Stork Technology Services Asia Pte Ltd (formerly known as Eastburn Stork Pte Ltd) v First Capital Insurance Ltd
[2006] SGHC 101

Case Number : OS 1720/2005

Decision Date : 03 July 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Devadason Letchamanan (Steven Lee Dason & Khoo) for the plaintiff; Anthony Wee and Elaine Tay (Rajah & Tann) for the defendant

Parties : Stork Technology Services Asia Pte Ltd (formerly known as Eastburn Stork Pte Ltd) — First Capital Insurance Ltd

Contract – Contractual terms – Conditions – Whether notice provision in insurance policy amounting to condition precedent to liability attaching on defendant-insurer under such policy – Whether defendant entitled to require strict compliance of notice provision by plaintiff-insured and repudiate liability for plaintiff's failure to do so – When "term" amounting to "condition precedent"

Contract – Waiver – Applicable principles when determining whether defendant-insurer waiving need for plaintiff-insured's compliance with notice provision in insurance policy

Words and Phrases – "Immediately" – Interpretation of word as used in notice provision of insurance policy

Words and Phrases – "May give rise to a claim" – Interpretation of phrase as used in notice provision of insurance policy – Whether insured or insurer to decide whether circumstances such that notice should be given

3 July 2006 *Judgment reserved.*

Lai Siu Chiu J:

1 The plaintiff, Stork Technology Services Asia Pte Ltd, applied for the following orders in the originating summons herein ("the OS") against the defendant, First Capital Insurance Limited:

(a) a declaration that the plaintiff had discharged its responsibilities under the insurance policy as an insured of the defendant in relation to claims, and/or had complied with its obligations as to the notice/notification of claims and/or transmission of documents under Condition 3 of the public liability insurance policy no ZPU00016127 ("the Policy");

(b) alternatively, a declaration that the defendant had by its conduct waived any and/or all breaches (if any) as to the notice requirement and/or transmission of documents under Condition 3 of the Policy;

(c) a declaration that the defendant is liable to indemnify the plaintiff under the Policy for all damages or sums paid or payable (less the applicable policy deductible) in relation to Suit No 1523 of 2002 ("the Suit") and appeals therefrom and all legal fees and disbursements incurred or to be incurred by the plaintiff in respect of the same, together with interest, from such time as the court may grant; and

(d) that the defendant pay the plaintiff all damages and/or all sums payable under the Policy (less the applicable policy deductible) in relation to the Suit and appeals therefrom and all legal fees and disbursements paid or payable by the plaintiff in respect of the same, together

with interest, from such time as the court may grant.

The background

2 The plaintiff was the second defendant in the Suit that had been instituted by Jet Holding Ltd ("Jet Holding") and three other parties against Cooper Cameron (Singapore) Pte Ltd ("Cameron") which was the first defendant. Jet Holding had chartered a drill ship called *Energy Searcher* ("the vessel") to Jet Shipping Ltd ("JSL"), the second plaintiff in the Suit. The vessel's manager was Jet Drilling (S) Pte Ltd ("JDL") who was the third plaintiff in the Suit while the fourth plaintiff in the Suit was Maurel Et Prom ("MEL") who claimed as assignee of the rights, title and interest of Jet Holding, JSL and JDL.

3 The Suit arose from the fracture of a slip joint on board the vessel on or about 16 March 2001, while the vessel was in the Bay of Bengal, off Chennai, India, working on a project that JDL had secured from Cairn Energy India Pty Limited, an oil exploration company.

4 The slip joint together with another slip joint (collectively "the slip joints") of the vessel had originally been found to be unfit for use. JDL then contracted with Cameron on behalf of JSL to refurbish and repair them. Cameron subcontracted the repair work to Van Der Horst Engineering Services Pte Ltd ("VDH"). Using selected components from both slip joints, VDH re-assembled a single operational joint. This refurbished joint was used as the primary slip joint on board the vessel. Cameron then subcontracted refurbishment of the unused parts of the slip joints to the plaintiff. The plaintiff was told to create a new slip joint ("the standby slip joint"). VDH sent the discarded parts to the plaintiff, which then used the parts to fabricate the standby slip joint.

5 When Cameron was sued, it instituted third party proceedings against the plaintiff for an indemnity against the claims of Jet Holding and the other three parties. The plaintiff in turn sought a counter-indemnity from Cameron for any damages that may be awarded against it. This counterclaim was not pursued eventually.

6 After a lengthy trial of 20 odd days, Belinda Ang Saw Ean J held, *inter alia*, (see *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2005] 4 SLR 417, hereinafter referred to as "the main judgment") that Jet Holding and JSL had title to sue but not JDL or MEL, whose claims she dismissed. She found that Cameron had been negligent and had breached its contract to use reasonable care and skill to repair the standby slip joint, which was the one that was in use on the vessel on 16 March 2001 when it failed.

7 Ang J further held that Cameron and the plaintiff owed a duty of care in tort to Jet Holding and JSL. She awarded Jet Holding and JSL judgment against Cameron in the sum of US$1m for the loss of a crucial component from the vessel's drilling unit called a blow out preventor ("BOP") and nominal damages of S$10 in respect of the other pleaded claims for damages. She declared that Cameron was entitled to be indemnified by the plaintiff to the extent of 50% of the damages awarded.

8 In her supplemental judgment ([2006] SGHC 20) dated 2 February 2006 ("the supplemental judgment"), Ang J awarded 30% of their costs and disbursements to Jet Holding and JSL, on the basis that they had succeeded only on a relatively small part of their claim for US$21m. JDL and MEL were ordered to pay the costs of Cameron and the plaintiff. As between Cameron and the plaintiff, Ang J awarded Cameron its costs on the third party proceedings and declared that the plaintiff should indemnify Cameron to the extent of 50% of the costs (including disbursements) payable to Jet Holding and JSL.

9 Six appeals arose out of the two judgments of Ang J. Jet Holding, JSL, JDL and MEL appealed against her decision in Civil Appeals Nos 96 and 122 of 2005 ("the main appeals"). Cameron appealed in Civil Appeals Nos 97 and 129 of 2005 (collectively "Cameron's appeals"), while the plaintiff appealed in Civil Appeals Nos 98 and 128 of 2005 ("the plaintiff's appeals"). Civil Appeals Nos 96, 97 and 98 of 2005 were appeals against the main judgment while the remaining three appeals were against the supplemental judgment.

10 In a reserved judgment ([2006] SGCA 20) delivered on 29 June 2006, the Court of Appeal dismissed the main appeals with costs to Cameron and the plaintiff. Cameron failed in its appeal in Civil Appeal No 97 of 2005 on the issue of liability to Jet Holding and JSL and on the damages awarded. However, as between itself and the plaintiff, Cameron partly succeeded on its appeal on the indemnity issue. It was Cameron's case that it was entitled to a full indemnity and not only 50% from the plaintiff, for the damages payable to Jet Holding and JSL.

11 The Court of Appeal held that *vis-à-vis* Cameron and the plaintiff under the third party proceedings, Cameron was not entitled to 100% contribution of the damages payable to Jet Holding and JSL. The appellate court held that Cameron was only entitled to a 50% contribution with the result that the plaintiff, in addition to paying US$500,000 of the US$1m damages awarded to Jet Holding and JSL, would pay half of Cameron's share of the damages or US$250,000. In other words, the plaintiff would pay a global sum of US$750,000 to Jet Holding and to JSL.

12 The Court of Appeal ordered Cameron to bear 25%, with the plaintiff bearing the remaining 75%, of the costs of Jet Holding and JSL in Cameron's appeals and in the plaintiff's appeals. As between themselves, the court ordered Cameron and the plaintiff to bear their own costs in Cameron's appeals and in the plaintiff's appeals.

13 Before the Court of Appeal heard the six appeals, the plaintiff had given notice to and informed the defendant of the judgments of Ang J. Now that the Court of Appeal has delivered judgment, the plaintiff would quite naturally look to the Policy and to the defendant to pay or reimburse the judgment sums due or paid to Jet Holding, JSL and to Cameron, including costs. The defendant, however, has already repudiated liability.

The facts

14 I turn now to the facts of the OS. The salient facts were undisputed and are essentially extracted from the affidavits filed by the parties' representatives, *viz* Ramaswamy Subramanian ("Subramanian"), the plaintiff's financial controller, on the plaintiff's behalf and by Elizabeth Lee Eng Khim ("Lee"), a claims executive, on the defendant's behalf. What the parties disagreed on was the interpretation of the relevant terms and conditions of the Policy.

15 According to Subramanian's first affidavit (filed on 13 January 2006), the defendant acquired the business of Winterthur Insurance (Far East) Pte Ltd ("Winterthur") with effect from 27 January 2003 and with it, the liabilities under the Policy. The Policy was first issued to the plaintiff under its former name Eastburn Stork Pte Ltd on 26 August 1999 and covered public liability including product liability claims, pursuant to a special condition endorsed on the Policy. It was renewed every year and at the material time, the Policy covered the period 1 July 2000 to 30 June 2001.

16 The plaintiff is a specialist service engineering company established in Singapore in 1978. Until April 2001, it was a subsidiary of an international multi-industry Dutch group known as Stork NV. The plaintiff's business is to service, repair and recondition equipment used in the oil and gas industry including high pressure drill floor equipment such as manifolds, spools, valves, BOPs and mud pump

modules.

17 Prior to the commencement of the Suit in December 2002, the plaintiff's managing director received from the Singapore office of English solicitors, M/s Stephenson Harwood, a letter dated 18 July 2002 ("Stephenson Harwood's letter"), representing *the owners, charterers and managers of the vessel*, giving notice of the "catastrophic failure" of the standby slip joint (described as "the Telescoping Joint" by the solicitors) on 16 March 2001.

18 Stephenson Harwood's letter went on to say:

> The Telescoping Joint was overhauled by Cooper Cameron (S) Pte Ltd and Stork Technology Services Asia Pte Ltd (formerly known as Eastburn Stork Pte Ltd) … in or about July 1998 to December 1998.
>
> We have been instructed to investigate the cause of the failure of the Telescoping Joint and the extent of your liability, if any. In order to assist our investigation into the failure of the Telescoping Joint, we should be grateful if you would provide the following documents.

19 The voluminous documents requested fell under three headings, *viz* (a) the Telescoping Joint; (b) details of work carried out during the repair overhaul of the Telescoping Joint; and (c) those relating to all new and replacement parts fitted to the Telescoping Joint during its overhaul in July–December 1998.

20 The concluding paragraph of Stephenson Harwood's letter read as follows:

> Please note that if the requested documentation is not forthcoming within the next 7 days we anticipate being instructed to apply to court to obtain an order for disclosure of those documents and/or class of documents listed above.

21 The plaintiff did not respond to Stephenson Harwood's letter. In his first affidavit, Subramanian justified the plaintiff's conduct on the basis that the plaintiff did not have privity of contract with the *owners, charterers or managers* of the vessel. He added:

> (a) Stephenson Harwood's letter was received three and a half years after the plaintiff had completed work on the standby slip joint.
>
> (b) No details were given of what type of failure occurred with regard to the Telescoping Joint.
>
> (c) The Telescoping Joint was identified by a production number (90000314) and a part number (615751-01) which were alien and unknown to the plaintiff.
>
> (d) The request for documentation included proprietary information belonging to Cameron.
>
> (e) Cameron had never informed the plaintiff of the occurrence of any failed telescoping joint. Hence, the plaintiff thought it had no connection with the standby slip joint supplied by Cameron.
>
> (f) The request for documentation appeared to be a bold and presumptuous request from foreign solicitors acting for unnamed parties seeking sensitive and confidential information belonging to Cameron.

(g) Stephenson Harwood's letter was not copied to Cameron.

Unbeknownst to the plaintiff, Stephenson Harwood had written to Cameron on 7 July 2002 demanding admission of liability for the failed standby slip joint, for which losses were estimated to be in the region of US$25m. Cameron instructed its solicitors (M/s Gurbani & Co) to reply to the demand. Before Gurbani & Co could reply, another letter dated 18 July 2002 was sent to Cameron by the English solicitors, which contents were identical to Stephenson Harwood's letter.

22 On 11 September 2002, the plaintiff was served with papers for Originating Summons No 1255 of 2002 for pre-action interrogatories ("the interrogatories application") by M/s Haridass Ho & Partners ("HHP"), who had been instructed by Stephenson Harwood. The interrogatories application was supported by a voluminous affidavit of one Helmut Ernst Van Roijen ("Roijen"), who subsequently testified at the trial of the Suit. The interrogatories application was fixed for hearing on 18 September 2002. In his affidavit, Roijen disclosed that the plaintiff and Cameron were potential defendants.

23 Realising the gravity of the situation, the plaintiff sent the papers for the interrogatories application to its solicitors, M/s Mallal & Namazie ("M&N") and notified its insurers.

24 At that juncture, there was some confusion. Upon checking its files, the plaintiff was under the impression that its insurer was Zurich Insurance (Singapore) Pte Ltd ("Zurich"). Accordingly, the plaintiff gave notice to Zurich by fax on 12 September 2002 and forwarded the latter a copy of the interrogatories application.

25 Subsequently, on 18 September 2002, the plaintiff forwarded the same set of papers to the defendant. It was only then that the plaintiff informed the defendant of Stephenson Harwood's letter.

26 The interrogatories application (which original hearing date of 18 September 2002 was postponed) was eventually disposed of on 4 December 2002. With Cameron's consent, the documents requested were provided by the plaintiff.

27 On 3 October 2002, Lee sent a fax to the plaintiff on the defendant's behalf, acknowledging receipt of the interrogatories application and advising that the defendant was not on risk.

28 Zurich, on the other hand, had appointed McLarens Singapore Pte Ltd ("McLarens") as adjusters upon receipt of the interrogatories application, albeit on a "without prejudice" basis.

29 The writ of summons for the Suit, although issued in December 2002, was only served on the plaintiff's solicitors on 6 June 2003. Thinking the defendant was not at risk, the plaintiff's solicitors liaised with McLarens on the pending Suit throughout 2003.

30 On 20 August 2003, Subramanian wrote to McLarens seeking confirmation that Zurich would indemnify the plaintiff under the relevant insurance policy. There was no response. Subramanian followed up with further letters dated 21 and 28 October 2003, which also met with no response.

31 Subramanian wrote yet again to McLarens on 10 March 2004 by which time the Suit had made considerable progress. On 12 March 2004, McLarens itself wrote to Zurich. Again there was no response. Subramanian then wrote to Zurich on 23 March 2004. On 15 April 2004, the plaintiff received a reply from Zurich through McLarens. Zurich said it was not at risk as its policy (which contained a product liability extension up to a limit of liability of $833,333) was for the period of 1 July 1998 to 30 June 1999.

32 Understandably, Zurich's letter caused considerable consternation to the plaintiff. Subramanian wrote to the defendant on 16 April 2004 to inform it of Zurich's position. On 21 April 2004, Lee replied on the defendant's behalf and requested, on a "without prejudice" basis, copies of the cause papers and forwarded a liability claim form ("the form") for the plaintiff's necessary action. Subramanian completed the form and returned it to the defendant on the following day. This was followed on 23 April 2004 by copies of all the documents the defendant had requested.

33 Not hearing from the defendant despite his making inquiries of Lee, Subramanian wrote to the defendant on 3 June 2004 seeking a response. On 9 July 2004, M/s Rajah & Tann ("R&T") sent a fax to M&N, the plaintiff's solicitors, repudiating liability on the defendant's behalf. R&T gave two reasons for the repudiation of liability:

(a) The Policy did not cover any product liability.

(b) Even if it did, the plaintiff had failed to provide the defendant with immediate notice of the potential claims by Cameron or by Jet Holding and its co-plaintiffs. Immediate notice of an occurrence which may give rise to a claim was a condition precedent to any liability, under Condition 3 read with Condition 10 of the Policy.

34 M&N replied to R&T on 4 August 2004 disputing the denial of liability, pointing out that the plaintiff had not delayed in giving notice to the defendant of the interrogatories application.

35 In its letter dated 9 August 2004 to the plaintiff's solicitors, R&T clarified that the plaintiff was informed of a potential claim in July 2002 when HHP wrote to the plaintiff for discovery of certain documents. (This is incorrect as the request came from Stephenson Harwood). M&N finally provided R&T with a copy of Stephenson Harwood's letter on 10 August 2004.

36 Further correspondence between the solicitors did not break the impasse. The plaintiff appointed M&N to defend the Suit at its own cost and expense.

37 The OS was issued on 10 November 2005 after Ang J had delivered the main judgment in the Suit on 22 August 2005.

The policy

38 It would be appropriate at this juncture to look at the conditions of the Policy, upon which the defendant relied to repudiate liability. First, Condition 3 states:

CLAIMS – RESPONSIBILITIES OF THE INSURED

In the event of any occurrence which may give rise to a claim under this Policy the Insured shall

(a) immediately give notice and full particulars in writing to the Company

(b) retain anything connected therewith for such time as the Company may reasonably require

(c) immediately forward to the Company upon receipt every letter claim writ summons or process in connection therewith

(d) immediately notify the Company when the Insured has knowledge of any impending

prosecution inquest or inquiry.

(Hereinafter, Condition 3 will be referred to as the "notice provision". Such a provision is commonly referred to as a notice-prejudice rule.) Condition 10 states:

OBSERVANCE

The due observance and fulfilment of the terms of this Policy so far as they relate to anything to be done or complied with by the Insured and the truth to the best of the Insured's knowledge and belief of the information furnished to the Company in connection with this insurance shall be conditions precedent to any liability of the Company.

39 Another relevant extract from the Policy is the Products Liability Annexure (Losses Occurrence Basis) which states as follows:

In consideration of the payment of an additional premium this Policy is extended subjected to the terms exclusions limits and conditions insofar as they are not specifically varied hereby to indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay by way of direct compensation for damage or injury suffered in the course of the Business consequent upon

1. accidental death or bodily injury including illness of any person

2. accidental loss of or damage to property

3. loss of profits sustained by any person arising as a result of a claim paid or admissible under 1 and/or 2 above.

caused by or in connection with or arising from

(a) anything manufactured sold supplied or financed including containers and packaging

(b) anything constructed erected or installed

(c) anything repaired serviced tested or processed

by the Insured or any Employee

and occurring within the Territorial Limits during any Period of Insurance but not prior to the date of this Extension.

The plaintiff's submissions

40 Counsel for the plaintiff, Mr Devadason Letchamanan ("Mr Dason"), argued that Stephenson Harwood's letter could not be viewed as "an occurrence which may give rise to a claim under the Policy" under the notice provision. Consequently, it did not have to be immediately notified to the defendant. Liability to third parties might not materialise from Stephenson Harwood's letter but might arise from the accident referred to therein.

41 The Policy was a liability policy. The words "claim under this policy" in the notice provision must refer to the plaintiff's claim under the Policy. The mere fact of an accident or incident that might give rise or did give rise to a claim by a third party did not entail as of necessity that there would be

a claim by the plaintiff against the defendant for indemnity. The case *The Vainqueur José* [1979] 1 Lloyd's Rep 557 was cited in support of this argument. It was submitted that there was a distinction between "claims under this policy" and a claim made by third parties which would lead to a "claim under this policy".

42 The words "may give rise" under the notice provision denoted more than a mere "possibility". Mr Dason argued that a notification was not required merely because a claim was possible, citing *Colinvaux's Law of Insurance* (Sweet & Maxwell, 7th Ed, 1997) at para 9-02 where the learned author stated:

> The word "likely" excludes the mere possibility of a claim, so that notification is not required merely because a claim is "possible".

Read in the converse, the notice provision would state:

> In the event of any occurrence which *may not* give rise to a claim under this policy, the insured need not immediately notify …

43 Consequently, Mr Dason submitted, the judgment of whether an occurrence may or may not give rise to a claim under the Policy vested in the plaintiff as the insured, although the judgment call must be reasonable, when tested against the circumstances prevailing. Therefore the plaintiff was only obliged to give notice of any occurrence which in its judgment might result in the plaintiff being held liable to a third party and result in the plaintiff having to make a claim under the Policy. The plaintiff need not give notice of any and every occurrence, however trivial, but only those that could be considered of sufficient gravity or applicability as might give rise to a claim under the policy: *Kathirvelu v Pacific & Orient Insurance Co Sdn Bhd* [1990] 3 MLJ 312 and *Halsbury's Laws of England* vol 25 (LexisNexis, 4th Ed, 2003 Reissue) at para 174.

44 At the time of receipt of Stephenson Harwood's letter, the plaintiff's judgment that the defendant need not be notified was eminently reasonable when seen in the light of the fact that at the subsequent trial of the Suit, Cameron disputed the identity of the standby slip joint. Indeed, upon its receipt of Stephenson Harwood's letter dated 18 July 2002, Cameron itself did not believe that the failed slip joint was the standby slip joint Cameron and the plaintiff had refurbished in November 1998. The fact that Cameron did not see fit to notify the plaintiff of Stephenson Harwood's demand dated 7 July 2002 and of its subsequent receipt of the firm's letter dated 18 July 2002 was indicative of the reasonableness of the common belief of the plaintiff/Cameron, that neither was involved in the incident of the failed slip joint.

45 A reasonable interpretation of Stephenson Harwood's letter was that it was a request for documents and not a claim or demand. Moreover the numbers stated therein were not familiar to the plaintiff. Stephenson Harwood's letter referred to a "catastrophic failure" and not a breakdown as would be the more appropriate word when used in connection with a failed slip joint.

46 A "claim" is made when a demand or a request for payment is made. It is not made by a mere notification of the happening of the insured event giving rise to a claim. Three cases were cited by counsel in support of this proposition, *ie*, *Chiu Teng Construction Co Pte Ltd v The Hartford Insurance Company (Singapore) Ltd* [2001] SGHC 119 at [116]–[118]; *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 and *Divcon International (HK) Pte Ltd v Union des Assurances de Paris-IARD* [1998] SGHC 241 at [17]–[22]. Moreover since Stephenson Harwood's letter did not make a claim against the plaintiff (as compared to their letter to Cameron dated 7 July 2002), there was no "possibility" or "likelihood" of the plaintiff making a claim under the Policy. Consequently, no

notification needed to be given to the defendant.

47 As for notification of the interrogatories application there was only a six-day delay between service (on 11 September 2002) by HHP and notification to Winterthur/the defendant (on 18 September 2002) with an intervening weekend (14–15 September 2002) between the two dates. In any case, the defendant had not been prejudiced by any delay in the notification as the interrogatories application was for pre-action discovery and was not a claim based on the occurrence of the failed slip joint.

48 The burden to prove a breach of a condition lay with the party making the assertion: see *Tan Thuan Seng v UMBC Insurans Sdn Bhd* [1998] 1 SLR 887 at [30]. It did not matter if the condition allegedly breached was stated to be a condition precedent to liability: *Bond Air Services Ld v Hill* [1955] 2 QB 417). Therefore, it was for the defendant to prove why a notification issued six days late was deemed not "immediate" in the circumstances of the case.

49 The notification clause in Condition 3 was not a condition precedent even if it could be said (which the plaintiff denied) that the same had been breached.

50 Policies should be construed strictly against the insurers and the *contra proferentum* rule applied. The Policy did not use the words "Terms, Conditions and Exclusions" together. "Exclusions" and "Conditions" were in separate categories. Therefore the word "terms" would not include "Conditions" and "Exclusions". Consequently the word "terms" under Condition 10 would not refer to the notice provision. The observance of Condition 10 was not a condition precedent to the defendant's liability. Therefore, any breach of the notice provision would only sound in damages which could be set off against the insured sum payable to the plaintiff.

51 Such a strict reading of the Policy was in accordance with the law: see *Stoneham v The Ocean, Railway, and General Accident Insurance Company* (1887) 19 QBD 237 at 239. The fact that a policy stated that certain clauses (of which the notice clause was one) were conditions precedent was not necessarily conclusive: see *MacGillivray on Insurance Law* (Sweet & Maxwell, 10th Ed, 2003) at
para 19-35.

The defendant's submissions

52 The defendant not surprisingly took a diametrically different stand from the plaintiff. I shall first deal with Lee's affidavit before I refer to the submissions tendered on the defendant's behalf.

53 Lee in her affidavit rebutted Subramanian's claim that the identification numbers stated in Stephenson Harwood's letter were "alien and unknown". She pointed out that the two numbers given at [19(c)] above were quoted in Cameron's purchase order no 45028553 to the plaintiff, which copy she exhibited in her affidavit.

54 Lee further refuted Subramanian's contention that the plaintiff did not know the identities of the vessel's owners nor how the plaintiff could have been responsible for the failure of the Telescoping Joint described in Stephenson Harwood's letter. She referred to the following facts:

(a) The vessel was referred to in Stephenson Harwood's letter.

(b) In Subramanian's affidavit, he had admitted that the plaintiff boarded the vessel in December 1998 for some testing works.

(c) Even though the vessel's owners were not identified in Stephenson Harwood's letter, reference was made to the vessel and the vessel's owners were identified by reference to the vessel.

(d) Stephenson Harwood's letter also referred to Cameron, Cameron's telescoping joint production number and stated the plaintiff's involvement in respect of the Telescoping Joint, *viz* that the plaintiff overhauled the Telescoping Joint with Cameron in or about July to December 1998.

Consequently, any reasonable person who received Stephenson Harwood's letter would have sought legal advice or sought Cameron's advice and responded to the request for additional information. Instead, the plaintiff did nothing.

55 Lee deposed that Stephenson Harwood's letter would constitute "an occurrence which may give rise to a claim under the Policy" under the notice provision. The sentence, "We have been instructed to investigate the cause of the failure of the Telescoping Joint and the extent of your liability, if any" in Stephenson Harwood's letter clearly indicated the possibility of the owners of the vessel making a claim against the plaintiff, depending on the outcome of the investigations as to the extent of the plaintiff's liability for the "catastrophic failure" in the Telescoping Joint. That sentence would have put any reasonable party on notice of a possible claim and not take it as a mere request for Cameron's documents.

56 Consequently, pursuant to Conditions 3(a) and 3(c) read with Condition 10, the plaintiff was obliged to give notice of Stephenson Harwood's letter and immediately forward a copy to the defendant.

57 Even if it could be said that Stephenson Harwood's letter did not come within the ambit of a "letter" under Condition 3(c), it would constitute "an impending prosecution, inquest or inquiry" under Condition 3(d). Again, the plaintiff was obliged to notify the defendant immediately upon its receipt of the same. Instead, the first time the defendant saw Stephenson Harwood's letter was on 10 August 2004, when M&N forwarded a copy to the defendant's solicitors.

58 Lee similarly maintained that the six-day delay between the plaintiff's receipt of the interrogatories application and its service on the defendant constituted a breach of the notice provision.

59 In the plaintiff's letter dated 18 September 2002 forwarding the interrogatories application, Subramanian stated in para 2:

> Earlier in July 02, we received a letter from their lawyers asking for these documents and we did not respond as there is no privity of contract between us and Jet Drilling.

Lee deposed that the plaintiff's cursory reference to Stephenson Harwood's letter was telling of its realisation that it may have breached its fundamental obligation under the notice provision.

60 A prayer in the OS (see [1(b)] above) asserted that the defendant had by its conduct waived any or all breaches as to "notice" under the notice provision. This assertion (according to Subramanian's affidavit) was in relation to Lee's fax dated 3 October 2002 (see [27] above) which said:

> We acknowledge receipt of your fax dated 18.9.02 with enclosures.

> From the documents provided, we note that your contract with Cooper Cameron (Singapore) Pte Ltd was in 1998 at which time we were not on risk. In view of the aforesaid, we are filing our papers away.

Lee explained that the papers relating to the interrogatories application served on the defendant omitted Roijen's affidavit (see [22] above) and did not include a copy of Stephenson Harwood's letter. As she was well aware that the plaintiff had notified Zurich of the interrogatories application and Zuric was the plaintiff's insurer in 1998 whereas the defendant's cover commenced from 1 July 1999, Lee did not see the need to review the Policy. She only realised the defendant was at risk when she received the plaintiff's letter dated 16 April 2004 (see [32] above) informing the defendant of Zurich's position.

61 Lee disagreed with Subramanian's assertion that no prejudice was suffered by the defendant in any case by the late notice of Stephenson Harwood's letter. Had the defendant been apprised of the same soon after 18 July 2002, she would have forwarded it to the defendant's solicitors for review in conjunction with the Policy. The defendant's solicitors may not have committed the error made by the plaintiff and/or Zurich and which Zurich only realised one and a half years after the interrogatories application was issued – that the failure of the Telescoping Joint was not a risk covered by Zurich. The defendant would also have instructed its solicitors to take over conduct of the Suit from the plaintiff's solicitors, which trial was only ten months away at the time Zurich discovered its error. By the time (16 April 2004) the plaintiff formally offered to the defendant an opportunity to take over the conduct of the Suit, substantial costs had been incurred by the plaintiff to its previous solicitors M&N, which costs could have been avoided if the defendant had taken over conduct of the interrogatories application back in September 2002.

62 I turn now to the arguments tendered on the defendant's behalf. Mr Anthony Wee submitted that the notice provision was a condition precedent the non-compliance of which afforded the defendant insurer a valid defence to avoid payment under the Policy.

63 Counsel for the defendant submitted that when a term was stipulated to be a condition precedent in an insurance policy, the insurer was under no liability under the policy until such a term was duly complied with by the insured, citing Poh Chu Chai, *Principles of Insurance Law* (LexisNexis, 6th Ed, 2005) (at p 392) and *MacGillivray on Insurance Law* ([51] *supra*) at para 28-22. A case which supported this principle was *Farrell v Federated Employers Insurance Association Ltd* [1970] 1 WLR 498 ("*Farrell*'s case"). According to *Farrell*'s case and *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274 ("*Pioneer Concrete*"), there was no need for the insurer to have suffered prejudice (as the plaintiff contended) before the insurer could rely on the breach of a notice provision which was a condition precedent. *Barratt Bros (Taxis) Ltd v Davies* [1966] 1 WLR 1334 (*Barratt Bros*' case) cited in *Farrell*'s case, which stated otherwise, was distinguishable on its facts. The rule was affirmed by the Privy Council in *Motor and General Insurance Co Ltd v Pavy* [1994] 1 WLR 462 and more recently in *Pilkington United Kingdom Ltd v CGU Insurance plc* [2005] 1 All ER (Comm) 283. It was also applied by the Supreme Court of South Australia in *McInerney v Schultz* (1981) 28 SASR 542.

64 The principle of strict compliance with the notice provision in insurance policies was recognised in our local context by Judith Prakash J in *Tan Thuan Seng v UMBC Insurans Sdn Bhd* ([48] *supra*). Prakash J followed the principles enunciated in *Farrell*'s case and in *Motor and General Insurance Co Ltd v Pavy* but distinguished them and applied *Barratt Bros*' case on the facts.

65 The words used in the notice provision were "immediately give notice … in writing", "immediately forward to [the defendant] upon receipt every letter claim writ summons or process",

"immediately notify [the defendant] when the [plaintiff] has knowledge of any impending prosecution inquest or inquiry". The wording was unambiguous and clearly called for strict compliance.

66 It was disingenuous of the plaintiff to say that Stephenson Harwood's letter could not be construed as "an occurrence which may give rise to a claim under the Policy". The language used referred to an investigation of the cause of the failure of the Telescoping Joint, the extent of the plaintiff's liability, if any, and gave notice of an intention to apply to court if documents requested were not forthcoming.

67 The operative word used in the notice provision was "may". *Black's Law Dictionary* (West Group, 7th Ed, 1999) defined "may" as "[h]as a possibility (to)" or "might". Accordingly, the event of an occurrence need only be the "possibility" rather than a "probability", of a claim.

68 Based on the authorities he had cited, counsel for the defendant submitted that if the court found that the plaintiff did in fact fail to comply with the notice provision, then a finding should also be made that the defendant was entitled to repudiate liability under the Policy, regardless of whether the defendant had suffered any prejudice from the plaintiff's non-compliance.

69 The court's attention was drawn to the evidence that emerged from Subramanian's affidavit: the plaintiff was a well-established company and was previously a subsidiary of a Dutch multinational group; it was not unfamiliar with insurance policies. The English courts in *Farrell*'s case and *Pioneer Concrete* ([63] *supra*) applied the condition precedent notice provision against individuals who were employees of the insured without finding an escape route from the consequences of the employers' breach of such provisions out of sympathy for the employees. In our case, the plaintiff was a commercial entity.

70 Counsel for the defendant questioned Subramanian's reasons for ignoring Stephenson Harwood's letter. Lee's assertion that the plaintiff was familiar with Cameron's production numbering system being prefixed with "90000" was not challenged or denied. Neither did the plaintiff deny that the purchase order of Cameron to the plaintiff for the standby slip joint contained the numbers said to be "alien and unfamiliar" by Subramanian. Further, Lee deposed that the plaintiff had worked with Cameron on no less than 68 occasions during 1998.

71 It was contended by counsel for the defendant that the defendant did not waive the plaintiff's breach. For waiver to apply, the plaintiff had to prove that the defendant had full knowledge of the breaches, according to *Putra Perdana Construction Sdn Bhd v AMI Insurance Bhd* [2005] 2 MLJ 123 and the House of Lords decision in *Banning v Wright* [1972] 1 WLR 972.

72 Even if it could be said that the defendant waived the plaintiff's breach in failing to inform and forward a copy of Stephenson Harwood's letter, it did not waive the plaintiff's compliance with the notice provision for future occurrences which may give rise to a claim under the Policy.

The issue

73 The only issue for determination in the OS is whether the defendant was entitled to require strict compliance of the notice provision by the plaintiff and repudiate liability (as it has done) for the plaintiff's failure to do so.

The decision

74 I start by addressing in their inverse order, the arguments raised by the parties. I deal first

with the issue of waiver. In the light of the explanation given in Lee's affidavit and the chronology of events set out above (at [24] to [32]), I dismiss the plaintiff's argument that the defendant had waived compliance of the notice provision *vis-à-vis* Stephenson Harwood's letter, by its letter dated 3 October 2003. To constitute waiver, the cases (at [71] above) show that the party who purportedly waived compliance of the notice must be apprised of the full facts. That was not the case here as the defendant was not even aware of the existence of Stephenson Harwood's letter until 18 September 2002 (see [25] above) and saw the same for the first time on 10 August 2004 (see [35] above).

75 The plaintiff's convoluted argument that the *contra proferentum* rule should apply is equally without merit. There is no ambiguity in any of the terms, conditions or exclusions in the Policy. For reasons stated below (at [76]–[77]), I do not accept that "term" would not include "conditions". In any case, as the defendant rightly pointed out, there is no separate or third category of conditions headed "Terms" in the Policy. The word "terms" appeared in small letters within Condition 10 and in the Products Liability Annexure (see [39] above).

76 Counsel for the defendant had referred the court to extracts from Kim Lewison's textbook, *The Interpretation of Contracts* (Sweet & Maxwell, 2004), on the meaning of condition (at p 451) where the author stated:

> In English law the word "condition" may mean (i) a requirement which must be satisfied before any contract comes into existence; (ii) a requirement which must be satisfied before a party can be liable to perform his obligations under a contract; (iii) a term of the contract; (iv) an important term of the contract, breach of which will amount to a repudiation of the contract; (v) a requirement which if satisfied will automatically bring the contract to end; or (vi) a requirement which if satisfied will entitle one party to bring the contract to an end.

The learned author went on to refer to the three meanings of the word "condition" as identified by Lord Denning MR in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 1 WLR 840. These were:

(a) a prerequisite to the very existence of an agreement;

(b) the common meaning of a provision or stipulation;

(c) a "term of art".

Elaborating on (c), Lord Denning said (at 851):

> A "condition" in this sense is a stipulation in a contract which carried with it this consequence: if the promisor breaks a "condition" in any respect, however slight, it gives the other party a right to be quit of his future obligations and to sue for damages: unless he, by his conduct, waives the condition, in which case he is bound to perform his future obligations, but can sue for the damages he has suffered.

Lords Reid and Simon of Glaisdale in the appeal to the House of Lords (*L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235) both indicated that where the word "condition" is used in a legal document, there is a presumption that it is used in its sense as a "term of art".

77 At p 453, Kim Lewison QC defined "conditions precedent" as follows:

> A condition precedent is a condition which must be fulfilled before any binding contract is

> concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract, but which suspends performance of it until fulfilment of the condition.

It is crystal clear on the wording of Condition 10 that observance of the notice provision was a condition precedent to the defendant's liability under the Policy. The wording of Condition 10 is no different from that suggested in Poh Chu Chai, *Principles of Insurance Law* ([63] *supra*) at p 388 in order to turn a term into a condition precedent:

> The due observance and fulfilment of the terms of this policy insofar as they relate to anything to be done or not to be done by the Insured shall be conditions precedent to any liability of the Company to make any payment under this policy.

78 My view is supported by *Tan Thuan Seng v UMBC Insurans Sdn Bhd* ([48] *supra*) cited by both counsel. There, the contractors' all risks policy issued by the defendant contained two conditions which are *in pari materia* to our Condition 10 and notice provision (save that the notice provision stipulated that the defendant must receive notice within 14 days of an occurrence). Prakash J held (at [15]) that the notice provision was a condition precedent to the defendant's liability.

79 The gravamen of the defendant's case was that the plaintiff had failed to comply with the notice provision with regards to Stephenson Harwood's letter and the interrogatories application.

80 At this juncture, I would like to revisit the notice provision– the operative words used are "any occurrence which may give rise to a claim under this policy". The reference by Mr Dason on the plaintiff's behalf to the extract from *Colinvaux's Law of Insurance* (see [42] above) was taken out of its context. This can be seen from the full passage (at para 9-02) of the book from which he quoted the extract:

> Where notice is required to be given "immediately" or "forthwith" it is taken to mean within a reasonable time and without any unjustifiable delay [citing *Farrell*'s case] … In liability insurance the assured is generally required to give notice of an occurrence or event likely to give rise to a claim. The word "likely" excludes the mere possibility of a claim, so that notification is not required merely because a claim is "possible".

However, the material words in the notice provision were "*may* give rise to a claim" not "*likely* to give rise to a claim". The Malaysian case *Kathirvelu v Pacific & Orient Insurance Co Sdn Bhd* ([43] *supra*) has no relevance either as in that case Condition 7 in the personal accident policy upon which the plaintiff based his claim contained the words "[u]pon the happening of any accident *likely* to give rise to a claim". I accept as correct the interpretation of the word *may* (at [67]) submitted on the defendant's behalf.

81 Let me now turn to Stephenson Harwood's letter to see whether it falls within the phrase "may give rise to a claim". The material sentence there reads:

> We have been instructed to investigate the cause of the failure of the Telescoping Joint *and the extent of your liability, if any.* [emphasis added]

Stephenson Harwood stated in no uncertain words that the plaintiff *may* be found liable upon the outcome of the firm's investigations of an *occurrence* involving the plaintiff. It was not a mere request for information and documents as Subramanian and Mr Dason sought to argue.

82 Was a "claim" against the plaintiff a "possibility"? Again the above sentence in Stephenson Harwood's letter leaves little room for doubt. With respect, the four cases cited by counsel for the plaintiff (at [46] above) have little relevance. The emphasis in the notice provision was on the "possibility" of a "claim" being made arising out of an "occurrence". Counsel for the plaintiff was splitting hairs in trying to draw a distinction in his submissions between "liability" and a "claim" proper.

83 The Court of Appeal in *Federal Insurance Co v Nakano Singapore (Pte) Ltd* ([46] *supra*) was tasked with determining the meaning of the following words (italicised below) in Condition 8 of the appellant's public liability policy:

> *[I]f a claim is made and rejected* and no action or suit is commenced within three months after such rejection … all benefit under this policy shall be forfeited.

The appellant had contended that it was entitled to repudiate liability under the policy because the insured's suit was contractually time-barred by reason of Condition 8. The insured gave notice of the accident (from which the claim arose) on 6 September 1985, followed by a letter to the insurance brokers on 15 August 1986 giving a breakdown of its claim totalling $503,037.61 with supporting documentation. The appellant wrote on 4 November 1986 to the insured repudiating liability for various reasons, which letter the insured ignored. On 26 June 1987, the insured submitted a written claim through its solicitors in the sum of $226,371.70. The appellant submitted (as a preliminary issue for the court's determination) that the insured's claim was time-barred as no suit was commenced within three months of 4 November 1986, when the appellant rejected the insured's claim.

84 It was in the above context that the appellate court, in dismissing the insurer's appeal, held (at 396–397, [23]) that:

> [A]n essential element in the 'making' of a claim is the making of a demand or request, express or implied, for payment. A claim is made when a demand or request for payment is made. It is not made by a mere notification of the happening of the insured event giving rise to a claim.

85 I pause here to refer to *Farrell*'s case ([63] *supra*). There, the appeal turned on the interpretation of Condition 1 in an employer's liability policy upon which the plaintiff attempted to make a claim for damages for serious injuries sustained in the course of his employment. Condition 1 stated:

> In the event of any occurrence which may give rise to a claim for indemnity under this policy, the employer shall as soon as possible give notice thereof to the association in writing with full particulars. Every claim, notice, letter, writ or process or other document, served on the employer shall be notified or forwarded to the association immediately on receipt. …

86 In November 1962, the appellant in *Farrell*'s case was injured at work. The insurers were notified of the accident in April 1963 and in August 1964, they told the appellant's solicitors that liability was disputed. In September 1964, a receiver was appointed to the employer company. Unknown to the appellant's solicitors, under the Third Parties (Rights against Insurers) Act 1930 (c 25) (UK), the employer's rights against its insurers vested in the appellant. On 28 September 1964, the appellant's solicitors issued a writ against the employer. On 6 January 1966, an attempt to serve the writ on the employer proved abortive. The writ was sent to the receiver on 17 January 1966. He returned it to the appellant's solicitors but instead of notifying the insurers, the appellant's solicitors obtained and signed judgment against the employer in default of appearance on 28 February 1966. On 2 March 1966, the insurers were notified of the proceedings when they were asked to satisfy the judgment after damages had been assessed. The insurers repudiated liability in reliance on

Condition 1. The English Court of Appeal held that the appellant was in breach of Condition 1 for on the facts, the insurers had not been notified of service of the writ either immediately or with all reasonable speed.

87 *MacGillivray* ([51] *supra*) had acknowledged (at para 19-39) that:

> There is very little English authority on the meaning of the words "immediately" or "forthwith" when used in insurance policies.

Colinvaux ([42] *supra*) had cited *Farrell*'s case for his comment (see [80] above) that "immediately" and "forthwith" meant within a reasonable time and without any unjustifiable delay. In *Farrell*'s case, counsel for the appellant relied on the definition of "immediately" by Fletcher Moulton LJ in *In re an Arbitration between Coleman's Depositories, Limited and The Life and Health Assurance Association* [1907] 2 KB 798 (at 807) to mean "with all reasonable speed considering the circumstances of the case". Both definitions are equally acceptable to me. I now apply the definitions to our facts.

88 In relation to Stephenson Harwood's letter, the plaintiff's delay in informing the defendant of the same was for a period of two months (18 July 2002 to 18 July 2002). Even then (see [59] above), the notification was a brief one-liner and no copy of Stephenson Harwood's letter was extended to the defendant (via its solicitors) until 10 August 2004, almost two years later. As for the interrogatories application, there was a delay of seven days between service of the application on the plaintiff (11 September 2002) and forwarding it in turn to the defendant (on 18 September 2002).

89 Based on the guidelines established by the cases and looking at the circumstances of this case, I am prepared to accept that seven days' delay in regard to notification to the defendant of the interrogatories application would not violate the meaning of "immediately".

90 However, the same cannot be said of the two months' delay with regards to Stephenson Harwood's letter (assuming the one-liner notification on 18 September 2002 can be considered proper compliance with the notice provision). Contrary to the plaintiff's arguments, the common law position does not require that an insurer must prove prejudice before he can rely on a breach of a condition precedent in a policy: see *Pioneer Concrete* ([63] *supra*). I reject the American authorities cited by the plaintiff which decided that prejudice is a requirement for reliance on breach of a condition precedent. In any case, there was real prejudice to the defendant in this case arising from the delay, according to Lee (see [61] above).

91 Counsel for the plaintiff (as well as Subramanian in his affidavit) had made the startling proposition that it was for the insured, *viz* the plaintiff, to decide whether it should give notice of an occurrence that may give rise to a claim. I do not accept this submission at all nor that *The Vainqueur José* ([41] *supra*) stands for this proposition; that case concerned a charterparty dispute. A notice prejudice rule like the notice provision is specifically put into insurance policies to protect the insurer, not the insured, bearing in mind that it is the insurer that will ultimately be the paymaster in the usual course of events (provided the insured complies with the terms of the policy and the claim is a risk insured against). Canadian cases (see *Marcoux v The Halifax Fire Insurance Company* [1948] SCR 278) support my viewpoint. Additionally, it is for the insurer, not the insured, to determine the issue of liability, in the giving of notice: see *Glenburn Dairy Ltd v Canadian General Insurance Co* [1953] 4 DLR 33.

92 The plaintiff could have accepted the defendant's repudiation of the Policy when it received Lee's fax of 3 October 2002 stating the defendant was not at risk. Instead, in applying for the various prayers set out in the OS, the plaintiff had elected to treat the Policy as still subsisting. This is

reflected in the House of Lords decision of *Fercometal SARL v Mediterranean Shipping Co SA* [1989] AC 788 which stands for the following proposition, succinctly stated in the headnotes of the report at 788–789, *viz:*

> [W]here a party wrongfully repudiated his contractual obligations in anticipation of the time for their performance, the other party could either affirm the contract by treating it as still in force or accept the repudiation and treat the contract as discharged …

That being the case, the plaintiff is bound by the terms and conditions stated in the Policy.

Conclusion

93 Before I make my ruling, I wish to make one observation on the difference between the affidavits filed by the parties. While Lee's affidavit deposed to facts, Subramanian's affidavit was more argumentative than factual and contained submissions that should best have been left to the plaintiff's counsel to put before the court. Subramanian took it upon himself, as the financial controller of the plaintiff, to decide that there was no privity of contract between the plaintiff and *the owners, charterers and managers of the vessel* that warranted his not replying to Stephenson Harwood's letter. Unfortunately, Subramanian was completely wrong in his surmise. The plaintiff and Cameron were sued by Jet Holding and the three co-plaintiffs for breach of a duty of care in tort, not breach of contract. Any reasonable person, let alone a reputable company like the plaintiff, would or should have obtained legal advice or, at the very least, passed Stephenson Harwood's letter onto his lawyers to respond, if not to review the merits of the allegations raised therein.

94 In failing to do so the plaintiff caused severe prejudice to the defendant, as can be seen from the outcomes (at first instance and on appeal) of the Suit.

95 Consequently, I hold that the defendant is not liable to the plaintiff on the Policy. For the plaintiff's breach of the notice provision which was clearly a condition precedent to liability attaching on the defendant under the Policy, the defendant was entitled to repudiate the Policy. Accordingly, I dismiss the OS with costs to the defendant to be taxed unless otherwise agreed.