

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 249

MA 22/1998

Between

International Testing Co Pte
Ltd

... Appellant

And

Public Prosecutor

... Respondent

GROUND S OF DECISION

Criminal Procedure and Sentencing — Sentencing; Insurance — Companies
— Regulation; Insurance — Companies — Regulation; Words and Phrases;
Words and Phrases

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International Testing Co Pte Ltd v Public Prosecutor

[1998] SGHC 249

MA 22/1998
Yong Pung How CJ
21 July 1998

1 YONG PUNG HOW CJ

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The appellant, a corporation, was convicted after a trial for carrying on insurance business in Singapore as an insurance agent for British United Provident Association Ltd (BUPA), which was an insurer not registered with the Monetary Authority of Singapore, an offence under s 33(1) Insurance Act (Cap 142, 1994 Ed). It was fined a total of \$22,000. The appellant appealed against the conviction and sentence. The only issues on appeal were: (1) whether the appellant was acting as an insurance agent carrying on insurance business in Singapore for BUPA; and (2) whether the prohibition in s 33(1) Insurance Act is only limited to policies relating to risks in Singapore. After hearing the submissions, I dismissed the appeal and now set out my grounds.

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2.The charge was as follows:

You, International Testing Co Pte Ltd Registration no: 199404857Z are charged that you, between October 1994 and March 1996, without the approval of the Monetary Authority of Singapore, did carry on insurance business in Singapore as insurance agent for British United Provident Association Ltd, which was an insurer not entitled to carry on insurance business in Singapore, and you have thereby committed an offence punishable under s 33(1) of the Insurance Act (Cap 142, 1994 Ed).

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3. The facts

5 The facts were simple and were agreed by the appellant. The whole of the prosecution case rested on the agreed facts. The appellant is a private limited company engaged in the business of consultant engineering services and general insurance. BUPA is an insurer based in the United Kingdom which offers health care insurance coverage. At the material times, BUPA was not registered with the Monetary Authority of Singapore under s 3 of the Insurance Act, and it was prohibited from carrying on any class of insurance business in Singapore. At the material times, Rosaline Margaret Yap Gim Leng (Rosaline Yap) and John William Wilson were the directors and shareholders of the appellant. Rosaline Yap was in charge of the general insurance business division in the company.

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4. Between October 1994 and March 1996, the appellant arranged for BUPA policies to be issued to: (1) PT Comismar Wanamaja (Comismar), a company incorporated in Indonesia; (2) David Quodling (Quodling), an Australian based in Malaysia.

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5. Comismar

8 In a letter dated 24 August 1994, the appellant informed BUPA that it was organising the health care insurance of the management and consultancy personnel of Comismar and conveyed information on Comismar. On 26 August 1994, BUPA replied and it was followed by an exchange of correspondence between BUPA and the appellant. On 3 October 1994, the appellant sent a letter to BUPA, enclosing the agreement duly signed by BUPA and the duly completed enrolment forms of five employees of Comismar. BUPA acknowledged receipt of the forms.

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6. Quodling

10 On 31 October 1995, the appellant, at the request of Quodling, sent to him literature on health insurance plans offered by BUPA and ProMedico, an insurer, and the application forms for both insurers. In the letter, the appellant asked Quodling to return the application form duly completed so that the application `could be handled and approval sought from the respective underwriters`. On 15 December 1995, the appellant forwarded to BUPA the application form completed by Quodling and the premium paid by Quodling. On 9 January 1996, the appellant informed Quodling that his application to BUPA had been accepted. The appellant further informed Quodling that the insurance cover had commenced on 1 January 1996 and that relevant documents would be despatched to him once the appellant received them. Subsequently

the appellant received the membership certificate issued by BUPA for Quodling and in turn sent the certificate to Quodling.

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7. The defence

12 At the close of the prosecution's case, the defence counsel argued that there was no case to answer. Section 33(1) of the Insurance Act only covered 'Singapore policies' under First Schedule para 2(1) or offshore policies issued in Singapore under para 2(2), read with s 2(5) of the Act. The policies in respect of which the appellant was charged were policies issued by foreign issuers not in Singapore. Alternatively, even if s 33(1) applied to the insurance policies in question, the appellant had not committed any offence as it had not carried on insurance business as an agent for an insurer; it had not received proposals for policies, issued policies or received premiums on policies under s 2(5). It merely acted as a post-box to transmit information from BUPA. The district judge rejected the defence submission of no case to answer. He called upon the appellant to enter its defence. The appellant elected not to give evidence. The district judge convicted the appellant on the grounds that the appellant did in fact carry on insurance business in Singapore as an insurance agent under s 2(5). Further s 33(1) was not restricted only to 'Singapore policies'.

13 The appeal

14 Whether the appellant was acting as an insurance agent for BUPA within s 33(1) Insurance Act

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8. Section 33(1) prohibits the carrying on by insurance agents of insurance business in Singapore for an insurer not registered with MAS. BUPA, in response to queries from the Commercial Affairs Department in its investigations against the appellant, replied that the appellant 'did not operate as a tied agent for BUPA International in Singapore but as an independent intermediary'. Counsel for the appellant argued that the appellant was not acting as an insurance agent for BUPA but as a postbox. I paid very little regard to BUPA's claims that the appellant was not an insurance agent acting on its behalf. Rather the court should examine whether, having regard to the policy behind legislation and the course of conduct of the appellant, it was acting as an insurance agent within the meaning of s 33(1) read with s 2(5).

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9. The policy behind the Act is to regulate and supervise the conduct of insurance business in Singapore. The Act draws a distinction between an insurance agent and an insurance broker: see ss 2(5) and 33. However, the definition in s 2(5) is unhelpful as it merely provides that a Singapore insurance broker means a person who is or has been carrying on business as an insurance broker in Singapore. Section 33(2) provides *inter alia* that a Singapore insurance broker shall only negotiate a contract of insurance with a Singapore insurer acting in the course of his business as such; the penalty for violating this provision is a maximum fine of \$10,000 or imprisonment for a term not exceeding a year.

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10. In my view, an insurance agent in s 2(5) is one who is acting as an agent of

the insurer in negotiating, servicing or effecting insurance contracts whilst an insurance broker is an intermediary who is independent of any one insurer, and is generally an agent of the insured. In insurance law, the term insurance broker is understood to be one who is independent of and does not act for a designated insurer: Lewis E Davids, ***Dictionary of Insurance***, p 11 and 38; Clarke, ***Law of Insurance Contracts*** (3rd Ed, 1997) p 189. This is fortified by an examination of s 33. A heavier penalty is provided for an insurance agent carrying on business for an unauthorised insurer than for an insurance broker who negotiates a contract with an unauthorised insurer. An insurance agent within s 2(5) is one that acts on behalf of the insurer and is perceived by the legislature as being more culpable. Of course this does not mean that an insurance agent necessarily acts on the insurer's behalf the whole of the time and he may in limited circumstances also act for the insured. In such a case, he will still be considered to be acting as an insurance agent under s 2(5). To hold otherwise would make the provisions of the regulatory legislation unworkable.

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11. Counsel argued that, since the appellant sent insurance brochures to Quodling of insurance proposals relating not only to BUPA but also to another insurer named ProMedico, the appellant was acting on behalf of Quodling. This was an untenable argument. The appellant did not hold itself out to act in the insured's interest as would be expected of a broker acting on behalf of the insured in negotiating insurance contracts. There was no reason why the appellant could not be acting as an insurance agent for both BUPA and another insurer.

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12. In my view, the correspondence in the exhibits showed that the appellant was acting as an agent of the insurer. On the facts it was likely that the people carrying on business for the appellant company had no idea whether it was acting as an agent or as a broker when it was conducting business for clients, but, as I have pointed out earlier, the court had to determine whether the course of conduct undertaken by the appellant showed that it was acting as an agent or as a broker. The appellant did not hold himself out as an insurance broker when it was doing business and it was not registered as an insurance broker. The commission was paid by BUPA to the appellant at a rate of 10% on the introduction of new business and 10% on its renewal, not by the proposed insured. The appellant had authority from BUPA to receive proposals and forward them to BUPA for approval, and to communicate the explanation of the various terms found in the proposals to the proposed insured. In these circumstances, there was no doubt that the appellant was an insurance agent acting for BUPA.

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Scope of s 33(1) read with s 2(5) - Is the prohibition in s 33 read with s 2(5) confined to Singapore policies only?

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13. For ease of convenience, I set out the relevant provisions:

33(1) No person shall, without the approval of the Authority , **carry on insurance business in Singapore** as insurance agent for an insurer not entitled under this Act to carry on the business in question in Singapore; and a person contravening this subsection shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$20,000 increased by a sum not exceeding \$1,000 for every day on which he is proved

to have done so, or to imprisonment for a term not exceeding 2 years or to both. 2(5) For the purpose of this Act, `Singapore insurer` and `Singapore insurance agent` mean a person who is or has been carrying on insurance business in Singapore as insurer and as insurance agent respectively, and `Singapore insurance broker` means a person who is or has been carrying on business as insurance broker in Singapore; and **references to carrying on insurance, or any class of insurance business, in Singapore include but include only the receipt of proposals for, or issuing of, policies in Singapore or the collection or receipt in Singapore of premiums on insurance policies .**

First Schedule - Definition of Insurance Terms

2(1) Subject to this paragraph and section 15(30 and (4) of the Act, `Singapore policy`, in relation to any insurer, means a policy issued in the **course of the insurer's business in Singapore and** falling within one of the following descriptions:

(a) a life policy or personal accident policy in the case of which, at the date of issue of the policy and (if the policy was issued before then) at the date of the establishment of the insurer's register of Singapore policies, the policy owner's address is or was an address in Singapore; (b) in relation to direct general insurance (other than personal accident policies) and facultative general reinsurance, a policy in the case of which the risk arises in Singapore or where the insured is a person resident in Singapore or is a permanent establishment in Singapore; and

(2) `Offshore policy`, in relation to any insurer, means any policy other than a Singapore policy, issued in the course of the insurer's business in Singapore.

14. The prosecution argued that s 2(5) read with s 33 are not confined only to Singapore policies but cover all offshore insurance policies as well. Counsel for the appellant argued that the provisions must be read with para 2 First Schedule which defines `Singapore policy` and `offshore policy`. The two policies in question were not `Singapore policies` as the insured were not persons with a address in Singapore or resident in Singapore or were a permanent establishment in Singapore or in respect of risks that arose in Singapore. He

argued that BUPA did not issue Singapore policies nor cause offshore policies to be issued in Singapore; the policies were UK policies issued in the UK.

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15.I now address the first argument that s 33 is limited only to Singapore policies. This argument is clearly without any merit. Section 2(8) provides that the definitions set out in the First Schedule shall have effect for the construction of references to policies of insurance, policy owners and policy moneys. However on the plain reading of s 2(5), there is nothing which indicates that it applies only to Singapore policies. The First Schedule defines `Singapore policy` and `offshore policy` but these terms are not found in s 2(5) nor in s 33. I am unable to see how reference to the First Schedule provides any assistance. The three categories in s 2(5) refer to receipt of proposals for issuing of policies in Singapore or the collection or receipt in Singapore of premiums on `**insurance policies**`, and not only Singapore policies. There is no reason why the definitions in para 2 of the First Schedule should apply to s 2(5) or s 33.

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16.Also, as the district judge pointed out, it is anomalous to read a limitation to s 33. Under s 15(1) read with the First Schedule, a registered person or body has to keep a register of all `Singapore policies` and offshore policies issued in Singapore, both of which have to be issued in Singapore. It cannot be that on one hand a registered and authorised insurer has to keep registers of both Singapore and offshore policies and yet, on another hand, one can carry on insurance business in Singapore as an insurance agent with respect to offshore (but not Singapore) policies for an unauthorised user. It must be that the

prohibition extends to carrying on insurance business with respect to all policies as insurance agent for all unauthorised and unregistered insurers.

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17. Counsel for the appellant had relied on the Preamble which provided that the Act was enacted to regulate insurance business in Singapore, and it could not have been intended to regulate foreign policies. With respect, the Preamble is inconclusive. There is nothing anomalous about the plain reading of ss 2(5) and 33. The Act does not regulate the carrying on of all insurance business, only the carrying on of insurance business ***in Singapore as defined in s 2(5)***.

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18. I am fortified by an examination of the legislative history. In 1986, s 2(5) was amended by deleting the words `Singapore policies` to replace them with the words `insurance policies`. It is clear that `insurance policies` in s 2(5) must refer to all insurance policies and not only to Singapore policies as defined in the First Schedule.

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19. The second argument raised by counsel was that even if s 33 covered offshore policies, the insurance policies were issued in the UK, and did not fall within s 2(5). I shall first consider the policy in relation to Quodling. This turns on the interpretation of the word `issuing` in s 2(5). `Policy` is defined in para 1 of the First Schedule to the Act, as including any contract of insurance whether or not embodied in or evidenced by an instrument in the form of a policy.

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20. `Issue` is not defined in the Act. The prosecution relied on **Koon Wing Lau v Calwell** [1949] 80 CLR 533 which held that `to issue` meant that the document had to pass from the possession of the authorities either into his manual custody or under his control or into his legal possession so as to be at his command. The district judge accepted the interpretation that, for the insurance policy to be issued to a person, there had to be physical delivery of the document into the custody of the recipient or under his control.

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21. **Koon Wing Lau v Calwell** was dealing with a case under the amended Australian Immigration Act 1949. The Act provided that a certificate of exemption `issued` by an authorised officer, to a prohibited immigrant or an immigrant required to pass a dictation test within a certain period, was deemed to be valid. When such a certificate was issued, he was not subject to provisions of the Act restricting entry into or stay in Australia. The importance of the certificate of exemption was that, if the certificate expired or was subsequently cancelled (on the stipulated grounds), he would be declared a prohibited immigrant and might be deported. The High Court of Australia held that the certificate was only `issued` within the 1949 Act if the certificate was delivered to the person named in the certificate. In that case, the High Court of Australia was dealing with the status of immigration of persons who could be deported. There was no doubt that, on such matters affecting his right to stay in Australia, the immigrant had to be informed as to whether he was allowed to remain in Australia. If the certificate was only signed by the authorities informing the immigrant and the certificate subsequently expired, he was liable to be deported.

Hence it was justifiable to hold that the certificate had to be delivered to the immigrant.

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22. Here, we were concerned with a very different matter, viz. the issuing of insurance policies. The meaning of `issuing` in s 2(5) has to be construed not in the abstract but with reference to the use of the term in insurance law. An insurance contract is concluded when the duly completed proposal form is accepted by the insurers. Acceptance has to be communicated to the insured party. However, intimation by the insurer that the insured's offer has been accepted can be in the form of the issuance of a policy to the insured: *Tan Lee Meng*, ***Law of Insurance*** (2nd Ed, 1997) at p 25. For the policy to be issued to the insured, there is no requirement that the policy must be both executed and delivered to the insured. Once the policy is executed to the insured, the policy is binding on both parties. This is illustrated in ***Roberts v Security Co Ltd*** [1897] 1 QB 111. In that case, a proposal for an insurance of goods against loss by burglary was made by the plaintiff to the defendant insurance company. The insurance company affixed the seal of the company to the policy which was in conformity to the proposal and the policy was duly signed. However, the policy remained in the hands of the insurance company and was not yet delivered when the loss occasioned by burglary occurred. The Court of Appeal held that the policy constituted a complete contract of insurance; the proposal was accepted when the policy was executed under the seal of the company.

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23. In this case, it was BUPA which had issued the policy of insurance to Quodling. The appellant sent a letter dated 9 January 1996 informing him that

his application to BUPA had been accepted and the policy would be despatched to him once the appellant received it. This showed that it was BUPA which had executed the insurance policy in the United Kingdom and then delivered it to the appellant as agent in Singapore. By executing the policy, the policy was `issued` in the United Kingdom. The delivery of the policy was not necessary to constitute `issuing` within s 2(5). As such I disagreed with the district judge who found that the policy to Quodling was issued by the appellant in Singapore.

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24.However, the prohibition in s 2(5) is not confined only to the issuing of insurance policies in Singapore. There are two other categories in s 2(5): (1) receipt of proposals for policies in Singapore and (2) collection or receipt in Singapore of premiums on insurance policies.

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25.There was no doubt that the proposal for the insurance policy was received in Singapore. `Proposal` is not defined in the Act. The district judge accepted the meaning as, where there was a proposal form issued by the insurer, the proposal was the form which had been duly completed by the insured; and where there was no proposal form, the proposal was a document which could be construed as an offer made by the proposed insured to the insurer which, if accepted by the insurer, constituted a binding contract between the proposed insured and the insurer. I agreed with this interpretation of the word `proposal`.

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26.On 31 October 1995. Quodling received a BUPA application form from the

appellant to be duly completed by himself. The appellant asked Quodling to return to it the completed forms so that they `may be handled and approval sought from the respective underwriters`. On an examination of the application form, it was indeed a proposal form which, when duly filled in and signed by the proposed assured and forwarded to the insurers, would operate as a formal offer by the proposed assured to the insurers. The duly completed form was received by the appellant who then forwarded it to BUPA on 15 December 1995. There was no doubt that the appellant had authority from BUPA to receive the proposal from the proposed insured, though it might not have authority to enter into the insurance contract on BUPA`s behalf. Hence there was receipt by the appellant on behalf of BUPA.

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27. It was doubtful whether there was receipt in Singapore of premiums on insurance policies. The appellant forwarded the duly completed application form together with ***a bank draft drawn in pounds made in BUPA`s favour*** for the first premium. Counsel for the defence argued that there was no receipt of moneys in Singapore as the premium took the form of a bank draft made to BUPA`s order for onward transmission. Receipt of the premiums only took place when the bank draft made in BUPA`s favour was delivered to BUPA. The appellant did not receive the premiums in Singapore. The appellant had authority to receive the bank draft and to transmit it to BUPA but it was essentially acting only as a conduit in this respect. Hence I found that there was no receipt of premiums in Singapore.

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28. In relation to Comismar, there was receipt by the appellant of BUPA`s

proposal in Singapore. The agreement was signed on 13 September 1994 and it was sent to the appellant. On 3 October 1994, the appellant sent to BUPA a letter enclosing an agreement duly signed by both Comismar and BUPA and the duly completed enrolment forms of five employees of Comismar. The insurance agreement was contained in the agreement duly signed by both parties.

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29. The result was that the conviction of the appellant should be upheld, but not on all the grounds relied on by the district judge. I found that the offence under s 33(1) of the Act was contravened on two occasions; the first was when the proposal for the insurance policy in relation to Quodling was received in Singapore on 15 December 1995 and the second was when the proposal for the insurance policy in relation to Comismar was received in Singapore on 3 October 1994. Both proposals were received by the appellant as BUPA's agent for onward transmission to BUPA.

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30. Sentence

39 The offence under s 33(1) of the Act is punishable with up to \$20,000 fine increased by up to \$1,000 for every day on which the offender is proved to have continued the offence, or up to two years imprisonment or to both. The district judge sentenced the appellant to an \$18,000 fine, increased by a sum of \$1,000 for every day of the four days it contravened s 33(1). With respect, I was of the view that the sentence was manifestly excessive. The appellant had contravened s 33(1) in relation only to two insurance policies relating to two different clients. The offence stretched from October 1994 to March 1996 but

the appellant's carrying on insurance business in Singapore was limited only to receiving proposals from the proposed insured and forwarding them to BUPA. The insured's interest was not shown to be affected nor was the operation over such a prolonged period. It was not carrying on a large scale insurance business for BUPA. It was the appellant's first conviction. I accepted that the appellant did not know that its manner of carrying on business contravened s 33. The public interest was not adversely affected. In the circumstances the fine should be reduced to \$10,000. Given my earlier finding that the offence was committed only on the receipt of Quodling's proposal in Singapore, as well as the receipt of Comismar's proposals in Singapore, the contravention of s 33(1) took place only on two occasions, as opposed to the four occasions found by the district judge. Accordingly the sentence was reduced to a \$10,000 fine increased by a sum of \$1,000 for each of the two days the appellant violated s 33(1), making a total sentence of \$12,000. The appeal against the sentence was allowed to this extent.

Yong Pung How CJ

NK Rajah (Rajah Velu & Co) for the appellant
Ng Der Lim (Deputy Public Prosecutor) for the respondent
