IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 152

Registrar's Appeal from State Courts No 12 of 2021

Between

Sompo Insurance Singapore Pte Ltd (formerly known as Tenet Sompo Insurance Pte Ltd)

… *Appellant*

And

Royal & Sun Alliance Insurance plc

… *Respondent*

JUDGMENT

[Credit And Security] — [Performance bond]
[Insurance] — [Marine insurance]
[Insurance] — [General principles] — [Subrogation]

TABLE OF CONTENTS

Sompo Insurance Singapore Pte Ltd
v
Royal & Sun Alliance Insurance plc

[2021] SGHC 152

General Division of the High Court — Registrar's Appeal from State Courts
No 12 of 2021
Philip Jeyaretnam JC
7 June 2021

24 June 2021 Judgment reserved.

Philip Jeyaretnam JC:

Introduction

1 Does an insurer's right of subrogation to the rights and remedies of the insured in respect of the subject matter of the loss extend to the right to call upon a performance bond provided to the insured by a third party in connection with the insured's original contract with the party responsible for the insured loss?

2 In this case, the insurance contract is governed by English law,[1] and so the relevant statutory provision is s 79(2) of the Marine Insurance Act 1906 (c 41) (UK), which is *in pari materia* with s 79(2) of the Marine Insurance Act (Cap 387, 1994 Rev Ed). Both the performance bond and the original contract

[1] Page 84 of 1st Affidavit of Michelle Karen Robinson filed on 16 March 2021 ("MKR's Affidavit"): RBOD pp 90.

(here one of carriage) are governed by Singapore law.[2] No evidence was given of English law, and counsel confirmed before me that I should proceed on the basis that there is no difference between English and Singapore law in relation to the interpretation of the respective Marine Insurance Acts, and in relation to the law of subrogation generally.

Facts

The parties

3 The plaintiff (and respondent in this appeal) is Royal & Sun Alliance Insurance plc ("RSA"). The defendant (and appellant in this appeal) is Sompo Insurance Singapore Pte Ltd ("Sompo").

Background to the dispute

4 On or about 19 December 2013, the Government of Singapore (the "Government"), through the Defence Science and Technology Agency ("DSTA"), entered into a Period Contract for Shipment of Cargo No. A31236 ("Carriage Contract") with Geometra Worldwide Movers Pte Ltd ("Geometra").[3] Under the Carriage Contract, Geometra agreed to transport, by seafreight, certain military cargo in containers (the "Cargo").[4]

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2 Page 26 of MKR's Affidavit at cl 22: RBOD p 32; p 137 of MKR's Affidavit at cl 7: RBOD p 143.

3 Respondent's written submissions dated 3 June 2021 ("RWS") at para 9; p 16 of MKR's Affidavit: RBOD p 22.

4 RWS at para 9.

5 RSA, together with other co-insurers, are the underwriters of the Government in respect of the Cargo.[5] The insurance contract is one of marine insurance, and an indemnity insurance.[6]

6 Clause 30.1 of the Carriage Contract provided that Geometra:[7]

> … lodge with the [Government] a Security Deposit for the sum of **five percent (5%)** of the estimated Contract Price in the form of an irrevocable and unconditional Performance Bond strictly in compliance with the format enclosed in **Annex E** issued by a bank or insurance company registered with the Monetary Authority of Singapore …
>
> [emphasis in original]

7 Clause 30.2 of the Carriage Contract further provided that:[8]

> [i]n the event of any default or breach of any of the obligations by [Geometra] under the Contract, the [Government] may at its sole discretion draw on the Security Deposit or the Performance Bond to satisfy any liquidated or other damages as may become due to the [Government] under the Contract.

8 Pursuant to cl 30.1 of the Carriage Contract, Sompo issued a Performance Bond in favour of the Government on 17 January 2014 ("Performance Bond").[9] The Performance Bond was valid from 19 December 2013 to 18 March 2017.[10] Under the Performance Bond, Sompo undertook irrevocably and unconditionally to pay the Government an amount not

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5 RWS at para 10; see pp 89–92 of MKR's Affidavit: RBOD pp 95–98.

6 Pages 67–95 of MKR's Affidavit: RBOD pp 73–101.

7 Page 27 of MKR's Affidavit: RBOD p 33.

8 Page 27 of MKR's Affidavit: RBOD p 33.

9 Pages 136–137 of MKR's Affidavit: RBOD pp 142–143.

10 Page 136 of MKR's Affidavit at cl 3: RBOD p 142.

exceeding a maximum of S$352,700 on receipt of the Government's first demand in writing.[11]

9 On or about 12 February 2015, the Cargo was loaded on board a vessel in good order and condition at Singapore.[12] Unfortunately, on or about 17 March 2015, one of the containers fell into the sea during discharge.[13] As a result, some of the equipment within the container was damaged.[14] The Government took the position that cl 12.2 of Annex 1 of the Carriage Contract was breached, and by virtue of cl 17 of Annex 1 of the Carriage Contract, Geometra was liable for all loss and damage to the Cargo while in their custody.[15] Such loss was subsequently quantified to be $200,945.56.[16]

10 On or about 24 March 2016, RSA indemnified the Government for the full quantified loss, namely $200,945.56.[17]

11 On 17 March 2017, RSA's solicitors, Clyde & Co LLP ("C&C"), wrote to Sompo on behalf of RSA and the Government to call on the Performance Bond in the sum of $200,945.56 ("C&C Letter"). In C&C's Letter, C&C said that they were "the English solicitors acting on behalf of owners of, and those

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11 Page 136 of MKR's Affidavit at cl 1: RBOD p 142.

12 Paragraph 10 of MKR's Affidavit: RBOD p 11.

13 Paragraph 11 of MKR's Affidavit: RBOD p 11; p 142 of MKR's Affidavit: RBOD p 148.

14 Paragraph 11 of MKR's Affidavit: RBOD p 11.

15 Page 254 of MKR's Affidavit: RBOD p 260; p 37 of MKR's Affidavit: RBOD p 43; p 38 of MKR's Affidavit: RBOD p 44.

16 Page 144 of MKR's Affidavit: RBOD p 150.

17 See the Acknowledgement & Agreement of Acceptance signed by the Singapore Government dated 24 March 2016 at p 163 of MKR's Affidavit: RBOD p 169.

entitled to sue in respect of, the above-referenced Cargo, including subrogated underwriters and the Ministry of Defence of Singapore, being part of the Government of the Republic of Singapore", and that they were making the demand "on behalf of the Government of the Republic of Singapore".[18]

12 On 28 March 2017, Sompo denied RSA's claim, for two reasons:[19]

(a) RSA, as the subrogated cargo insurer, had "no right to call on the [Performance Bond]" as Sompo had issued the Performance Bond to the Singapore Government, and accordingly, the Singapore Government was "the only party entitled to demand payment on the bond"; and

(b) The Performance Bond had expired as it "was not called upon by the Singapore Government within the validity period".

13 Subsequently, and prior to the commencement of these proceedings, the Government and RSA entered into a Deed of Assignment on 31 August 2020 ("Deed of Assignment").[20] The Singapore Government assigned all of its rights of action, claims and/or benefits of all causes of action and rights to sue, in respect of the loss and/or damage to the Cargo arising out of and/or in connection with, *inter alia*, the Performance Bond to RSA.[21] It is because of the Deed of Assignment that RSA sues in its own name.

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18 Pages 254 and 255 of MKR's Affidavit: RBOD p 260.

19 Page 262 of MKR's Affidavit: RBOD p 268.

20 Pages 278–280 of MKR's Affidavit: RBOD pp 284–286,

21 Page 279 of MKR's Affidavit at cl 1: RBOD p 285.

Procedural history

14 RSA filed its claim by originating summons in the District Court. It obtained judgment on 4 May 2021. Sompo appealed against the whole of the decision.

The parties' cases

15 RSA says that as the underwriter of the Government it was entitled to exercise its right of subrogation by calling upon the Performance Bond. It relies on s 79(2) of the Marine Insurance Act 1906 (c 41) (UK), which provides as follows:

> **79 Right of subrogation.**
>
> …
>
> (2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

16 RSA contends that upon indemnifying the Government on 24 March 2016, it succeeded to the Government's rights on the Performance Bond, because the Performance Bond was given in relation to the insured loss and represented one of the ways in which the Singapore Government could reimburse itself for that loss.[22]

17 Sompo contends that RSA was not entitled to call on the Performance Bond because only the Government was entitled to do so under its terms.

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22 RWS at paras 28–30.

Therefore, the C&C Letter, being from C&C and not the Government, failed to comply with the terms of the Performance Bond. Sompo also argues that subrogation only extends to rights against the person responsible for the loss. In this case, the person responsible for the loss was Geometra and not Sompo. Accordingly, the C&C Letter was not a valid demand on the Performance Bond, and as no valid demand was made before expiry on 18 March 2017, Sompo has no liability under it.[23]

18 Sompo also raised two other defences before the district judge below. One concerned the Deed of Assignment, which Sompo pointed out did not retrospectively ratify the call on the Performance Bond as an act of the Government.[24] However, it has not been RSA's case that the Deed of Assignment operated by way of retrospective ratification. Rather, they contend that the call was made pursuant to their right of subrogation.[25] The second defence raised below was that the call was fraudulent and unconscionable. The first was raised in written submissions on appeal[26] but it was accepted in the hearing before me that it was not relevant given RSA's non-reliance on the Deed of Assignment. The second was not raised at all on appeal. As these defences are no longer pursued, I will not deal with them.

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23 Appellant's written submissions dated 7 June 2021 ("AWS") at paras 16–23 and 30.

24 Paragraph 17 of 1st affidavit of Ivan Lim Chiang Leng filed 9 April 2021 ("IL's Affidavit"): RBOD p 294.

25 RWS at paras 47–48.

26 AWS at paras 32–35.

Decision below

19 The learned district judge agreed with RSA and gave judgment in its favour. First, he accepted that the C&C Letter was in form expressly given "on behalf of the Government of Singapore".[27] Secondly, he held that the right of subrogation is not limited to rights and remedies "against the person responsible for the loss".[28] He also accepted that the assignment was for the purpose of bringing legal proceedings in RSA's name.[29] He dismissed the defence of fraud and unconscionability because it did not go beyond bare assertion.[30]

Issues to be determined

20 This appeal raises two issues:

(a) Did the C&C Letter strictly comply with the terms of the Performance Bond?

(b) Does the right of subrogation extend beyond rights of the insured against the person responsible for the loss, to other means by which the insured may recoup or reimburse his loss, such as by calling on a performance bond?

Issue 1: Strict compliance

21 A demand on a bond must strictly comply with the terms of the bond: see, for example, the Court of Appeal decision in *Master Marine AS v Labroy*

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27 Notes of Evidence dated 4 May 2021 for DC/OSS 47/2021 ("DC NEs") at p 14 D–E.

28 DC NEs at p 15C–E.

29 DC NEs at p 16A–D.

30 DC NEs at p 16E.

Offshore Ltd and others [2012] 3 SLR 125 at [31] and [32]. The doctrine of strict compliance ensures certainty, making it simple for the issuer to decide whether to honour the call. The issuer is not expected or entitled to exercise any discretion, but must reject the call if it does not strictly comply with the terms of the bond. One must construe the bond to determine what, if any, the formal requirements for the call are. The corollary of strict compliance is that formal requirements must be clearly stated on the face of and within the four corners of the bond so that those dealing with any call know exactly what must be complied with.

22 In written submissions before me, Sompo contended that cl 1 of the Performance Bond, which obliged payment to be made "upon receipt of the Government's first demand in writing", established a formal requirement that the demand had to be issued by the Government.[31] During oral argument, Sompo's counsel clarified that he was not suggesting that a duly authorised agent could not make the call on behalf of the Government. This clarification was of course correctly made, because a government, like a corporation, must act through a natural person. Thus, even if a letter is issued on a government ministry's letterhead, someone would sign it as the government's agent. Sompo's counsel confirmed that solicitors, if duly authorised by the Government, could make the call. I should add for completeness that the terms of a performance bond may, and sometimes do, stipulate who may make the call on behalf of a corporation or other entity, such as a requirement for the signature of two directors in the case of a corporation or the signature of a designated level of departmental officer in the case of a government. The Performance Bond makes no such stipulation.

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[31] AWS at para 16.

23 After that clarification, Sompo's argument on this point appears to be put as follows. Sompo's counsel contends that insufficient evidence of authority, whether directly from the Government or via subrogation, had been provided at the time of the call. He argues that if the beneficiary's agent makes the call, it must show proof of its authority. In this case, C&C did not provide Sompo with any evidence of its authority to make the call on the Government's behalf. It did not provide any warrant or other authority from the Government. On the other hand, if C&C relied on RSA's having been subrogated to the Government's rights, it did not provide documents showing how it was entitled to exercise subrogated rights, such as evidence of the insurance contract or its payment thereunder. Indeed, C&C did not provide any evidence of authority given to it by RSA.

24 This contention is not supported by the wording of the Performance Bond. The Performance Bond does not say that the demand must be accompanied by proof of authority of the person making the demand on the Government's behalf. The only requirement is that the demand be in writing and "the Government's".[32] The Government's demand, as already explained, would inevitably have to be signed by someone authorised by the Government, and if parties intended that that person's authority had to be evidenced in some way then that stipulation would have been included as a term of the Performance Bond. The terms of the Performance Bond simply do not require accompanying evidence of authority.

25 C&C's Letter is explicit concerning its authority to make the call on behalf of the Government. It opens with the assertion of "acting on behalf of

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[32] Page 136 of MKR's Affidavit at cll 1 and 4: RBOD p 142.

owners of, and those entitled to sue in respect of, the … Cargo, including subrogated underwriters and the Ministry of Defence of Singapore, being part of the Government of the Republic of Singapore".[33] Immediately prior to the demand for payment, the letter repeats the words "on behalf of the Government of the Republic of Singapore".[34]

26 Sompo relies on the case of *Maridive & Oil Services (SAE) and another v CAN Insurance Co (Europe) Ltd* [2002] 1 All ER (Comm) 653, a decision of the English Court of Appeal. In that case, the bond was in favour of a protection and indemnity club, The Shipowners' Mutual Protection and Indemnity Association (Luxembourg) ("the Club"), who was the defined obligee and who the bond described as "a legally representative [*sic*] of Maridive & Oil Services (S.A.E)" ("Maridive"). Payment on the bond was to be made upon written demand by the defined obligee. However, when the demand came to be made, the solicitors making it stated their client to be Maridive, and made no mention of the Club at all. This was held to be an invalid demand, even if Maridive was the principal of the Club, because the Club was the defined obligee. This case does not however assist Sompo, because in the present case the solicitors making the demand correctly identified the Singapore Government as the beneficiary of the bond and expressly made the demand on its behalf.

27 Sompo also relies on an email that DSTA sent to C&C on 14 June 2017 about three months after the C&C Letter to suggest that neither RSA nor C&C had authorisation to make the call on the Performance Bond.[35] It recorded

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33 Page 254 of MKR's affidavit: RBOD p 260.

34 Page 255 of MKR's affidavit: RBOD p 261.

35 AWS at para 45(b).

DSTA's regret "that we are unable to provide the letter of authority, given the existing right of subrogation under law".[36] This email does not assist Sompo's contention. C&C never purported to act for the Government under express authority. Rather, they derived their authority from RSA, which by virtue of the doctrine of subrogation was entitled to use the Singapore Government's name for the call on the Performance Bond even without the Government giving consent for this specific use. As explained below, the subrogor impliedly promises to allow the use of his name for the pursuit of rights of action to which the subrogee becomes subrogated. Even if the subrogor wishes to resile from that promise, it is specifically enforceable in equity. In any case, the email does not in any way derogate from RSA's rights as subrogee, but expressly affirms those rights. Subrogation occurs automatically upon indemnification of the insured's loss, and requires no other positive act from either the insured or the insurer.

28 I also reject Sompo's argument that the call had to be accompanied by evidence of subrogation. There is nothing in the terms of the Performance Bond requiring this.

Issue 2: The extent of subrogation

29 The second issue is whether RSA was subrogated to the Government's rights on the performance bond. Sompo's contention principally rests on an apparent qualification concerning those rights of the insured to which the insurer is subrogated that may be found in many of the textbook extracts and cases cited to me, to the effect that those rights are against a person responsible for the

[36] Page 27 of IL's Affidavit: RBOD p 314.

insured loss. For example, Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 12th Ed, 2019) ("*Colinvaux*") states at para 12-004:

> While the negative side of subrogation is generally emphasised by the courts, subrogation has an equally important "positive" side. The insurers are entitled to take over all of the rights of the assured, whether in contract or tort, legal or equitable, *against the person responsible for the loss*, and are also entitled to take advantage of any benefit which accrues to the assured which diminishes the loss. …
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> [emphasis added]

30 RSA's counsel rejects this qualification. She relies on the wording of s 79(2) of the Marine Insurance Act (c 41) (UK), which contains no such qualification and instead refers to "all rights and remedies of the assured in and in respect of the subject-matter insured".

31 RSA's counsel also relies on the next part of the extract from *Colinvaux*, cited at [29] above, namely the entitlement "to take advantage of any benefit which accrues to the assured that diminishes the loss".

32 As with any consideration of the common law, the exercise lies not merely in parsing the words of judgments or textbooks but in understanding the principles underlying those words. It is important to consider the juridical basis of the law of subrogation.

33 I refer to the common law, because one must keep in mind that s 79 of the Marine Insurance Act (whether UK or Singapore) is not an exhaustive statement of the law of subrogation to be applied to marine insurance. Rather, it provides statutory recognition that the common law doctrine of subrogation applies to marine insurance contracts. As observed in F D Rose, *Marine*

Insurance: Law and Practice (Informa, 2nd Ed, 2012) at para 27.13, one must find the detail of that doctrine in the common law.

34 The doctrine of subrogation in the context of indemnity insurance arose from the implication by the common law of terms in the contract of indemnity insurance that prevent the insured from recovering more than an indemnity. A contract that permitted the insured to make a profit from the occurrence of an event would begin to resemble a wager, a transaction which the common law did not favour. As noted in John Birds, Ben Lynch & Simon Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Ed, 2012) para 23–001, "the fundamental principle of indemnity insurance [is] that the assured shall receive no more than a full indemnity for his real loss, and must not be permitted to make a profit out of being insured".

35 By terms implied in the contract of indemnity insurance, the insured promises to take specific steps or actions so that he will not be overcompensated and the insurer's interest in paying only for the insured's actual loss is protected. Primarily, this is a matter between insured and insurer. However, to be effectively enforced, these implied contractual promises may in some aspects have to be recognised or given effect to in relation to third parties, and for this purpose equity steps in to confer on the insurer an equitable interest in the insured's rights of action against third parties in respect of the subject-matter of the loss. Lord Templeman explained the juridical basis of the law of subrogation in his speech in the House of Lords in *Lord Napier and Ettrick and another v Hunter and others* [1993] AC 713 at 736:

> It may be that the common law invented and implied in contracts of insurance a promise by the insured person to take proceedings to reduce his loss, a promise by the insured person to account to the insurer for moneys recovered from a third

> party in respect of the insured loss and a promise by the insured person to allow the insurer to exercise in the name of the insured person rights of action vested in the insured person against third parties for the recovery of the insured loss if the insured person refuses or neglects to enforce those rights of action. There must also be implied a promise by the insured person that in exercising his rights of action against third parties he will act in good faith for the benefit of the insured person so far as he has borne the loss and for the benefit of the insurer so far as he has indemnified the insured person against the insured loss. My Lords, contractual promises may create equitable interests. An express promise by a vendor to convey land on payment of the purchase price confers on the purchaser an equitable interest in the land. In my opinion promises implied in a contract of insurance with regard to rights of action vested in the insured person for the recovery of an insured loss from a third party responsible for the loss confer on the insurer an equitable interest in those rights of action to the extent necessary to recoup the insurer who has indemnified the insured person against the insured loss.

36 Understanding the law of subrogation in this way elucidates how it applies in various situations. For example, as the right of subrogation is implied by law into the indemnity insurance contract it can be expressly excluded or limited by that contract.

37 The doctrine of subrogation has been classically described by Brett LJ in *Castellain v Preston and others* [1883] 11 QBD 380, at 388:

> … as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such a right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. …

38 Turning to the question raised in this appeal, it can be answered by considering what the relationship of the Performance Bond is to the insured loss. The Performance Bond relates to the loss suffered by the Government from breach of the Carriage Contract, and it is that same loss which is insured. Calling on the Performance Bond was a remedy available to the Government that if taken would have reduced the loss. Hence if the Performance Bond had been called upon prior to the making of the insurance claim, RSA would only have paid the Government in respect of any part of the insured loss that was not already covered by the pay out under the bond. If the Government made its insurance claim first and was paid out on that, but then subsequently called upon the Performance Bond, it would be accountable to the insurer for any proceeds it might receive under the Performance Bond. This follows straightforwardly from the principle that the insured cannot by the indemnity insurance contract obtain more than he has lost, and once he has received payment under the Performance Bond his loss has reduced by that amount. It is a benefit that has accrued to the insured that diminishes his loss.

39 It follows that the insurer, upon payment to the insured, is subrogated to the insured's rights even on a contract, such as the Performance Bond, that is given not by the person responsible for the loss but by someone else, so long as that contract concerns the subject-matter of the insured loss.

40 This result accords with the policy concern of the law that risks are allocated to those best able to evaluate them and adopt measures of risk reduction or mitigation. The issuer of a performance bond has the opportunity prior to issuing it to evaluate the creditworthiness of the principal and – if thought prudent – to obtain security from that principal. By comparison, the insurer has less opportunity to assess the creditworthiness of its insured's

contractual counterparties, and even if it did would have only blunter and less effective tools at its disposal for the purpose of controlling or mitigating that risk.

41 Sompo contends in this appeal that the insurer should be limited to pursuing its subrogated rights against Geometra. That is not correct. RSA has the option to pursue its subrogated rights against Geometra or against Sompo, just as the Government did. It is no answer to tell the subrogated insurer to pursue a different remedy any more than it would be an answer to the insured. Both insured and insurer have the choice of remedy. Of course, once Sompo has paid on the Performance Bond, it has the right to look to its principal, Geometra, including by reference to any security that it obtained prior to issuing the Performance Bond.

Conclusion

42 An insurer's right of subrogation to the rights and remedies of the insured in respect of the subject matter of the loss extends to the right to call upon a performance bond provided to the insured by a third party in connection with the insured's original contract with the party responsible for the insured loss. As RSA by its solicitors made a valid call in the name of the Government on the Performance Bond prior to its expiry, Sompo must pay RSA in accordance with that call. I dismiss the appeal.

43 Costs should follow the event, and I fix the costs of the appeal to be paid by Sompo to RSA at $6,000 inclusive of disbursements.

Philip Jeyaretnam
Judicial Commissioner

Govintharasah s/o Ramanathan, Sharma Neharika and Beverly Nah (Gurbani & Co LLC) for the appellant;
Wong Wan Chee and Ng Tse Jun Russell (Rev Law LLC) for the respondent.