IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 39

Suit No 647 of 2016
(Summons No 4880 of 2016)

Between

(1) Motor Insurers' Bureau of Singapore
(2) Koo Siew Tai

… *Plaintiffs*

And

AM General Insurance Bhd (formerly known as Kurnia Insurans (Malaysia) Bhd)

… *Defendant*

And

Liew Voon Fah

… *Third Party*

JUDGMENT

[Insurance] — [Motor vehicle insurance] — [Motor Insurers' Bureau]
[Insurance] — [Motor vehicle insurance] — [Insurer Concerned]
[Contract] — [Remedies] — [Damages]

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Motor Insurers' Bureau of Singapore and another
v
AM General Insurance Bhd
(formerly known as Kurnia Insurans (Malaysia) Bhd)
(Liew Voon Fah, third party)

[2018] SGHC 39

High Court — Suit No 647 of 2016 (Summons No 4880 of 2016)
Quentin Loh J
17 April 2017, 28 August 2017; 9 October 2017

23 February 2018 Judgment reserved.

Quentin Loh J:

Introduction

1 These proceedings arise from an accident which occurred over 10 years ago on 8 December 2007. The third party, Mr Liew Voon Fah ("Liew"), was riding his motorcycle in Singapore with the second plaintiff, his wife, Mdm Koo Siew Tai ("Koo") riding pillion, when they met with a road traffic accident. Liew's motorcycle was insured by the defendant, AM General Insurance Bhd ("AM Gen"), at the time. Koo brought an action against Liew for her injuries and she obtained final judgment against Liew on 21 February 2011. Sadly, that sum remains unpaid to date because of a disagreement between the Motor Insurers' Bureau of Singapore ("the MIB") and AM Gen.

2 Suit No 647 of 2016 ("Suit 647") was commenced by the plaintiffs on

21 June 2016 to compel AM Gen to satisfy the judgment debt (see [7] below). The plaintiffs subsequently applied for determination of a question of law under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court"). Their application was strongly opposed by AM Gen, which takes the position that Koo lacks *locus standi* in Suit 647 and that the MIB cannot recover substantial damages, since payment of the judgment debt will benefit Koo rather than the MIB.

Facts

Background to the dispute and procedural history

3 As is usual in such cases, the facts are within a fairly narrow compass and not in dispute. Koo and Liew are both Malaysian citizens. Koo was 34 years old and Liew was 37 at the time of the accident; they are now 44 and 47 respectively.

4 On 8 December 2007, Liew was taking Koo to work on his Malaysian-registered motorcycle (registration number JGT 6125), when he met with an accident along Ayer Rajah Expressway. His motorcycle skidded and Koo was flung off the motorcycle onto the road. She sustained serious head injuries (including skull fractures and loss of brain tissue) and was conveyed to National University Hospital for emergency treatment, following which she was discharged for treatment in Malaysia.[1] Koo also suffered post-traumatic epilepsy as a result of the accident.[2] The motorcycle was insured under a policy of insurance number JVA 0647209 ("the Policy") issued by AM Gen (then known as Kurnia Insurans (Malaysia) Bhd) at the time of the accident.[3] The

1 Koo's AEIC in Suit 613/2009, para 3.

2 Koo's affidavit in OS 838/2010, affirmed on 13 May 2010, para 4.

Policy did not cover passenger liability.

5 On 16 July 2009, Koo commenced Suit No 613 of 2009 ("Suit 613") in Singapore against Liew for compensation for her injuries. AM Gen instructed lawyers to represent Liew in Suit 613. However, the lawyers subsequently discharged themselves on 5 April 2010 on AM Gen's instructions that the Policy did not cover passenger liability.[4]

6 On 20 April 2010, AM Gen took out Originating Summons No 383 of 2010 ("OS 383") seeking the following reliefs:

> (a) a declaration that, under the terms of the Policy, AM Gen was not liable to satisfy any judgment sum for damages, interests and costs as might be found or adjudicated to be payable by Liew to Koo in Suit 613; and
>
> (b) a permanent injunction restraining Koo and Liew from making any claim against the MIB in respect of any judgment sum for damages, interest or costs which might be awarded by the court in favour of Koo against Liew in Suit 613.

7 It appears that AM Gen applied for the permanent injunction above because it expected that if the MIB were to compensate Koo, the MIB would seek an indemnity from AM Gen under the "Insurer Concerned" principle.[5] OS 383 was dismissed with costs by Judith Prakash J (as she then was) on 2 July

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3 Koo's affidavit in Suit 647/2016, affirmed on 6 October 2016, para 2.

4 Minute Sheet dated 5 April 2010 in Suit 613/2009 (Summons 1229/2010).

5 Sureshkeris s/o Kerisnan's affidavit in OS 383/2010, filed on 21 April 2010, paras 26–28.

2010. AM Gen did not appeal, nor did it take any further steps to defend Liew in Suit 613. On 10 August 2010, interlocutory judgment was entered against Liew with damages to be assessed. On 21 February 2011, final judgment was entered against Liew with damages in the sum of S$788,057.73, plus interest, costs and disbursements ("the Judgment Debt").[6] Liew has not satisfied the Judgment Debt to date.

8 On 26 April 2012, Koo filed Originating Summons No 404 of 2012 ("OS 404") against the MIB, seeking satisfaction of the Judgment Debt from the MIB pursuant to its obligations under an agreement between the MIB and the Minister for Finance of the Republic of Singapore, which I define at [20] below as "the Principal Agreement". On 8 June 2012, the MIB applied for OS 404 to be struck out and dismissed under O 18 r 19 of the Rules of Court on the basis, *inter alia*, that Koo, not being a party to the Domestic Agreement, had no cause of action or *locus standi* against the MIB.[7] This application to strike out failed. In the alternative, the MIB applied for and was granted a stay of OS 404 pending the determination of other proceedings which were ongoing at the time and which, though factually unrelated, stood to have a bearing on the legal principles applicable to OS 404. These were the proceedings in Originating Summons No 808 of 2011, which was determined at first instance on 4 October 2012 (see *Pacific & Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v Motor Insurers' Bureau of Singapore* [2013] 1 SLR 341 ("*Pacific & Orient*"). That decision was upheld on appeal on 29 April 2013.

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6 Koo's affidavit in Suit 647/2016, affirmed on 6 October 2016, para 7.

7 Chua Peng Cher's affidavit in OS 404/2012, sworn on 8 June 2012, para 12.

9 On 19 November 2013, the MIB joined AM Gen as a third party in OS 404, claiming that it was entitled to be indemnified by AM Gen against Koo's claim pursuant to the Principal Agreement and two other agreements defined at [21] and [22] below as "the Domestic Agreement" and the "Special Agreement".

10 In response to the MIB's argument that Koo lacked *locus standi* in OS 404 due to privity, Koo's solicitors wrote to the Ministry of Finance on 28 January 2015 requesting the Minister for Finance to compel the MIB to honour the Principal Agreement and satisfy the Judgment Debt.[8]

11 On 13 March 2015, the Public Trustee's Office ("the Public Trustee") replied to Koo's solicitors, referencing the letter to the Ministry of Finance and stating that their letter had been referred to the Public Trustee. The Public Trustee stated that having carefully considered their letter, the enclosed documents and case law, it disagreed with Koo's interpretation of the Principal Agreement and there was no basis for the Public Trustee to be joined as a party to OS 404.[9] Although the Public Trustee was not before me, unless there was some very good reason for their taking such a position which I have failed to appreciate, I do not think the Public Trustee was entitled to wash its hands of this matter (see [49]–[51] and [55]–[59] below). The Public Trustee also stated, correctly in my view, that the Minister for Finance had assigned all his rights and duties under the Principal Agreement to the Public Trustee and there was no basis to join the Minister for Finance to the proceedings (see [20] below).

12 On 19 October 2015, the court ordered a stay of OS 404 by consent of

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8 Koo's affidavit in Suit 647/2016, affirmed on 6 October 2016, p 123.

9 Koo's affidavit in Suit 647/2016, affirmed on 6 October 2016, p 137.

Koo and the MIB. Koo and the MIB then together commenced Suit 647 against AM Gen on 21 June 2016, by which they seek to compel AM Gen to satisfy the Judgment Debt in Koo's favour.

13 On 7 October 2016, Koo and the MIB filed Summons No 4880 of 2016 ("SUM 4880") in Suit 647 under O 14 of the Rules of Court. SUM 4880 was amended on 31 August 2017. As amended, SUM 4880 is an application for:

(a) a determination of whether AM Gen is the "Insurer Concerned" as defined in cl 1 of the Domestic Agreement, and if so, whether AM Gen is obliged to satisfy the Judgment Debt; and

(b) final judgment to be entered in favour of Koo or, in the alternative, the MIB, in the sum of S$788,057.73 and interest thereon at 5.33% per annum from the date of issuance of the writ in Suit 647 to the date of final judgment;

(c) in the alternative, interlocutory judgment to be entered in the MIB's favour for damages to be assessed; and

(d) in the further alternative, an order of specific performance of the Special Agreement read with the Domestic Agreement, requiring AM Gen to pay the sum stated in (b) above to Koo within 14 days.

14 At the hearing before me on 9 October 2017, the plaintiffs applied for and were granted leave to file an affidavit describing the MIB's physical size and operations. The plaintiffs filed the affidavit of Mr Ng Choong Tiang on 19 October 2017. On 23 October 2017, Mr Liew Teck Huat, counsel for AM Gen, asked for leave to file an affidavit in response. This was followed up on 1 November 2017 with the draft affidavit AM Gen proposed to file. In an effort

to avoid factual disputes, I asked the parties to see if they could agree on what I thought would be uncontroversial facts:

(a) the MIB currently occupies office space of approximately 400 square feet at 180 Cecil Street, #15-02 Bangkok Bank Building, Singapore 069546;

(b) the MIB has occupied this office since 2014; and

(c) the MIB is currently staffed by one Manager/Secretary and two support staff.

15 On 17 November 2017, counsel for AM Gen wrote to say, in gist, that the above facts were not really relevant since the true question was whether the MIB, notwithstanding that it was a small organisation with a small office, had the financial means to manage claims such as the present one. AM Gen reiterated its request to file an affidavit in response. On 27 November 2017, I gave leave to AM Gen to do so and directed that this affidavit be filed within two weeks. That same day, AM Gen filed the affidavit of Mr Hwi Thiam Seng, which had been affirmed earlier on 25 October 2017. In any event, both these affidavits were peripheral to the issues at hand and I have not relied upon them in coming to my decision.

16 For completeness, I should add that Koo was working in Singapore at the time of the accident but her employment was terminated after the accident and she and Liew both now reside in Malaysia.

The legal framework

17 In order to understand the claims that arose out of the accident, it is

necessary to briefly reiterate the legal framework governing the relationship between the MIB and Malaysian insurers which have insured vehicles involved in traffic accidents in Singapore. (This is described in greater detail in *Pacific & Orient* at [8]–[17]).

18 As I stated in *Pacific & Orient* at [8], "the ubiquitous motor vehicle, indispensable to modern life, has an unfortunate inherent capacity to injure, maim or cause the death of other road users or pedestrians as well as inflict property damage. All too often, more than one category of harm is caused". This gave rise to social legislation like the English Road Traffic Act of 1930 (c 43) (UK), which ensures that no motor vehicle is driven without compulsory insurance cover for causing personal injury or death to a third party arising out of the negligent use of the motor vehicle. Our equivalent is the Motor Vehicles (Third Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) ("the MV(TP)A"). The MV(TP)A provides that where, for one reason or another, the insurer is able to avoid or deny liability or cover to the vehicle owner or the driver, the insurer must nonetheless first satisfy any judgment for death or personal injury entered against its insured owner or driver. Thereafter, the insurer is entitled to proceed to recover that sum from its insured. An important requirement placed on the victim is that he has to give notice of his claim to the insurer.

19 However, even with the enactment of the MV(TP)A in 1960, there were still situations where a victim would be left without compensation, *eg*, in a hit-and-run accident where the driver could not be traced, or where the terms of the driver's insurance policy excluded liability (see *Halsbury's Laws of Singapore* vol 13(2) (LexisNexis, 2016 Reissue) at para 155.719). A further safety net was needed. That safety net was the MIB scheme.

20 On 22 February 1975, the MIB entered into a Memorandum of Agreement with the Minister for Finance of the Republic of Singapore. The agreement sets out the circumstances under which the MIB has an obligation to compensate victims of road accidents (essentially where there is no effective insurance for the vehicle involved, where the driver of the vehicle cannot be traced and where the insurer has become insolvent). I hereafter refer to this agreement, as supplemented by a Supplemental Agreement on 24 September 1998 and a Further Supplemental Agreement dated 13 August 2003, as "the Principal Agreement". It should be noted that the Minister for Finance assigned its rights, benefits, interests, privileges, powers, remedies and duties under the Principal Agreement to the Public Trustee of the Republic of Singapore by way of a Deed of Assignment dated 13 August 2003.[10]

21 Also on 22 February 1975, the MIB entered into another Memorandum of Agreement with all insurance companies and Lloyd's underwriters which sold motor insurance policies in Singapore (which, as supplemented by a Supplemental Agreement dated 24 September 1998, I shall refer to as "the Domestic Agreement"). The Domestic Agreement specifies the situations and conditions under which an insurance company is liable to compensate victims of a traffic accident.

22 The Domestic Agreement is signed only with insurers registered in Singapore. To ensure that Malaysian insurers, whose insured vehicles enter Singapore, are subject to the same obligations, the MIB signs special agreements with individual Malaysian insurers by which the latter agree to be bound by the obligations in the Domestic Agreement in the same way as a Singaporean insurer. Malaysian vehicles driven into Singapore must be insured

[10] Koo's affidavit in Suit 647/2016, affirmed on 6 October 2016, p 161.

by an insurer which has entered into such an agreement with the MIB in order to be exempt from the statutory requirements relating to compulsory insurance under the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) (see s 3 of the Motor Vehicles (Third-Party Risks and Compensation) (Exemption) Notification (GN No S 526/1998)). In this case, the relevant agreement was signed between the MIB and AM Gen (then known as Industrial & Commercial Insurance (Malaysia) Bhd) on 26 October 1987 ("the Special Agreement"). Clause 2 of the Special Agreement states:

> The Company … covenants with the [MIB] that it will comply with every obligation imposed upon Members of the [MIB] by [the Domestic Agreement] in every respect as if the Company were an "Insurer" for the purposes of the said Agreement and in particular undertakes and binds itself to the [MIB] to make any payment demanded under Clauses 6 and 7 of the said Agreement and to furnish the Council of the Bureau such particulars of its premium income as the Council may require.

23 I should add that the Special Agreement is not unprecedented or novel. The Motor Insurers' Bureau of West Malaysia ("MIBWM") was set up in 1968, before the Singapore MIB was set up in 1975. Because the Malaysian equivalent of the Domestic Agreement was only signed with insurers registered in Malaysia, the MIBWM had no recourse against Singaporean insurers in relation to injuries or deaths caused by Singapore vehicles on West Malaysian roads. Malaysian insurers were concerned that they would have to bear the brunt of personal injury or death claims in Malaysia involving Singapore vehicles where the Singapore insurers were entitled to avoid liability under their policies. The MIBWM therefore entered into "special agreements" with motor insurers in Singapore, pursuant to which the latter agreed to be bound by MIBWM's memorandum and articles of association and the Malaysian equivalents of the Principal and Domestic Agreements (see [11] and [17] of *Pacific & Orient*). When Singapore set up the MIB in 1975, the act of entering into Special

Agreements with Malaysian insurers was an established practice and precedent.

The parties' cases

The plaintiffs' case

24 The plaintiffs submit that Suit 647 is suitable for summary judgment because there is no material dispute of fact, all necessary evidence is documentary in nature, and the outcome hinges on the proper construction of the Principal, Domestic and Special Agreements.[11]

25 As for the questions framed in SUM 4880, the plaintiffs submit, on the authority of *Pacific & Orient*, that AM Gen is the "Insurer Concerned" for the purposes of the Domestic Agreement.[12] Clause 1 defines "Insurer Concerned" as:

> the Insurer who at the time of the accident which gave rise to a liability required to be insured by the Compulsory Insurance Legislation was providing an insurance against such liability in respect of the vehicle arising out of the use of which the liability of the Judgment Debtor was incurred.

Clause 1 further states that an insurer will be the "Insurer Concerned" notwithstanding that:

> some term, description, limitation, exception or condition (whether express or implied) of the insurance or of the proposal form on which it is based expressly or by implication excludes the Insurer's liability whether generally or in the particular circumstances in which the Judgment Debtor's liability was incurred …

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11 Plaintiffs' submissions in SUM 4880/2016 dated 13 April 2017, para 10.

12 Plaintiffs' submissions in SUM 4880/2016 dated 13 April 2017, para 14.

26 The plaintiffs therefore submit that AM Gen is liable to satisfy the Judgment Debt, notwithstanding the fact that the Policy does not cover passenger liability, pursuant to cl 3(1) of the Domestic Agreement (read with the Special Agreement):

> If a Judgment is obtained in Singapore against any person (hereinafter referred to as the "Judgment Debtor") in respect of liability required to be insured by the Compulsory Insurance Legislation the Insurer Concerned will satisfy the Original Judgment Creditor if and to the extent that the Judgment has not been satisfied by the Judgment Debtor within twenty-eight days from the date upon which the person in whose favour it was given is entitled to enforce it.

27 As regards *locus standi*, the plaintiffs accept that Koo has no *locus standi* under the common law because she is not a party to the Principal, Domestic or Special Agreements.[13] However, they submit that Koo is entitled to maintain a joint action with the MIB against AM Gen because she is a beneficiary of an implied trust arising out of the Domestic Agreement, in relation to which the MIB is the trustee.[14]

28 The MIB, on the other hand, has the requisite *locus standi* to sue AM Gen on two bases: as a contractual counterparty to the Domestic and Special Agreements, and in equity as trustee for Koo. In the former situation, the plaintiffs submit that the MIB is entitled to substantial damages on the broad ground set out in *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*").[15] In the latter situation, the plaintiffs submit that the MIB is

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13 Plaintiffs' supplementary submissions in SUM 4880/2016 dated 17 April 2017, para 7.

14 Plaintiffs' submissions in SUM 4880/2016 dated 13 April 2017, paras 24–33.

15 Plaintiffs' supplementary submissions in SUM 4880/2016 dated 17 April 2017, paras 11, 13, 18 and 22.

entitled to either specific performance on the basis of the principle in *Beswick v Beswick* [1968] AC 58 ("*Beswick*"), or to recover substantial damages on behalf of Koo on the basis of the principle in *Lloyd's v Harper* (1880) 16 Ch D 290 ("*Lloyd's*").

The defendant's case

29 AM Gen contends that Suit 647 is not suitable for summary judgment under O 14 r 12 of the Rules of Court because the questions stated by the plaintiffs are not properly framed and do nothing to resolve the issue in the action; SUM 4880 raises questions of public importance; there are substantial factual disputes; and SUM 4880 does not dispose of the whole matter or save time or costs.[16]

30 As for the merits of SUM 4880, AM Gen accepts that it is the "Insurer Concerned" in relation to the accident which occurred, within the meaning of cl 3 of the Domestic Agreement.[17] However, it opposes SUM 4880 for the following reasons:

(a) First, Koo has no *locus standi* to sue AM Gen directly, not being a party to the Principal, Domestic or Special Agreements.[18] As for the implied trust argument, such an implied trust can only arise in the context of the Principal Agreement, whereas AM Gen's purported liability to satisfy the Judgment Debt as Insurer Concerned arises under the Domestic Agreement.[19]

16 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, paras 127, 133, 264, 257 and 283.

17 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 284.

18 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 144.

19 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, paras 150 and 157.

(b) Secondly, the MIB has suffered no actionable loss and neither the narrow nor broad ground in *Family Food Court* applies.[20]

(c) Thirdly, under the terms of the Principal and Domestic Agreements, AM Gen's liability to satisfy the Judgment Debt does not arise until after the MIB has satisfied the Judgment Debt. It is only once the MIB has compensated the victim that it can then seek an indemnity from the Insurer Concerned.[21]

31 On that note, AM Gen submits that specific performance is unavailable because there is no reciprocity. In particular, the MIB is unwilling to satisfy the Judgment Debt, which it is purportedly obliged to do under cl 3 of the Principal Agreement:[22]

> If judgement in respect of any liability which is required to be covered by a policy of insurance under the [MV(TP)A] is obtained against any person or persons in any Court in Singapore and either at the time of the accident giving rise to such liability there is not in force a policy of insurance as required by the [MV(TP)A] or such policy is ineffective for any reason (including the inability of the insurer to make payment) and any such judgement is not satisfied in full within twenty-eight days from the date upon which the person or persons in whose favour such judgement was given became entitled to enforce it then the [MIB] will, subject to the provisions of this Part … pay or cause to be paid to the person or persons in whose favour such judgement was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such portion thereof as relates to such liability) or satisfy or cause to be satisfied such judgement.

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20 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 214.

21 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 229.

22 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 232.

32 AM Gen also submits that specific performance is unavailable because damages are not inadequate, in that Koo would be adequately compensated if only the MIB satisfied the Judgment Debt.[23]

33 AM Gen has joined Liew as a third party to Suit 647 on the basis that it is entitled to be indemnified by Liew against the plaintiffs' claim and the costs of Suit 647, or to contribution from Liew to the extent of the Judgment Debt.[24] However, Liew did not participate in the proceedings in SUM 4880 before me and did not tender any submissions. The questions framed for determination in SUM 4880 relate solely to whether the plaintiffs may seek satisfaction of the Judgment Debt from AM Gen, and do not concern Liew.

Issues to be determined

34 It must be noted at the outset that the first part of the Plaintiffs' first issue for determination, *viz*, whether AM Gen is the "Insurer Concerned" as defined in cl 1 of the Domestic Agreement (see [13(a)] above), turned out to be uncontested. Both parties accept that AM Gen is the "Insurer Concerned" for the purposes of the Domestic Agreement. It is also important to note that Mr Liew conceded that if the MIB were to pay the Judgment Debt to Koo, it would "have a full right of indemnity against [AM Gen] on the basis of [*Pacific & Orient*]".[25] I need only confirm that these two concessions by Mr Liew are correct and unarguable otherwise.

35 However, AM Gen strenuously maintains that the MIB has to pay Koo first, and only after it has done so does the MIB's right to an indemnity or

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23 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 246.

24 Third Party Notice.

25 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 239.

reimbursement from AM Gen arise under the Domestic Agreement and Special Agreement. On the second part of the first issue put forward by the Plaintiffs (see [13(a)] above), AM Gen contends that since the MIB has not satisfied Koo's judgment, there is no liability on AM Gen's part to indemnify or reimburse the MIB under the Domestic Agreement and Special Agreement. I will deal with this second part below.

36 It will be apparent that there is some disjoint between the issues actually in dispute (as seen from the parties' respective positions) and the questions framed for determination. The question which is framed for determination – namely, whether AM Gen is the Insurer Concerned – is not disputed by AM Gen. The real dispute centres on whether Koo has *locus standi* to sue AM Gen, whether AM Gen is liable to satisfy the Judgment Debt and whether the MIB is entitled to substantial damages. For this reason, the defendant submits that the questions framed by the plaintiffs "do nothing to resolve the issue in the action" because they do not put the legal bases of the plaintiffs' claim (particularly, that of an implied trust and the MIB's entitlement to substantial damages) before the court.[26] For the same reason the defendant submits that SUM 4880 does not dispose of the whole matter or save time or costs.[27]

37 Order 14 r 12(1) of the Rules of Court states:

> The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter where it appears to the Court that —
>
> > (*a*) such question is suitable for determination without a full trial of the action; and

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26 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 127.

27 Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 281.

> (*b*) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

38 Order 14 r 12(1) enables the court to determine, "of its own motion", any question of law or construction of any document where such determination will fully determine the entire cause or matter or any claim or issue therein. In my view, the real issues between the parties are as follows:

(a) whether the plaintiffs have *locus standi* to sue in Suit 647;

(b) whether AM Gen is contractually obliged to satisfy the Judgment Debt; and

(c) if so, what relief the plaintiffs may obtain.

39 In my view, a determination of these issues would dispose of Suit 647 in large part (at least as between the plaintiffs and the defendant) if not in whole, and I see no reason not to determine them. Both the plaintiffs and the defendant dealt with these issues at length in their respective submissions, and I am satisfied that they had ample opportunity to be heard on them, as is required under O 14 r 12(3). In my view, this is a case in which determination under O 14 r 12 is appropriate. I will take the defendant's other objections in turn.

40 First, the defendant submits that SUM 4880 raises questions of public importance. It will determine, for the first time, whether the victim of a traffic accident involving a motor vehicle without insurance or effective insurance coverage can sue the MIB directly (whether via an implied trust or otherwise), and whether the MIB can compel the Insurer Concerned to pay the judgment debt under cl 3 of the Domestic Agreement without first paying the judgment creditor.[28] While I agree that the issues framed are questions of public

importance, in that they will clarify the procedure for victims of traffic accidents involving Malaysian vehicles to obtain compensation, I do not think that renders them unsuitable for determination under O 14 r 12.

41 Some cases throw up questions of law which bear a strong nexus to the factual context. In such cases the court will generally be in a better position to answer the questions of law having had the benefit of the factual evidence emerging at trial. The questions of law may also evoke public policy concerns which the court can better appreciate through the evidence of witnesses deeply familiar with that industry or topic. For example, in *Obegi Melissa and others v Vestwin Trading Pte Ltd and another* [2008] 2 SLR(R) 540 ("*Obegi*"), the court was faced with the question whether a party which had discarded certain office documents could be regarded to have abandoned and thus relinquished ownership of those documents and their contents. If so, another party which had retrieved those documents from the rubbish collection point of the building where the office unit was located and had used the information contained therein would not be liable for conversion or theft. The Court of Appeal stated at [40]:

> … In *Lim and Tan Securities Pte v Sunbird Pte Ltd* [1991] 2 SLR(R) 776, Chan Sek Keong J (as he then was) held at [22] that "the novelty of the legal issues and also the uncertainty of the factual issues that ha[d] become apparent" warranted a full trial in that case. As this court pointed out in *Tat Lee Securities Pte Ltd v Tsang Tsang Kwong* [1999] 3 SLR(R) 692, the O 14 r 12 procedure is not appropriate where the law relating to the issues in dispute is unclear and more evidence is needed before those issues can be satisfactorily determined. The present suit similarly raised novel legal issues and required a full examination of all the relevant facts. It was thus unsuitable for determination under O 14 r 12.

42 In *Obegi*, rubbish disposal raised "the issue of protecting the privacy of individuals and business entities", which was "a matter of considerable public

[28] Defendant's submissions in SUM 4880/2016 dated 12 April 2017, paras 273–275.

importance and should not be decided summarily" (at [42]). The Court of Appeal strongly emphasised the nexus between the legal and factual aspects of the case, observing that the suit "raised novel legal issues and required a full examination of all the relevant facts" (at [40]), that "several important findings of fact [needed] to be made before the … claim … [could] be properly determined" (at [42]), that "[t]he resolution of these factual issues [might] be necessary to determine precisely which party had ownership or possession of the [d]ocuments at the time they were retrieved" (at [42]), that "close scrutiny of the factual circumstances [was] necessary before it [could] be ascertained whether equity [might] be or [had] been properly invoked to protect the confidential information allegedly contained in the [d]ocuments" (at [43]), and that "[o]n a full consideration of the facts, the use of the [d]ocuments … [might] present novel questions of law" (at [43]).

43 Likewise, in *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch) and another* [2015] 2 SLR 540, the High Court declined to use the O 14 r 12 procedure because there were "a number of important factual findings that [needed] to be made before the questions … [could] be answered", and the "lack of expert evidence on industry practice [left] the court ill-equipped to answer the questions" (at [38]).

44 This is not such a case. As stated above, the facts are within a narrow compass and not disputed. The questions of law which arise for decision are not specially related to the facts or dependent on the outcome of any factual dispute. In my view, a trial judge would not be in a better position to determine the questions posed purely by virtue of having heard the evidence of the witnesses. Nor are the questions such as would benefit from the insight of expert witnesses or witnesses intimately acquainted with the industry; they primarily depend on

a construction of the contractual documents and an application of legal principles.

45 Secondly, the defendant submits that there are substantial factual disputes in Suit 647. In particular, it submits that the plaintiffs are estopped by convention from contending that Koo has *locus standi* as the beneficiary of an implied trust arising from the Domestic and/or Special Agreements, because:

(a) Koo took the position in her solicitors' letter to the Minister for Finance on 28 January 2015 that the Minister for Finance should compel the MIB to pay Koo (see [10] above) and is "therefore estopped from taking a different position in this action".

(b) The MIB denied liability to satisfy the Judgment Debt in OS 404 on the basis that Koo had no *locus standi* to sue it, not being a party to the Domestic Agreement (see [8] above), and cannot now contend that it is Koo's trustee under the Domestic and/or Special Agreements and that she has *locus standi* to sue in Suit 647.

AM Gen reasons that estoppel by convention is an "intensely factual matter", and should therefore await unravelling at trial.[29]

46 There is, with respect, no merit in this submission. The doctrine of estoppel by convention was described by the Court of Appeal in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 at [44]–[45] in the following terms:

> Estoppel by convention is not founded on any representation but on an agreed statement of facts the truth of which has been

[29] Defendant's submissions in SUM 4880/2016 dated 12 April 2017, paras 258–262.

> assumed by the parties to be the basis of the transaction (see also Spencer Bower's *The Law Relating to Estoppel by Representation* (4th Ed, 2004) at para VIII.2.1.
>
> In *Singapore Island Country Club v Hilborne* [1996] 3 SLR(R) 418, the Court of Appeal laid down the following criteria for estoppel by convention (at [27]):
>
> > (a) that there must be a course of dealing between the two parties in a contractual relationship;
> >
> > (b) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and
> >
> > (c) that it must be unjust to allow one party to go back on the agreed interpretation.

47 There is no evidence of any "course of dealing" between AM Gen and Koo. There is only a single letter sent to the Minister (apparently without copying AM Gen), requesting the Minister to sue the MIB under the terms of the Principal Agreement. There is certainly nothing that could even remotely suggest an understanding (much less a convention or practice) between Koo and AM Gen that AM Gen was not obliged to satisfy the Judgment Debt under the terms of the Domestic Agreement. Nor is there any evidence of a "course of dealing" between AM Gen and the MIB regarding Koo's *locus standi*. The fact that the MIB took a different position on this issue of law in OS 404 falls far short of establishing the type of conduct capable of giving rise to an estoppel by convention.

48 The defendants did not point to any other factual disputes in their submissions and I see none that could have any bearing on the questions as I have framed them. I therefore see no reason not to determine the issues in dispute under O 14 r 12; on the contrary, determination will save the parties significant time and costs.

Question 1: Whether the plaintiffs have *locus standi* to sue in Suit 647

49 To support their argument of implied trust, the plaintiffs cite various authorities, including *Tomlinson v Gill* (1756) Amb 330 ("*Tomlinson*"), *Gregory and Parker v Williams* (1817) 3 MER 582 ("*Gregory*"), *Hardy v Motor Insurers' Bureau* [1964] 2 All ER 742 ("*Hardy*"), *Gurtner v Circuit* [1968] 2 QB 587 ("*Gurtner*"), *Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor* [2006] 2 MLJ 116 ("*Ramli*") and *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 ("*TKM*"). No argument was made on the basis of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed), presumably because the agreements concerned were entered into before the period to which that Act applies (see s 1 of the Act).

50 *Gurtner* was a case in which the victim of a traffic accident sued the Motor Insurers' Bureau of the UK ("the UK MIB") for satisfaction of an unsatisfied judgment against the tortfeasor, pursuant to the UK MIB's obligation under an agreement entered into between the UK MIB and the Minister of Transport on 17 June 1946 ("the Uninsured Drivers' Agreement"). This is equivalent to the obligation of the MIB under cl 3 of the Principal Agreement in Singapore. Motor accident victims were not party to the Uninsured Drivers' Agreement and the Court of Appeal took the view that the Minister had not entered into it as their agent. Their Lordships unanimously agreed that the only person capable of enforcing the Uninsured Drivers' Agreement was therefore the Minister himself; the unsatisfied judgment creditor had no right of action against the UK MIB. The court also took the view, however, that accident victims could indirectly seek payment from the UK MIB by compelling the Minister of Transport to sue on the Principal

Agreement and obtaining an order of specific performance (see 596B–D, 598F–599B and 606A–B). Lord Denning MR and Diplock LJ also considered that such an order, once obtained by the Minister of Transport, could be enforced against the UK MIB directly by the unsatisfied judgment creditor in whose favour the order was made (see 596B–D *per* Lord Denning MR and 598F–599B *per* Diplock LJ), although Salmon LJ disagreed (see 606A–B). For this proposition Lord Denning MR relied on the *obiter dictum* of Lord Pearce in *Beswick* at 91F–G, to the effect that O 45 r 9 of the Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) would enable the plaintiff widow in that case (for whose benefit the court made the order of specific performance) to enforce payment directly. I pause to note that we have the same provision in our Rules of Court. *Gurtner* is also cited in *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) at para 17-011 for the proposition that though the third party cannot himself sue on the contract, he can enforce any order for specific performance which the contracting party obtains.

51 *Gurtner* is therefore authority that a traffic accident victim has no action at common law against the MIB directly, but may compel the Public Trustee to sue the MIB on the Principal Agreement should the MIB fail to discharge its obligations thereunder. I have already expressed my view at [11] above that the Public Trustee was wrong to wash its hands of this dispute over Koo's unsatisfied judgment.

52 *Gurtner* was followed by the Malaysian Court of Appeal in *Ramli* at [27]. The appellants in that case were a motorcyclist and his pillion rider who had suffered grave injuries in a collision with another motorcycle whose rider had no third party risk coverage at the time of the accident. Judgment was entered against the uninsured rider of the other motorcycle. The appellants

commenced proceedings against the MIBWM and the Minister of Transport of Malaysia for payment of the judgment sum, pursuant to an agreement which had been entered into between the MIBWM and the Minister on 15 January 1968 ("the Malaysian Principal Agreement").

53 The MIBWM took issue with the appellants' *locus standi*, as they were not party to the Malaysian Principal Agreement. In rejecting this argument, the Court of Appeal cited *Gurtner*, *Tomlinson* and *Gregory* for the proposition (at [33]) that:

> … [W]hen a contract as in our present instance is made between first respondent and second respondent for the benefit of the appellants, then second respondent can sue on the contract for the benefit of the appellants, and recover all that the appellants would have recovered as [if] the contract had been made by the appellant himself. Implicit in this proposition of ours, is the fact that if the second respondent fails in his duty, the appellants as beneficiaries under the implied trust, may successfully maintain an action against the first respondent and second respondent as joint defendants. This issue of locus of the appellants, to sue, is for purposes of this appeal *cadit quaestio*.

The plaintiffs rely on these authorities to say that Koo may maintain an action against AM Gen directly on the basis of an implied trust, in which the MIB is trustee for traffic accident victims.

54 However, the remarks in *Gurtner* and *Ramli* concerned the obligations of the UK and Malaysian *motor insurers' bureaux* under the UK and Malaysian equivalents of the *Principal Agreement* respectively, whereas the present case concerns the obligations of the *Insurer Concerned* (not the MIB) under the *Domestic Agreement*. I do not think that the Domestic Agreement can be characterised as giving rise to an implied trust in Koo's favour.

55 For the court to find that the promisee holds the contractual promise on trust for a third party, the contractual promise must have been obtained *for the benefit of the third party*. In *Tomlinson*, for example, the defendant Gill promised the widow of an intestate to make good any deficiency of assets to pay the debts of the intestate if she would permit him to be joined in the letters of administration. The creditors brought an action against Gill for satisfaction of their debts. Lord Hardwicke held that they could not bring an action at law for lack of privity, but could do so in equity because "the promise was for the benefit of the creditors, and the widow is a trustee for them".

56 *Tomlinson* was followed in *Gregory*, in which a man named Parker agreed to transfer certain assets to another named Williams, on condition that Williams use the assets to discharge Parker's debt to a creditor named Gregory. Sir William Grant MR held that Gregory could not recover at law against Williams, but could do so in equity as he "derive[d] an equitable right through the mediation of Parker's agreement" and could "insist upon the benefit of the promise made to Parker". The principle was approved by the House of Lords in *Les Affréteurs Réunis Société Anonyme v Leopold Walford (London), Limited* [1919] AC 801.

57 The Principal Agreement is analogous. There is no doubt that the various contractual promises given by the MIB – including the obligation to satisfy unpaid judgments under cl 3 – were given to the Minister for the benefit of traffic accident victims, who would otherwise face great difficulty obtaining compensation from uninsured or untraced drivers. However, the same cannot be said of cl 3(1) of the Domestic Agreement. Since the victims would be protected by cl 3 of the Principal Agreement in any event, it is more accurate to say that cl 3(1) of the Domestic Agreement was entered into for the benefit of the *MIB*.

In effect, the MIB transferred its obligation to satisfy unpaid judgments to the Insurers Concerned. This is captured in Tan Lee Meng, *Insurance Law in Singapore* (Butterworths, 2nd Ed, 1997) at p 650:

> The understanding between the [MIB] and the motor insurers adopts what has been termed the "insurer concerned" principle. This means that in cases where there is a policy in existence in respect of the vehicle which caused injury or death, the responsibility of complying with the arrangements made under the Principal Agreement is *delegated to* the insurer which issued the policy.
>
> [emphasis added]

The learned author cites cl 3(1) of the Domestic Agreement as an example.

58 Moreover, there must usually be some evidence that the contracting party intended to make himself a trustee of the benefit of the contract for the purported beneficiary, beyond the mere fact that the purported beneficiary stands to benefit from the contract (*Underhill and Hayton: Law of Trusts and Trustees* (David Hayton, Paul Matthews & Charles Mitchell eds) (LexisNexis, 19th Ed, 2016) at para 9.88; see also *Gandy v Gandy* (1884) 30 Ch D 57, in which Cotton LJ remarked at 68 that where C agrees with A to discharge A's debt to B, that does not make B a *cestui que trust*). Even an intention to benefit the third party is insufficient – there must have been an intention to *create a trust*, although there is no need to use the words "trust" and "trustee" (*Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd ed, 2015) ("*Chitty*") at paras 18-081 and 18-084; *Treitel: The Law of Contract* (Edwin Peel gen ed) (Sweet & Maxwell, 14th ed, 2015) ("*Treitel*") at paras 14-082 and 14-085).

59 In this case, the Preamble to the *Principal Agreement* states that the parties thereto "are desirous of implementing a scheme to secure compensation to third party victims of road accidents" in cases where "the victim is deprived

of compensation by the absence of insurance, or of effective insurance" and "when the driver responsible for the accident could not be traced". By contrast, the Preamble to the *Domestic Agreement* does not mention traffic accident victims at all. It states only that the Principal Agreement "imposes on the Bureau certain obligations", and that "all parties are desirous of carrying out" those obligations and of "putting into effect the objects of the Bureau … in the most efficient expeditious and economical manner". I therefore do not think it can be said that cl 3(1) of the Domestic Agreement was a promise held on trust by the MIB for victims like Koo. Rather, it was a promise made by all insurers to the MIB for the MIB's benefit.

60 I should add that, even if an implied trust were to arise in the context of cl 3(1) of the Domestic Agreement, it would not give Koo a direct action against the Insurer Concerned in her own right. Both *Gurtner* and *Ramli* held that, should the MIB fail to satisfy unsatisfied judgments obtained by traffic accident victims, the Minister could sue on the Principal Agreement *but the victims ordinarily could not*. (I note that in *Gurtner* it was held that the Minister should sue for specific performance of the agreement, while in *Ramli* it was held that the Minister would be able to recover substantial damages; but this is not relevant to the case at hand.) In both cases it was also held that, should the Minister refuse to sue, the victim could join him as a defendant and thus compel performance. The victims would therefore ordinarily have no recourse against the MIB directly, not being party to the Principal Agreement; it was only if the Minister refused to sue that the victims could commence proceedings against the Minister and the MIB jointly.

61 This is confirmed by *The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) v Westacre Investments Inc and other*

appeals [2016] 5 SLR 372 ("*Yugoimport*"), in which the Court of Appeal stated at [116] that "a beneficiary under a trust cannot sue a third party in relation to the trust property because he does not have a claim at law against the third party and thus has no cause of action against him". Although the beneficiary may sue a third party directly under what has come to be known as the *Vandepitte* procedure, that procedure applies to situations in which the trustee refuses to sue. In *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 the Privy Council stated at 79 that:

> ... [A] party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. *The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant.*
>
> [emphasis added]

62 *Vandepitte* was followed in *Harmer v Armstrong* [1934] Ch 65, in which the English Court of Appeal said at 83 that "if the trustee will not enforce [the beneficiaries' rights] for them the beneficiaries can come before the Court but they must bring before the Court the trustee also". The nature and purpose of the *Vandepitte* procedure were described in *Yugoimport* at [117] as follows:

> … [T]he *Vandepitte* procedure is a rule of procedure, and not a rule of substance. Its purpose is to serve as a procedural "short-cut" to avoid the multiplicity of actions. *In a normal case where the trustee refuses to sue a third party*, a beneficiary under a trust would have to bring an action against the trustee to compel him to begin an action against the third party, or to replace the trustee. The *Vandepitte* procedure allows instead for the conflation of the two actions, such that the beneficiary can bring an action against the third party in his own name, while also joining the trustee as a defendant. But the *Vandepitte* procedure does not affect the substantive rights of the parties. The right that the beneficiary enforces under such an action is the right of the trustee. …

[emphasis added]

63 *Snell's Equity* states at para 3-050, citing *Vandepitte*, that in general only the trustee has the right to sue the debtor or obligor, but *if* the trustee refuses to sue, the beneficiary may sue and join the trustee as a second defendant.

64 Applying that principle, if an implied trust were to arise in the context of the Domestic Agreement and the MIB refused to enforce cl 3(1) of the Domestic Agreement against the Insurer Concerned, the victim would be able to sue the Insurer Concerned and the MIB as co-defendants. In that situation, the victim would be suing "in right of the trustees and in the room of the trustees, who should be joined as defendants", rather than "enforcing a right reciprocal to some duty owed directly to [her] by [the Insurer Concerned]" (Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th Ed, 2012) at p 414). In the case before me, the MIB has commenced proceedings against the Insurer Concerned for Koo's benefit. Her inclusion as co-plaintiff adds nothing to the MIB's case against the Insurer Concerned, whom Koo has no *locus standi* to sue in her own right.

65 The MIB, on the other hand, clearly has *locus standi* to sue AM Gen for any breaches of its contractual obligations under the Special Agreement (read with the Domestic Agreement), to which both the MIB and AM Gen are party. This is not and indeed cannot be disputed.

Question 2: Whether AM Gen is contractually obliged to satisfy the Judgment Debt

66 That brings me to the question of whether AM Gen is contractually obliged to satisfy the Judgment Debt directly (rather than merely indemnifying the MIB) under cl 2 of the Special Agreement read with cl 3(1) of the Domestic

Agreement.

67 AM Gen submits that the MIB's obligation under cl 3 of the Principal Agreement takes priority over the Insurer Concerned's obligation under cl 3(1) of the Domestic Agreement, such that the Insurer Concerned merely has a duty to indemnify the MIB after the MIB pays the judgment sum directly to the victim. In support it cites *Pacific & Orient* at [60(b)]:

> [I]f MIB is to satisfy the said judgment obtained by that passenger, to the extent that it remains unsatisfied in the situation referred to above, MIB is entitled to recover this amount from P&O Insurance which shall indemnify MIB for all amounts, costs and/or interest paid by MIB in connection with the judgment.

68 However, that passage only states that *if* the MIB satisfies the judgment debt, it is entitled to be indemnified by the Insurer Concerned. That follows from a plain reading of cl 6 of the Domestic Agreement, which provides that *if* in any case *it appears* to the Council of the MIB *expedient* (*ie*, appropriate, suitable, practical or convenient), the Council *may* itself satisfy any judgment which under the terms of cl 3 an Insurer Concerned is obliged to satisfy (see [73] below).

69 It may be apposite at this juncture to point out that *Pacific & Orient* did not decide and is not authority for the proposition that the MIB has to satisfy the judgment debt first before it can recover the same from the Insurer Concerned. The *ratio decidendi* of *Pacific & Orient*, found at [60], is as follows:

> (a) Where a Malaysian insurer which has signed a Special Agreement with the MIB insures the driver or rider of a Malaysian registered vehicle, and that vehicle is involved in an accident in Singapore resulting in personal injury to a passenger of the said vehicle,

then notwithstanding that such personal injury is excluded or not covered by the terms of the Malaysian insurer's policy, the Malaysian insurer is an "Insurer Concerned", and *is required and therefore under an obligation to satisfy any judgment obtained by the said passenger against the said driver* pursuant to cl 3(1) of the Domestic Agreement.

(b) *If* the MIB is to satisfy the judgment obtained by that passenger, to the extent that it remains unsatisfied in the aforesaid situation, the MIB is entitled to recover this amount from the "Insurer Concerned", who shall indemnify the MIB for all amounts, costs and/or interest paid by the MIB in connection with the judgment.

70 AM Gen's argument that cl 3 of the Principal Agreement takes priority over cl 3(1) of the Domestic Agreement is, with respect, quite misplaced. Although there is no language in either provision which indicates that one is subject to the other, it is important to remember that the Principal Agreement is one between the Minister for Finance and the MIB, not the individual insurers. Clause 3 of the Principal Agreement provides that if a relevant judgment is not satisfied within 28 days from the date it is given, the MIB will, subject to certain provisions of Part II, pay or cause to be paid to the victim the sum payable or any part remaining unpaid. That obligation is owed by the MIB to the Minister. The Domestic Agreement, on the other hand, is a separate agreement between the MIB and its members (or insurers who are under the same obligations as its members by virtue of the Special Agreement they signed with the MIB). Clause 3(1) of the Domestic Agreement (read with the Special Agreement) places the obligation *on the Insurer Concerned* to satisfy the judgment creditor if and to the extent that the relevant judgment is not satisfied or fully satisfied by the judgment debtor within 28 days from the date of the judgment. There is

therefore nothing express or implied in these agreements that requires the MIB to satisfy the judgment under the Principal Agreement first before any liability arises as between the MIB and the individual insurers under the Domestic Agreement read with the Special Agreement.

71 On the contrary, as a matter of construction, AM Gen's interpretation of cl 3(1) of the Domestic Agreement is clearly incorrect for the following reasons.

72 First, it is at odds with the wording of cl 3(1), which requires the Insurer Concerned to "*satisfy the Original Judgment Creditor* if and to the extent that the Judgment has not been satisfied by the Judgment Debtor within twenty-eight days" [emphasis added] (see [26] above). Clause 3(1) thus *unequivocally* obliges the Insurer Concerned to pay the judgment sum *to the victim*, not to indemnify the MIB. The defendant's interpretation amounts to rewriting cl 3(1) such that the Insurer Concerned's obligation takes effect as an obligation to indemnify or reimburse the MIB.

73 Secondly, cl 6 of the Domestic Agreement states:

> If in any case it appears to the Council of the Bureau expedient the Bureau may itself satisfy any Judgment which under the terms of Clause 3 hereof an Insurer is obliged to satisfy and in such case the Bureau shall be entitled to recover from such Insurer the sum paid by it.

Clause 6 gives the MIB the discretion to satisfy the judgment debt, which necessarily implies that it has no *obligation* to do so. This must be because satisfaction of the unpaid judgment debt is the obligation of the Insurer Concerned. It is only *if* the MIB decides to itself satisfy the judgment that the Insurer Concerned discharges its obligations under the Domestic Agreement by reimbursing the MIB rather than paying the victim directly.

74 Thirdly, cl 4 of the Domestic Agreement states:

> All payments made by an Insurer under Clause 3(1) hereof shall be deemed to be made in discharge of the liability of the Bureau under the [Principal] Agreement to make the same.

Clause 4 would not be necessary if the role of the Insurer Concerned were confined to reimbursing or indemnifying the MIB for satisfaction of the judgment, since satisfaction by the MIB would have *already* discharged the MIB's liability under the Principal Agreement.

75 Fourthly, it is apparent from both cl 4 and the Preamble to the Domestic Agreement (see [59] above) that cl 3(1) was intended to delegate certain of the MIB's obligations under the Principal Agreement to the Insurer Concerned. As I stated in *Pacific & Orient*, cl 3 of the Domestic Agreement "simply represents a transmission of MIB's mirror obligation under the Principal Agreement to its members via the 'Insurer Concerned' mechanism" (at [40]). It follows from the concept of delegation that the obligation of the Insurer Concerned under cl 3(1) of the Domestic Agreement must take the same shape and form as the MIB's obligation under cl 3 of the Principal Agreement – that is, to satisfy the judgment debt in the first instance, rather than waiting for the MIB to do so.

76 Fifthly, cl 3 of the Principal Agreement envisages that in the case of an unsatisfied judgment against an uninsured driver, the MIB will "pay *or cause to be paid*" any sum payable thereunder or "satisfy *or cause to be satisfied*" such judgment [emphasis added]. The terms in italics imply that the MIB need not pay or satisfy the judgment in the first instance, and may cause the sum to be paid through other means. The plaintiffs submit,[30] and I agree, that one of the ways in which the MIB might cause such judgment to be paid or satisfied is by

[30] Minute Sheet, 9 October 2017.

suing the Insurer Concerned under the Domestic and Special Agreements, as the MIB is doing in these proceedings.

77 I think it is also worth repeating that the recitals in the Domestic Agreement or memorandum of the MIB clearly state, *inter alia*, that the Principal Agreement imposes certain obligations on the MIB (which I repeat are owed to the Minister for Finance) and "all parties are desirous of carrying out" the Principal Agreement and "putting into effect the objects of the Bureau … *in the most efficient expeditious and economical manner*" [emphasis added]. The MIB and its members have determined that one of the most efficient, expeditious and economical mechanisms to carry out the MIB's obligations is through the "Insurer Concerned" principle, which obviates the need for the MIB to make frequent calls for cash contributions from its members and the need to maintain a large pool of reserves with all the financial accounting and administrative obligations that would entail (see [137] below).

78 AM Gen referred to a UK treatise, *The Law of Motor Insurance* (Robert Merkin and Jeremy Stuart-Smith eds) (Sweet & Maxwell, 1st Ed, 2004) ("*The Law of Motor Insurance (1st Ed)*"), to support its position that the MIB must first satisfy the judgment sum before looking to the Insurer Concerned for reimbursement.[31] With respect, this argument must also fail.

79 I accept that the law of insurance in Singapore has its roots in English insurance law, and our Principal and Domestic Agreements are modelled on the Malaysian equivalents, which in turn were modelled on the English arrangements. But the Singapore and English arrangements are not identical. The UK MIB has signed two agreements with the Secretary of State for

[31] Defendant's submissions in SUM 4880/2016 dated 12 April 2017, para 163.

Transport: an Uninsured Drivers' Agreement (current version signed on 3 July 2015) and an Untraced Drivers' Agreement (current version signed on 28 February 2017). The two agreements correspond to Parts II and III of the Principal Agreement in Singapore respectively. Our Domestic Agreement bears some similarity to Art 79 (previously Art 75) of the UK MIB's articles of association, and the Insurer Concerned is known in the UK as the "Article 79 Insurer" (previously the "Article 75 Insurer"). *The Law of Motor Insurance (1st Ed)* states at para 7-61:

> The MIB is required under the Uninsured Drivers Agreement to meet a judgment obtained by a third party against an uninsured driver within seven days from the date on which the third party was entitled to enforce the judgment, to the extent that the judgment has not been satisfied by the driver. Under cl.4(1) of Article 75 [equivalent to cl 3(1) of the Domestic Agreement in Singapore], the obligation to satisfy a judgment is imposed upon an Article 75 insurer acting on behalf of the MIB … As the obligation to satisfy a judgment against an uninsured driver is, so far as the third party is concerned, one imposed on the MIB, *the MIB itself must – under cl.6 of Article 75 – itself satisfy the judgment within that period if for any reason it has not been fully satisfied by the Article 75 Insurer. …*
>
> [emphasis added]

80 AM Gen relies on the portion in italics for the proposition that "if the Article 75 Insurer does not pay, the obligation must be met by the MIB".[32] This text and proposition relied upon by AM Gen appear to follow from the wording of Cl 6 of Article 75. However, Cl 6 does not exist in isolation and sits alongside other clauses. Clauses 4–6 state (see *The Law of Motor Insurance (1st Ed)* at p 850):

> Clause 4
>
> (1) IF a judgment is obtained against any judgment debtor the Article 75 Insurer will satisfy the original judgment creditor

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[32] Defendant's submissions in SUM 4880/2016 dated 12 April 2017, paras 158 and 163.

> if and to the extent that the judgment has not within seven days of the execution date [defined as the date upon which the original judgment creditor became entitled to enforce it against the judgment debtor] been satisfied by the judgment debtor.
>
> (2) …
>
> Clause 5
>
> THE making of any payment by an Article 75 Insurer under Clause 4(1) hereof shall not entitle that Insurer to any reimbursement in respect thereof from MIB.
>
> Clause 6
>
> IF a judgment is obtained against any judgment debtor and remains unsatisfied, MIB will after the expiry of seven days from the execution date itself satisfy the same.

81 It becomes clear, in context, that the Article 75 Insurer has to satisfy the judgment under Cl 4. If the Article 75 Insurer fails to do so, the obligation for the MIB to do so kicks in under Cl 6. The preceding Cl 5 makes clear that if the Article 75 Insurer pays the judgment creditor it shall not be entitled to any reimbursement from the MIB. Even in the context of Article 75, the clauses do not say that the Article 75 Insurer (*ie*, the Insurer Concerned) has *no* obligation to satisfy the judgment until the UK MIB has done so. AM Gen's contention to this effect amounts to re-writing the clauses and is clearly untenable.

82 It is also important to emphasise that the equivalent of Cl 6 is *not* found in the Domestic Agreement, the Principal Agreement or the Special Agreement. There is no clause in any of those agreements which expressly requires the MIB to satisfy the judgment in the event that the Insurer Concerned fails to do so.

83 It is worth noting that Cl 6 was subsequently deleted from Article 75. It does not appear in the version of Article 75 found at Appendix 8 of the second edition of the text, *The Law of Motor Insurance* (Robert Merkin and Maggie

Hemsworth eds) (Sweet & Maxwell, 2nd Ed, 2015) ("*The Law of Motor Insurance (2nd Ed)*"), which was not brought to my attention by counsel. At the same time, the old Cll 4(1) and 5 were amalgamated into a new Cl 3 (see para A8-03):

> (3) Obligation to satisfy judgments
>
> (a) If a Road Traffic Act Judgment [defined as "a judgment obtained in a court of competent jurisdiction in respect of a Road Traffic Act Liability"] is obtained the Article 75 Insurer will satisfy the original judgment creditor if and to the extent that the judgment has not within seven days of the execution date been satisfied by the judgment debtor.
>
> (b) The making of any payment by an Article 75 Insurer under paragraph (3)(a) of this Article shall not entitle that Member to any reimbursement in respect thereof from the Bureau.

84 These amendments to Article 75 prompted amendments to the text of the treatise. The relevant paragraph of *The Law of Motor Insurance (2nd Ed)* is now numbered as para 7-68 and reads as follows:

> By art.75(3) the art.75 insurer has an obligation to satisfy a judgment, in default of settlement within seven days by the judgment debtor, where that judgment relates to liability arising out of the use of a motor vehicle on a road as is required to be covered by the RTA 1988 … As the obligation to satisfy a judgment against an uninsured driver is, so far as the third party is concerned, one imposed on the MIB, the MIB has an obligation to satisfy the judgment, subject to the terms of the Uninsured Drivers' Agreement 1999 or 2015. …

The italicised portion of the quotation at [79] above has been reworded, presumably because the old Cl 6 was deleted. Given that the old Cl 6 likewise finds no equivalent in our Domestic Agreement, the quotation from *The Law of Motor Insurance (1st Ed)* is of little persuasive value here.

85 AM Gen also placed great reliance on the Federal Court of Malaysia's recent decision of *Iskandar bin Mohd Nuli v AmGeneral Insurance Bhd (previously known as AmG Insurance Bhd)* [2017] 5 MLJ 25 ("*Iskandar (FC)*" or "*Iskandar*" for the case at first instance) to support its submission that the victim must first obtain satisfaction of the Judgment Debt from the MIB before the Insurer Concerned's indemnity under the Special Agreement arises.

86 In *Iskandar*, the owner of a motorcar, Sharul, lent his motorcar to one Iskandar. Iskandar drove into Singapore with his wife, Zuraini, as a passenger. The motorcar was involved in a road traffic accident in Singapore on 13 December 2010, as a result of which Zuraini sustained injuries. On 31 January 2013, Zuraini instituted an action for negligence in the Singapore High Court against Iskandar. The motorcar was insured by AM Gen at the time and the policy of insurance, like the Policy in the present case, excluded coverage for passenger liability.

87 While Zuraini's suit was still pending in Singapore, AM Gen commenced a suit in the Malaysian High Court against the owner of the car as first defendant and against Iskandar as second defendant and sought four declarations, the first of which read as follows:

> A declaration that [AM Gen] is not liable to satisfy any judgment or part thereof obtained by [Zuraini] in the Singapore Suit against the [second defendant driver].

The other three declarations related to AM Gen not being liable under its policy to the first defendant owner and/or the second defendant driver for Zuraini's injuries, loss or damage arising from the accident in Singapore; that the second defendant driver was in fundamental breach of the terms of the policy; and that if AM Gen was held directly or indirectly liable to satisfy any judgment or part

thereof obtained by Zuraini in the Singapore suit, then AM Gen would be entitled to an indemnity from the first and/or the second defendant. The learned Judge at first instance dismissed the claim and declined to grant any of the declarations prayed for. She held that AM Gen was liable to satisfy the judgment for damages obtained by Zuraini notwithstanding that the policy excluded cover for passenger liability; that AM Gen was liable under the policy to the second defendant as authorised driver; that the second defendant driver was not in breach of the contract of insurance; and that AM Gen was not entitled to an indemnity from the second defendant driver.

88 Three things stand out from this action in Malaysia. First, it was an action by an insurer against its insured and the authorised driver, and three of the four declarations sought related to claims as between the insurer and insured. Secondly, the first declaration was, whether deliberately or not I cannot tell, worded widely enough to encompass the rights as between AM Gen and the MIB and indeed Zuraini as well. Thirdly, and most importantly, having started the action in Malaysia and asking for a widely worded declaration that affected MIB's claim under the Domestic Agreement and Special Agreement against AM Gen as the Insurer Concerned, AM Gen nonetheless *chose*, again whether deliberately or not I cannot tell, *not to add the MIB as a party to that action.* Similarly, AM Gen also chose *not* to add Zuraini as a party to the Malaysian action.

89 It is a very basic tenet of law that before one obtains a remedy against another party, including a declaration of rights *inter se*, or that affects the rights of that other party, that other party should at least be heard or made a party to the action: see *Family Food Court*, where the Court of Appeal at [64] cited the

Privy Council decision of *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 at 55:

> In their Lordships' view one of the principal objects of the rule [*ie*, the then Malaysian equivalent of O 15 r 6 of the ROC] is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. …

In *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881, Sundaresh Menon JC (as he then was) also cited the above *dicta* from *Pegang Mining* at [37] and further added at [40]:

> … The plaintiff being the party that has brought the matter for adjudication *prima facie* has the choice of who he wishes to proceed against. But his is by no means the overriding choice. Once the court has been seised of the matter, although it will have due regard to the plaintiff's choice, it has the overriding discretion as to who should be before it in order to ensure that the issues raised are properly and fairly disposed of and that all those having a legitimate interest in the subject matter of the proceedings have had the opportunity to be heard.

This is also encapsulated in *Singapore Civil Procedure 2018,* Vol I (Sweet & Maxwell, 2018) (Foo Chee Hock, gen ed) where it states at para 15/6/2:

> [O 15 r 6] has not altered the legal principles with regard to parties to actions, and in no way qualified the necessity of having before the court the proper parties necessary for determining the point at issue.

90 Unsurprisingly, the Malaysian authorities are to similar effect, *eg*:

(a) In the Federal Court decision of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622, Abdul Hamid Mohamad CJ cited (at [79]) the *dictum* from *Pegang Mining*:

> … one of the principal objectives of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard.

He cited further from *Pegang Mining* at [80]: "A better way of expressing the test is will his rights against or liabilities to any party to the action in respect of the subject-matter of the action be directly affected by any order which may be made in the action." Abdul Aziz Mohamad FCJ said, at [115]:

> For it to be said that his 'rights will be affected' by the judgment of the court, the party to be added must of course have an interest in the subject matter of the action. At p 56 B (left) Lord Diplock expressed the test for the interest in the following words: 'will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?' …

(b) I note that in his submissions, Iskandar cited the case of *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59, a decision of the Malaysian Court of Appeal, to the Federal Court,[33] referring the latter to the statement of Viscount Radcliffe in *Ikebife Ibeneweka and others v Peter Egbuna and another* [1964] 1 WLR 219 ("*Ikebife Ibeneweka*") at 226: "… [T]here has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court." However, that citation is incomplete because in the very next sentence, Viscount Radcliffe says:

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[33] Affidavit of Achala Krishna Menon in SUM 4880, affirmed on 23 October 2017, p 133.

> Where, as here, defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitles the same judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

Indeed the full passage from *Ikebife Ibeneweka* was cited by the Supreme Court in *Dewan Undangan Negeri Kelantan and another v Nordin bin Salleh and another* [1992] 1 MLJ 697 (cited in *Air Express International* at [20]). Having cited the above remarks, Gunn Chit Tuan SCJ then made the point that the appellants "were in reality fighting the suit on behalf of" persons who had not been joined (see 719I–720C), placing that case squarely within the exceptional situation described by Viscount Radcliffe. Similarly, in *Ketua Pengarah Jabatan Alam Sekitar and another v Kajing Tubek and others and other appeals* [1997] 3 MLJ 23, the Malaysian Court of Appeal cited the full passage from *Ikebife Ibeneweka* and then stated:

> The exceptional circumstances to which Lord Radcliffe referred in the foregoing passage are … absent in the present case. The learned judge was therefore wrong in rejecting the argument … for denying standing in point of relief. … There is no dispute that declaratory judgments are in the discretion of the court … It is not a discretion exercisable at the mere whim and fancy of an individual judge. It is a discretion that is to be exercised in accordance with settled practice and well-established principles that regulate the grant of the remedy. …

(c) In *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1989] 2 MLJ 298, Wan Adnan J (as he then was), after citing *dicta* from *Pegang Mining*, said at 300G (left): "To prevent injustice being done the court should

allow a person whose rights will be affected by its judgment an opportunity of being heard."

(d) In *Eh Riyid v Eh Tek* [1976] 1 MLJ 262.1, Raja Azlan Shah FJ (as he then was) said at 263H–I (right):

> My view of the matter is that it is a rule pertaining to [the] adding of parties and which affects the right of a person if judgment is passed in his absence and without giving him an opportunity of being heard. The … key of the whole rule is that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, which means that if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.

91 AM Gen appealed against the High Court's decision. Before the Court of Appeal, AM Gen confined its appeal only to the refusal of the second and fourth declarations; there was no appeal from the refusal to grant the first declaration (cited at [87] above) and the third.

92 The Court of Appeal allowed AM Gen's appeal. It drew a distinction between AM Gen's liability under the policy of insurance and AM Gen's liability under the Special Agreement (*AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* [2016] 1 MLJ 818 ("*Iskandar (CA)*") at [57]). The court took the view that AM Gen's liability under the Special Agreement arose only in Singapore under a compulsory arrangement which had no effect on AM Gen's rights under the policy. The Special Agreement did not "affect or alter the rights under the policy inter se [AM Gen] qua insurer, [the motorcar owner] qua insured and [Iskandar] qua authorised driver" (at [58]). It held that, as a result, AM Gen's exclusion of passenger liability under the policy of insurance was "preserved".

93 Additionally, the Court of Appeal cited *Pacific & Orient* for the proposition that AM Gen's liability under the Special Agreement would only arise if (a) Zuraini obtained judgment on her claim against Iskandar in the Singapore suit, and (b) the MIB paid on the judgment sum (see *Iskandar (CA)* at [37], [38] and [58]).

94 I agree with the proposition that AM Gen's liability under the Special Agreement would only arise if Zuraini obtained judgment on her claim against Iskandar in the Singapore suit. With the greatest of respect, however, *Pacific & Orient* does not stand for the second proposition that AM Gen's liability under the Special Agreement *would only arise* if the MIB paid on the judgment sum. As discussed above, cl 3(1) of the Domestic Agreement states in plain language otherwise. I have set out the *ratio* of *Pacific & Orient* at [69] above. In any case, the Court of Appeal acknowledged that this was "not the issue in [the] appeal" (at [58]) and that its statement in the first two sentences of [58] was *obiter*.

95 The Malaysian Court of Appeal therefore granted the two declarations sought by AM Gen on appeal, *viz*:

> (a) a declaration that AM Gen was not legally liable under their policy of insurance to their insured owner and insured driver for the injuries, loss and damage suffered by Zuraini; and
>
> (b) a declaration that if AM Gen was held directly or indirectly liable to satisfy any judgment or part thereof obtained by Zuraini against the second defendant driver in the Singapore suit, then AM Gen was entitled to an indemnity from the first and/or the second defendant.

96 Iskandar appealed to the Federal Court. He framed eight questions of law for determination.[34] The Federal Court granted him leave to appeal on four, *viz*, Questions (II), (III), (IV) and (VI):

> (II) Whether pursuant to the Special Agreement (together with its annexures), a Malaysian insurer is liable to satisfy a judgment obtained by a victim of an accident involving a Malaysian registered vehicle in Singapore, even though the motor insurance policy issued by the Malaysian Insurer does not cover passenger liability?
>
> (III) If question (II) is answered in the affirmative, whether under the Special Agreement (together with its annexures), the Malaysian insurer is entitled to seek indemnity against the authorised driver of the Malaysian registered vehicle that was involved in the accident in Singapore?

Questions (IV) and (VI) are not relevant as they involve construction of the policy and the operation of estoppel.

97 It will be seen that Question (II) can be read widely enough to encompass the rights and obligations of the MIB and AM Gen *inter se* even though, as already noted above, the MIB was not made a party to the Malaysian proceedings or given the opportunity to be heard.

98 The Federal Court answered Question (II) in the negative and went on to hold at [13]: "In the light of the above we do not need to deal specifically with the rest of the questions posed."

99 Mr Liew relies on the Federal Court's answer to Question (II) for the proposition that the MIB has no cause of action until it pays Koo first and then seeks an indemnity from AM Gen.[35] Although on its face the Federal Court's

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34 Affidavit of Achala Krishna Menon in SUM 4880, affirmed on 23 October 2017, p 99.

35 Defendant's skeletal submissions in SUM 4880 dated 5 October 2017, para 37.

answer to the question posed could be read widely to encompass Mr Liew's proposition, with respect, Mr Liew's reliance on this proposition is misplaced for a number of reasons.

100 First, Mr Liew ignores the fact that *Iskandar* is an action brought by a Malaysian insurer against its insured owner and insured driver. Zuraini and the MIB were not parties to the action and were certainly not heard. Moreover, certain key statements in the judgments relied upon by Mr Liew were accepted by the Court of Appeal to be *obiter*.

101 Secondly, there are passages in *Iskandar (CA)* and *Iskandar (FC)* which indicate that the courts were primarily concerned with the rights and obligations between the parties before them (*ie*, AM Gen, Iskandar and Sharul) under the policy of insurance, rather than with the position *vis-à-vis* Zuraini and the MIB under the Principal, Domestic and Special Agreements. The Federal Court's answer to Question (II) must therefore be taken in that context and this can be seen from its judgment at [6] in dealing with the position between the insurer and its insured:

> [6] To determine the questions of law posed, before dealing with the special agreement together with the annexures, *one must begin with the insurance policy* between the insured Shahrul and [AM Gen] which governs the contractual relationship between them. It is not in dispute that the said policy does not cover passenger liability. …
>
> [emphasis added]

Its judgment at [8]–[9] is also consistent with this reading:

> [8] … The rights and obligations of [AM Gen] under this special agreements [*sic*] are between [AM Gen] and Singapore Motor Insurers' Bureau and not with the insured per se. …
>
> [9] … In our view the terms of the special agreement did not incorporate itself into the contract of insurance but remains a

> special arrangement between [AM Gen] and the Singapore MIB. …

102 This echoed what was stated in *Iskandar (CA)* at [58]:

> … However, that is not the issue in this appeal. The issue here is whether the plaintiff [AM Gen] is legally liable under the policy to [the owner, Shahrul] and or [the driver, Iskandar] for injuries, loss and damages suffered by Zuraini. [AM Gen's] liability under the special agreement arises only in Singapore under this compulsory arrangement made in Singapore. Further, we do not think that the special agreement has any effect on [AM Gen's] rights under the policy; the special agreement does not affect or alter the rights under the policy inter se [AM Gen] qua insurer, Shahrul qua insured and [Iskandar] qua authorised driver. Accordingly, we hold that [AM Gen's] rights under the policy are therefore preserved. The exclusion of third party coverage for passengers other than employees under the policy is preserved.

103 Thirdly, Mr Liew's reliance on the paragraphs below in *Iskandar (FC)* are either, as I have said above, not properly interpreted in their context, or if they are to be construed as Mr Liew contends, then Mr Liew runs into difficulties with what is stated in the judgment of the Federal Court. The relevant paragraphs in *Iskandar (FC)* state:

> [8] … The specific agreement and its annexures are found in ('Ikatan Teras Dokumen' Vol 2, p 182).
>
> [9] We refer particularly to cll 3, 4 and 5 of the same which clearly set out the scheme of how the special agreement works. The rights of the appellant [Iskandar] lie against the Singapore MIB, if the consent judgment is not satisfied, then the Singapore MIB would satisfy the same and claim an indemnity from [AM Gen]. **In our view the terms of the special agreement did not incorporate itself into the contract of insurance but remains a special arrangement between [AM Gen] and the Singapore MIB.** We now set out in its entirety cl 3 of the special agreement.
>
> > (3)(1) If a Judgment is obtained in Singapore against any person (hereinafter referred to as the 'Judgment Debtor') in respect of liability required to be insured by the Compulsory Insurance Legislation the Insurer

> Concerned will satisfy the Original Judgment Creditor if and to the extent that the Judgment has not been satisfied by the Judgment Debtor within twenty-eight days from the date upon which the person in whose favour it was given is entitled to enforce it.

[10] We refer to the decision of the Singapore High Court in [*Pacific & Orient*] which was relied quite substantially by [Iskandar]. **This case must be looked at in the context of legislation that makes it compulsory for passenger cover. In our view, the propositions of law in this case with regards to the special agreement and its clauses incorporating itself into the contract of insurance is the position in Singapore whilst *the position of law in Malaysia remains that the contract of insurance is the binding document between the parties.*** Further the operation of cl 3 of the special agreement, clearly envisages that the obligation is for Singapore MIB to settle the consent judgment 28 days after the consent judgment had become enforceable. Therefore, the special agreement remains in essence an arrangement for enforceability of an unsatisfied judgment against the insurance company in a situation where the contract of insurance does not provide cover as in our instant case. This is clearly amplified by cl 5 of the special agreement which we now set out:

> 5. If in Singapore a Judgment is obtained against any person in respect of a liability required to be insured by the Compulsory Insurance Legislation and none of the Insurers is liable to satisfy the same under Clause 3 hereof the Bureau will after the expiry of twenty-eight days from the date upon which the Original Judgment Creditor became entitled to enforce such Judgment against the Judgment Debtor itself satisfy the same.

[11] **To encapsulate, Zuraini would be unable to enforce the consent judgment she has obtained against [AM Gen] as the policy issued does not include, cover for passenger liability and no liability would ensue**. …

[12] **As such, Zuraini's only recourse is to rely on the special agreement and its terms** ie the agreement between the respective insurance companies including [AM Gen] and the Singapore Motor Insurers Bureau and in particular cl 5. **There was no question of the special agreement being interposed into the contract of insurance and to find otherwise would also mean imposing liabilities on [AM Gen] where no premiums were paid for by the insured**. We are therefore of the view that the Court of Appeal had committed no appealable error and we agree with their findings.

> [emphasis in original omitted; emphasis added in bold and bold italics]

104 The passages above in bold support the conclusion that the Federal Court judgment has to be read in the context of the case before it, *viz*, a case as between an insurer and its insured owner and authorised driver.

105 There seems to be some error in the second sentence of *Iskandar (FC)* at [9] where it is stated that the rights of the appellant driver, Iskandar, lie against the MIB. That reference must have been to the injured party Zuraini and not Iskandar, as Iskandar derives no rights under the Principal, Domestic or Special Agreements or in law against the MIB.

106 If the Federal Court judgment is to be read or interpreted as Mr Liew contends, then with the greatest respect, I cannot agree with the Federal Court's conclusions.

107 First, I note that there is a reference to cll 3, 4 and 5 of the "special agreement" with cl 3(1) set out in full at [9]. In terms of the terminology I have used, cl 3(1) cited is from the Domestic Agreement, *not* the Special Agreement which AM Gen signed with the MIB on 26 October 1987 where it covenanted with the MIB to comply in every respect with every obligation imposed upon its members as if AM Gen were an "Insurer" for the purposes of the Domestic Agreement. The references to cll 3, 4 and 5 are therefore to the Domestic Agreement and not the Special Agreement, which only contains three clauses.

108 Secondly, as for that part of the judgment at [10] which states that cl 3 of the Special Agreement clearly envisages that the obligation is for the Singapore MIB to settle the judgment obtained by Zuraini against Iskandar ("the Consent Judgment") 28 days after the Consent Judgment had become

enforceable, it is plainly a mistake or mistakenly refers to some other clause in the documents provided to the Federal Court. On any reading cl 3(1) as quoted in the Federal Court judgment at [10] unambiguously states that *the Insurer Concerned* will satisfy the judgment within 28 days of it becoming enforceable, *not* the MIB.

109 Thirdly, the Federal Court then went on to state that its reading was "amplified by cl 5 of the special agreement" which it then proceeded to set out. That was cl 5 of the Domestic Agreement, which applies where a judgment is obtained against any person in respect of a liability required to be insured by the MV(TP)A "and none of the Insurers is liable to satisfy the same under Clause 3". Again with respect, cl 5 of the Domestic Agreement deals with the case of untraced drivers in "hit-and-run" accidents. It does not deal with cases where the policy of insurance in question excluded a particular liability. This is because the Domestic Agreement contains a very detailed definition of "Insurer Concerned" (the phrase used in cl 3 of the Domestic Agreement), which clearly states that an insurer remains an "Insurer Concerned" "notwithstanding that— … (iii) some term, description, limitation, exception or condition (whether express or implied) of the insurance … expressly or by implication excludes the Insurer's liability whether generally or in the particular circumstances in which the Judgment Debtor's liability was incurred".

110 I can accept that as a matter of Malaysian law, as stated by the Federal Court of Malaysia, where the terms of the policy of insurance exclude passenger liability, a victim who was a passenger at the time of the accident has no recourse against the insurer directly. But the insurer does not avoid liability altogether; it remains liable pursuant to the terms of the Domestic Agreement read with the Special Agreement. This is what the Federal Court stated at [12]

(save for the erroneous reference to cl 5). This is consistent with the recent decision of the Malaysian Court of Appeal in *Hameed Jagubar bin Syed Ahmad v Pacific & Orient Insurance Co Berhad* [2017] MLJU 968, which appears to have accepted that the Insurer Concerned is liable to satisfy the judgment in such a situation (at [44]–[50]). In that case, the operable clause is not cl 5 of the Domestic Agreement (which applies where there is no Insurer Concerned as it is a "hit-and-run" accident with an untraced driver) but cl 3, which renders the Insurer Concerned liable to satisfy the judgment. Clauses 3 and 5 are alternatives, covering two of the three main situations which the MIB scheme was designed to cover (see [20] above). Although the victim would be unable to enforce a judgment obtained against the Insurer Concerned directly as he or she is not party to the Domestic Agreement, he or she can compel the MIB to sue the Insurer Concerned under the Domestic Agreement and join the MIB as co-defendant if it is reluctant to do so.

111 Insofar as the Court of Appeal of Malaysia and the Federal Court of Malaysia suggest that the MIB must *first satisfy* the judgment before the Insurer Concerned's obligation under cl 3 of the Domestic Agreement arises (see [93] above and *Iskandar (FC)* at [9], cited at [103] above), I must with the greatest of respect disagree for the reasons that I have given above.

112 I therefore find that AM Gen is liable to satisfy the Judgment Debt pursuant to cl 3(1) of the Domestic Agreement and has breached that clause by failing to do so.

Question 3: What reliefs the plaintiffs may obtain

113 Although the MIB is the counterparty to the Domestic Agreement, AM Gen says that the loss arising from AM Gen's breach is effectively suffered by

Koo, who remains uncompensated for her injuries. The plaintiffs submit that the MIB, suing as Koo's trustee under the Domestic Agreement, is entitled to recover substantial damages on behalf of Koo on the basis of the principle in *Lloyd's* ([28] *supra*) (approved in *TKM* at [89]–[90]):

> I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.

114 Alternatively, the plaintiffs submit that the MIB, suing under the Domestic Agreement, may recover substantial damages under what was described as the "broad ground" in *Family Food Court*.

115 The plaintiffs submit that the MIB is also entitled to specific performance on the basis of the principle in *Beswick*, but the primary relief sought is an award of damages for the reason that it would be easier to enforce in Malaysia.

Recovering damages on Koo's behalf

116 The principle in *Lloyd's* enables a party who contracted for the benefit of a third party to sue for damages on behalf of the third party as its trustee or agent (see *Lloyd's* at 315 and 317; see also *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 ("*Woodar*") at 293H). Since I have found that the Domestic Agreement did not give rise to a trust for Koo's benefit, the principle in *Lloyd's* does not apply.

The MIB has suffered substantial loss

117 The plaintiffs' alternative submission is that the MIB is entitled to substantial damages under the broad ground in *Family Food Court*. The broad

ground was first formulated by Lord Griffiths in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 WLR 408 in response to the general rule that the plaintiff/promisee can only recover nominal damages for a breach of contract where it has suffered no loss (for instance, where the substantial loss is suffered by a third party) (*Family Food Court* at [31]). Unlike the narrow ground, which is an exception to the general rule in that it enables the plaintiff/promisee to recover substantial damages *on behalf of* a third party (*Family Food Court* at [41]), it is a misnomer to characterise the broad ground as an "exception" (see *Family Food Court* at [48]). That is because it does not entitle the plaintiff to claim damages for another's loss, but rather reconceptualises the loss for which the plaintiff/promisee seeks to be compensated (see Leong Wai Kum, Alexander Loke and Burton Ong, "The conceptual basis of the solicitor's liability to a third party related to the client: reconstructing the *White v Jones* principle in Singapore" (2016) 32(1) PN 32 at p 45). Specifically, under the broad ground, the plaintiff/promisee who has not suffered financial loss seeks compensation for loss of its *performance interest*, defined as "the plaintiff/promisee's interest in the contract being performed and (consequently) his receiving the benefit which he had contracted for" (*Family Food Court* at [34], cited in *Indulge Food Pte Ltd v Torabi Marashi Bahram* [2010] 2 SLR 540 ("*Indulge Food*") at [55]). In short, the "loss" lies in the fact that the plaintiff "did not receive what he had bargained and paid for" (*Chia Kok Leong and another v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 ("*Prosperland*") at [53]). The broad ground has been described as "a reaffirmation of existing legal principle" (*Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*") at 552H *per* Lord Goff), based on "orthodox" and "ordinary contractual principles" (*Panatown* at 591A and 594G *per* Lord Millett) and "based … on classic contractual theory" (*Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68

("*Darlington*") at 80F *per* Steyn LJ). I note that the broad ground was endorsed by Lord Goff of Chieveley and Lord Millett in *Panatown* as well as by Steyn LJ in *Darlington*, and has been endorsed in Singapore (*Family Food Court* at [51]; *Prosperland* at [59]).

118 In my view, the MIB is entitled in this case to substantial damages under ordinary compensatory principles of contractual damages, without any need to have recourse to the broad ground. The broad ground enables the plaintiff to sue for damages where the loss of his performance interest cannot be framed in purely financial terms (see Alexander F H Loke in "Damages to Protect Performance Interest and the Reasonableness Requirement" (2001) Sing JLS 259 ("*Damages to Protect Performance Interest*") at p 262; Janet O'Sullivan, "Reflections on the role of restitutionary damages to protect contractual expectations" in *Unjustified Enrichment: Key Issues in Comparative Perspective* (David Johnston & Reinhard Zimmermann, eds) (Cambridge University Press, 2002) 327 ("*Reflections on the Role of Restitutionary Damages*"), at 334–336). This might be the case, for example, if the plaintiff's objective in contracting was not to make a profit but to benefit other persons altruistically (see Ewan McKendrick, "The Common Law at Work: The Saga of *Alfred McAlpine Construction Ltd v Panatown Ltd*" (2003) 3 OUCLJ 145 ("*The Common Law at Work*") at pp 167–168).

119 On the facts, however, I am satisfied that the MIB *has* been caused to suffer financial loss as a result of AM Gen's breach of cl 3(1) of the Domestic Agreement. This is because the MIB is contractually obliged to satisfy the Judgment Debt under cl 3 of the Principal Agreement. Nothing in the Domestic Agreement removes or diminishes the MIB's liability under cl 3 of the Principal Agreement. On the contrary, cl 4 of the Domestic Agreement presupposes that

the MIB is liable to satisfy the Judgment Debt *unless and until* the Insurer Concerned does so. Had AM Gen complied with its contractual obligation under cl 3 of the Domestic Agreement read with the Special Agreement, it would have satisfied the Judgment Debt "in discharge of the liability of the [MIB] under the [Principal] Agreement" (cl 4 of the Domestic Agreement, see [74] above). As a result of AM Gen's breach of contract, however, the MIB's liability remains and it may be sued on the Principal Agreement for satisfaction of the judgment.

120 If Koo were to successfully sue the MIB for satisfaction of the Judgment Debt, there is no doubt that the MIB would be able to recover the same from AM Gen as contractual damages. "[C]ompensation paid to a third party, whether under a court judgment or by way of settlement, has been recovered as damages against the defendant" (Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor*") at para 4-023). The only difference in this case is that the MIB has not *yet* been made to satisfy the Judgment Debt. Its liability to satisfy the Judgment Debt under the Principal Agreement has not crystallised into actual payment. In my view, however, that does not prevent the MIB from claiming and obtaining substantial damages.

121 First, it is clear that prospective and contingent losses are recoverable subject to the usual rules of proof of loss, causation and remoteness. *McGregor* states at para 11-024:

> The rule is that damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time the action was commenced, *but also for the future or prospective damage reasonably anticipated as the result of the defendant's wrong*, whether such future damage is certain or contingent. …

[emphasis added]

122 Common examples include prospective pain and suffering, loss of amenities of life, medical expenses and loss of earnings. Prospective damage may also, as in this case, take the form of a legal liability or obligation towards a third party that has not been discharged due to the counterparty's failure to perform in the third party's favour. This is supported by *Treitel* at para 14-022 and *Chitty* at para 18-049, both of which state:

> **Damages in respect of a promisee's loss.** The promisee may claim damages where he has suffered loss as a result of the promisor's failure to perform in favour of the third party. … The loss suffered by the promisee would be the cost of making an alternative provision, and there is some authority to support the view that damages for breach of contract may be recovered to compensate for such loss even though the provision is wholly voluntary. A fortiori *the promisee can recover substantial damages where he is under a legal obligation to make a payment to the third party and where this obligation would have been discharged if the promisor had paid in accordance with the contract*. …
>
> [bold in original; emphasis added in italics]

123 This principle was applied in *Randall v Raper* (1858) EB & E 84 ("*Randall*") (cited in *McGregor* at para 10-029), where the claimant buyer had purchased seed barley, which turned out to be of inferior quality, and was sued by his sub-buyer for damages. The claimant agreed to make compensation but no sum had been agreed on and no payment actually made. Finding that the claimant could recover damages from the defendant seller on the basis of his liability to the sub-buyer, Lord Campbell CJ stated at 89:

> … [I]t is contended … that, even if the damages could be recovered in the event of actual payment, they cannot be recovered upon a mere liability. I think we cannot lay down a rule that the mere liability cannot be the foundation of damages: if it can, the amount [may be] estimated by a jury. The demand is made, and is a just one: and, though it is not

> yet satisfied, yet the jury may find to what extent the plaintiffs are damnified by their having become liable to it.

124 Likewise, Erle J stated "the true rule" to be that "a liability to loss is sufficient to give the party liable a title to recover". Crompton J denied that payment was necessary to entitle a party to recover and that "[a] liability to payment, which has been incurred by a plaintiff in consequence of the breach of a defendant's contract, may well form a part of the damages, though it may be difficult to estimate them" (at 90–91).

125 *Randall* was followed more recently in *Total Liban SA v Vitol Energy SA* [2001] 1 QB 643 ("*Total Liban*"). In that case, the purchaser had bought gasoline, which turned out to be defective, from the defendant and supplied it to a third party. The purchaser was therefore contractually liable to the third party but unable to compensate it, having become impecunious. The question before the court was whether the purchaser could claim substantial damages against the seller prior to discharging its liability to the third party. Peter Gross QC, sitting as a deputy judge of the High Court, accepted *Randall* as authority "against the existence of any rule of law that liability without payment does not constitute recoverable loss" (at 661*c–d*). Gross QC held at 664*f*:

> A legal liability owed by B to C, consequent upon and not too remote from A's breach of its contract with B, is capable of constituting recoverable loss entitling B to substantial damages from A. There is no rule of law, requiring B first to have paid C. *Randall*'s case so holds and is good law.

Total Liban was decided in the context of A's breach resulting in B *acquiring* a liability to C, but I see no reason why the principle should not also apply where B has a pre-existing liability to C that would have been discharged but for A's breach. That is the very point made in the passages from *Treitel* and *Chitty* at [122] above.

126 The situation where A promises to discharge B's debt to C was considered at length by Windeyer J (dissenting) in the Australian High Court case of *Coulls v Bagot's Executor* (1967) 119 CLR 460. He stated *obiter* at 501–502:

> The question which presents itself at this point is what is the measure of damages for breach of a promise to confer a benefit upon a third party? Take the case supposed above — a contract by A with B under which B is to pay $500 to C. A sues B for breach of contract. There are authorities which say that he could recover only nominal damages, because it is C who has suffered not he: see *West v Houghton* (1879) 4 CPD 197; *Viles v Viles* (1939) SASR 164; but *cf Drimmie v Davies* (1899) 1 IR 176. As Else-Mitchell J remarked in *Cathels v Commissioner of Stamp Duties* (1962) SR (NSW) 455, at p 472, the cases on this point are "conflicting and unsatisfactory". … I do not see why, if A sued B for a breach of it, he must get no more than nominal damages. *If C were A's creditor, and the $500 was to be paid to discharge A's debt, then B's failure to pay it would cause A more than nominal damage.* Or, suppose C was a person whom A felt he had a duty to reward or recompense, or was someone who, with the aid of $500, was to engage in some activity which A wished to promote or from which he might benefit — I can see no reason why in such cases the damages which A would suffer upon B's breach of his contract to pay C $500 would be merely nominal: I think that, in accordance with the ordinary rules for the assessment of damages for breach of contract, they could be substantial.
>
> [emphasis added]

127 Windeyer J's remarks are referred to in Ewan McKendrick, *Contract Law* (Palgrave Law Masters, 12th Ed, 2017) at p 138 for the proposition that, where B provides consideration for A to discharge a debt owed by B to C, "B might be entitled to more than nominal damages" in the event of A's breach. The same author elaborates the point in *Contract Law: Text, Cases, and Materials* (Oxford University Press, 5th Ed, 2012) at p 973:

> The promisee is clearly entitled to sue and recover damages in respect of the loss that he has suffered as a result of the breach. Take the case where the promisee is a debtor of the third party

> and the promisor has promised to pay a sum of money to the third party in order to discharge the promisee's liability to the third party. The promisor fails to make the promised payment to the third party. The consequence is that the promisee remains indebted to the third party and, to that extent, the promisee does suffer loss as a result of the failure of the promisor to make the payment to the third party.

128 Indeed, this is supported by the Court of Appeal's remarks in *Family Food Court* at [51], commenting on the decision in *Prosperland*. In the latter case, Prosperland was the developer of a condominium. The construction of the condominium was completed in August 1993 and proved to be defective. On 2 May 2002, Prosperland sued the main contractor and architects for breach of contract. By that time, however, Prosperland was no longer the owner of the condominium, the MCST having acquired title in the common property. Prosperland had not yet spent any money to effect the repairs, nor had it been sued by the MCST in respect of the defects, and the defendants argued that Prosperland was therefore not the proper party to sue. The Court of Appeal found that Prosperland was entitled to damages on the narrow ground, but expressed the view, *obiter*, that Prosperland was, "in principle, entitled to claim for substantial damages pursuant to the broad ground" (at [59]). The Court of Appeal in *Family Food Court*, commenting on this decision, observed at [51]:

> … It should also be noted that a significant factor which influenced this court's view as to why the broad ground should also (apart from the narrow ground) be of avail to Prosperland was that the MCST was, in fact, contemplating an action against Prosperland in respect of the defects in the condominium ([*Prosperland*] at [58]):
>
> > *[T]here is evidence that the MCST intended to carry out the repairs and it was also looking towards Prosperland (the developer) for relief*. The MCST also expected Prosperland to carry out the rectifications. Moreover, there is evidence that Prosperland intended to use the damages recovered for that purpose. *Prosperland and the present owners of the condominium are related.* [emphasis added]

> In other words, Prosperland was technically facing a potential claim for loss suffered by the MCST in respect of the defects in the condominium and was, in fact, prepared to make good those defects using the damages recovered in its suit against the Defendants. *Thus, arguably, the "fact" that Prosperland had suffered no substantial loss was not entirely accurate.*
>
> [emphasis added]

129 The Court of Appeal considered that the prospect of liability to the MCST could amount to "substantial loss", notwithstanding that Prosperland had not yet been sued. That supports my conclusion that the MIB's liability to pay Koo constitutes substantial loss, even if it has not yet had to pay. The measure of the MIB's loss is simply what it is liable to pay Koo under the Principal Agreement (*ie*, the Judgment Debt).

130 Not every liability to a third party will support a claim for substantial damages. For example, where it is clear and certain that liability will never be discharged by the claimant, recovery will be denied him so as to avoid his reaping a windfall (*McGregor* at para 10-029, citing *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2009] PNLR 5). That said, the law does not demand that the plaintiff prove his loss with absolute certainty. The Court of Appeal has firmly rejected the idea that only nominal damages are recoverable for a contingent loss; "everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy" (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [29], citing *Chaplin v Hicks* [1911] 2 KB 786 at 793). The court must adopt a "flexible approach with regard to the proof of damage". Where absolute certainty is impossible, for example where the plaintiff's claim is for prospective pecuniary loss, the court must do the best it can on evidence

which is as precise as possible (*Robertson Quay* at [30]). Proof of damage is an "intensely factual" exercise and "depends *wholly* on the *factual matrix* concerned" [emphasis in original] (*Robertson Quay* at [27]).

131 On the facts, I am confident that if AM Gen were not made to satisfy the Judgment Debt, the MIB would certainly do so. The MIB has given an undertaking to satisfy the Judgment Debt in Koo's favour should the present proceedings fail.[36] Even if the MIB did not do so voluntarily, Koo would be able to revive OS 404 against the MIB for satisfaction of the Judgment Debt. I have earlier explained why, although Koo is not privy to the Principal Agreement, she would in my view be able to call upon the Public Trustee to compel the MIB to satisfy the Judgment Debt (see [51] above).

132 I note for completeness that there is no doubt that the MIB's loss was caused by AM Gen's breach of its contractual obligations under cl 3 of the Domestic Agreement read with the Special Agreement, and that it is not too remote. In the circumstances, I find that the MIB is entitled to substantial damages against AM Gen.

Availability of the broad ground

133 If liability to Koo does not constitute substantial loss on the part of the MIB, I take the view that the MIB would be able to sue for substantial damages under the broad ground for loss of its performance interest in cl 3(1) of the Domestic Agreement.

134 The concept of performance interest is "a wide one" and forms an "integral part of the common law of contract" (*Indulge Food* at [56]). The broad

[36] Plaintiffs' supplementary submissions in SUM 4880 dated 17 April 2017, para 21(b).

ground essentially recognises that a plaintiff/promisee's performance interest need not be exclusively financial. This is eloquently conveyed by Prof McKendrick in *The Common Law at Work* at pp 167–168:

> [N]ot all contracting parties enter into contracts with a view to making money. This is particularly true in the case of consumers. The consumer who orders a new bathroom suite does not enter into the contract in order to make a profit but to obtain a particular suite of his or her choice. Local authorities who enter into contracts for the provision of services or amenities for residents do not do so with a view to enhancing their own financial position but rather to provide a service for their constituents. … Against this background, it is suggested that the conception of loss adopted by the law of contract should extend beyond physical damage and financial loss in order to reflect the fact that, increasingly, we enter into contracts with a view other than to make money. Thus we enter into contracts in pursuit of our leisure interests or to obtain services which promote the quality of our lives but do not directly enhance our financial position. These are interests which our society values and they should be reflected in the law of contract. Contracts may also be concluded for altruistic reasons. … There is more to life than money and there is more to the law of contract than the protection of financial interests. This should be reflected both in the conception of loss adopted by the law of contract and in the rules applicable to the assessment of damages.

135 The same idea is expressed by Janet O'Sullivan in *Reflections on the Role of Restitutionary Damages* at p 334:

> [T]he 'performance interest' is undervalued by the practice of measuring the plaintiff's loss by reference to the exchange or market value of performance, even in a non-commercial context where he contracted for reasons other than the realisation of profit.

136 Lord Goff gave the example, in *Panatown*, of a wealthy philanthropist who contracts for work to be done to the village hall at his own expense. The work proves defective. The trustees who own the hall suggest that the philanthropist should recover damages from the builder and hand the damages

to them, and that they will then instruct another builder to rectify the damage. Is the philanthropist's claim for substantial damages doomed to fail because he does not own the hall, and has not incurred rectification expenses? Lord Goff thought this "absurd". In his view, the philanthropist ought to obtain substantial damages, for he "suffered loss because he did not receive the bargain for which he had contracted with the first builder" (at 548). This example illustrates how a promisee's performance interest may lie not solely in his or her own gain or amenity, but that of third parties whom he or she intends to benefit.

137 What is the MIB's performance interest in cl 3 of the Domestic Agreement? Besides its obvious financial interest in the discharge of its liability under the Principal Agreement, which I have discussed above, the MIB has an interest in keeping its operational costs (and, by extension, the contributions of its members) low. As I stated in *Pacific & Orient* at [41]:

> The whole scheme of a motor insurance bureau rests on providing a social safety net for accident victims which fall through gaps in the compulsory insurance cover. The concept of the "Insurer Concerned" is to cut down administrative costs of a bureau, which would have to be borne at the end of the day by all general insurers issuing motor policies. I accept the evidence set out in Mr Chew Loy Kiat's affidavit, which explains the "Insurer Concerned" concept as having been "designed as a practical measure to achieve administrative convenience and save costs, by relieving [MIB] from investigating, handling and settling claims from victims of road accidents in cases where there is an Insurer Concerned". Further, "[t]he concept works by the 'swings and roundabouts' principle, as all compensation payments by the [MIB] under the Principal Agreement are indirectly financed by all its members".

138 Mr Ng Choong Tiang, the manager/secretary of the MIB, deposed in the present proceedings that the MIB occupies a small office space of approximately 400 square feet. Its affairs are administered by three staff: Ng, as manager/secretary, and two supporting staff who provide administrative

support. Claims are assessed by the MIB Council, comprising seven members from the leading motor insurers and the Government. The Chairman of the MIB Council happens to be the President of the General Insurance Association. The Council meets once every two months and its members are not remunerated by the MIB. The MIB therefore refers untraced driver claims to law firms, investigators and loss adjusters, and relies on the Insurer Concerned to investigate, handle and settle claims involving uninsured drivers under cl 3(1) of the Domestic Agreement. This allows it to devote the bulk of its resources to compensating road accident victims who are truly without recourse.[37]

139 The MIB also has a social interest in seeing that victims promptly receive the compensation to which they are entitled. As I stated in *Pacific & Orient* at [16], the "underlying rationale of a scheme like the [MIB] is to fulfil the social aim of providing compensation for all road accident victims where for some reason there was no effective insurance policy to cover the liability", as well as to "help spread the risk among all insurers issuing motor insurance policies within the jurisdiction in cases of untraced drivers and insolvent insurers". The MIB's memorandum and articles of association reflect these aims (see *Pacific & Orient* at [12]–[13]). The MIB's income and property are to be "applied solely towards the promotion" of its objects, and are not to be distributed to its members in the form of dividends or bonuses. The MIB may be compared to the wealthy philanthropist in Lord Goff's example in that it is animated by a social purpose, *ie*, to see that victims of uninsured and untraced drivers are duly compensated for their injuries. In my view, these factors together give the MIB a real and substantial interest in the performance of the

[37] Affidavit of Ng Choong Tiang, affirmed on 19 October 2017.

Insurer Concerned's obligation under cl 3(1) of the Domestic Agreement and would entitle it to substantial damages.

Scope of the broad ground

140 I here address Lord Millett's remark in *Panatown* at 591 that the broad ground should be restricted "to building contracts and other contracts for the supply of work and materials where the claim is in respect of defective or incomplete work or delay in completing it" (at 591). This seems to have been motivated by caution rather than any objection in principle to extending the broad ground beyond those categories of contract, as it was only a restriction "for the present". The other speeches in *Panatown* did not impose such a restriction. Indeed, Lord Goff thought (at 545D–E) that Lord Griffiths' broad ground addressed:

> … not a special problem which arises in in a particular context, such as carriage of goods by sea, but a general problem which arises in many different contexts in ordinary life, notably in the domestic context where parties may frequently contract for benefits to be conferred on others, though it may well arise in other contexts, such as charitable giving or even, as the present case shows, a commercial transaction.

141 Lord Goff therefore anticipated that "full recognition of the importance of the performance interest" would "open the way to principled solution of other well-known problems in the law of contract, notably those relating to package holidays" as well as those described by Lord Wilberforce in *Woodar* at 283G–H (*ie*, ordering meals in restaurants for a party or hiring a taxi for a group) (*Panatown* at 553B–C).

142 There is no obvious reason why the broad ground must be confined to any particular genre of contract. The broad ground essentially reconceptualises

the loss which the plaintiff/promisee is compensated for, and does not depend on an incident of a particular genre of contract (unlike the narrow ground, which envisages a transfer of proprietary interest; see *Family Food Court* at [40]). That said, many aspects of the doctrine remain untested or undecided. This calls for some caution in expanding the broad ground beyond its original context of building contracts.

143 Having considered the aspects of the broad ground doctrine which remain controversial, I find that none of them poses any difficulty in the present case. There is no reason why the broad ground should not be available in the present case.

144 One of the most significant concerns about the broad ground is that it may allow the plaintiff/promisee an uncovenanted benefit or a windfall. The concern is that the plaintiff/promisee may pocket the damages rather than spending them on rectifying the breach so that the third party may benefit. Diverse views have been expressed on this issue. It has been suggested that the broad ground applies only if it can be shown that the third party has recourse against the plaintiff – either in the form of the plaintiff's liability to account (see *Panatown* at 577E–F; on the other hand see 592D *per* Lord Millett), or in the form of a contractual right against the plaintiff under a separate contract (see *Chitty* at para 18-063). Others have suggested that the broad ground is only available if the plaintiff/promisee has already incurred expenses to obtain the performance for which he contracted, or clearly intends to do so (see *Panatown* at 574C–E *per* Lord Jauncey of Tullichettle and 533B–D *per* Lord Clyde, and Andrew Burrows, "No Damages for a Third Party's Loss" (2001) 1 OUCLJ 107 at pp 109–110; on the other hand see *Panatown* at 547F–H and 556B–F *per* Lord Goff). Professor McKendrick suggests that the intention to cure may serve

as evidence that the promisee's interest truly lies in the performance of the contract (*The Common Law at Work* at p 175; see also *Damages to Protect Performance Interest* at pp 264–265). The current position in Singapore is that there is no universal requirement of intention to rectify, but the precise facts are "of the first importance" in each case (*Family Food Court* at [53]).

145 There is no risk of the MIB obtaining a windfall in this case. All that the MIB seeks to recover (and all that it can recover) against the Insurer Concerned under the Domestic Agreement is no more and no less than what it must pay to the victim under cl 3 of the Principal Agreement. The MIB is contractually liable to satisfy the Judgment Debt under cl 3 of the Principal Agreement and can be sued on the authority of *Gurtner* should it fail to do so. The MIB has also given an undertaking to satisfy the Judgment Debt in Koo's favour should their claims in the present proceedings be dismissed.[38] The MIB therefore not only intends to apply the damages for Koo's benefit but in fact has a legal obligation to do so.

146 A second concern is that the broad ground may lead to the defendant being doubly liable, say to the plaintiff in contract and separately to the owner of the defective premises in tort. That may also occur where the third party has a direct contractual right against the promisor. For this reason, Lords Browne-Wilkinson and Jauncey thought that the broad ground was unavailable in *Panatown* in part because the third party, UIPL, had a contractual right under the duty of care deed against the promisor, McAlpine (see *Panatown* at 577H–578G and 574E–H respectively). Lords Goff and Millett disagreed (see *Panatown* at 557H–561D and 595A–E respectively). The problem of double

[38] Plaintiffs' supplementary submissions in SUM 4880 dated 17 April 2017, para 21(b).

recovery was briefly referred to in *Family Food Court* at [66] in the context of a third party being an undisclosed principal.

147 Again, there is no question of double recovery in the present case, since I have already established that Koo has no independent claim against AM Gen (see [59]–[64] above). I note in passing that the problem of double recovery is in any event not insurmountable (see *Prosperland* at [52]). Various solutions have been proposed, including ordering a stay of one set of proceedings (see *Panatown* at 595E *per* Lord Millett), joining the relevant party or parties to the proceedings (see *Panatown* at 561D *per* Lord Goff) and requiring the plaintiff to provide an undertaking to effect remedial works or to obtain a release of the third party's right against the defendant (see *Damages to Protect Performance Interest* at p 265; John Cartwright, "Damages, Third Parties and Common Sense" (1996) 10 JCL 244 at p 256).

148 Thirdly, there is debate about whether the broad ground can support a claim by the plaintiff for consequential loss and damages for delay. In building contracts, for example, it will be the third party (who has a proprietary interest in the damaged property) who suffers these losses, and not the promisee. This has allegedly "persuaded some supporters of the broad ground to change position as far as damages for delay or consequential loss are concerned and opt instead for the recovery of genuine third party losses" (Hannes Unberath, "Third Party Losses and Black Holes: Another View" (1999) 115(Oct) LQR 535 at p 543). While Lords Goff and Millett thought that Panatown could obtain damages for delay under the broad ground (see *Panatown* at 554E–555H and 591B respectively), Lords Clyde and Jauncey disagreed (see *Panatown* at 534B and 573G–H respectively). While this may be one of the thornier problems

plaguing the broad ground, it does not pose any difficulty on the facts of this case and I do not think it is necessary for me to resolve it.

149 In the circumstances, while the broad ground continues to face some teething issues, I see no reason why it should not be available on the facts of this case.

150 Since I have found that the MIB is entitled to substantial damages, there is no need for me to consider the MIB's claim for specific performance.

Conclusion

151 My conclusions on each of the issues are therefore as follows:

(a) The MIB has *locus standi* to sue AM Gen, being a party to the Domestic Agreement. Koo lacks *locus standi* in both common law and equity to sue AM Gen under the Domestic Agreement.

(b) AM Gen is contractually obliged to satisfy the Judgment Debt under cl 3(1) of the Domestic Agreement. Its obligation is not limited to reimbursing the MIB after the MIB has satisfied the Judgment Debt, although it is liable to do so if the MIB exercises its discretion under cl 6 of the Domestic Agreement to satisfy the Judgment Debt first.

(c) The MIB is entitled to substantial damages as AM Gen's failure to satisfy the Judgment Debt has caused it financial loss. In the alternative, it is entitled to substantial damages under the broad ground in *Family Food Court*.

152 I therefore order final judgment to be entered in favour of the MIB for damages in the sum of S$788,057.73, plus interest at 5.33% per annum on the sum of S$788,057.73 from 21 February 2011 (the date of final judgment in Suit 613) to the date of this judgment. I will hear parties on costs.

Quentin Loh
Judge

Anthony Wee and Pak Waltan (United Legal Alliance LLC) for the plaintiffs;
Niru Pillai, Liew Teck Huat, Priya Pillay and Achala Menon (Niru & Co LLC) for the defendant;
third party unrepresented, absent.