SHC Capital Ltd *v* NTUC Income Insurance Co-operative Ltd
[2010] SGHC 224

Case Number : Originating Summons No 135 of 2010

Decision Date : 05 August 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Adeline Chong Seow Ming (Infinitus Law Corporation) for the plaintiff; Desmond Tan and Aileen Chia (Lee & Lee) for the defendant.

Parties : SHC Capital Ltd — NTUC Income Insurance Co-operative Ltd

Insurance

Contract

5 August 2010 Judgment reserved.

Chan Seng Onn J :

Introduction

1 The plaintiff, SHC Capital Limited ("SHC"), and the defendant, NTUC Income Insurance Co-operative Limited ("NTUC") are insurance companies, which offer, *inter alia*, workmen's compensation insurance. The present application was brought by SHC for a declaration that NTUC is liable in respect of a payout made pursuant to a workmen's compensation policy.

Background Facts

2 On 22 April 2005, an industrial accident involving a workman occurred at 33 Tuas Crescent, the premises ("premises") belonging to and occupied by Pan-United Concrete Pte Ltd ("Pan-United"). It is not disputed that Pan-United had engaged Simei Engineering & Trading ("Simei") as its main contractor, who in turn engaged EIN Engineering and Construction ("EIN") as its sub-contractor for a project involving the collection of several dismantled structures from another site and delivery of these structures to the premises. Simei also engaged Hup Hin Trading Co Pte Ltd ("Hup Hin") to supply a mobile crane and an operator to lift the structures. Hup Hin in turn arranged for Hock Swee Seng Construction and Transportation ("Hock Swee") to supply a mobile crane and a crane operator (one Ng Kia Soong) to operate the crane for the project.

3 Omar Bin Hoydeen ("Omar"), one of the workmen employed by EIN to perform the work of a qualified rigger and signalman for the project, was seriously injured when he was struck by the metal chains attached to the boom of the mobile crane operated by Ng Kia Soong at the material time. Omar subsequently commenced an action, Suit 527 of 2006, in the tort of negligence to claim damages for his personal injuries from (a) Pan-United as the occupier of the premises; (b) EIN as his employer; (c) Simei as the main contractor; and (d) Hock Swee as the owner and operator of the mobile crane involved in the accident.

4 On 10 July 2007, interlocutory judgment was entered by consent against the defendants in Suit 527 of 2006 for 90% of total liability, with damages to be assessed. The apportionment of liability

vis-à-vis the various parties were as follows:

(a)	Omar himself	10%
(b)	Pan-United	10%
(c)	EIN and Simei (collectively)	26.7%
(d)	Hock Swee	53.3%

Damages were thereafter assessed. EIN and Simei's liabilities in total amounted to $317,664.70, which was paid by SHC. However, SHC made no apportionment between EIN's and Simei's respective liabilities although Omar was Ein's employee and not Simei's.

The insurance policies

5 On 1 June 2004, Pan-United took out a Workmen's Compensation Policy with NTUC ("NTUC Policy"), covering the period from 1 June 2004 to 31 May 2005. The initial coverage provided by the NTUC policy was limited only to " *PAN-UNITED CORPORATION LIMITED AND SUBSIDIARIES &/OR RELATED COMPANIES F.T.R.R.& I*". The NTUC policy insured Pan-United and its subsidiaries against all sums of which they would be liable to pay under statute or common law for claims brought against them by workmen under their employment.

6 The NTUC Policy contains a Cross Liability Clause which reads:

> **CROSS LIABILITY CLAUSE**
>
> Each of the parties comprising the Insured [Pan-United and its subsidiaries] shall for the purpose of this Policy be considered as a separate and distinct unit and the words "the Insured" shall be considered as applying to each party in the same manner as if a separate Policy had been issued to each of the said parties and the Insurers hereby agree to waive all rights of subrogation or action which they may have or acquire against any of the aforesaid parties arising out of any accident in respect of which any claim is made hereunder.
>
> Subject otherwise to the terms, conditions and exceptions of this Policy.

The following term is also found in the endorsement of the NTUC policy:

> **Contingent Liability for Sub-Contractors (in the NTUC Policy)**
>
> It is hereby declared and agreed that the Policy is extended to cover the Insured's legal liability in respect of acts of employees of their sub-contractors for which *they* may be responsible. *Provided that the indemnity given is on the condition that*:
>
> (a) it is contingent upon the liability incurred not being covered or indemnified by an insurance of the sub-contractors.
>
> (b) if any claim submitted is covered by the sub-contractor's more specific insurance, then this Policy shall not insured (sic) the same except only as regards any excess beyond the limit of liability covered by such specific insurance.
>
> Subject otherwise to the terms, conditions and exceptions of this Policy.

[emphasis added]

7 The NTUC Policy coverage was later extended *vide* an endorsement dated 28 March 2005 to include all tiers of sub-contractors engaged by Pan-United and its subsidiaries and related companies. The revised certificate of insurance from NTUC states the following as the "Name of Insured":

> PAN-UNITED CORPORATION LIMITED AND SUBSIDIARIES &/OR RELATED COMPANIES &/OR **ALL TIERS OF SUB-CONTRACTORS** &/OR THE FOLLOWING PRINCIPALS AS LISTED BELOW F.T.R.R.&I. (Emphasis added.)

8 The new "Name of the Insured" clause should be read with the Cross Liability Clause in the original NTUC Policy in the following manner:

> **CROSS LIABILITY CLAUSE**
>
> Each of the parties comprising the Insured [Pan-United and all tiers of its sub-contractors, *i.e.* Simei and EIN] shall for the purpose of this Policy be considered as a separate and distinct unit and the words "the Insured" shall be considered as applying to each party [*i.e.* Simei and EIN] in the same manner as if a separate [NTUC] Policy had been issued to each of the said parties [*i.e.* Simei and EIN] and the Insurers hereby agree to waive all rights of subrogation or action which they may have or acquire against any of the aforesaid parties arising out of any accident in respect of which any claim is made hereunder.
>
> Subject otherwise to the terms, conditions and exceptions of this Policy.

It is not disputed in the present application by SHC that EIN and Simei fall within the class of insured named and identified in the NTUC policy as "*all tiers of sub-contractors*" since EIN was a second tier sub-contractor and Simei was a first tier sub-contractor of Pan-United for the project. Consequently, by the operation of the Cross Liability Clause, they were deemed as having been separately issued a workmen's compensation policy by NTUC.

9 Separately, SHC had also underwritten two Workmen's Compensation policies ("SHC Policies") to insure EIN for the period from 15 April 2005 to 14 April 2006 and Simei for the period from 22 October 2004 to 21 October 2005 against all sums of which they (*i.e.* EIN and Simei) would be liable to pay under statute or common law for claims brought against them by workmen under their employment. Both of these policies are annual workmen's compensation policies with identical terms and conditions. They are not specific policies issued in respect of a particular job or project.

10 The SHC policies each contain a Non-contributory Clause, which excludes liability on SHC's part if the insured has been insured by any other workmen's compensation policy:

> **NON-CONTRIBUTORY CLAUSE (in both SHC Policies)**
>
> Warranted that if the Insured [EIN/Simei] is covered under any other Policy for Workmen's Compensation Insurance, the Company [SHC] will not indemnify the Insured [EIN/Simei] nor be called upon to contribute under this Policy.

It is not disputed by the parties that the wording of this clause is sufficient to exclude SHC's liability to indemnify the insured person [EIN/Simei] if it has been double insured.

The dispute between the insurers

.

11 Prior to the entry of a consent order upon Omar's claim against Pan-United, Simei, EIN and Hock Swee on 10 July 2007, SHC's solicitors had written to NTUC on 12 January 2007, requesting them to take over conduct of the defence for Simei and EIN, relying upon the Non-contributory Clause in their respective policies. However, NTUC, by their solicitor's letter dated 13 February 2007, rejected SHC's request on the ground that its policy did not cover Simei and EIN. Thus, NTUC only had conduct of Pan-United's defence while SHC conducted Simei and EIN's defences. SHC subsequently commenced third party proceedings against NTUC, seeking a court declaration that NTUC shall be fully liable for indemnifying Simei and EIN, or in the alternative, that SHC and NTUC are each liable to indemnify 50% of Simei and EIN's liabilities. The third party proceedings were subsequently discontinued, without prejudice to the parties' respective rights and liabilities. After SHC had indemnified Simei and EIN, and NTUC had indemnified Pan-United, SHC commenced the present proceedings, seeking a declaration from the court that NTUC is liable to make a contribution to SHC for either 100% or 50% of the amounts it had already paid out to Simei and EIN.

12 SHC now makes this application on the ground that (i) the NTUC Policy covered EIN and Simei for the claims of Omar, thereby creating a situation of double insurance; and (ii) that NTUC did not exclude its equitable obligation to make a contribution to SHC in its contract with EIN and Simei. Before going into the merits of SHC's application, it is essential to first outline the legal principles on double insurance.

The law on double insurance

13 Double insurance occurs when an insured person has been insured by two insurers in respect of the same liability: Poh Chu Chai, *Principles of Insurance Law* (LexisNexis, 6th ed, 2005) ("*Principles of Insurance Law*") at p 1233. *Principles of Insurance Law* also provides a succinct summary of the legal right of contribution available to an insurer (which has fully compensated an insured person in respect of a particular risk) against the other insurer which has insured the same insured person against the same risk (at p 1243):

> When a particular risk is insured with two or more insurers and a loss arising from the risk is fully paid for by one insurer, the insurer is entitled to contribution from the other insurers who have not paid. An insurer's right of contribution is not based on contract but arises from principles of equity, that persons who are liable for the same loss should contribute equally towards the loss…

14 In *American Surety Co of New York v Wrightson* (1911) 103 LT 663, Hamilton J remarked that this duty of contribution may be based on general propositions that "contribution is based upon principles of equity that equality is sometimes equity, and that there should be a rateable portion amongst those who have to contribute…" Reference may also be made to *Colinvaux's Law of Insurance* (Sweet & Maxwell, 8th ed, 2006), at p 414, where the author outlined the difference between the insurer's right of subrogation and contribution:

> … Contribution should be carefully distinguished from subrogation. Since contribution implies more than one contract of insurance, it is only where there are two or more policies involved that there can be any confusion between the two. Subrogation ensures that the assured receives no more than an indemnity: contribution ensures that the insurers do not suffer injustice amongst themselves because of that rule. Unlike a claim for subrogation, a contribution action must be brought in the insurer's own name.

15 However, an insurer may seek to exclude its liability by way of indemnity to its insured or by

way of contribution to another insurer, who has insured the same insured person in respect of the same risk. One method of achieving this end is to provide that an insurer is not liable if the policy holder has been insured for the same risk under another policy. Such an exclusion clause has been construed in *Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd* [1985] 1 WLR 734, where a car owner allowed a friend to drive his car, and in the course of doing so, the friend injured a third party. The car owner had an insurance policy insuring against any liability to third parties caused by any driver driving his car, with the owner's consent. In the car owner's policy, there was a clause which provided that the car driver would be indemnified for third party risks provided that he (*i.e*. the car driver) was "not entitled to indemnity under any other policy". On the facts of that case, the friend who was then driving the car also had a policy of insurance which insured him against liability to third parties caused while driving a private car not belonging to him. The third parties brought an action against both insurers claiming payment. The Privy Council (on appeal from the Federal Court of Malaysia) held that by virtue of the exclusion clause in the car owner's policy, the policy containing an exclusion clause was *not on risk at the time of the accident*. Therefore, the full burden of the indemnity must be borne by the driver's insurers.

16 Similarly, in *Nanyang Insurance Co Ltd v Commercial Union Assurance Plc* [1996] 1 SLR(R) 441, two insurers had insured the same assured against the risk of accidents in the course of work. In Commercial Union Assurance Plc's insurance policy, it excluded its liability to indemnify the assured if it had any other policy of indemnity or insurance in respect of the same risk, unless the loss suffered by the assured was higher than the "amount which would be payable under such other indemnity or insurance had this policy not been effected". The loss sustained by the assured was $63,023.28, which was lower than the upper limit of policy issued by Nanyang Insurance Co Ltd. The court held that the Commercial Union Assurance Plc's exclusion clause had rendered it not liable. There was no double insurance and Nanyang Insurance was legally obliged to indemnify the assured for 100% of his loss. Thus, although Nanyang Insurance had already limited its liability to no more than its rateable proportion (i.e. 50-50 in the event of double insurance), its rateable proportion clause did not operate.

17 However when both insurers exclude liability in their respective contracts with the insured person in the event of double insurance, then, the exclusion clauses cancel each other out, with the net effect that both insurers share liability equally as amongst themselves. In *Weddell v Road Transport & General Insurance Co Ltd* [1932] 2 KB 563, Rowlatt J said the following while construing two third party motor insurance contracts containing exclusion of liability clauses (at 567-568):

> … In my judgment it is unreasonable to suppose that it was intended that clauses such as these should cancel each other (by neglecting in each case the proviso in the other policy) with the result that, on the ground in each case that the loss is covered elsewhere, it is covered nowhere. On the contrary, the reasonable construction is to exclude from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence, and to hold in such cases that both companies are liable, subject of course in both cases to any rateable contribution proportion clause which there may be…

The declarations sought

18 In these proceedings, SHC is seeking the following declarations:

> 1 A declaration that [NTUC's] Workmen's Compensation Policy... extends to cover [EIN] and [Simei].
>
> 2 That [SHC] shall be indemnified by [NTUC] for

(i) the contribution to damages paid for and on behalf of [EIN] and [Simei]

and

(ii) the legal costs and disbursement expended for and on behalf of [EIN] and [Simei]

amounting to $317,664.70, paid in connection to the claims of the workman [Omar] against [EIN] and [Simei].

3 Alternatively, a declaration that [SHC] shall be indemnified by [NTUC] for

(i) the contribution to damages paid for and on behalf of [EIN] and [Simei]

and

(ii) the legal costs and disbursement expended for and on behalf of [EIN] and [Simei]

amounting to $158,853.35... paid in connection to the claims of the workman [Omar] against [EIN] and [Simei].

The parties' arguments

19 Before the court, SHC argues that since the "Name of Insured" clause in the NTUC policy includes all tiers of sub-contractors and the effect of the Cross Liability Clause is such that a separate policy has been issued to each insured person, *viz*, Simei and EIN, Simei and EIN have been insured by NTUC. As Simei and EIN have also been insured by SHC, they have been insured by two different insurers in respect of the same risk. Since SHC has excluded its liability to indemnify Simei or EIN in the event of double insurance in its Non-contributory Clause, SHC could claim a 100% contribution of the $317,664.70 which it has paid out to Omar on behalf of Simei and EIN.

20 NTUC, on the other hand, submits that SHC ought not to be indemnified because the Contingent Liability Clause in the NTUC Policy prevented the NTUC Policy from being on risk in the first place. While NTUC did not dispute that Simei and EIN were the insured and Hock Swee was a second tier sub-contractor of Simei within the meaning of the Contingent Liability Clause, it submits that provisos (a) and (b) (see [6] above) were condition precedents to NTUC's liability to indemnify Simei and EIN. Since Simei and EIN have been double insured, NTUC argues that its NTUC Policy was not on risk by virtue of proviso (a).

21 SHC's reply is that the Contingent Liability Clause is simply irrelevant to the present case for the following reasons. First, the main provision in the Contingent Liability Clause served the purpose of enlarging the risk insured. Thus, the effect of the Contingent Liability Clause was that the NTUC Policy was "extended to cover" insured persons against "the Insured's legal liability in respect of acts of employees of their sub-contractors for which they may be responsible". Secondly, the "Insured" mentioned in the main provision of the Contingent Liability Clause must cover only Pan-United, because the Contingent Liability Clause is meant to indemnify it against vicarious liability or occupier's liability for its sub-contractors' breaches of duty. Thus, the Contingent Liability Clause is irrelevant to the present proceedings because the dispute is over the identity of the party which was legally obligated to indemnify Simei and EIN for their liabilities to Omar. Thirdly, since the main provision is irrelevant, the provisos are therefore inapplicable to exclude NTUC's liability.

The legal issues

22 The present application raises three issues. The first issue is whether Simei and/or EIN have both been double insured. The second issue is whether NTUC has properly excluded its liability to indemnify Simei and/or EIN by its provisos to the Contingent Liability Clause in its policy. The last issue is whether, if NTUC is liable to indemnify Simei and/or EIN under the terms of the NTUC Policy, SHC's right to seek a contribution or reimbursement has been precluded by its voluntary payment to Simei and/or EIN.

The proper construction of the operative clauses

23 I begin first by noting that the operative clauses in the NTUC Policy and the SHC Policies provide similar coverage in respect of workmen's compensation. The operative clauses setting out the coverage in the SHC Policies read ("SHC Operative Clause"):

> **NOW THIS POLICY WITNESSETH** that *if any workman in the Insured's employment shall sustain personal injury by accident or disease caused during the Period of Insurance and arising out of and in the course of his employment by the Insured [EIN or Simei] in the Business*, the Company will subject to the terms exceptions conditions and warranties, and any memorandum if applicable, contained herein or endorsed hereon (all of which are hereinafter collective referred to as the Terms of the Policy) indemnify the Insured against all sums for which the Insured shall be liable to pay compensation either under the Legislation or at Common Law, and will in addition pay all costs and expenses incurred by the Insured with the written consent of the Company. [emphasis added]

The operative clause in the NTUC policy setting out the coverage reads ("NTUC Operative Clause"):

> **NOW THIS POLICY WITNESSETH** that *if any workman in the Insured's employment shall sustain personal injury by accident or disease caused during the Period of Insurance and arising out of and in the course of his employment by the Insured [Pan-United and subsidiaries, subsequently extended to all tiers of sub-contractors, which includes EIN and Simei] in the Business*, the Society will subject to the terms exceptions conditions and warranties, and any memorandum if applicable, contained herein or endorsed hereon (all of which are hereinafter collective referred to as the Terms of the Policy) indemnify the Insured against all sums for which the Insured shall be liable to pay compensation either under the Legislation or at Common Law, up to $10,000,000 any one claim or series of claims arising out of any one event and will in addition pay all costs and expenses incurred by the Insured with the written consent of the Society. [emphasis added]

Thus, it is apparent that the words in the operative clauses of the NTUC and SHC policies cover the same type of risk *i.e.* the risk of a claim by the insured's own employee arising from personal injuries sustained in the course of his employment by the insured. Since the NTUC Policy applies to Simei and EIN by virtue of the expansion of coverage to "all tiers" of sub-contractors and the Cross Liability Clause and it is not disputed that Simei and EIN are also insured under the SHC Policies, it is clear that they have been double insured in respect of liability for injuries of *their* employees. Since the parties have confirmed that Omar is EIN's employee and not Simei's employee, both the NTUC Policy and the SHC Policy issued to EIN were on risk insofar as EIN's liability to Omar was concerned. EIN was therefore double insured. However, as far as Simei's liability was concerned, neither the NTUC nor the SHC operative clauses applied to render the NTUC policy or the SHC policy issued to Simei on risk because Omar was not a workman in the employment of Simei, unless the insurance coverage to Simei has been separately extended by other clauses in the policy to claims by even non-employees. Unlike the NTUC policy, there is no such extension of coverage to Simei under the SHC policy for claims by a non-employee such as Omar. Unfortunately, this crucial distinction between Simei's and EIN's liability to Omar was not drawn in the course of arguments by counsel for both parties.

The proper construction of the Contingent Liability Clause in the NTUC Policy

24 In the light of the above, NTUC's argument that its policy is not on risk given that proviso (a) (see [6] above) was a condition precedent to the triggering of the coverage in the entire policy (including the NTUC Operative Clause) need only be considered insofar as *EIN's liability* is concerned. I am of the view that in order for proviso (a) to the Contingent Liability Clause to have any bite, the main provision in the Contingent Liability Clause must apply to the present case. This is because the words of the proviso limit NTUC's liability, which is set out by the main provision. In this regard, I first deal with SHC's argument that the Contingent Liability Clause only insures Pan-United and not Simei or EIN. I am unable to see why the word "insured" in the context of this clause should be so confined, when SHC readily accepts that "insured" in the context of the rest of the policy refers to Pan-United and "all-tiers" of sub-contractors. Words ought to be interpreted as having the same meaning as they have been used elsewhere in the policy: McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification (*Oxford University Press, 2007) at para 4.16.Thus, I reject this submission.

25 I am also of the view that the Contingent Liability Clause must be read to provide for an extension of coverage, over and above the coverage already provided by the NTUC Operative Clause since it expressly provides that NTUC's liability "is extended to" cover the Insured's liability for the acts of the employees of *their sub-contractors*. In its submissions, counsel for SHC referred the court to another clause which provides for an extension of the scope of coverage provided by the NTUC Policy:

> **To and from work/meal breaks including personal & public transport (including ferry) within Singapore but excluding motorcycle risk**
>
> It is hereby noted that this *Policy is extended to include* an event happening to a workman in pursuance of or arising out of and/or in the course of his employment by the Insured. Such event shall be deemed to be arising out of and in the course of his employment when occurring:
>
> Whilst the workman on any working day (including Sundays and any Public Holidays)
>
> i) is travelling (including the workman's own transport) between his place of residence/the place for meal breaks and place of employment and/or other place for the purpose of his employment
>
> ii) is travelling (including the workman's own transport) between his place of employment and place of residence/meal breaks
>
> *Provided that* any such event giving rise to a claim under this Policy is not incurred during or after any substantial interruption or deviation from the journey made for a reason or purpose unconnected with his employment which would ordinarily have materially added to the risk of injury.
>
> [emphasis added]

The words "is extended to" in this context convey the meaning that the coverage provided by the NTUC Operative Clause is extended beyond injuries to employees in the course of work, to cover employer's liability for injuries to employees while commuting to and from the work place, and during meal breaks. Similarly, in the context of the Contingent Liability Clause, the words "is extended to" must convey the meaning that the scope of coverage provided by the NTUC Operative Clause has

been expanded beyond the employer's liability for injury to employees in the course of work.

26 Thus, the Contingent Liability Clause which insures insured persons against the "acts of employees of their sub-contractors for which they may be responsible" covers a different scope of liability from that which is covered by the NTUC Operative Clause. While the word "they" is ambiguous in the sense that it is not immediately apparent whether "they" refers to sub-contractors or the Insured, I am of the view that "they" refers to the Insured. I find that the purpose of the Contingent Liability Clause is to expand the coverage afforded to Pan-United, or any other Insured person *e.g*. EIN and Simei, against liability for breaches of duties by its sub-contractors. It would be absurd for the NTUC Policy to insure an insured person against the acts of their sub-contractors' employees, for which the sub-contractor and not the insured was responsible.

27 Further, I am also of the view that the main provision in the Contingent Liability Clause should be read as extending NTUC's cover to an insured person against the risk of its sub-contractor injuring any person, *who is not the insured's own employee*. This is because the NTUC Operative Clause would already have covered the insured's liability to its own employees for injury sustained in the course of work. This must be the construction of the Contingent Liability Clause, because reasonable commercial men would not have seen the need to extend the ambit of coverage via an endorsement, in order to cover substantially the same risk already covered by the NTUC Operative Clause. In this context, I interpret the word "sub-contractors" in the Contingent Liability Clause widely, to include all tiers of sub-contractors. I am of this view because it would make no commercial sense for the Insured to be insured only against liability for the acts of its immediate sub-contractor. One can imagine a case for instance, where Pan-United, the insured, is held liable as occupiers of the premises for injuries to third parties caused by a sub-contractor, three tiers below in the hierarchy of contractual relationships, such as Hock Swee. In such a circumstance, the Contingent Liability Clause must have been intended to apply to provide Pan-United with coverage.

28 The present case is thus distinguishable from *Awang bin Dollah v Shung Shing Construction & Engineering Co Ltd* [1997] 2 SLR(R) 746, where the word "sub-contractors" was held to refer only to an immediate sub-contractor. That case concerned a workmen's compensation policy which insured a contractor against injuries to its employees in the course of employment (similar to that in the SHC Operative Clauses and the NTUC Operative Clause). It was extended by an endorsement to cover "3 General Labourers (Sub-Contractors' Workers)". These three workers were not identified. The Court of Appeal held at [55] that:

> ... Assuming that it was usual and convenient for the main contractor to take out a single policy covering all contractors including subcontractors and sub-subcontractors, it seems to us extremely odd that, in such a major contract as this, only three "General Labourers (Sub-Contractors' workers)" were covered by the policy.

The Court of Appeal also held that since there was nothing in the context of the policy which indicates that a broad construction of the word "sub-contractors" should be adopted to include all tiers of sub-contractors below, a narrower construction should be adopted. In the present case, given that the NTUC Policy has been extended to cover "all tiers" of sub-contractors, it would be incongruent to read the Contingent Liability Clause narrowly. I find that given the internal context, and the clear and unambiguous external context, "sub-contractors" in NTUC's Contingent Liability Clause ought to be read widely to include all tiers of sub-contractors.

29 While it appears at first blush strange to construe a workmen's policy to extend beyond the mere provision of coverage for the insured's liability for injury to its own employees, attempts to enlarge the insured risk covered by workmen's compensation policies are not uncommon. Workmen's

compensation insurance policies are frequently extended in an attempt (whether successful or otherwise) to provide comprehensive coverage to all contractors working on a worksite to include claims against them (not only from their own employees but from other workmen at the worksite) arising from injuries caused by acts of employees of their sub-contractors or their sub-sub-contractors for which the insured contractors may be held responsible.

30 Having construed the Contingent Liability Clause in this manner, it becomes clear that it is inapplicable to EIN. Thus, the provisos cannot possibly apply to exclude NTUC's liability. This is because EIN simply did not have a sub-contractor, whose employee had injured Omar, so as to trigger the operation of the main provision in NTUC's Contingent Liability Clause in the first place. In fact, Omar was injured by an employee of Hock Swee, a sub-sub-contractor of Simei (and not of EIN). Now that the Contingent Liability Clause is not applicable for the NTUC policy pertaining to EIN as the insured, EIN is therefore double insured by both NTUC and SHC with respect to Omar's injuries. Thus, given that SHC's policy contained a Non-contributory Clause, SHC's policy is not on risk insofar as EIN's liability to its employee, Omar, is concerned. Since the NTUC Policy did not also have an exclusion clause in the event of double insurance, NTUC is 100% liable to provide an indemnity to EIN.

31 As far as Simei is concerned, although the NTUC Operative Clause and SHC Operative Clause do not extend any insurance coverage for Simei's liability in relation to personal injuries sustained by a non-employee of Simei (such as Omar), the Contingent Liability Clause in the NTUC policy has however extended coverage to Simei for its liability to claims made by a non-employee. Thus, although Hock Swee is factually Simei's sub-sub-contractor, the main provision in NTUC's Contingent Liability Clause should apply if Simei is found liable to Omar for Hock Swee's employees' acts. In the present case, because consent judgment was entered against Simei for the acts of Ng Kia Soong, an employee of Hock Swee, it is clear that Simei is held legally responsible by way of the consent judgment for the acts of Ng Kia Soong. It is therefore necessary to consider the applicability of the provisos to the Contingent Liability Clause to Simei.

The applicability of provisos in the Contingent Liability Clause to Simei

32 Provisos (a) and (b) (see [6] above) are exclusion clauses which limit NTUC's liability to indemnify the insured person under the Contingent Liability Clause. Proviso (a) provides that an indemnity is given on the condition that the liability has not been covered by an insurance of the sub-contractors. In the present context, proviso (a) would apply if the sub-contractor (Hock Swee) has been insured against the risk of its employee (Ng Kia Soong) injuring a third party like Omar. Since no evidence was adduced before the court indicating that Hock Swee had taken out any such policy to that effect, I am of the view that proviso (a) to the Contingent Liability Clause has not been triggered.

33 Since proviso (a) is inapplicable, *a fortiori*, proviso (b) is inapplicable. Proviso (b) provides that where the insured's sub-contractor has been covered by more specific insurance, NTUC's liability to indemnify the insured for accidents caused by employees of the insured's subcontractors is limited only to the any excess beyond the limit insured under the subcontractor's more specific insurance policy. There is no evidence that Hock Swee is covered by more specific insurance. Therefore both provisos to the Contingent Liability Clause are inapplicable on the facts.

34 Since the Contingent Liability Clause covers Simei and the provisos do not operate, the NTUC Policy was on risk and NTUC was therefore liable to indemnify Simei against its liability for the personal injuries sustained by Omar.

Whether SHC may maintain a claim for reimbursement from NTUC although it has paid out

despite being under no legal obligation to do so

35 Having decided that NTUC is legally obliged to provide both EIN and Simei a full indemnity in respect of their liabilities to Omar, the next issue is whether SHC, who paid out to Simei and EIN when it was under no legal obligation to do so, may claim a contribution or reimbursement from NTUC.

36 The right of contribution exists as between co-insurers who have insured the same assured against the same risk, in respect of the same subject matter: *MacGillivray on Insurance Law Relating to All Risks Other Than Marine* (Sweet & Maxwell, 11th ed, 2008) at para 23-001 ("*MacGillivray*"). Thus, when two insurers are liable for the same loss, the insurer called upon to make payment may have the right to seek payment from the other insurer: *MacGillivray* at para 23-032. The concept of contribution is similar to another concept known as reimbursement, save for a slight difference. In the case of contribution, it is essential that both the plaintiff and defendant are jointly and/or severally liable to the same third party in respect of the same debt: see *Moule v Garrett* (1871-1872) LR 7 Ex 101 at 104; *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 ("*Bonner*") at 178 and Mitchell, *The Law of Contribution and Reimbursement* (Oxford, 2003) ("*Mitchell*") at para 1.06. In the case of reimbursement, the plaintiff and defendant do not need to be jointly and/or severally liable to the third party in respect of the same debt. It would suffice if the plaintiff is compellable or compelled under the law or by necessity to discharge the defendant's debt and was not acting officiously in so doing: *Halsbury's Laws of England*, 4th edition Reissue vol 40(1) at para 63 ("*Halsbury's Law of England*, vol 40(1)"); *cf* Goff and Jones*, The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) ("*Goff and Jones*") at para 15-001 which states that the plaintiff must have been compelled by law to make a payment in order to obtain reimbursement. An example of a claim in reimbursement is where a surety who was called upon to pay a sum of money on the default of the principal debtor or some other person who is principally liable makes a claim against the principal for a full indemnity: *Halsbury's Laws of England*, vol 40(1) at para 65. Another example may be found in *Exall v Partridge* (1799) 8 TR 308, where the claimants' goods which were on land leased to the defendants, were seized by the landlords in distress of rent. The claimant, having paid rent to obtain the release of goods, successfully obtained recoupment (another word for reimbursement) from the defendants.

37 Apart from that distinction, in substance, the two concepts are similar. In *Mitchell*, the author stated that (at para 1.03):

> Broadly speaking, English law divides claims of this sort into two types: claims for contribution and claims for reimbursement. Claims for reimbursement lie when the liabilities owed by the claimant and the defendant to the third party are such that the claimant is entitled to shift the whole burden of paying the third party onto the defendant. Claims for contribution lie where the claimant and the defendant must share the burden of paying the third party, with the result that the claimant can shift only part of this burden onto the defendant. However, there is no substantial difference in principle between contribution claims and reimbursement claims, as the basic components of each type of claim are the same, and it is only the quantum of the claimant's entitlement which distinguishes them. Consistently with this, the courts have a discretion to make 100 per cent contribution awards which are essentially identical with reimbursement awards.

Later, at para 1.20, the author said the following:

> It should be reiterated here that although English lawyers are accustomed to think of contribution and reimbursement as distinct remedies, whose award is governed by separate sets of rules, in

> reality the principles which underlie contribution and reimbursement awards are the same. The only practical difference between contribution and reimbursement claims is that a claimant bringing an action for reimbursement invariably seeks to recover the whole of his payment from the defendant, while a claimant bringing a contribution action may seek to recover some smaller proportion of his payment. But there is no reason in principle why a claimant should not recover the whole of his payment in a contribution action. To put this in another way, the courts are quite able to make 100 per cent contribution awards if they think this appropriate.

38 The remedies of contribution or reimbursement are restitutionary in nature, and are aimed at preventing unjust enrichment of a defendant who has been conferred a benefit by the plaintiff's payment: *Grupos Torras SA v Al-Sabah (No 5)* [2001] Lloyd's Rep Bank 36 at 64. Thus, the remedy of contribution or reimbursement would prevent unjust enrichment to a defendant, whose liability has been extinguished *pro tanto* by the claimant's payment to a creditor.

39 I pause to make the observation that it appears that the law may countenance a claim for contribution even where the plaintiff and defendant were under no common liability to be sued. In *Bonner*, (cited with approval in *FBI Foods Ltd – Aliments FBI Ltee v Glassner* 86 BCLR (3d) 136 ("*FBI Foods*"); *Friend v Brooker* [2009] HCA 21 at [44]; *Whitham v Bullock* [1939] 2 KB 81) Vaugham Williams LJ remarked (at 174) that there:

> is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. *The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued*. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued.
>
> [emphasis added]

Thus, in *FBI Foods*, Dillon J remarked that:

> The equitable principle requires that the burden borne by one for the benefit of others associated with him in interest, whether borne because of election by a plaintiff of choice of parties or by requirement of law as to parties to actions, be shared equally.

In *Whitham v Bullock*, the English Court of Appeal referred to the above passage in *Bonner* in a case where the lessee of land had assigned the lease as to part of the land to X and part to Y. The result was that the lessor could distrain against either X or Y for the whole of the rent but could sue to recover from each only the proportionate part of the rent. Because Y failed to pay its proportion under threat of distraint by the lessor, X paid the whole of the rent and then sought a contribution from Y. Clauson LJ held that X had an equity to recover contribution from Y because although X was not liable to be sued directly for all of the rent, the equity of X arose from payment under stress of legal process. Also, X had paid out in order not to lose its chattels which were on the premises. Clauson J held that there was sufficient "community of interest" in the two plots of the leased land. Thus, X's claim against Y for a contribution succeeded.

40 In the present case, SHC is seeking a declaration that it is entitled to a reimbursement, and in

the alternative, contribution. I have concluded above that SHC's policy is not on risk insofar as EIN's and Simei's liabilities to Omar were concerned. SHC is therefore precluded from pursuing a claim for contribution from NTUC for making payment to EIN and Simei when SHC's own policy was never at risk. It is not necessary for the present application to consider whether SHC and NTUC share sufficient "community of interest", because the parties did not proceed on that point. As stated in Friedmann, *Double Insurance and Payment of Another's Debt* (1993) 103 LQR 51 at p 53,

> Where a number of persons are potentially liable to the plaintiff, some of them may have a strong interest in settling the claim. There is also a public interest in facilitating settlement. However, a serious difficulty arises if it transpires that the party who satisfied the plaintiffs claim was not actually liable to him. In such a case the rules as to adjustment [*i.e*. contribution] among multiple debtors are inapplicable, since the payor was not a "debtor". The issue is then channelled to the general problem of payment of another's debt... and the reasonable solution is to allow the payor to recover from the real debtors. English law is not, however, very benevolent to a party who without being requested confers a benefit upon another, and since the payor did not act under legal compulsion, he may well be branded as "volunteer"...

41 The resolution of this application for reimbursement therefore turns on the issue of whether SHC indemnified Simei and EIN under legal compulsion (or factual necessity). The general rule is that since equity does not assist a volunteer, no right of contribution or reimbursement exists at law if a claimant has paid out to a creditor in excess of its legal liability voluntarily, *i.e*., in the absence of compulsion by law, which discharged the defendant's legal liability: see *Legal & General Assurance Society v Drake Insurance Co Ltd* [1992] 1 All ER 283 ("*Legal & General Assurance*"); *Moule v Garrett* (1872) LR 7 Ex 101 at 104 and *Goff and Jones* at para 15-001. In *Legal & General Assurance*, two motor insurers insured a vehicle owner against injuries caused to third parties by persons driving his car with his consent. Both insurance policies contained a clause limiting liability to its rateable proportion. The assured made a claim against one insurer. The insurer, having ascertained that its policy covered the same loss as that covered by the other insurer, paid out in full anyway and subsequently sought to recover a 50% contribution. The English Court of Appeal held that in paying in excess of its legal obligation, the paying insurer was acting as a volunteer. The English Court of Appeal also held that although under s 151 of the Road Traffic Act 1988 (c 52) (UK), an insurer was not allowed to plead any policy defence to a claim by the third party victim, s 151(7) of the same Act provided the paying insurer recourse against the assured in respect of any sum paid in excess of its liability under its policy. Since the paying insurer failed to exercise its right of recourse against the assured, the English Court of Appeal held that he was a volunteer.

4 2 *Legal and General Assurance* has been subject to much criticism, on the ground that it is unclear why a theoretical right of recourse against the assured which may prove to be worthless as a matter of fact, ought to prevent the paying insurer from exercising its right of recourse: *Colinvaux* at p 421 - 422. Indeed, I would go so far as to say that there is much to be said for encouraging insurers to pay out expeditiously, leaving disputes on liability between different insurers to be resolved at a later date, without the paying insurer's right of recourse being removed on the ground that he had acted as a volunteer: see Friedmann, *Double Insurance and Payment of Another's Debt* (1993) 103 LQR 51. However, in *Legal & General Assurance* at p 897, Lloyd LJ said the following:

> [Counsel] argued that the plaintiffs were acting very properly in not seeking to recover the excess over 50% from [the Insured], and that it would be an unmerited consequence to deprive them of their right to contribution. Insurers should not be encouraged to take every legal defence, and pursue every legal remedy which may be open to them against their assured. This is a valid point so far as it goes. But to allow a claim against the defendants based on such considerations would extend the equitable doctrine of contribution beyond any previous

authority....

43 In a subsequent case of *Drake Insurance plc v Provident Insurance plc* [2004] QB 601 ("*Drake Insurance*"), *Legal and General Assurance* was accepted as good law, but was distinguished. The facts in *Drake Insurance* were very similar to the facts in *Legal and General Assurance*, which concerned two insurers who provided third party motor insurance to the same party. However, in *Drake Insurance*, the defendant insurer obtained an arbitral award to confirm that it could avoid its policy for non-disclosure. The plaintiffs consistently but unsuccessfully attempted to encourage the defendant to discharge its contractual obligation to the assured, and therefore paid out in full to the assured. The plaintiff sought a 50% contribution from the defendant. The trial court, applying *Legal & General Assurance*, dismissed the plaintiff's claim. The English Court of Appeal, reversing the lower court decision, held that the arbitral award was not binding on the claimants, and in paying out in full, the plaintiffs were not acting as volunteers. This is because the arbitral award created an insuperable difficulty for the plaintiff to assert that the defendants were liable to indemnify the assured, and the consistent protests of the plaintiffs showed that payment had not been voluntary. The consistent protests distinguished *Drake Insurance* from *Legal & General Assurance*.

44 In the English Court of Appeal's judgment in *Drake Insurance*, Rix LJ expressed serious doubts about the holding in *Legal & General Assurance* (at [128]):

> In reaching this conclusion, I have put on one side the fact that under section 151 of the Road Traffic Act 1988 Drake could in any event have been compelled to make payment to Mr Beech once he had obtained an unsatisfied judgment against Mrs Kaur. I do so because that was not viewed as saving the situation in [*Legal & General Insurance*], *even though it is not clear to me from the judgments in that case why the merely theoretical right to recover the excess of Drake's liability under section 151(7)... should make all the difference*. [emphasis added]

Clarke LJ expressed similar views at [157] - [158]:

> 157 ... I would only say about the decision that it does seem to me to have unfortunate results if it means that an insurer, instead of making a sensible settlement with the insured and subsequently claiming contribution from a co-insurer, has to rely on the "rateable proportion" clause in order to protect its position against the co-insurer.
>
> 158 Perhaps the House of Lords will one day have an opportunity to reconsider the [*Legal and General Assurance*] case.

4 5 *Drake Insurance* has in turn been criticised by *Goff and Jones*, at para 14-036. The authors opined that:

> First, Drake Insurance's protest did not magically oblige it to make the payment. Secondly, the rateable proportion clause was not the subject of litigation in Eagle Star. Thirdly, the fact that the claimant insurer was liable to the third party for the whole loss did not mean that it could claim contribution from the co-insurer. It could have recovered the excess from the assured, as Lloyd LJ pointed out in *Legal and General*.

However, the authors of *Goff and Jones* were also of the view that the fact that the defendant insurer had an arbitral award in his favour was sufficient to justify the English Court of Appeal's conclusion. This is because if Drake had refused to pay more than 50%, the assured would have failed to recover the other 50% against Provident, who had an arbitral award in his favour (which was eventually set aside): see also *Macgillivray* at para 23-051.

46 From the foregoing discussion, it is apparent that regardless of the utility of legal compulsion as a touchstone of voluntariness, it is not sufficient to explain every contribution and reimbursement award. Before it was set aside, the arbitral award in *Drake Insurance*, while binding upon the assured and Provident, did not bind Drake. Drake was thus not compelled by law, but by necessity, in the circumstances, to fully indemnify the assured. Furthermore, the requirement of legal compulsion is difficult to sustain in a case where a claimant has freely undertaken his legal liability to its creditor. In double insurance cases, usually, two indemnity insurers would have freely and independently chosen to indemnify the same assured. It would be difficult to justify why either of the insurers would be entitled to contribution using the legal compulsion analysis, since they have both chosen voluntarily to expose themselves to their legal obligations.

47 Turning to the present case, like the English Court of Appeal in *Drake Insurance*, I am of the view that SHC's right to reimbursement or contribution is not extinguished because it has fully indemnified EIN in respect of its liability to Omar in Suit 527 of 2006 (but not Simei, see below at [49]) out of practical necessity despite the legal efficacy of its Non-contributory Clause in the EIN policy issued by it. On the facts, SHC has consistently protested against bearing sole liability for indemnifying EIN. I am therefore satisfied that SHC's indemnification of EIN's liability was not voluntary nor without regard to the absence of legal liability to EIN on account of its Non-contributory Clause. I based my decision on a statement of agreed facts submitted by the parties to confirm, *inter alia*, the steps SHC had taken to engage NTUC to provide EIN a full indemnity *before* SHC paid out the amount to Omar.

48 The parties agreed that not long after Omar commenced the proceedings in Suit 527 of 2006, Pan-United, Simei and EIN made their respective claims against SHC and NTUC. NTUC agreed to have conduct of only Pan-United's defence. Thereafter, SHC's solicitors wrote to NTUC's solicitors, requesting NTUC to have conduct of Simei's and EIN's defences, citing the Non-contributory Clause in the SHC Policies. NTUC's solicitors replied, refusing SHC's request, on the ground that its policy did not cover Simei and EIN, relying upon NTUC's Contingent Liability Clause. NTUC was added as a third party to Suit 527 of 2006, wherein SHC sought declarations from the court similar to those sought today. Those proceedings were subsequently discontinued without prejudice to SHC and NTUC's respective rights and defences. SHC later commenced the present proceedings. I am of the view that SHC's conduct throughout showed that its payment to EIN was not voluntary. If SHC, like NTUC, refused to provide Simei and EIN with an indemnity on the ground that they have submitted a claim against the wrong insurer, it would have been detrimental to SHC's business reputation. I also do not see why SHC ought to be penalised on the ground that it paid out expeditiously, and for choosing to resolve the dispute between itself and NTUC at a later date. In the circumstances, I find that SHC is entitled to a full reimbursement from NTUC in respect of EIN's liability to Omar.

49 If SHC has paid out in respect of Simei's liability, I am of the view that SHC is not entitled to a reimbursement from NTUC. In the present case, SHC simply did not adduce evidence to the effect that it had taken any steps to ascertain whether Simei was liable in its capacity as an employer, and in what capacity it has conceded liability to Omar. Thus, SHC paid out, without regard as to whether its policy was on risk, or even potentially on risk. Although the NTUC Policy was on risk, by virtue of Simei's liability being covered by the Contingent Liability Clause, SHC should not be entitled to a reimbursement.

50 However, in any event, for the purposes of the present application, I declare that NTUC is liable for reimbursing SHC for the full amount it has paid to Omar in respect of EIN's liability in Suit 527 of 2006, *i.e.* $317,664.70. This is because I find that the full sum of $317 664.70 must have been paid by SHC in full indemnification of EIN's liability. The parties have agreed that Simei and EIN have admitted to liability to Omar jointly, and thus it was impossible to apportion the liability for the amount

of $317,664.70 between Simei and EIN. However, there was nothing on the facts to prevent SHC from paying out the full sum of $317,664.70 in respect of EIN's liability as a joint tortfeasor. In so doing, SHC would have also discharged Simei's liability to Omar under the consent judgment entered in Suit 527 of 2006. It was EIN's or Simei's (or both's) prerogative to seek an indemnity, however much the amount, from SHC, as it deemed fit. Since Simei would have no legal right to seek an indemnity from SHC under the terms of the SHC Policies, I am of the view that the indemnity sought against SHC must have been in respect of EIN's liability. Having arrived at this conclusion, it must necessarily follow that SHC may seek a reimbursement from NTUC, for the amount of $317,664.70 which SHC has paid out in respect of EIN's liability as a jointly and severally liable tortfeasor.

Alternative analysis where proviso(a) in NTUC's Contingent Liability Clause applies

51 For completeness, I will now analyse the alternative factual scenario where I assume that Hock Swee has been separately insured against liability for claims by a non-employee of Hock Swee, such as Omar. In this alternative scenario, proviso (a) in NTUC's Contingent Liability Clause will then apply with the result that the NTUC policy will *not* be on risk to cover Simei for claims made against it by a non-employee of Simei *i.e*. Omar. The outcome is that SHC will *not* be able to seek any indemnity or reimbursement from NTUC for any insurance payment made out by SHC to Simei. However, this possibility will make no difference to the final outcome because (as has been explained above) SHC's policy does not extend to providing insurance coverage for Simei for claims made against it by persons who are *not* employees of Simei. Strictly therefore, SHC would *not* have paid out any insurance monies on behalf of Simei, which was never covered by SHC for the injuries to Omar. Accordingly, there is no contribution or reimbursement that SHC can seek from NTUC to begin with and therefore, it would not have mattered to SHC that proviso (a) applied in respect of the NTUC policy rendering NTUC being not at risk to indemnify Simei for Omar's claims. Under these circumstances, SHC would have paid out the full sum of $317,664.70 only in respect of EIN's liability (and not Simei's liability) as a joint tortfeasor. In so doing, SHC would have also discharged Simei's liability to Omar under the consent judgment entered in Suit 527 of 2006. Accordingly, the indemnity sought against SHC must have been in respect only of EIN's liability, for which the NTUC policy insuring EIN remained fully at risk. The Non-contributory Clause in the SHC policy covering EIN was effective against NTUC, there being double insurance in the case of EIN. It must necessarily follow that SHC may seek a reimbursement from NTUC, for the amount of $317,664.70 which SHC would have paid out in respect of EIN's liability as a jointly and severally liable tortfeasor. Even with this alternative factual scenario, the same conclusion is reached.

Conclusion

52 In the light of the above, I declare that NTUC is legally obligated to reimburse SHC for the sum of $317,664.70, which was paid by SHC to indemnify EIN and Simei for their liability arising out of Suit 527 of 2006.

53 The costs of this application are to be borne by NTUC.