American International Assurance Co Ltd v Wong Cherng Yaw and Others [2009] SGHC 89

Case Number : Suit 670/2008, SUM 4743/2008

Decision Date : 17 April 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Quek Mong Hua and Esther Yee (Lee & Lee) for the applicants/defendants; Quentin Loh SC, Elaine Tay and Shannon Tan (Rajah & Tann LLP) for the plaintiff

Parties : American International Assurance Co Ltd — Wong Cherng Yaw; Tan Siew Mui Junie; Lim Wee Chee; Liaw Chong Kiaw; Wong Shyh Yaw; Tie Ah Chai; Low Bee Hong; Goh Chong Wee Jasper; Tan Tiong Thye; Ong Swee Boon

Civil Procedure

17 April 2009

Andrew Ang J:

Introduction

1 This application for interim payment of certain sums made by way of Summons No 4743 of 2008 ("Sum 4743") was one of two applications made by the defendants in response to the plaintiff's refusal to release funds which the defendants had invested with the latter under 21 Investment Linked Policies ("ILPs"). The other application by way of Summons No 4476 of 2008 ("Sum 4476") for interim preservation of the proceeds of the ILPs has since been resolved pursuant to a "without prejudice" agreement between the parties to place the proceeds in a joint stakeholder's account pending resolution of the main suit, Suit No 670 of 2008. With regard to Sum 4743, I granted the defendants' application for interim payment and ordered a sum of $1,019,300 which represented the balance of the defendants' capital invested with the plaintiff to be paid by the plaintiff to the defendants.

The facts

2 The plaintiff is an insurance company with whom the defendants and one Lee Swee Chee invested a total of $1,059,300 under 21 ILPs. The original policyholders of the ILPs are as follows:

	ILP No	Original Policyholder	Date of Inception	Total Capital Invested (S$)	Agent
1	U023615760	1st Defendant	08.12.05	10,000	1st Defendant
2	U023615524	1st Defendant	21.03.06	10,000	1st Defendant
3	U024528733	1st Defendant	27.03.07	*60,000	2nd Defendant
4	U121512862	2nd Defendant	03.01.02	*67,900	1st Defendant

5	U023615825	2nd Defendant	05.01.06	10,000	1st Defendant
6	U023882454	3rd Defendant	31.03.06	*33,300	1st Defendant
7	U023882700	3rd Defendant	24.04.06	15,000	1st Defendant
8	U024386755	3rd Defendant	14.12.06	*137,000	2nd Defendant
9	U023615744	3rd Defendant	24.03.06	*80,000	1st Defendant
10	U024152646	3rd Defendant	03.08.06	10,100	1st Defendant
11	U024386632	4th Defendant	21.02.07	20,000	2nd Defendant
12	U024616661	4th Defendant	23.05.07	100,000	2nd Defendant
13	U021574858	4th Defendant	28.12.01	10,000	1st Defendant
14	U090196322	5th Defendant	11.07.07	15,000	2nd Defendant
15	U024057411	6th Defendant	26.05.06	*61,000	1st Defendant
16	U024153344	6th Defendant	11.12.06	30,000	2nd Defendant
17	U024493033	7th Defendant	10.07.07	*80,000	2nd Defendant
18	U023544763	8th Defendant	19.10.05	10,000	1st Defendant
19	U024460655	9th Defendant	23.03.07	50,000	2nd Defendant
20	U024528445	10th Defendant	30.05.07	*80,000	2nd Defendant
21	U080170808	Lee Swee Chee	21.12.07	170,000	2nd Defendant
Note: Figures marked with an asterisk (*) indicate that subsequent top up premiums were made by the policyholders					

3 As a result of various assignments between the defendants and Lee Swee Chee, the policyholders of the 21 ILPs came to be as follows:

	ILP No	**Policyholder**	**Date of Inception**	**Date of Assignment**	**Assignor**

1	U023544763	1st Defendant	19.10.05	27.06.07	8th Defendant
2	U023615760	1st Defendant	08.12.05	22.10.07	5th Defendant
3	U023615524	1st Defendant	21.03.06	–	–
4	U024528733	1st Defendant	27.03.07	22.10.07	5th Defendant
5	U121512862	2nd Defendant	03.01.02	–	–
6	U023615825	2nd Defendant	05.01.06	–	–
7	U024057411	2nd Defendant	26.05.06	25.10.07	6th Defendant
8	U024153344	2nd Defendant	11.12.06	25.10.07	6th Defendant
9	U024460655	2nd Defendant	23.03.07	06.03.08	9th Defendant
10	U080170808	2nd Defendant	21.12.07	25.12.07	Lee Swee Chee
11	U023882454	3rd Defendant	31.03.06	–	–
12	U023882700	3rd Defendant	24.04.06	–	–
13	U024386755	3rd Defendant	14.12.06	–	–
14	U023615744	3rd Defendant	24.03.06	–	–
15	U024528445	3rd Defendant	30.05.07	02.06.08	10th Defendant
16	U024152646	3rd Defendant	03.08.06	–	–
17	U024386632	4th Defendant	21.02.07	–	–
18	U024616661	4th Defendant	23.05.07	–	–
19	U021574858	4th Defendant	28.12.01	–	–
20	U024493033	5th Defendant	10.07.07	15.06.08	7th Defendant
21	U090196322	5th Defendant	11.07.07	–	–

4 Under an ILP, premiums paid by the policyholder are used to invest in units in funds listed in a "Schedule of Funds" annexed to each policy. The funds listed may differ between different plans. The number of units in a fund which a policyholder could purchase with any given sum under an ILP

depends on the price at which the units are to be issued. When a policyholder liquidates the units in the fund due to the policyholder is determined by the price at which the units are redeemed. Under the ILPs, policyholders are also entitled to switch between funds as many times as they want. All the policyholders have to do is to instruct the plaintiff to switch their invested sums from one of more funds into other funds (which process I shall refer to as "fund switches"). These rights are derived from the following contractual provisions which apply to the ILPs:

FUND SWITCH

> [The policyholder] may, from time to time, instruct [the plaintiff] to switch all or any of the Units of a Fund via a Fund Switch in writing in such manner and subject to such conditions as [the plaintiff] may from time to time impose. [The plaintiff] reserve[s] the right to revise at any time in [their] discretion any minimum fund switch amount imposed and to terminate or suspend this Fund Switch facility. [The plaintiff] shall not be held responsible for any losses arising from or attributable to [their] decision to terminate or suspend this facility.
>
> ...
>
> [The policyholder has] 4 free switches per policy year, and the switches thereafter shall be subject to a Fund Switch Fee of S$25 per switch payable by [the policyholder] through the cancellation of Units. No Fund Switch Fee, however, will be payable on any fund switch into or out of the AIA S$ Money Market Fund [which is one of the funds from which policyholders could choose]. Any unused free switches will be forfeited at the end of the policy year.

5 Somehow, through numerous fund switches over the course of two years or so, the defendants were able to make large profits. Their investments peaked on 7 August 2008 with the ILPs valued at a total of $18,759,523.27, giving the defendants a paper gain of $17,700,223.27. Things, however, were not always so rosy. According to the third defendant, Lim Wee Chee ("Lim"), a former teacher at a junior college, who was authorised to make his affidavit filed on 13 October 2008 on behalf of the other defendants, he had initially suffered huge losses when he first invested in these ILPs. He purchased his first policy (Policy No. U023615744) effective from 24 March 2006 and he suffered losses within the first few months of its commencement. He was naturally interested to find out how the funds worked so as to recoup his losses. He started analysing and observing the performance of the various funds and the markets to which they were linked. He realised that the margin of change for each fund was usually limited to about 3%. By keeping up with the trends of fund prices, he was able to take calculated risks by switching from one fund to another to avoid adverse fluctuations in prices and to ride on positive trends.

6 Pursuant to his right to switch funds, he made more than 300 fund switches over the span of two years and the other defendants also performed similar fund switches. After the first four free fund switches, the defendants would pay the fund switch fee of $25 for each subsequent fund switch and the plaintiff would dutifully carry out the defendants' instructions. The defendants were not always successful in their speculation. They incurred losses for at least 20% of the switches (the plaintiff contests this figure and argues that the defendants only incurred losses for 10–13% of the switches). In any event, the investments were giving the defendants good returns. So confident was Lim that he was doing something right that he even borrowed money from friends, relatives and banks to invest more money in the ILPs. Throughout all this, Lim and the other defendants had made partial withdrawals from their respective policies without a hitch.

7 Sometime in June 2007, the first defendant who was the plaintiff's Financial Services

Consultant, was queried by his superior on the frequency of the fund switches. He explained that Lim and he had decided to switch funds after analysing the markets. Nothing happened after these interviews and the plaintiff *continued* to carry out the defendants' instructions to switch funds. The first defendant was queried again on the same matter in May 2008 by a member of the plaintiff's Compliance Department and he gave the same reply. Again, the plaintiff continued to carry out the defendants' instructions to fund switch.

8 The situation, however, changed three months later. On 8 August 2008, when Lim applied to partially withdraw a sum of $495,420 from the proceeds of one of his policies (Policy No U023615744), the plaintiff refused to allow the withdrawal. The plaintiff would later, in defending this application, justify its refusal on the basis of the following contractual provision:

> **REDEMPTION OF UNITS**
>
> [The policyholder] may from time to time instruct [the plaintiff] to redeem Units from [the policyholder's] Policy for cash by giving [the plaintiff] written notice by way of a partial withdrawal, Regular Withdrawal or a full surrender in such manner and subject to such conditions as [the plaintiff] may from time to time determine.
>
> ...
>
> [The plaintiff] reserve[s] the right to refuse any redemption requests if all relevant documentation has not been submitted, or in any other circumstances as may be notified to [the policyholder]. ***[The plaintiff] reserve[s] the right to terminate or suspend the Partial Withdrawal and/or the Regular Withdrawal facility at any time in [the plaintiff's] discretion***. **[**The plaintiff] shall not be responsible for any losses whatsoever arising from or attributable to [the plaintiff's] decision to suspend or terminate these facilities. [emphasis added]

9 At the time, however, the plaintiff's response to Lim in a letter dated 18 August 2008 was as follows:

> We acknowledge your request for a partial withdrawal of the above Policy.
>
> ***Your request is being processed***. This may be ***delayed*** due to certain inquiries in relation to the above Policy that are now taking place.
>
> We regret any inconvenience caused. [emphasis added]

In the same way, other attempts by the first, second and fifth defendants to partially withdraw their policies were also refused:

> (a) On 12 August 2008, the first defendant sought full withdrawal of his policy (Policy No U023615760) worth $348,771.31;
>
> (b) On the same day, 12 August 2008, the second defendant surrendered one of her policies (Policy No U024153344) worth $250,560 and sought partial withdrawal of a sum of $463,576.82 from another (Policy No U024057411); and
>
> (c) The fifth defendant surrendered his policy (No U090196322) worth $20,770.52 on 29

August 2008.

Upset with the plaintiff's response, Lim wrote a letter in reply dated 22 August 2008 expressing his displeasure with the plaintiff's lack of transparency and accountability.

10 The defendants' applications made from 25 to 29 August 2008 to fund switch were also refused. No reason was given for the refusal. The defendants were very concerned with the state of affairs. With their moneys locked up in these investments, the defendants were facing potentially financial hardship: the fourth defendant, for instance, had tied up a large portion of her retirement funds in the ILPs; and Lim was unable to repay the bank loans he had taken and faced the prospect of bankruptcy proceedings being initiated against him. In these circumstances, Lim sought the help of the defendants' solicitors who wrote to the plaintiff on 3 September 2008 demanding payment of the partial withdrawal he had sought. In their letter of reply dated 8 September 2008, the plaintiff's solicitors requested that Lim's solicitors hold their hands while they took instructions and they promised to reply by the close of business on 15 September 2008.

11 When the plaintiff did not respond by that date, the defendants' solicitors wrote to the plaintiff on 18 September 2008 stating that they would proceed with legal action if the plaintiff did not reply by 19 September 2008. To their amazement, the defendants received a letter dated 9 September 2008 from the plaintiff with the shocking news that a Writ of Summons indorsed with a Statement of Claim had been filed against them that very same day. The plaintiff brought a whole host of claims against the defendants comprising:

(a) A claim that the defendants had been unjustly enriched by $17,700,223.27 having exploited the plaintiff's mistake in determining the Bid Prices for the fund switches;

(b) A claim exploiting the plaintiff's mistake in determining the Bid Prices for the fund switches and knowingly causing and/or causing a loss to the other policyholders of about $11,040,000;

(c) A declaration that the defendants are liable as constructive trustees for the loss and damage caused to the other policyholders of the plaintiff;

(d) A claim against the defendants for the tort of conspiracy;

(e) A claim against the first and second defendants for breach of their fiduciary duties and contracts as agents of the plaintiff;

(f) A claim seeking an account and inquiry to trace and recover the proceeds;

(g) A claim seeking recovery of the sums of $239,945.50 and $189,490.93 previously paid out to the second and fourth defendants respectively; and

(h) A claim seeking an indemnity from the defendants for liability incurred by the plaintiff to the other policyholders.

12 As would later emerge, the basis of these claims rested on the simple allegation: that the plaintiff had made a mistake in valuing the funds by using one day old Bid Prices (contrary to the express terms of the contract between the parties) to effect the fund switches and that this had led to the defendants being given a larger share of the funds than that to which they were entitled. Martin Knight ("Knight"), the plaintiff's vice president of the Actuary Department, in his affidavit filed on 21 November 2008 (at [8.1], [16], [17], [19] and [27] to [29]) explained how the plaintiff's alleged

mistake led to the defendants making "surreal" profits:

8.1 The gains which the Defendants purportedly made under the 21 ILPs are not real gains. These "gains" were made as a result of the application of 1 day old prices to effect the Defendants' Fund Switching transaction in the Affected Funds at the relevant times from sometime in or around July 2006 to early August 2008 which was a mistake and which is not in accordance with the terms of the ILPs.

…

16. For ease of reference, if a Fund Switch application is received by the Plaintiff by 2pm on Wednesday, the Bid Price at which units are redeemed from the fund to be switched out of (Fund A) and the Bid Price at which units are to be issued from the fund to be switched into (Fund B) is determined according to the formula below:

> Bid Price on Wednesday = Fund Value on Wednesday divided by the total number of Units in the Fund on Wednesday.

17. The formula to determine the Fund Value on Wednesday is:

> Fund Value on Wednesday = Value of assets in the Fund on Wednesday less liabilities of the Fund on Wednesday less any applicable proportionate management fees.

...

19. However, for the Affected Funds (and other affected funds which are not the subject matter of this action), instead of applying Wednesday's Bid Price, the Plaintiff mistakenly applied Tuesday's Bid Price for Fund Switches transacted during the Frequent Fund Switching Period. This occurred because Tuesday's Fund Value was applied to determine the Bid Price instead of Wednesday's Fund Value and the number of units used in the formula for Bid Price was also at Tuesday's value.

...

27. By way of further illustration, the Defendants' Fund Switching transactions in and out of the Affected Funds during the Frequent Fund Switching period are depicted below using assumed values and market movements for easy illustration:

Switch In

27.1 On Tuesday:

(a) Fund Value or Net Asset Value (NAV) of Fund A = $1 million.

(b) Number of units in Fund A = 1 million units.

(c) Unit price or Bid Price for Fund A = $1 million ÷ 1 million units = $1.00 per unit.

27.2 On Wednesday:

(a) Policyholder puts in request by 2 pm to switch into Fund A with $100,000 (assume $100,000 is the value from redeemed units of fund from which the policyholder switched out of).

(b) Based on market performance of the underlying assets of Fund A, unit price of Fund A should increase by 10% to $1.10.[*] Correct Bid Price for policyholder's Fund Switch into Fund A should be $1.10.

(c) But, because of the Plaintiff's mistake, the Bid Price applied is Tuesday's price, i.e. $1.00.

(d) Hence, [the] policyholder gets $100,000 ÷ $1.00 per unit = 100,000 units in Fund A when he should actually get $100,000 ÷ $1.10 per unit = 90.909 units. [The policyholder] "gains" 9,091 more units than he should have got if the correct unit price @ $1.10 was applied for his fund switch into Fund A.

Switch Out

27.3 On Tuesday:

(a) Fund Value or Net Asset Value (NAV) of Fund B = $1 million.

(b) Number of units in Fund B = 1 million units.

(c) Unit price or Bid Price for Fund B = $1 million ÷ 1 million units = $1.00 per unit.

27.4 On Wednesday:

(a) Policyholder with 100,000 units in Fund B puts in request by 2pm to switch out of Fund B.

(b) Based on market performance of the underlying assets of Fund B, unit price of Fund B should decrease by 10% to $0.90.[*] Applicable Bid Price for policyholder's Fund Switch out of Fund B should be $0.90.

(c) But, because of the Plaintiff's mistake, the Bid Price applied is Tuesday's price, i.e. $1.00.

(d) Hence, policyholder gets 100,000 units x $1.00 per unit = $100,000 from redemption of units in Fund B when he should actually get 100,000 units x $0.90 = $90,000.

28. Hence based on the above illustration, the policyholder would have "gained" $10,000 from switching out of Fund B and 9,091 units in Fund A.

29. But these "gains" are not real, i.e. they were not gains made based on the performance of Fund A and Fund B but were "gains" made at the expense of the Affected Policyholders in those funds.

[*Assumption is made as to the market performance]

[emphasis in original]

13 This explanation by Knight was, however, only made known later when he filed his affidavit. At the time of receipt of the letter dated 19 September 2008, the defendants did not know fully the nature or basis of the claims brought against them. Apart from notifying the defendants of the claims, the plaintiff's lawyers also stated in the same letter that:

> pending the final determination of [the plaintiff's] claims, [the plaintiff] will be taking steps to ensure that monies in dispute under all the affected policies of the [defendants] are held in escrow insofar as such monies have not already been withdrawn by [the defendants], for which [the plaintiff's] rights to recover the same are expressly reserved.

14 Although disappointed with the plaintiff's response, the defendants were comforted by the assurance that the value of their policies would be preserved given the volatile financial market conditions. Any such comfort was, however, short-lived. By 2 October 2008, Lim noticed that the defendants' funds in their ILPs were still being actively traded. The defendants thus sent yet another letter on the same day, 2 October 2008, to request that the funds be put aside in an escrow account to be held jointly by both parties' solicitors as stakeholders. There was no reply. By 9 October 2008, with the collapse of Lehman Brothers Holdings Inc and the consequent devastation in the financial markets, the total value of the defendants' investments in the ILPs had plunged to S$11,360,834.24 – a loss of approximately $5m from the S$16,148,985.91 it was worth on 19 September 2008 on which day the defendants had received the plaintiff's assurance that the latter would be taking steps to ensure that the moneys in dispute were held in escrow. It did not help that, at the time, public confidence was shaken as to the plaintiff's financial viability. These circumstances led to the

defendants taking out Sum 4476 in which they applied for the court to order that the moneys in dispute be held in escrow. As explained earlier (at [1] above), this application was resolved by the parties reaching a "without prejudice" agreement to place the proceeds in a joint stakeholder's account pending resolution of the main suit, Suit No 670 of 2008.

15 The defendants also took out Sum 4743 praying, *inter alia*, that the court order that:

> [w]ithout prejudice to the parties' respective positions in the Suit, the Plaintiff do release to the Defendants an interim payment in the sum of:-
>
> (a) $1,579,098.65 being the sums [sought by the defendants through their request for partial withdrawal and/or full surrender of their ILPs]; or alternatively
>
> (b) $1,059,300 being the Defendant's capital invested with the Plaintiff; or alternatively
>
> (c) such other sum as [the court] shall deem fit.

The interim payment was sought to alleviate the financial hardship the defendants were facing which, amongst other consequences, threatened to cripple their ability to conduct the litigation.

The issues raised

16 The defendants sought the interim payment on the basis of the court's inherent jurisdiction. However, recourse to the court's inherent jurisdiction is inappropriate, save in the most exceptional cases, where there is an existing rule (whether by way of statute or subsidiary legislation or rules of court) already covering the situation at hand (see *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [81]). There are statutory provisions and rules of court relating to interim payments. Section 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") reads as follows:

> **Powers of High Court**
>
> 18. — (1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.
>
> (3) The powers referred to in subsection (2) shall be exercised in accordance with any written law or Rules of Court relating to them.

17 The relevant part of the First Schedule to which s 18(2) of the SCJA refers reads as follows:

> **Interim payment**
>
> 15. Power to order a party in a pending proceeding to make interim payments to another party or to a stakeholder or into court on account of any damages, debt or other sum, excluding costs, which he may subsequently in the proceeding be adjudged to be liable to pay.

18 Section 18(3) of the SCJA, however, states that such a power shall be exercised in accordance with the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The relevant rules, O 29 rr 10, 11 and 12 read

as follows:

Application for interim payment (O. 29, r. 10)

10. — (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to enter appearance has expired, apply to the Court for an order requiring that defendant to make an interim payment.

(2) An application under this Rule shall be made by summons but may be included in a summons for summary judgment under Order 14.

(3) An application under this Rule shall be supported by an affidavit which shall —

(*a*) verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application;

(*b*) exhibit any documentary evidence relied on by the plaintiff in support of the application; and

(*c*) if the plaintiff's claim is made under the Civil Law Act (Chapter 43), contain the particulars mentioned in section 20(6) of that Act.

(4) The summons and the supporting affidavit or affidavits must be filed at the same time, and must be served on the defendant against whom the order is sought within 3 days from the date of filing.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

Order for interim payment in respect of damages (O. 29, r. 11)

11. — (1) If, on the hearing of an application under Rule 10 in an action for damages, the Court is satisfied —

(*a*) that the defendant against whom the order is sought has admitted liability for the plaintiff's damages;

(*b*) that the plaintiff has obtained judgment against the defendant for damages to be assessed; or

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant 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 defendant 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 defendant 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.

Order for interim payment in respect of sums other than damages (O. 29, r. 12)

12. If, on the hearing of an application under Rule 10, the Court is satisfied —

(*a*) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid;

(*b*) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs,

the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

19 The application before me fell within the ambit of O 29 r 12. Consequently, the issue raised for my consideration was whether I had the power under O 29 r 12 to order the interim payment and whether I ought to exercise my discretion to do so.

The law on interim payments

General principles on interim payments

20 The law on interim payments was well summarised by Neill LJ in *Schott Kem Ltd v Bentley* [1991] 1 QB 61 at 71, after a survey of the authorities, as follows:

(1) that rules 11 and 12 of Order 29 form part of a single code: see *Shearson Lehman* [1987] 1 W.L.R. 480, 492H, *per* Nicholls L.J.;

(2) that under both rules the court approaches the matter in two stages;

(3) that at the first stage the court has to consider whether it is "satisfied" of one of the matters set out in sub-paragraphs (*a*), (*b*) and (*c*) of the rules. … In a case where rule 12(1)(*c*) is relied on the court has to be satisfied:

"that, if the action proceeded to trial: the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs …"

(4) That in order for the court to be satisfied that the plaintiff would obtain judgment:

"something more than a prima facie case is clearly required; but not proof beyond reasonable

doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden:" see *Shearson Lehman* [1987] 1 W.L.R. 480, 489A, *per* Lloyd L.J.

Furthermore, even where conditional leave to defend is given under Order 14 the court may nevertheless order an interim payment in an appropriate case. Thus in *British and Commonwealth Holdings Plc. v. Quadrex Holdings Inc*. [1989] Q.B. 842, 866D, Sir Nicolas Browne-Wilkinson V.-C. put the matter as follows:

"in cases where on the evidence then before it, the court entertains sufficient doubts as to the genuineness of the defence to give only conditional leave to defend, it is possible for a court to be satisfied that the plaintiff will succeed at trial. Although in such a case it does not automatically follow that it is appropriate to make an order for interim payment, if in all the circumstances such payment appears sensible and desirable, in my judgment it can be ordered."

(5) That at the second stage the court, if satisfied that the plaintiff would recover a substantial sum, may then proceed, if it thinks fit, to order an interim payment "of such amount as it thinks just." At this stage under rule 11(1) the payment must not exceed:

"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."

Under rule 12 the payment ordered must take account of "any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely."

...

(9) That interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve.

21 Thus, in reading O 29 r 12 (and O 29 r 11 for that matter), there are two stages to the court's decision to grant an order for interim payment. First, the court must be satisfied that one of the grounds stated in the sub-paragraphs is established. With regard to r 12(*c*), the court must be satisfied that the applicant would obtain judgment for a substantial sum of money. If the strength of the defence is such that the court would only grant conditional leave to defend if the application was one for summary judgment, the court could still be satisfied that the applicant would obtain judgment for a substantial sum of money (*British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] QB 842 at 866). If the court is so satisfied, it has the *power* to grant an order for interim payment. The court then moves on to consider, at the second stage, whether it ought to exercise its discretion to do so and to determine the quantum of such payment.

The relevant considerations at both stages of the decision-making process

22 There are different considerations at both stages and the implications of these considerations on the decision to grant an interim payment is significant. In *Shanning International Ltd v George Wimpey International Ltd* [1989] 1 WLR 981 ("*Shanning*"), the English Court of Appeal was faced with a case in which the plaintiff was a subcontractor to the defendant who had secured the main contract for the construction of a hospital in Oman. A dispute having arisen between the parties, the plaintiff issued a writ against the defendant and subsequently applied for summary judgment under O

14 of the English Rules of Court or, alternatively, for an interim payment under O 29. The defendant, in an affidavit, admitted liability for £904,000 of the £969,000 claimed by the plaintiff but sought to set off that sum against an alleged counterclaim of £3,476,000 which would wholly extinguish the plaintiff's claim. The lower court refused summary judgment on the basis that there were counterclaims which qualified as set-offs on which the defendant could rely but ordered the defendant to make an interim payment of £350,000. He held that the effect of O 29 r 12(*c*) required the court to consider first, whether the plaintiff had a prima facie right to a judgment for a substantial sum of money and then secondly, whether that right was modified by any set-off claimed by the defendant.

23 The English Court of Appeal agreed with the lower court that the decision to order an interim payment was a two-stage process but disagreed on the considerations that had to be taken into account at the first stage. The court held (*per* Glidewell LJ) that (at 989):

> [T]he [lower court] judge ... was correct ... to consider the matter arising on the application for an interim payment in two stages. The first stage was to answer the question, was he satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for a substantial sum? If the action did proceed to trial, the court would, of course, have to rule on the defendant's counterclaim and set-off. As I have said, if the amount set off exceeded the amount found to be due to the plaintiff in the first instance, there would be no judgment for the plaintiff. In my judgment, on the wording of the rule it is inescapable that, at stage 1, the likelihood of the set-off or any other defence succeeding must be considered by the court.
>
> If, but only if, the court *is* satisfied at stage 1, then it proceeds to consider at stage 2 whether, in its discretion, it should order an interim payment and, if so, of what amount. ***At that stage the rules <u>again</u>require the court to take any set-off claimed by the defendant into account or <u>any counterclaim arising out of some other transaction and not available as a defence</u>*** and, in an application under rule 11, any alleged contributory negligence. [emphasis added]

It appears that the English Court of Appeal in *Shanning* regarded defences, set-offs and any other counterclaims as relevant considerations not only at the second stage, but also at the first, in determining whether the applicant would obtain judgment for a substantial sum (see *Civil Procedure 2007* (London: Sweet & Maxwell, 2007) at [25.7.11]).

The distinction between set-offs and independent cross-claims

24 It is important at this juncture to make some observations on the differences between set-offs, counterclaims and cross-claims. The act of deducting from sums otherwise due is known variously as set-off, cross-claim or counterclaim. Some of these terms carry different meanings. So far as legal terminology is concerned, the terms "cross-claim" and "counterclaim" are used interchangeably. It is important to appreciate, however, that set-off has a narrower meaning than cross-claim. All set-offs are cross-claims but not all cross-claims are set-offs. To highlight the difference, the following observation by Lord Denning MR in The Nanfri; Federal Commerce and Navigation Co Ltd v Molena Alpha Inc *[1978] QB 927* at 988 ("*Federal Commerce*") (cited favourably by the Court of Appeal in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1 at 14 ("*Pacific Rim Investments*")) is apposite:

> … it is not every cross-claim which can be deducted [and which thus qualifies as a set-off]. It is only cross-claims that arise out of the same transaction or are closely connected with it. ***And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to***

enforce payment without taking into account the cross-claim. [emphasis added]

25 The House of Lords in *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] 1 AC 1056 ("*Bank of Boston*"), however, approved a formulation that the Privy Council had expressed in *The Government of Newfoundland v The Newfoundland Railway Co* (1888) 13 App Cas 199 that an equitable set-off may occur if there is a cross-claim "flowing out of and inseparably connected with the dealings and transactions which also give rise" to the claim. Lord Brandon of Oakbrook, who delivered the judgment of the Law Lords, did not regard that formulation as a departure from the impeachment test first set out in *Rawson v Samuel* (1841) 41 ER 451 and adopted by Lord Denning in *Federal Commerce*. Lord Brandon opined that it was merely a "different version" of the impeachment test while Lloyd LJ (at 1102) later characterised it as "the same test in different language". A decade or so later, Potter LJ in *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd's Rep 93 ("*Bim Kemi*"), delivering the judgment of the Court of Appeal, reviewed the authorities on equitable set-off and adopted the test approved by the House of Lords in the *Bank of Boston* case. More recently, Sundaresh Menon JC in *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR 856 at [28] ("*Abdul Salam*") considered Potter LJ.s decision in *Bim Kemi* and held that:

> the further passages [from Potter LJ's decision on the test in *Bank of Boston* cited do not add] to the understanding of the applicable principles when considering whether an equitable set-off may be raised. The question of whether a sufficient degree of closeness is established in the connection between the respective claims is not determined by some sort of formulaic process. In each case, the question turns on whether the respective claims are so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other.

It appeared that Menon JC regarded the differences between the impeachment test and the *Bank of Boston* test as academic. This is unsurprising considering the fact that as, Lloyd LJ observed, the two tests are the same albeit in different language. I respectfully agree with this view.

26 With regard to the nature of the equitable set-off, the Court of Appeal in *Pacific Rim Investments*, after an extensive review of the English authorities, went on to conclude that equitable set-off was a *substantive* defence and that the right of equitable set-off arose where there were good equitable grounds for directly impeaching the title to the legal demand for a sum of money (see generally *Pacific Rim Investments* ([24] *supra* at [18] to [37]). Having set out the law on set-offs, I turn now to the English Court of Appeal's decision in *Shanning*.

My disagreement with the decision in Shanning

27 I would agree with the court in *Shanning* ([22] *supra*) that the lower court in that case erred in the sense that the test under the first stage is not whether the applicant had a *prima facie* right to a judgment, but whether the claim would in fact succeed (see *British and Commonwealth Holdings PLC v Quadrex Holdings Inc* ([21] *supra*). However, I would respectfully disagree that in determining whether the claim would in fact succeed, the court has to take into account counterclaims arising out of some other transaction which is not available as a defence ("independent cross-claims") in addition to any defence and set-offs.

28 With respect to the English Court of Appeal, I find that the wording of O 29 r 12 does not support the view that independent cross-claims have to be considered at the first stage. For convenience, I shall set out the relevant parts of O 29 r 12 again:

Order for interim payment in respect of sums other than damages (O. 29, r. 12)

12. If, on the hearing of an application under Rule 10, the Court is satisfied —

(*a*) …

(*b*) …

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs,

the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

29 There is nothing in r 12(*c*) which states that the court has to consider all cross-claims (whether independent cross-claims or set-offs). The imposition of such a requirement would have to be viewed either as being implicit from the wording and therefore legitimate, or, worse, as an unwarranted addition to the wording of r 12(*c*). Glidewell LJ's conclusion that all cross-claims had to be considered appeared to stem from his view that in order for the applicant to obtain "judgment" within the meaning of r 12(*c*), the court would have to rule on independent cross-claims in addition to set-offs and defences.

30 With respect to Glidewell LJ, I am of the view that this conclusion may be premised on too simplistic a reading of the word "judgment" in r 12(*c*). In a suit where the respondent's independent cross-claim is for a larger sum than that claimed by the applicant, assuming both succeed in their claims, the former will be able to execute the judgment it obtains for the balance. This, however, does not mean that the applicant failed to obtain judgment for his claim. This is well explained by the learned author of S R Derham, *The Law of Set-Off* (Oxford University Press, 3rd Ed, 2003) at [1.04]:

> A defendant's right to counterclaim against the claimant in the claimant's action originated in the [English] Supreme Court of Judicature Act 1873, section 24(3). It differs from set-off in that it does not give rise to a defence, but rather it constitutes a procedural device by which the court may consider independent cross-actions in the same proceedings. ***The cross-actions are treated as independent actions for all purposes except execution***. Since a set-off gives rise to a defence to the claimant's claim, there is only one judgment for the balance. ***In the case of a counterclaim, the courts, particularly in the early years after the Judicature Acts, would sometimes enter only a single judgment for the balance, although the usual practice is to enter separate judgments on both the claim and the counterclaim, but with execution issuing only for the balance***. [emphasis added]

Therefore, both the respondent's independent cross-claim and the applicant's claim could succeed with the result that both parties obtain judgment. It is only in the *execution* that the party with the larger claim receives the balance. (This stands in juxtaposition to a case where a cross-claim for a larger sum qualified also as a set-off thus having the effect of extinguishing the other party's claim with the result that only *one* judgment is entered in favour of the party bringing the cross-claim.) Therefore, there is nothing to preclude an applicant from obtaining judgment within the meaning of r 12(*c*) even though he has to defend an independent cross-claim for a larger amount. Only if the cross-claim also qualified as a set-off would he be precluded from obtaining judgment. Therefore, while it could be said that it was implicit in the wording of r 12(*c*) for set-offs to be considered, this is

not the case for independent cross-claims.

31 In so interpreting r 12(*c*), I have to account for the wording which comes after r 12(*c*) (which I shall refer to as "the proviso"). Having concluded that set-offs but not independent cross-claims have to be considered at the first stage, the presence of the word "set-off" in the proviso may be deemed superfluous. This may be so. However, the following would be the best way to read of r 12(*c*) harmoniously with the proviso: whereas the requirement to consider set-offs is implicit by virtue of the terms "would obtain judgment" (since no judgment can be obtained if the set-off exceeds the applicant's claim), the requirement to consider independent cross-claims would not be implicit in the use of those words (since judgment *could still be obtained* by the applicant even if the respondent succeeds in its independent cross-claim for a larger sum).

32 The implication of the differing interpretations (mine and that in *Shanning*) is this. Under my interpretation, at the first stage, in determining whether the applicant would obtain judgment for a substantial sum of money, notwithstanding the respondent's independent cross-claims (regardless of their strength), if the court is satisfied that the applicant would obtain judgment for his claim and that this would amount to a substantial sum of money, it *may* in its discretion order interim payment. Under the interpretation in *Shanning*, this is not possible. If the respondent has an arguable case in respect of its independent cross-claims and these cross-claims are for an amount which exceeds the applicant's claim, the court has *no* discretion to order interim payment. Thus, the *Shanning* interpretation in effect institutes an impediment to the exercise of the court's power to order interim payments whereas my interpretation does not and instead leaves the matter of the respondent's independent cross-claims as a factor to be considered at the second stage in the court's exercise of its discretion to grant an interim payment. The implication of my interpretation is that if the respondent has a strong case with regard to the cross-claims, the court may very well be reluctant to exercise its discretion in favour of the applicant but it is not prevented from doing so.

33 The court's power to order interim payments to be made is framed widely in the First Schedule of the SCJA. It is nevertheless circumscribed by the Rules of Court by virtue of s 18(3) of the SCJA but *no further*. While the *Shanning* interpretation has been incorporated into Rule 25.7 of the English Civil Procedure Rules (c 12), there has been no similar amendment to Singapore's O 29 r 12. Therefore, I do not think it proper to further curtail the powers of the court by reading in a restriction which is not found in the clear wording of the rules. Neither are the interests of justice better served by reading in such a restriction. Leaving the matter of independent cross-claims as a factor for the court to consider in the exercise of its discretion would also better serve the objective of interim payments. It is well accepted that the purpose of allowing interim payments is "to mitigate hardship or prejudice to [the applicant] which may exist during the period from the commencement of an action to the trial" (*per* Nicholls LJ in *Shearson Lehman Brothers Inc v Maclaine, Watson & Co Ltd* [1987] 1 WLR 480 at 492; see also the dictum of Ralph Gibson LJ in *Ricci Burns Ltd v Toole* [1989] 1 WLR 993 at 1002).

34 It may be that the respondent has an arguable case with regard to its independent cross-claim but the court ought still to retain the discretion to order an interim payment to be made in circumstances where great hardship would befall the applicant if the payment was not made – such as, in this case, where the interim payment is necessary for the applicant to properly conduct the litigation and to defend the cross-claim. There could be myriad situations in which the interim payment would be warranted notwithstanding that the respondent has an arguable case with regard to its independent cross-claim. For justice to be done, the approach must be on a case by case basis, something the *Shanning* interpretation leaves little room for.

My decision

35 The defendants prayed for interim payment of $1,579,098.65 being the sums sought by the defendants through their request for partial withdrawal and/or full surrender of their ILPs or alternatively $1,059,300 being the defendants' capital invested with the plaintiff. I ordered interim payment of the latter sum less $40,000 which was the amount of capital which had earlier been withdrawn.

The first stage – whether the defendants would have obtained judgment for a substantial sum of money

36 At the first stage of the process in deciding whether to grant the order for interim payment, I had to be satisfied that the defendants would obtain judgment for a substantial sum of money. On the terms of the contract, while the plaintiff may rely on the clause (quoted above at [8]) which gives them the right to suspend the partial withdrawal facility, there is no such right with regard to full surrender of policies. For policy surrenders, the following clause governs:

Termination

> [The policyholder's] Policy shall automatically terminate on the occurrence of the earliest of the following:
>
> a) after Death Benefit has been paid; or
>
> b) on Policy Surrender; or
>
> c) on the Maturity Date; or
>
> d) whenever [the policyholder's] policy acquires a zero or negative Policy Value on any given Valuation Day.
>
> On termination of [the policyholder's] Policy, any extra benefits set out in the Supplementary Agreements attached to [the] Policy will also terminate.
>
> Termination of [the] Policy shall be without prejudice to any claim arising prior to such termination.

37 There is nothing in this clause or the aforementioned clause (quoted above at [8]) which gives the plaintiff the right to resist a full surrender of the policy. This makes perfect sense for otherwise it would be at the plaintiff's complete discretion to simply choose never to repay policyholders even after they have surrendered their policies.

38 In this regard, barring the question of set-offs, there is no defence to the defendants' requiring full recovery of the proceeds of their ILPs, which amount to $10,323,621.71, now held in escrow in the joint names of the parties' solicitors. I turn now to consider the issue of set-offs.

39 The plaintiff has brought a whole host of claims (set out above in [11]). It is an impressive list of claims of which that for unjust enrichment may be regarded as a set-off against the defendants' claim for the proceeds of their ILPs. Bearing in mind the test for equitable set-offs expounded by Menon JC in *Abdul Salam* and Lord Denning's test endorsed in *Pacific Rim Investments*, it could be said that the claim for unjust enrichment is so closely-connected to *a part* of the defendants' claim for the proceeds of their ILPs that it would be unjust for the latter to succeed on their claim without taking into account the plaintiff's claim.

40 I emphasised that there was only a close-connection between the claim for unjust enrichment and *a part* of the defendants' claim for the proceeds of their ILPs. This is so because it is critical to note that the claim for unjust enrichment would only impeach the defendants' claim for the proceeds of their ILPs in so far as the proceeds constituted an alleged unjust enrichment. In this regard, it could not be sensibly argued that the defendants were unjustly enriched by the capital which they had invested with the plaintiffs. As for the claims (b) to (d) in [11] above which revolve around causing loss to the plaintiff in the sense that it had incurred liabilities to the other policyholders, the basis of the alleged loss lies in the allegation that the defendants had taken advantage of the plaintiff's mistake in determining the Bid Price and had thus made false gains to the detriment of the other policyholders. In short, the other policyholders' loss is the defendants' false gain. On this basis, I would still draw the distinction between the defendants' capital and the alleged false gains. These claims would only go directly to impeach the defendants' demands for the proceeds of their ILPs in so far as the proceeds represented the false gains. I would thus conclude, again, that these claims could only constitute set-offs with regard to the proceeds of the defendants' ILPs *in excess* of the capital they had invested (*ie*, the alleged false gains). I did not think that these claims could impeach the defendants' demand for return of their capital.

41 In the vast majority of situations in which a cross-claim qualifies as a set-off, it is used to set-off the *entire* claim. In this regard, I acknowledge that my view of the plaintiff's claim as a set-off against *part* only of the defendants' claim may at first blush seem fairly novel. It is, however, a natural consequence of the basis for characterising a cross-claim as a set-off. The cross-claim is regarded as a set-off only where it impeaches the applicant's demand, that is, where it is so closely connected with its demands that it would be manifestly unjust to allow it to enforce payment without taking into account the cross-claim. Where there is a lack of such a connection, the cross-claim does not qualify as a set-off. What then if the cross-claim is closely connected with only part of the demand? While the defendants' claim rests on the single ground that it is their contractual right to recover the proceeds of the ILPs, the plaintiff's cross-claim's connection with the defendants' claim lies not in the *basis* of the latter's claim but in the *nature or character* of the proceeds sought to be claimed. There is, in a sense, an asymmetry in the claims in that the plaintiff's cross-claim is closely connected only with part of the defendants' claim – that is, the claim for the proceeds of the ILPs in so far as the proceeds are *in excess* of the capital (*ie*, the gains arising from the fund switching).

42 In my view, the doctrine of equitable set-off, as a remedy in equity, is not a blunt tool but an instrument of precision to meet the ends of justice. While it may be unjust to allow the defendants to claim the proceeds in excess of their capital without regard to the plaintiff's cross-claims which are premised on unjust enrichment and/or the alleged false gains, it would *not* be unjust to allow the defendants to claim their capital. Consequently, while the plaintiff's claims may qualify as a set-off against the defendant's claim for the proceeds of the ILPs in excess of their capital, in my view, it cannot qualify as a set-off against the defendants' claim for the proceeds of the ILPs in so far as the proceeds represent their capital.

43 The plaintiff calculated that, using what they contend ought to have been the "proper" Bid Prices, the defendants' capital would have been reduced to $566,604 by 22 October 2008. On that basis, they argued that the defendants should only be able to recover this amount as their capital. This argument, however, is untenable because it assumes that the defendants would have continued fund switching even if the "proper" Bid Prices were used. This is an unwarranted assumption because the defendants may not have continued to fund switch, they may have continued to fund switch in the same way, or in other ways garnering them even more profits or causing them to make further losses. It could also be argued that the defendants would not have even invested as much as they did if the "proper" Bid Prices were used. We will never know. It is pure speculation to argue that the defendants' capital would have been diminished to $566,604 had the "proper" Bid Prices been applied.

I was therefore prepared to regard the defendants' capital as that which they had invested initially.

44 I shall not go through the other claims. Suffice it to say that I did not think that the other claims were so closely connected to the defendant's claim for the proceeds of their ILPs representing the capital they had invested.

45 In these circumstances, at the first stage of the analysis, I was satisfied that the defendants would have obtained judgment for the proceeds of the ILPs in so far as the proceeds represented the capital they had invested and that this would have amounted to a substantial amount of money. Before I turn to the second stage of the analysis, I must express the view that even if I was wrong to disagree with the *Shanning* interpretation, I would still have come to the same conclusion after taking into account all of the plaintiff's claims at the first stage. This is so because I was satisfied on a balance of probabilities that the plaintiff would have obtained judgment for the proceeds of their ILPs even taking into account the plaintiff's claims. While the plaintiff has an impressive list of claims (set out above at [11]), the issue at the heart of the matter is a simple one. It is this: did the plaintiff really make a mistake in calculating the Bid Price for the fund switch transactions?

46 If the plaintiff's calculation of the Bid Price in the past fund switching transactions by the defendants was in accordance with the terms of the contract between the parties, then there would be no mistake and, accordingly, the plaintiff would have no claim. It is thus appropriate to set out the relevant contractual provisions:

FUND SWITCH

> [The policyholder] may, from time to time, instruct [the plaintiff] to switch all or any of the Units of a Fund via a Fund Switch in writing in such manner and subject to such conditions as [the plaintiff] may from time to time impose. [The plaintiff] reserve[s] the right to revise at any time in [their] discretion any minimum fund switch amount imposed and to terminate or suspend this Fund Switch facility. [The plaintiff] shall not be held responsible for any losses arising from or attributable to [their] decision to terminate or suspend this facility.
>
> ***Fund Switches shall be made on the relevant Valuation Day*.**
>
> Units of the Other Fund will be purchased with proceeds derived from the cancellation of the Units of the Original Fund. The number of Units redeemed and issued in the Original Fund and Other Fund respectively pursuant to the Fund Switch shall be determined by reference to the ***Bid Prices prevailing as at the Valuation Day*** on which the switch is to take effect and based on the following formula:
>
> $$A = \frac{(B \times BP) - SF}{IP}$$
>
> where:
>
> A = the number of Units of the Other Fund to be issued,
>
> B = the aggregate number of Units of the Original Fund to be switched and

BP **=** ***the Bid Price per Unit of the Original Fund prevailing on the Valuation Day on which the Fund Switch is to take effect***.

SF = the applicable Fund Switch Fee

IP **=** ***the Bid Price per Unit of the Other Fund prevailing on the Valuation Day on which the Fund Switch is to take effect***,

...

PRICING AND
CUT-OFF TIMES

PRICING

Units are issued and redeemed on a forward pricing basis and the pricing is done on an offer-bid basis as follows:

...

Fund Switch : **The number of Units to be issued and redeemed pursuant to a Fund Switch shall be based on the Bid Price prevailing as at the Valuation Day** immediately following the receipt and approval of your Fund Switch application or in the case of Fund Switches pursuant to the Automatic Fund Switch and Automatic Fund Re-balancing facilities (subject to us approving your application for the Automatic Fund Switch or Automatic Fund Re-balancing facility), ***the Bid Price prevailing as at the Valuation Day falling on or immediately after the date on which the relevant Fund Switches are to take effect***.

[emphasis added]

47 The foregoing provisions suggest that the Bid Price for the fund switching transactions is the Bid Price which is *prevailing* on the "Valuation Day". "Valuation Day" is defined as follows:

"**Valuation Day**" is described under the PRICING AND CUT-OFF TIMES provisions and means in connections [*sic*] with the issuance, cancellation and realisation of Units, every Business Day.

...

CUT-OFF TIMES

The cut-off time for approval of application and receipt of premium is 2.00 pm (Singapore time) on each Valuation Day.

We reserve the right to revise any cut-off time at any time.

Applications approved by us or, in relation to the issue of Units, where premiums are received later, premiums received by us after the cut-off time will be transacted based on the Bid or Offer Price (as the case may be) prevailing as at the next Valuation Day.

Thus, the term "Valuation Day" refers to every business day. If the application for a fund switch is received before 2pm (Singapore time) on a particular day, that day is regarded as the "Valuation Day". If the application is received after 2pm (Singapore time) on a particular day, the next business day would be regarded as the "Valuation Day".

48 From the foregoing thus far, it appears that the plaintiff is right to say that the Bid Price ought to be that *prevailing* on the Valuation Day. This begs the question, however, of what the "prevailing" Bid Price is. Counsel for the plaintiff placed much emphasis on the fact that the valuation was described as being on a forward pricing basis (in the clause quoted above at [46]). There is, however, no magic to this description. This is so in light of the fact that there are *specific* provisions which set out the method by which one could calculate the prevailing Bid Price on a particular Valuation Day. These provisions are as follows:

VALUE OF UNITS

A Unit shall have two transaction values, namely the Offer Price and the Bid Price.

(a) The Offer Price on each Valuation Day shall not be more than the result of dividing the Fund Value (as determined in the FUND VALUATION provisions) by the number of Units held in the Fund on the day before the Valuation Day, multiplied by 100/95 and then rounded to the next higher one (1) cent.

(b) ***The Bid Price on each Valuation Day shall not be less than the result of dividing the Fund Value (as determined in the FUND VALUATION provisions) by the number of Units held in the Fund on the day before the Valuation Day and then rounded by the next lower one (1) cent***.

Units shall be credited to or debited from the Fund and/or your Policy only on the relevant Valuation Day. Where notice is required, Units being debited shall be valued by reference to their Bid Price prevailing as at the Valuation day immediately following our receipt of such notice.

[emphasis added]

49 The *prevailing* Bid Price on a particular Valuation Day shall thus not be less than the Fund Value divided by the number of Units held in the Fund on the day *before* the Valuation Day. The following clause provides for how the Fund Value should be calculated:

FUND VALUATION

The Fund Value shall be determined by us on every Valuation Day under normal circumstances subject to any events of suspension as described in the FUND ADMINISTRATION provisions. Whenever appropriate, we shall seek the services of a person or firm approved by us to be qualified to obtain the value, whether selling or buying, of the Fund's assets and shall observe applicable laws and accepted practices in dealing with the Fund's assets.

The Fund Value shall be equal to the following:

(a) the value of all the assets held in the Fund on the business day immediately preceding

the Valuation Day, less

(b) the amount which we shall determine as liabilities of the Fund on the business day immediately preceding the Valuation Day, less

(c) a weekly charge of 1/52 of the management fee or the appropriate equivalent charge if the Fund is valued more or less frequently than weekly.

[emphasis added]

50 The provisions clearly state that the Fund Value is based on the value of the assets on the business day *immediately preceding* the Valuation Day (less the liabilities of the fund on the business day immediately preceding the Valuation Day and the management fee or the appropriate equivalent charge). Therefore, Knight's view of the method by which the Bid Price is to be calculated is wrong. His explanation (quoted above at [12] and repeated here) is as follows:

16. … if a Fund Switch application is received by the Plaintiff by 2pm on Wednesday, the Bid Price at which units are redeemed from the fund to be switched out of (Fund A) and the Bid Price at which units are to be issued from the fund to be switched into (Fund B) is determined according to the formula below:

Bid Price on Wednesday = Fund Value on Wednesday divided by the **total number of Units in the Fund on Wednesday**.

17. The formula to determine the Fund Value on Wednesday is:

Fund Value on Wednesday = **Value of assets in the Fund on Wednesday** less liabilities of the Fund on Wednesday less any applicable proportionate management fees.

51 There are two errors in Knight's method in calculating the Bid Price. First, in accordance with the clause quoted above at [48], the Bid Price on Wednesday is calculated by the Fund Value on Wednesday divided by the total number of Units in the Fund "on the day before the Valuation Day". This would be Tuesday and not Wednesday. Second, in accordance with the clause quoted above at [49], to calculate the Fund Value on the Wednesday, one would have to use the value of all the assets in the fund "on the business day immediately preceding" the Valuation Day. This would also be Tuesday and not Wednesday. In summary, the proper method of calculating the Bid Price (if a Fund Switch application is received by the plaintiff before 2pm on Wednesday) is as follows:

(a) Valuation Day = Wednesday (see explanation above at [47]).

(b) Bid Price on Wednesday = Fund Value on Wednesday divided by the total number of Units in the Fund *on the day before* Valuation Day. This would be a Tuesday (see clause quoted above at [48]).

(c) Fund Value on Wednesday = Value of assets in the Fund *on the business day immediately preceding* the Valuation Day (day preceding Wednesday: Tuesday) less liabilities of the Fund *on the business day immediately preceding* the Valuation Day (day preceding Wednesday: Tuesday) less any applicable proportionate management fees (see clause quoted above at [49]).

52 Therefore, I conclude that it was not a mistake to apply "one-day old" prices to the fund

switching transactions: it was in accordance with the contractual provisions. Quite apart from the question of contractual interpretation, I note also that the plaintiff had been using "one-day old" prices since the inception of the Investment Linked Policies and for fund switches made by other policyholders as well, a fact which counsel for the plaintiff conceded.

53 Turning back to the contract, even if it were not clear from the contractual provisions that the Bid Prices which had been applied in the past transactions was correct, the provisions would *at the least* have to be regarded as being ambiguous with the result that the *contra proferentum* rule would apply against the plaintiff. After all, this was a standard form contract drafted by the plaintiff and entered into with the defendants who had no say in varying the foregoing terms. In the final analysis, it would appear that the plaintiff had not made a mistake in using "one-day old" prices – the use of these prices was in accordance with the contract. Accordingly, the plaintiff has no claim. If this were an application for summary judgment, I would have, *at the most*, granted the plaintiff conditional leave to defend. Therefore, even under the *Shanning* interpretation, I would have been satisfied that the defendants would succeed in obtaining judgment for a substantial amount. I thus had the power to order the plaintiff to make interim payment to the defendants. I turn now to consider whether, in the exercise of my discretion, I ought to do so and, if so, the quantum of such payment.

The second stage – the exercise of my discretion to order interim payment

54 Given the broad wording of the proviso which governs the second stage of the analysis, the court has a wide discretion in deciding whether to exercise its power to grant an interim payment. It must be remembered that the objective of interim payments is to mitigate the hardship to the applicant which may exist during the period from the commencement of an action to the trial. Indeed, the circumstances call for the grant of such payment to alleviate the hardship which the defendants are facing.

55 Given the size of the loans which the defendants took to finance their investments, and the defendants having exhausted all their means to properly service the loans, the defendants face a very real risk of bankruptcy proceedings being initiated against them which would cripple their ability to pursue their rights in these proceedings. This is especially so for Lim who, in his affidavit filed on 12 January 2009 at [22] to [29], has detailed the ramifications of having his investments locked up. He faces the risk of being made a bankrupt, and he has had difficulty in finding a job again as a full-time teacher due to his financial situation. In the meantime, he has had to take up an adjunct teaching position for which he gets much lower pay. He also does not have any staff welfare benefits and misses out on regular increments or prospects of progressing in his career.

56 These factors, especially the fact that if the defendants are deprived of the interim payment sought, they would be severely prejudiced and handicapped in their ability to advance their case, weigh heavily in favour of granting the order for interim payment.

57 While under O 29 r 11, the award may not exceed a reasonable proportion of the damages which are likely to be recovered after taking into account contributory negligence, any set-off, cross-claim or counterclaim, there is no such limitation on O 29 r 12. The court is only called upon to *take into account* any set-off, cross-claim or counterclaim. So while I was free to order an interim payment for the entire proceeds of the ILPs, I chose not to in light of the cross-claims notwithstanding that these claims were, in my view, very weak. I thus saw fit to order interim payment of the capital invested by the defendants with the plaintiff.

Conclusion

58 In light of the fact that I was only prepared to order interim payment of the capital invested by the defendants (for the foregoing reasons), I chose to grant the applicant's alternative prayer for such payment and not payment of the $1,579,098.65 which consists partly of profits and partly of capital.

59 Counsel for the defendants informed me that $40,000 in capital had previously been withdrawn and that the remaining capital represented in the proceeds of the ILPs was $1,019,300. This was confirmed by counsel for the plaintiff. Accordingly, I ordered interim payment of this sum by the plaintiff to the defendants and costs to be paid by the plaintiff fixed at $4,500 plus disbursements.