Tan Ryan *v* Lua Ming Feng Alvin and another
[2011] SGHC 151

Case Number : Suit No 74 of 2010 (Summons No 1368 of 2011)

Decision Date : 14 June 2011

Tribunal/Court : High Court

Coram : Colin Liew AR

Counsel Name(s) : Namsivayam Srinivasan (Hoh Law Corporation) for the plaintiff; Patrick Yeo and Lim Hui Ying (KhattarWong) for the first defendant; Niru Pillai (Global Law Alliance LLC) for the second defendant.

Parties : Tan Ryan — Lua Ming Feng Alvin and another

Civil Procedure

Insurance

14 June 2011

Colin Liew AR:

Introduction

1 This was an application by the plaintiff for an interim payment of $80,000 from the first defendant pursuant to O 29 r 10 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court"). I granted the plaintiff's application, and, given the novelty of some of the issues involved, I now provide the grounds of my decision.

2 Under O 29 r 11(1) of the Rules of Court, the court has the power to make an order for interim payment, but this power is curtailed in the circumstances provided for in O 29 r 11(2). For convenience, the relevant provisions of O 29 r 11 are as follows:

> **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 —
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> …
>
> (*b*) that the plaintiff has obtained judgment against the defendant for damages to be assessed; …
>
> …
>
> 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.

3 It was not disputed that O 29 r 11(1)(*b*) of the Rules of Court was satisfied, since the plaintiff had obtained interlocutory judgment against the first defendant (see [9] below). Instead, the dispute was essentially as to O 29 r 11(2), *ie*, whether the first defendant was "a person who is insured in respect of the plaintiff's claim" or "a person whose means and resources are such as to enable him to make the interim payment". Due to the somewhat awkward phrasing of O 29 r 11(2), I should clarify that in these grounds, when I refer to either limb of O 29 r 11(2) "applying" or being "satisfied", I mean that an interim payment cannot be ordered, *ie*, the defendant is *not*, for instance, a person who is insured in respect of the plaintiff's claim.

Background

Suit 74 of 2010

4 On 15 October 2008, at about 3.03am, while riding his motorcycle along the Pan Island Expressway, the plaintiff was involved in a serious road accident when a motor car ("SGT 6356X") driven by the first defendant collided into him. As a result of the accident, the plaintiff suffered serious injuries which necessitated the amputation of a portion of his left leg.

5 The first defendant was not in fact the owner of SGT 6356X. That person was his sister, Lua Bee Leng Sally ("Sally Lua"), who had been issued a comprehensive motor insurance policy ("the Policy") by M/s Allianz Insurance Company of Singapore Pte Ltd ("Allianz" or the "second defendant", depending on the capacity in which it acted). As required by the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) ("the Act"), the Policy provided insurance coverage to Sally Lua and other authorised drivers of SGT 6356X in respect of, *inter alia*, third party risks. It should be said that the first defendant was driving SGT 6356X with the authority of Sally Lua, and would, *prima facie* at least, therefore have been insured under the Policy.

6 Subsequently, in respect of the accident, the first defendant was charged with, and on 13 August 2010 convicted of, *inter alia*, an offence of driving while under the influence of drink under s 67(1)(*b*) of the Road Traffic Act (Cap 276, 2004 Rev Ed).

7 The plaintiff then commenced the present suit against the first defendant, who, as is common in these types of cases, was initially represented by M/s Global Law Alliance LLC ("Global Law"), the solicitors for Allianz. On 25 June 2010, however, Global Law wrote to the first defendant, stating that Allianz repudiated liability under the Policy to indemnify him against the plaintiff's claim, on account of the fact that the first defendant had been driving while under the influence of alcohol. Allianz's purported repudiation of liability under the Policy was pursuant to cl 5.3, which provided:

5.3 When are you not insured?

You are not insured under any part of this Policy:

a) if Your Car is being driven by a person

…

iv) who has more than the legal limit of any alcohol in his blood or breath

…

8 Once Allianz purported to repudiate liability under the Policy, Global Law was no longer in a position to act for the first defendant, and, accordingly, on 26 October 2010 the first defendant engaged M/s KhattarWong to represent him. Immediately thereafter, on 27 October 2010, Allianz applied to be joined as the second defendant, represented by Global Law, which application was granted on 24 November 2010. However, at all points in these proceedings, no direct claim was being made by the plaintiff against the second defendant.

9 On 11 January 2011, the trial was heard by Andrew Ang J, and interlocutory judgment was entered in favour of the plaintiff against the first defendant only, with costs and damages reserved to the Registrar.

Summons 1368 of 2011: first hearing

10 That was the background against which the parties appeared before me on 11 May 2011 in respect of the plaintiff's application for interim payment. It was quite clear that O 29 r 11(1)(*b*) of the Rules of Court was satisfied (see [3] above), and so the remaining question was whether O 29 r 11(2) precluded me from entertaining the plaintiff's application.

11 Counsel for the second defendant, Mr Niru Pillai, was unfortunately scheduled to attend another hearing, and therefore was only able to briefly set out the second defendant's position. This was to the effect that the second defendant did not consider itself to be in a position to consent or object to the application, because it had repudiated liability *vis-à-vis* the first defendant, and its statutory obligation under s 9 of the Act to satisfy a judgment obtained by the plaintiff was only triggered when the plaintiff obtained a *final* judgment. Mr Pillai thereafter left it to the first defendant to deal with the plaintiff's application.

12 Counsel for the plaintiff, Mr N Srinivasan, clarified that interim payment was only being sought against the first defendant and not the second defendant. Mr Srinivasan's submission in support of the application was essentially that, notwithstanding that the second defendant had purported to repudiate its liability under the Policy, nonetheless the first defendant was still "a person who is insured in respect of the plaintiff's claim", and therefore O 29 r 11(2)(*a*) of the Rules of Court did not apply. For this proposition Mr Srinivasan relied on *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 ("*Du Zhao Di*"), which he submitted was on all fours with the present case, save that in *Du Zhao Di* interlocutory judgment had not been obtained.

13 Counsel for the first defendant, Mr Patrick Yeo, objected to the plaintiff's application. He allied himself with the second defendant's position and argued that, since the second defendant had repudiated liability under the Policy, and given that the second defendant was not obliged under the Act to satisfy interlocutory judgments, the second defendant was therefore not obliged to meet any order of interim payment. According to the English Court of Appeal in *O'Driscoll v Sleigh and another* (unreported, 20 November 1984) ("*O'Driscoll*"), cited with approval in *Du Zhao Di*, the test under O 29 r 11(2)(*a*) was whether the insurer would be obliged to meet any interim award. Since the second defendant was not so obliged, Mr Yeo submitted, the first defendant was not "a person who is insured in respect of the plaintiff's claim" and therefore O 29 r 11(2)(*a*) applied, making it impermissible for me

to make an order for interim payment.

14 There was also some argument as to O 29 r 11(2)(*b*), *ie*, whether the first defendant was "a person whose means and resources are such as to enable him to make the interim payment". Mr Srinivasan argued that since the first defendant had been able to retain KhattarWong throughout these proceedings (as well as proceedings in the Subordinate Courts in respect of his criminal charges), O 29 r 11(2)(*b*) did not apply, while Mr Yeo's response was that no affidavit evidence had been produced by the plaintiff as to the first defendant's means and resources.

15 As I required some time to consider parties' arguments, as well as the applicability of *Du Zhao Di*, I reserved my judgment.

Summons 1368 of 2011: second hearing

16 After considering the matter, however, I was concerned that certain points had not been fully addressed during the hearing, and I therefore invited parties to clarify the following:

(a) The authorities on which the second defendant claimed to take the position that, under s 9 of the Act, it was only obliged to satisfy final and not interlocutory judgments;

(b) The burden of proof under O 29 r 11(2) of the Rules of Court;

(c) Evidence as to the means and resources of the first defendant for the purposes of O 29 r 11(2)(*b*); and

(d) Whether, if interim payment was ordered, it could be paid to the plaintiff personally, or whether it had to be paid to the Public Trustee pursuant to s 9 of the Act.

17 Parties appeared before me again on 13 June 2011, and, after hearing arguments from counsel for all parties on the above points, I granted the plaintiff's application.

Issues

18 The issues which arose for my consideration, therefore, were as follows:

(a) Whether, notwithstanding that the second defendant had purported to repudiate its liability under the Policy, the first defendant was nonetheless "a person who is insured in respect of the plaintiff's claims" within the meaning of O 29 r 11(2)(*a*) of the Rules of Court; and

(b) Who bore the burden of proving whether the first defendant was "a person whose means and resources are such as to enable him to make the interim payment" within the meaning of O 29 r 11(2)(*b*), and whether that burden had been discharged;

(c) Whether, if neither O 29 r 11(2)(*a*) nor O 29 r 11(2)(*b*) was applicable, I ought to exercise my discretion to order interim payment, and if so the amount of interim payment to be granted; and

(d) Whether, if interim payment was ordered, it could be paid to the plaintiff personally, or whether, under s 9 of the Act, it had to be paid to the Public Trustee.

O 29 r 11(2)(a) of the Rules of Court

20 I should say that, unlike the second issue under O 29 r 11(2)(*b*) of the Rules of Court (see [47] below), no question of burden of proof arose under O 29 r 11(2)(*a*), because, as Mr Srinivasan rightly pointed out, the parties being agreed on all material facts, the only questions were questions of law, *viz*, the meaning of the phrase "a person who is insured in respect of the plaintiff's claim" and whether the agreed facts fell within O 29 r 11(2)(*a*) as properly construed. Although this question was ostensibly one of construction of O 29 r 11(2)(*a*), that task was made more difficult due to the fact that the scheme of compulsory third party motor insurance under the Act had to be taken into account, because whether or not the first defendant was "insured in respect of the plaintiff's claim" depended very much on some of the provisions of the Act.

The Act

21 The Act originally derived from the UK's Road Traffic Act 1930 (c 43) (UK) ("the RTA 1930") and its many iterations, the most material for present purposes being the Road Traffic Act 1934 (c 50) (UK) ("the RTA 1934"), Road Traffic Act 1972 (c 20) (UK) ("the RTA 1972") and Road Traffic Act 1988 (c 52) (UK) ("the RTA 1988"). The Act was introduced to ensure that innocent victims of road accidents ("third parties") would be adequately protected in the event of fatality or bodily injury. As Tan Lee Meng, *Insurance Law in Singapore* (Butterworths Asia, 2nd ed, 1997) explains at p 573:

> The [Act], which is intended to safeguard the legal rights of third parties who have been injured or killed by persons who use motor vehicles on the road, establishes a system for compulsory motor insurance in Singapore with regard to third party liability. It requires a motor insurer to meet the insured's obligations to a third party… in the event that the insured does not do so.

22 Some salient features of the Act should be mentioned. Under s 3 of the Act, all users of motor vehicles must be issued an insurance policy which insures the user and other authorised drivers against third party risks, in particular, liability incurred by the user in respect of the death or bodily injury of any person as a result of the use of the motor vehicle (see s 4(1)(*b*) of the Act). The insured person must also be issued a certificate of insurance under s 4(9) of the Act. Once those requirements have been complied with, the Act's object is then to see that any third parties who are the victims of road accidents will generally receive the compensation they are entitled to, and it achieves this by, *inter alia*, statutorily removing some of the insurer's freedom to contract out of its liabilities to the insured person. Under ss 7 and 8 of the Act, for instance, the third party's position has been considerably strengthened by legislative intervention, because where these sections apply, certain attempts by the insurer to restrict or exclude its liability under the insurance policy to indemnify the insured person are rendered ineffective, and the insurer will be contractually obliged to indemnify the insured person under the insurance policy in respect of the third party's claim against the insured person for damages, which sums the insurer may be able to recover from the insured person (as of right in the case of s 8 of the Act, but only if the insurance policy so provides in the case of s 7). As I will be referring to ss 7 and 8 later in these grounds, it will be useful to set out exactly what they provide:

> **Certain conditions in policies or securities to be of no effect**
>
> **7.—**(1) 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 such claims as are mentioned in section 4 (1) (*b*) [*ie*, claims in respect of death or bodily injury by third parties].

(2) Nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

Avoidance of restrictions on scope of policies covering third-party risks

8.—(1) Where a certificate of insurance has been issued under section 4 (9) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:

(*a*) the age or physical or mental condition of persons driving the vehicle;

(*b*) the condition of the vehicle;

(*c*) the number of persons that the vehicle carries;

(*d*) the weight or physical characteristics of the goods that the vehicle carries;

(*e*) the times at which or the areas within which the vehicle is used;

(*f*) the horse-power or value of the vehicle;

(*g*) the carrying on the vehicle of any particular apparatus; or

(*h*) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Road Traffic Act (Cap 276),

shall as respects such liabilities as are required to be covered by a policy under section 4 (1) (*b*) be of no effect.

(2) Nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability.

(3) Any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.

Finally, s 9 of the Act gives the third party who has obtained judgment against the insured person a statutory right of action against the insurer, allowing the third party to directly enforce his judgment against the insurer, even if the insurer has avoided or cancelled the policy and is not therefore liable to the insured person:

Duty of insurers to satisfy judgments against persons insured in respect of third-party risks

9.—(1) If after a certificate of insurance has been issued under section 4 (9) to the person by

whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under section 4 (1) (*b*) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the Public Trustee as trustee for the persons entitled thereto —

(*a*) any sum payable thereunder in respect of the liability including any amount payable in respect of costs; and

(*b*) any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) Notwithstanding subsection (1) providing for the payment to the Public Trustee —

(*a*) where the judgment is for a sum not exceeding the relevant amount, the insurer may pay the sum to the person or persons entitled to the benefit of the judgment; …

(3) No sum shall be payable by an insurer under subsections (1) and (2) —

…

(*b*) in respect of any judgment so long as execution thereon is stayed pending an appeal; …

…

23 It was apparent, therefore, that simply because the second defendant had purported to repudiate its liability to indemnify the first defendant under the Policy in respect of the plaintiff's claim, it did not follow that the first defendant was not therefore "insured": it might have been that, as a matter of law, such repudiation was ineffective due to one of the provisions of the Act, as was held to be the case in *Du Zhao Di*.

Du Zhao Di

24 The facts of *Du Zhao Di*, as Mr Srinivasan noted, were materially similar to those in the present case. The plaintiff and defendant were involved in an accident when the defendant opened the door of his car and the plaintiff, while riding a bicycle, collided into the open door. The plaintiff sued the defendant seeking substantial damages. The defendant was initially represented by lawyers acting for the intervener, Mayban General Assurance Berhad, who had issued a third party motor vehicle insurance policy to the defendant. However, as a result of the defendant's non-cooperation in the preparation of the defence, the intervener purportedly repudiated liability on the insurance policy. The matter then came before the learned assistant registrar ("AR") Mr Mohamed Faizal on the plaintiff's application for an interim payment. One of the grounds on which the intervener opposed the application was that, given that it had repudiated liability to the defendant under the insurance policy, the defendant was not "insured in respect of the plaintiff's claim" within the meaning of O 29 r 11(2)(*a*).

25 The learned AR rejected this argument. He held that the intervener's repudiation of liability under the insurance policy would not affect the plaintiff for the following reasons:

33 … Insofar as the [plaintiff] 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 [plaintiff] was concerned, the [defendant] was covered by a valid policy of insurance, for it is conventional wisdom that "conditions precedent to liability and conditions subsequent to 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 [plaintiff] 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**…

34 Therefore… I was of the view that the [intervener] would, by virtue of the above reasoning, be treated, so far as the [plaintiff] 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 [intervener] 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 [plaintiff]**.

[emphasis added in bold]

The learned AR's reasoning in these passages could be summarised as follows. The intervener's purported repudiation of its liability under the insurance policy to indemnify the defendant in respect of the plaintiff's claim was of no effect as far as the plaintiff was concerned, because it fell foul of s 7(1) of the Act (see [22] above). Therefore, by operation of s 7(1), the intervener was still contractually obliged to indemnify the defendant under the insurance policy in respect of the plaintiff's claim. As a result, the defendant was to be considered "insured in respect of the plaintiff's claim" under O 29 r 11(2)(*a*) of the Rules of Court, and an interim payment could be (and was) ordered.

O'Driscoll

26 At [35] of *Du Zhao Di*, the learned AR found support for his approach in the English case of *O'Driscoll*, where the plaintiff was a passenger in a bus and was injured when the bus braked suddenly, as a result of the first defendant's motor car losing a wheel and skidding across the road. The first defendant was covered by a policy of motor insurance, which on the face of it covered his potential liability to the plaintiff in respect of the accident. However, as in *Du Zhao Di* and the present case, his insurers purported to repudiate their liability to him under the policy, on the basis of certain clauses to the effect that the insurers would be relieved of liability if the first defendant's vehicle was defective or if he failed to give notice of the accident to them within a specified time. The question for the Court of Appeal, therefore, was whether the insurers' purported repudiation of liability meant that the first defendant was not "a person who is insured in respect of the plaintiff's claims" within the meaning of Order 29, rule 11(2)(*a*) of the Rules of the Supreme Court (SI 1965/1776) ("the RSC") (*in pari materia* with O 29 r 11(2)(*a*) of the ROC).

27 Griffiths LJ held that the purpose of Order 29, rule 11(2) of the RSC was to ensure that interim payments would only be ordered where it was likely that such an order would be met, either because the defendant was insured and it could be assumed that the insurance company would meet the interim payment, or because the defendant himself had the means and resources to make the interim payment. Griffiths LJ stated that the "obvious purpose" of Order 29, rule 11(2) of the RSC was to ensure that "costs and time are not wasted in making applications for interim payments which,

however meritorious, have no realistic likelihood of being met." Accordingly, his Lordship construed Order 29, rule 11(2)(*a*) of the RSC as being concerned with whether "there is a policy in existence which obliges an insurer to meet an interim award". As stated (see [13] above), this conclusion was adopted by the learned AR in *Du Zhao Di* (at [37]), and I would add my respectful agreement that Griffiths LJ's views enunciate the true purpose of O 29 r 11(2) of the ROC.

28 On the facts of *O'Driscoll*, Griffiths LJ held that the application of Order 29, rule 11(2)(*a*) of the RSC was not attracted, as a result of s 148 of the RTA 1972, subsection (2) of which was in all material respects identical to s 7 of the Act, while subsection (1) corresponded to s 8 of the Act (see [22] above). It will be recalled that the insurers in *O'Driscoll* attempted to repudiate liability to the first defendant under the policy pursuant to clauses relating to the condition of the vehicle and notice to be given by the first defendant. Insofar as reliance on the former clause was concerned, that was rendered ineffective by s 148(1)(*b*) of the RTA 1972 (corresponding to s 8(1)(*b*) of the Act), while the insurer's attempt to invoke the latter clause was nullified by s 148(2) of the RTA 1972 (corresponding to s 7(1) of the Act). Consequently, Griffiths LJ concluded that "[s]o the position is that insurers will, by virtue of those two subsections, be treated, so far as the plaintiff is concerned, as insurers with a duty to indemnify the first defendant in respect of her claim", and therefore the first defendant was "insured in respect of the plaintiff's claim", and Order 29, rule 11(2)(*a*) of the RSC did not apply.

Discussion

(1) Authorities inapplicable

29 Notwithstanding the fact that both *Du Zhao Di* and *O'Driscoll* appeared to be strongly in the plaintiff's favour, I was of the view that neither authority directly applied on the facts of this case, because both judgments turned on legislative provisions which did not apply here.

30 Both *Du Zhao Di* and *O'Driscoll* relied on s 7 of the Act (or its English equivalent) to hold that the purported repudiations of liability under the respective policies were of no effect (*vis-à-vis* the plaintiffs). Unfortunately, s 7 of the Act only applies where the contractual clause in question relieves the insurer of liability "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*" [emphasis added]. In *Du Zhao Di*, the "specified thing" was the defendant's non-cooperation in the preparation of the defence, while in *O'Driscoll* it was the first defendant's failure to give sufficient notice. Both of these unquestionably occurred after the happening of the event which gave rise to a claim under the respective policies, *viz*, the accidents. In this case, however, the "specified thing" was the first defendant's driving while under the influence of alcohol (see [7] above), which occurred *before* the accident, and as a result s 7 of the Act could not apply.

31 Admittedly, it was possible to reach a different conclusion if one was inclined to take a very narrow reading of cl 5.3 of the Policy. On such a reading, whether SGT 6356X was driven by a person with "more than the legal limit of any alcohol in his blood or breath" could only be determined with any certainty when the driver was charged or upon his conviction by a court of law, and if so then in this case that determination only took place *after* the occurrence of the accident giving rise to the plaintiff's claim. Such a reading of cl 5.3, however, was highly strained and surely did not reflect the intention of the parties to the Policy, and as such was not an interpretation which I considered as being open to me to take.

32 The decision in *O'Driscoll* also rested on the English equivalent of s 8(1)(*b*) of the Act (see [28] above), but clearly cl 5.3 of the Policy had nothing to do with "the condition of the vehicle".

(2) Section 8(1)(*a*) of the Act

33 Notwithstanding this, however, *O'Driscoll* showed the way forward, because if cl 5.3 of the Policy fell foul of any of the other limbs of s 8(1) of the Act, the second defendant's purported repudiation of liability under the Policy would have been of no effect *vis-à-vis* the plaintiff. The prime candidate in this respect was s 8(1)(*a*), *ie*, could cl 5.3 be regarded as a term of the Policy which purported to "restrict the insurance of the person insured… by reference to… (a) the age or physical or mental condition of persons driving the vehicle"? In other words, could driving under the influence of alcohol be said to relate to a "physical or mental condition"?

34 Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 9th ed, 2010) at para 22-036, says of s 148(2)(*a*) of the RTA 1988 (*in pari materia* with s 8(1)(*a*) of the Act):

> … This does not extend to a condition requiring the assured to exercise reasonable care and to employ only steady and sober drivers, but *conditions prohibiting driving by persons under the influence of drugs or alcohol are outlawed*.
>
> [emphasis added]

Unfortunately, the authorities cited in relation to this last proposition were *Louden v British Merchants' Insurance Co Ltd* [1961] 1 Lloyd's Rep 154 ("*Louden*"), *Criminal Proceedings against Rafael Ruiz Bernáldez*, Case C-129/94 [1996] ECR I-289 ("*Bernáldez*"), a decision of the European Court of Justice, and *Storebrand Skadeforsikring AS v Finanger* [2000] Lloyd's Rep IR 462 ("*Finanger*"), a decision of the European Free Trade Association Court. *Louden* will be discussed later (see [36] below), while both *Bernáldez* and *Finanger* proceeded on the basis of European Union law and were therefore of no assistance to me.

35 In Robert Merkin and Jeremy Stuart-Smith, *The Law of Motor Insurance* (Sweet & Maxwell, 2004) at para 5-138, the following passage appears in a discussion of s 148(2)(*a*) of the RTA 1988:

> The insurers may not rely upon any policy term relating to "the age or physical or mental condition of persons driving the vehicle." **This provision** has been held not extend [*sic*] to a condition requiring the assured to exercise reasonable care and to employ only steady and sober drivers, although it **clearly extends to conditions which purport to restrict the insurers' liability where the vehicle is being driven by persons under the influence of drugs or alcohol**. In *Bernaldez* the European Court of Justice confirmed that a compulsory cover could not exclude liability for loss or damage inflicted by a drunken driver. **The English courts had independently reached the view prior to the adoption of compulsory insurance that intoxication was no defence to a claim on a policy**.
>
> [emphasis added in bold]

Tinline v White Cross Insurance Association, Limited [1921] 3 KB 327 ("*Tinline*") and *James v British General Insurance Company, Limited* [1927] 2 KB 311 ("*James*"), which were cited as authorities for the final sentence in the above quotation, were unhelpful, for they preceded the introduction of compulsory third party motor insurance, and they only decided that, as a matter of public policy, an insured person was not precluded from suing his insurer for an indemnity in respect of liability incurred by him towards a third party who had been killed or injured as a result of the insured person's criminal conduct, as long as such conduct was negligent rather than intentional (see to similar effect the decision of the Singapore Court of Appeal in *The New India Assurance Co Ltd v Woo Ching Fong* [1962] MLJ 432). *Tinline* and *James*, therefore, were decided solely on the basis that the rule of

public policy known as *ex turpi causa non oritur actio* did not apply, and, because in neither case was there a clause in the insurance policy by which the insurer purported to restrict the scope of the policy or exclude its liability by reference to the insured person's criminal behaviour, *Tinline* and *James* did not need to consider whether the insurers could rely on such a clause.

36 In *Louden* (which was the authority cited in *The Law of Motor Insurance* in relation to the proposition that s 148(2)(*a*) of the RTA 1988 "clearly extends to conditions which purport to restrict the insurers' liability where the vehicle is being driven by persons under the influence of… alcohol" (see [35] above)), the court was required to confront just such a question. There the insured person had taken out a comprehensive motor insurance policy, which contained an exclusion clause stating that the insurer would not be liable under the policy to the insured person in respect of bodily injury "sustained whilst under the influence of… intoxicating liquor". The insured person died as a result of an accident which occurred while he was under the influence of alcohol, and the question was whether the insurer was liable under the policy to the insured person's estate. Lawton J held (at 158) that, on the evidence, the insured person had been under the influence of intoxicating liquor within the meaning of the exclusion clause (on which see [41] below), and gave judgment for the insurer. However, *Louden* was not directly relevant because, there being no claim by a third party, there was no consideration of the English equivalent of s 8(1)(*a*) of the Act.

37 Similarly, in *Marcel Beller Ltd v Hayden* [1978] 1 Lloyd's Rep 472 ("*Marcell Beller*"), a life assurance policy excluded liability for "death… directly or indirectly resulting from… the insured person's own criminal act", and the insured person had died in a road accident caused by his driving under the influence of drink contrary to s 5 of the RTA 1972. The court held that the insurer was entitled to rely on the exclusion clause and deny liability to the insured person. Again, however, *Marcell Beller* was not quite on point because no question of compulsory third party motor insurance was involved.

38 The above cases therefore fell into two categories. There were cases (*James*) which held that, at common law, an insurer could not exclude liability (under the doctrine of *ex turpi causa*) to indemnify the insured person against a third party's claim by reference to the insured person's drink driving, but where the policy in question did not contain an exclusion clause. There were also cases (*Louden* and *Marcel Beller*) which held that, at common law, an insurer could exclude liability to the insured person by reference to an exclusion clause relating to his being under the influence of alcohol or his criminal behaviour, but which only concerned the insured person's own claim, and not a claim by him for an indemnity in respect of damages to be paid to a third party victim.

39 Consequently, somewhat surprisingly, it appeared that the question of whether a clause in an insurance policy, such as cl 5.3 of the Policy, which excluded the insurer's liability to indemnify the insured person against a third party's claim where the insured person had been driving under the influence of alcohol fell foul of s 8(1)(*a*) of the Act was untouched by authority, and it was open to me to consider the matter from first principles.

40 It seemed to me that there was every reason to construe s 8(1)(*a*) of the Act as nullifying cl 5.3 of the Policy.

41 First, on a literal interpretation, I could not see how a clause in an insurance policy which referred to the driver of a vehicle having "more than the legal limit of any alcohol in his blood or breath" did not relate to the "physical or mental condition" of the person driving the vehicle. A contamination of a person's bloodstream by a foreign substance (such as alcohol) seemed to me to be eminently a matter of that person's "physical… condition". The manner in which the exemption clause in *Louden* had been construed was also instructive in this regard. Lawton J, in interpreting the words

"under the influence of intoxicating liquor", applied a construction which had long been settled in England since the case of *Mair v Railway Passengers Assurance Company, Ltd* (1877) 37 LT 356, *viz*, that those words connoted the disturbance of "the balance of a man's mind" or "the quiet, calm, intelligent exercise of the faculties" (*Louden* at 157). That appeared to me to indicate that exclusion clauses in insurance policies which referred to driving under the influence of alcohol (or variants thereof) were to be understood as relating to the "mental condition" of the driver.

42 Second, a purposive interpretation (as required by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed)) led to the same conclusion. Section 8 of the Act had its origins in s 10 of the RTA 1934 (see *Colinvaux's Law of Insurance* at para 22-036 at fn 309), which was enacted to ensure that the system of compulsory third party motor insurance established by the RTA 1930 was not circumvented and undermined by motor insurers contracting out of liability by imposing terms and conditions of their choosing (see *Zurich General Accident and Liability Insurance Company, Limited v Morrison and others* [1942] 2 KB 53 at 61 to 62 (*per* Goddard LJ)). Section 10 of the RTA 1934 (and now s 8 of the Act) was to be seen, therefore, as preventing motor insurers from excluding liability for common risks, in keeping with the avowed purpose of the Act of ensuring compensation to third party victims of road accidents (see [21] above). Viewed in this light, it was entirely understandable for the UK Parliament to have provided that insurers could not escape liability by stipulating that the insurance policy did not cover liabilities arising, for example, from drivers being underage (now embodied in s 8(1)(*a*) of the Act), or in poor health (s 8(1)(*a*)), or from vehicles that were poorly maintained (s 8(1)(*b*)) or overloaded (s 8(1)(*c*) and (*d*)). That these occurrences were frequent dangers in 1934 could be seen from the fact that most if not all of them were prohibited under the RTA 1930 (see for instance ss 3, 5, 9, 25 and 30 of the RTA 1930), and I considered it reasonable to regard driving while under the influence of drink (proscribed by s 15 of the RTA 1930) as a common risk that insurers were to be prevented from deploying as a basis on which to escape liability under the insurance policy.

43 In addition, I did not regard this construction of s 8(1)(*a*) of the Act as being particularly oppressive towards motor insurers, who were, after all, given a statutory right under s 8(3) of the Act (see [22] above) to claw back from the insured person whatever moneys had to be paid out as a result.

Conclusion on O 29 r 11(2)(a) of the ROC

44 For the foregoing reasons, I concluded that the second defendant's purported repudiation of liability under the Policy to indemnify the first defendant in respect of the plaintiff's claim, pursuant to cl 5.3 of the Policy, was of no effect as far as the plaintiff was concerned, by operation of s 8(1)(*a*) of the Act. As such, the second defendant was still contractually obliged to indemnify the first defendant against the plaintiff's claim, and that being the case, there was clearly a policy of motor insurance in existence which obliged an insurer to meet an interim payment, and therefore, in accordance with Griffith LJ's views in *O'Driscoll* (see [27] above), O 29 r 11(2)(*a*) of the Rules of Court did not apply.

O 29 r 11(2)(b) of the Rules of Court

45 It was held in *Du Zhao Di* (at [29]) that the two limbs of O 29 r 11(2) were to be read disjunctively, so it was sufficient for the success of the plaintiff's application that at least one of the limbs of O 29 r 11(2) did not apply.

46 In the event that I was wrong in my construction of O 29 r 11(2)(*a*) of the Rules of Court, therefore, it was necessary to consider whether the same result would be reached (*ie*, that the interim payment could be ordered), because O 29 r 11(2)(*b*) did not apply.

Burden of proof

47 Given the dispute between the parties over whether the evidence in this case established that the first defendant was "a person whose means and resources are such as to enable him to make the interim payment", whether O 29 r 11(2)(*b*) applied turned on the issue of the burden of proof, hence my invitation to parties to address me on this point (see [16] above).

48 Again, what authorities there were shed little light on this matter. Neither *Du Zhao Di* nor *O'Driscoll* was applicable, because it was either assumed without argument that the burden rested on the plaintiff (*Du Zhao Di* at [23] and [30]), or it was accepted that O 29 r 11(2)(*b*) in fact applied, *ie*, the defendant did not have the means and resources to enable him to make the interim payment (*O'Driscoll*). Indeed, I was not directed to any case where the question of the burden of proof under O 29 r 11(2)(*b*) had arisen for explicit consideration.

49 Although I was initially inclined to the view that the burden of proof under O 29 r 11(2)(*b*) rested with the plaintiff, I eventually decided that the burden of proof was on the first defendant, as a result of ss 105 and 108 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), which provide:

> **Burden of proof as to particular fact**
>
> **105**. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> …
>
> **Burden of proving fact especially within knowledge**
>
> **108**. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

50 In *Wong Leong Wei Edward and another v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352 at [29], Steven Chong J approved the view (see *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (V Kesava Rao ed) (LexisNexis Butterworths Wadhwa Nagpur, 18th ed, 2008) at p 4476) that s 108 was:

> … designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the [plaintiff] to establish facts which are 'especially' within the knowledge of the [defendant] and which [the defendant] could prove without difficulty or inconvenience… The word 'especially'… means facts that are pre-eminently or exceptionally within his knowledge.

51 Whether the first defendant had the "means and resources… to enable him to make the interim payment" within the meaning of O 29 r 11(2)(*b*) was a fact especially within the first defendant's knowledge, and the first defendant could (dis)prove it without difficulty or inconvenience, whereas it would be impossible or disproportionately difficult for the plaintiff to prove it. After all, it was hard to imagine who else but the first defendant would have knowledge of his financial affairs. Consequently, the first defendant bore the burden of proving that he was not "a person whose means and resources are such as to enable him to make the interim payment", whether as a particular fact the existence of which he wished me to believe under s 105 of the EA, or as a fact especially within his knowledge under s 108 of the EA.

52 I found clear support for this approach in *The "Asia Star"* [2010] 2 SLR 1154, a decision of the Court of Appeal on the duty to mitigate in the context of a breach of a voyage charterparty by the appellant shipowner's failure to deliver the chartered vessel. In rejecting the respondent charterer's argument that it had acted reasonably in refusing to spend US$399,500 to engage an alternative available vessel ("the *Puma*") and thereby mitigate its loss, because of its impecuniosity, the Court of Appeal held that the burden of proving the fact that chartering the *Puma* would have been financially prohibitive lay on the respondent, stating (at [63]):

> In the present case, the respondent wished to rely on the alleged fact that the additional US$399,500 which it would have had to pay if it had chartered the *Puma* was a financially prohibitive sum that it could not afford – *ie*, **it wanted the court to believe in the existence of this fact (see s 105 of the Evidence Act). This fact was "especially within the knowledge of [the respondent]" for the purposes of s 108 of the Evidence Act since only the respondent could be fully aware of all the relevant particulars of its own financial position at the material time**. **Thus, … the respondent must satisfactorily establish with cogent evidence that it *was* indeed unable to afford to spend an additional US$399,500 at the material point in time**…
>
> [emphasis added in bold]

Discharging the burden

53 The next question was whether the first defendant had discharged his burden of proof by adducing evidence that he was not "a person whose means and resources are such as to enable him to make the interim payment" under O 29 r 11(2)(*b*) of the Rules of Court.

54 No affidavit evidence was produced by the first defendant to prove that he lacked the means and resources to enable him to make the interim payment. In contrast, as Mr Srinivasan pointed out, the first defendant had retained KhattarWong throughout these proceedings and those in the Subordinate Courts (see [14] above), and I was entitled to presume under s 116(*f*) of the EA that, in the common course of business, KhattarWong would have charged (and the first defendant would have agreed to pay) a not insignificant retainer. On that basis, I was not persuaded that O 29 r 11(2)(*b*) of the Rules of Court had been made out by the first defendant.

Whether to order interim payment and the quantum to be ordered

55 This issue could be taken relatively shortly. Since neither O 29 r 11(2)(*a*) nor (*b*) of the Rules of Court applied, it was appropriate for me to exercise my discretion to order interim payment in view of the plaintiff's dire injuries and his consequent need to pay for his medical treatment, which I was told is ongoing. As for the quantum, Mr Yeo very fairly conceded at the first hearing that if interim payment was to be ordered, he would not quarrel with the sum of $80,000.

Whether interim payment was to be paid to the plaintiff personally

56 This issue initially arose because I considered it possible that, if s 9 of the Act applied in this case, under s 9(1)(*a*), an interim payment obtained by the plaintiff against the first defendant, being a sum payable under a judgment in respect of a liability required to be covered by the Policy, had to be paid by the second defendant to the Public Trustee (see [22] above).

57 However, upon further consideration, it became clear to me that s 9 of the Act was not being invoked (because the plaintiff was not making a direct claim against the second defendant but was

merely applying for interim payment against the first defendant) and, unlike s 8 (see [44] above), had no other relevance in this case. Therefore, as a matter of course, interim payment was to be paid by the first defendant to the plaintiff personally.

58 I should add that, thus far, I have not referred to the first and second defendants' submission that, under s 9 of the Act, the second defendant is only obliged to satisfy final and not interlocutory judgments (see [11] and [13] above). Nonetheless, as both defendants founded themselves strongly upon this argument, it would be a disservice to their counsels' efforts if I did not articulate my reasons for agreeing with their submissions, albeit only tentatively, because the question of whether s 9 of the Act applied to interlocutory as well as final judgments appeared never to have arisen before and I was therefore unguided by authority on an issue which was not directly pertinent to this application.

59 First, although s 9 of the Act does not in terms distinguish between final and interlocutory judgments, some of the language in s 9, *eg*, s 9(2)(*a*) which speaks of a "judgment *for a sum* not exceeding the relevant amount" [emphasis added] (see [22] above), more naturally described final rather than interlocutory judgments (see also s 9(3)(*b*) which speaks of "execution" of the judgment – interlocutory judgments cannot be enforced (*Tan Kim Seng v Ibrahim Victor Adam* [2004] 1 SLR(R) 181 at [31])).

60 Second, in virtually all the cases in which s 9 had been successfully relied upon, the third party had obtained final judgment against the insured person. Indeed, it was difficult to imagine why the third party would need to rely on s 9 of the Act to enforce an interlocutory judgment (obtained against the tortfeasor) against the insurer by applying for an interim payment to be paid by the insurer to the Public Trustee. The only situation in which such a course of action was conceivably necessary was where the insurer had purported to repudiate liability to the insured person, but such repudiation was rendered ineffective *vis-à-vis* the third party due to ss 7 or 8 of the Act, and the third party had obtained interlocutory judgment and an order for interim payment against the insured person, who then absconded from jurisdiction. Even so, however, it was surely more principled to require the third party to avail himself of the normal measures for executing court orders (to enforce the order for interim payment), and/or proceed expeditiously to final judgment before resorting to s 9 of the Act, than to distort the natural language of s 9 in order to force it to encompass interlocutory judgments.

61 My attention was also drawn to *The Public Trustee Practice Circular 1 of 2004: Administration of Accident Compensation Monies under the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189)*, para 7 of which stated clearly that "[t]he Public Trustee will not administer any cases for interim payment only". Although this was, strictly speaking, an administrative restriction imposed by the Public Trustee rather than a legal one under s 9 of the Act, the Public Trustee's position reinforced the view that, in practice, there was little or no need for the third party to use s 9 of the Act to enforce an interlocutory judgment (obtained against the tortfeasor) against the insurer.

62 Had it been necessary to decide the point, therefore, I should have thought that s 9 of the Act ought to be construed as covering only final and not interlocutory judgments. Fortunately, however, the point did not arise in the present case, and therefore I need say no more about this issue.

Conclusion

63 For all the foregoing reasons, I granted the plaintiff's application for an interim payment of $80,000 from the first defendant, pursuant to which I made an order in terms of prayers 1 and 2 of the summons.

64 Since the plaintiff succeeded against the first defendant, I ordered that costs of $2,000 be paid by the latter to the former. However, as the second defendant had been unnecessarily burdened by these proceedings despite the fact that the plaintiff had no direct claim against it, I ordered that the plaintiff pay costs of $500 to the second defendant.