrary, they specifically preserve a right of action against him and the existence of the arrangements between the Motor Insurers Bureau and the Secretary of State do not have the effect of insuring an uninsured driver.*
>
> [emphasis added]

39 Leveraging on Schiemann J's observations, Mr Rai argued that as in this case, given that the interveners had taken steps to repudiate the insurance contract, there would similarly be no basis to deem the respondent "insured". Whilst the link was not explicitly highlighted during the course of his oral submissions, it was plainly evident that Mr Rai's contention operated on the premise that as the insurers were no longer indemnifying the defendant, it must follow that the defendant was not "insured" for the purposes of O 29 r 11(2)(a) of the Rules.

40 Such a contention predicated itself on the belief that *Powney v Coxage* stood for the proposition that the term "insured", as found in O 29 r 11(2)(a) of the Rules, is synonymous with the term "indemnification". With respect, this constitutes a gross misreading of *Powney v Coxage*. It should be reminded that Schiemann J's observations were made in the context of the absence of any conventional insurance arrangement between the defendant and an insurance agency – it was in such

a context that the plaintiff had attempted to canvass the argument that although there was no conventional insurance agreement, the purported indemnification by the MIB amounted to "insuring" the defendant under O 29 r 11(2). In this regard, Schiemann J was merely highlighting that there was no "indemnification" to even speak of in the said context. Put another way, Schiemann J was not purporting to enunciate a direct link between indemnification and the existence of an insurance policy, but that any argument that indemnification by a third party agency could amount to being "insured" in law does not warrant consideration since there was no "indemnification" on the facts to begin with. It stood for nothing more and certainly did not stand for the proposition being canvassed by Mr Rai, namely that the *lack of indemnification* must necessarily warrant the conclusion that the defendant was not "insured" for the purposes of O 29 r 11(2)(a) of the Rules. In any event, I fail to see how such a conclusion could be seriously canvassed in light of the explicit finding in *O'Driscoll* that the test was not one of indemnification but whether there was a real likelihood of the award being satisfied by either party (see [36] above).

41 Seen in that context, it becomes apparent that the case of *Powney v Coxage* would be of little assistance to the determination of the matter that was before me. As such, for the reasons already given earlier, I arrived at the view that O 29 r 11(2)(a) of the Rules has been made out insofar as the defendant "is insured in respect of the [applicant's] claim". More overarchingly, on the back of the discourse above, I was also of the opinion that nothing in O29 r 11(2) would pose a formidable hurdle in the making of the order for interim payment in the circumstances.

Amount that should be awarded

42 Having dealt with the dual-fold matter of whether O 29 r 11(1)(c) has been satisfied and whether there would be any hurdle that would be posed by O 29 r 11 (2) of the Rules in the making of such an order, and in the light of the existence of protestations on the part of the insurers as to the quantum that was being sought by the defendant, I shall now deal briefly with the matter of the amount that I saw fit to award.

43 The insurers' protestations under this limb, as I understood them, were dual-fold: first, any quantum that is to be awarded as an interim payment must stem from the need to mitigate any hardship or prejudice that is occasioned to a plaintiff – to that end, whilst any payment ordered by this Court should, quite rightly take into account the immediate financial needs of Jiang, Mr Rai contended that there would be no basis to take into account matters such as the future career prospects and loss of potential earnings when ascertaining what would be a fair sum to be awarded in the form of an *interim* payment. Second, while expressly conceding that he was making such an argument *in vacuo*, Mr Rai noted that the damages that would eventually be awarded to the respondent may well considerably depressed should an eventual finding be made that there was contributory negligence. When seen in the context of such a dual-fold submission, Mr Rai contended that a fairer amount that should be awarded would be $50,000. According to Mr Rai, there was also considerable virtue in awarding such an amount when seen from another perspective: if, in due course, it was found that $50,000 would have been too low, it would always be open for the applicant to apply to be given a further interim payment.

44 To commence analysis, under O 29 r 11 of the Rules, the court may exercise its discretion to make an order for an interim payment for any such amount as it "thinks is just", save that such an amount should not exceed a reasonable proportion of the damages which were likely to be recovered after taking into account other possible. Whilst, on its face, this appears to provide a considerable degree of latitude to the arbiter to decide the appropriate amount to be awarded, I should stress that such discretion is by no means unfettered – instead, as is invariably the case with the exercise of any form of discretion, case law has delineated, over time, the principles that would serve to guide the

Courts as to what would be an appropriate amount.

45 In that context, it would appear to be generally accepted that the court need not engage in a detailed examination of the needs of the applicant concerned, as long as it is satisfied that the pre-conditions to such an award are met: see *Stringman (a minor) v McArdle* [1994] 1 WLR 1653. Instead, where no amount is specified in an interim payment application, the Court is generally satisfied to award the minimum sum that the Court feels that the plaintiff is likely to be awarded. As highlighted in *British and Commonwealth Holdings PLC v Quadrex Holdings Inc* (The Times, 8 December 1988):

> …as a general rule, the *just amount will be the minimum* (but *no more than the minimum*) which, on the strong balance of probabilities, the court considers the *plaintiff is likely to be awarded* on the eventual final assessment of damages…
>
> [emphasis added]

46 For completeness, I should add that the same approach appears to be implicitly (though not explicitly) followed in domestic jurisprudence as well: see, in this respect, *Ong & Co Pte Ltd v Ngu Tieng Ung* [1999] 4 SLR 379 at [13].

47 It should be stressed that unlike most conventional requests for interim payments, the applicant in the matter before me sought to be awarded a specific amount, namely $100,000. In the circumstances therefore, there was no necessity for me to undertake a detailed analysis of what would be the minimum amount that the applicant was likely to receive at the conclusion of a full substantive hearing in relation to the matter – instead, it would be imminently logical that if I were to find that such minimum amount that she was likely to obtain would amount to more than $100,000, the sum requested for by the applicant should, as a matter of course, invariably be ordered.

48 As alluded to earlier (see [8] above), the applicant was, in relation to the substantive action, claiming damages of some $386,000 from the defendant as a result of the accident. Whilst I readily accept that this could well be *slightly* more than would be eventually awarded (though I stress that I am making no actual finding on the matter), taking cognisance of the conventional wisdom that a "tort victim must…be compensated for *all* possible financial ill-effects of the injury": see Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 6th ed (Butterworths: London, 1999) at 119, I could not help but arrive at the conclusion that there was significant merit underlying most of the claims of the applicant: the numerous receipts, bills and quotations, for example, evidence payments that have *already* been made as a result of the accident, monies that were expanded on Jiang's medical treatment and for palliative care. Medical opinion (in the form of a letter from Changi General Hospital) also appears to indicate that there is every chance that Jiang would require long-term medical treatment and attention. Tellingly, Mr Rai didn't even attempt to make any allusion to any of the heads of the applicant's claim being unwarranted or unmeritorious. To that end, the only caveat that I had to the likely success of her claim *in toto* would be whether the amounts claimed was *slightly* on the high side. That said, even if I assume all these factors in the defendant's favour, and effect the necessary adjustments to the applicant's claim to take into account such concerns and to take the defendant's case at its highest, I would still be of the unstinting view that the amount that is likely to be awarded to the applicant at the end of the trial for the substantive action would remain considerably more than $100,000.

49 I now turn to the two protestations on the part of Mr Rai to an award of $100,000. Mr Rai's point on contributory negligence can be summarily dealt with: as Mr Rai himself conceded when I probed further during the course of the parties' oral submissions, such an argument of a depression of

damages predicated upon the existence of contributory negligence (on Jiang's part) was speculative and had not been based on any substantive or concrete evidence of an intimate knowledge of what happened. Needless to say, no weight should be placed on mere conjecture. In any event, in the interest of completeness, I should stress that even if it could be suggested that there was a tint of contributory negligence on Jiang's part, I see it as fanciful to suggest that this would actuate itself in the form of a reduction of the sum to the point where the sum awarded would be depressed to less than $100,000.

50 In relation to Mr Rai's suggestion that this court should be conservative in any assessment of the appropriate sum that should be awarded for the purposes of the interim payment given that the plaintiff would be in possession of a right to apply sometime in the future should the award granted be found to be insufficient, there would be no latent benefit to having the sum paid out in "two bites rather than one": see the English decision of *Huggair (By her Mother and Next Friend) v Eastbourne Hospitals NHS Trust QBD* (Unreported, 29 April 1997). Simply put, there was no virtue whatsoever in being unjustifiably conservative, delay the inevitable and result in the parties having to incur considerable costs (due to the need to file applications of the same import in future) in the process.

51 Accordingly, taking all these considerations into account, it was clear to me that while the vagaries of the litigation process necessarily meant that a nagging, albeit remote, possibility existed that the amounts that may eventually be awarded might very well end up to be considerably less than expected, it could not, for a moment, be suggested that $100,000 constitutes an excessive amount that would be disproportionate to the apportionment of blame that lies on the defendant. Indeed, the converse applied – insofar as there was a very high degree of probability that the applicant would be likely to recover a sum in considerable excess of $100,000 at any such trial.

Coda

52 I should briefly append a quick comment in relation to a matter that I took cognisance of during the course of the proceedings in relation to the ambit of O 29 r 11(2) of the Rules. Given the bifurcation between O 29 r 11(2) in the domestic context, and that of the UK equivalent (see [27] above), it would appear that, on the current state of the law, there would be no avenue for an injured party to seek an *interim payment* from the Motor Insurers' Bureau of Singapore where there was an uninsured defendant of modest means or where the defendant was untraceable. This appeared, at least at first glance, to be somewhat anomalous especially since an injured party under the same factual matrix would appear to be able to enforce a *final judgment* in such instances against the same organisation. Legislative intervention in England that statutorily overrules *Powney v Coxage* and that allows for an interim order to be made against "a public body" has ensured that such an apparent anomaly is plugged. Given that such applications serve to mitigate the hardship or prejudice that may exist before any judgment can be obtained, and in the light of the fact that the availability of fairly urgent medical treatment could often be determined by the outcome of such (interim payment) applications, any distinction in the rights of third parties in Singapore to obtain an interim as opposed to a final judgment against the organisation concerned, appears difficult to appreciate. To that end, there may be some force in the argument that the amendments that had been promulgated in relation to the UK Rules of Court should equally be effected in Singapore (subject, of course, to any necessary variations to suit the domestic context) to provide the Courts jurisdiction, in the appropriate circumstances, to order an interim payment against the Motor Insurers' Bureau of Singapore.

Conclusion

53 This application, in my view, perfectly encapsulates the difficulties that invariably confront

both the insurer and the third party when a defendant becomes uncontactable. While it is readily accepted that there may well be good reasons for a defendant's enforced absence from the jurisdiction, such a defendant is under a *moral* (if not *legal*) duty to ensure that the necessary steps are taken to remain contactable or at least to keep his insurance company in the loop as to his whereabouts. Compulsory insurance schemes have been put in place by the legislature in no small part to ensure that injured parties (and their loved ones) are not left in the lurch and that their needs are taken care of – in that context, it would be most unfortunate if a plaintiff is left with no basis in law for an interim payment, though such a claim may well be meritorious, as a result of the dearth of facts that would invariably result due to the non-availability of a defendant (who is able to easily clarify what transpired). Whilst in this particular instance, a happy confluence of factors has enabled me to make the interim payment order, I shudder to think what might have happened if, due to less fortuitous circumstances, an applicant was unable to prove a case given the vacuum of information that may result from the defendant's absence (or where my observations at [52] would squarely apply), especially where the need for such funds take on an added urgency.

54 Fortunately, no such unhappy dilemma befalls me. Accordingly, for the reasons highlighted above, I granted the applicant's application for interim payment and set costs at $1,000.