Lonpac Insurance Bhd *v* American Home Assurance Co
[2011] SGHC 257

Case Number : OS 100 of 2011

Decision Date : 30 November 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : M Ramasamy and Nagaraja S Maniam (M Rama Law Corporation) for the plaintiff; Hong Heng Leong and Sunita Carmet Netto (Ang & Partners) the defendant.

Parties : Lonpac Insurance Bhd — American Home Assurance Co

Contract – Contractual Terms – Admissibility of Evidence

30 November 2011 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff ("Lonpac") and the defendant ("AHA") are insurance companies operating in Singapore. Both of them issued workmen's compensation policies covering, *inter alia*, the liability of Rotary Engineering Ltd ("REL") to compensate its employees who suffered work related injuries. The main question is whether there is double insurance so both Lonpac and AHA have to contribute to the compensation ordered to be paid to an injured worker. The answer to this question may, however, be dependent on whether extrinsic evidence can be admitted to help the court in the task of construing the policy issued by Lonpac.

2 REL is part of a corporate group known as the Rotary Group of Companies ("the Group"). Lonpac has, for a number of years, issued a workmen's compensation policy to the Group. This policy ("the annual policy") is issued on an annual basis and covers the calendar year. Among other things, it covers the liability of REL to its employees for work-related injuries. The annual policy has been issued in 2006, 2007 and 2008 (to specify only the material years) and if Lonpac is liable under the annual policy, its liability will arise in respect of the annual policy for the period 1 January 2008 to 31 December 2008. The wording of the annual policy in each year has been more or less identical.

3 AHA also issued a workmen's compensation policy but only in respect of REL's liability specifically and not in respect of that of other companies in the Group. This policy ("the project policy") was issued on 3 March 2006 and was to be effective until 2 June 2008 plus a "maintenance period" of 12 months. The policy covered REL's workmen's compensation liability arising in connection with a specific project to construct petroleum storage and terminal facilities on Jurong Island ("the project") in which REL was the main contractor employed by Universal Terminal (S) Pte Ltd ("UT").

The accident and the claim

4 On 29 November 2008, one Ganesan a/l Subramaniam ("the claimant"), who was a crane and hoist operator employed by REL, was injured in an accident while working on the project. On 23 December 2008, the claimant applied to the Commissioner of Labour for compensation under the Work Injury Compensation Act (Cap 354).

5 Based on an initial assessment by the National University Hospital, the Ministry of Manpower ("MOM") served a notice of assessment on AHA requiring it to pay the sum of $54,900 to the claimant. AHA objected to the notice of assessment on the basis that it was only liable to pay 50% of the sum, and that Lonpac was liable to pay the other 50% under the doctrine of double insurance.

6 Having heard arguments from both parties, on 19 January 2011, the Assistant Commissioner of Labour ("the Assistant Commissioner") ordered Lonpac and AHA to each pay 50% of the compensation sum assessed by MOM to the claimant in full and final settlement of his claim. The Assistant Commissioner rejected Lonpac's application to adduce oral and other evidence to show that the claimant was not covered by the annual policy. Lonpac was dissatisfied with this decision and therefore lodged an appeal by way of the present proceedings.

These proceedings

7 By the originating summons herein, Lonpac has applied for an order that the decision of the Assistant Commissioner made on 19 January 2011 ("the Decision") ordering that Lonpac and AHA each pay the claimant the sum of $27,450 as compensation in Workmen's Compensation Claim Case No 0825361E (LCH3) be set aside or revised. The originating summons also states that the following substantial questions of law have arisen in this matter *viz*:

(a) Whether the Assistant Commissioner had erred in disallowing the admission of extrinsic evidence; and

(b) Whether the Assistant Commissioner had erred in finding that Lonpac and AHA were each liable to pay $27,450 to the claimant.

8 As an aside, I understand that this dispute has not held up payment to the claimant and that he has in fact received the full amount due to him.

9 It was not disputed below and is not disputed before this court that:

(a) The claimant was an employee of REL working on the project when he was injured;

(b) The claimant was injured in the course of his employment with REL;

(c) The sum payable to the claimant was $54,900 as specified in the notice of assessment; and

(d) AHA is liable under the project policy to pay compensation to the claimant.

Discussion

10 An insurer has the right to claim contribution from another insurer in a case of double insurance *i.e.* the risk insured and the person insuring are the same (Poh Chu Chai, *Principles of Insurance Law* (LexisNexis, 6th ed., 2005 at p 1244). This appeal therefore hangs on whether the annual policy also covers the risk triggering the application of the project policy in this case *ie* the risk of injury to the claimant, as REL's employee, in the course of the project ("the Risk"). Although the class of insured under the annual policy is wider than the insured under the project policy – the former being the Group as a whole whereas the latter is only REL – as far as the Risk is concerned, the person insuring is the same.

11 As stated above, the primary issue is whether the annual policy also covers the claimant's claim, thereby triggering the doctrine of double insurance and rendering Lonpac liable to pay half of the compensation amount. This is a question of construction of the annual policy and the main dispute is whether extrinsic evidence can be admitted to aid the court in its task of construing the annual policy. The Assistant Commissioner treated the issue of construction as being separate from the issue of the adduction of oral evidence and both parties' written submissions proceed on the same basis. It appears to me, however, that the second issue (*ie*, whether extrinsic evidence is admissible to construe the policies) is necessarily a subsidiary issue of the first (*ie*, the proper construction of the annual policy). If extrinsic evidence is admissible to construe the annual policy, it must be taken into account to reach a proper construction of the annual policy – it does not seem sensible to reach a conclusion on the proper construction of the annual policy before answering the question of whether extrinsic evidence is admissible to construe the annual policy.

12 As a starting point, a plain reading of the terms of the annual policy does suggest that it insures against the Risk. The annual policy is drafted very widely, in particular:

(a) The "Business/Profession" covered includes "Engineering Construction Works in the field of (1) Civil and Structural Works (2) Buildings (including piling works) (3) Electrical, Engineering & Scaffolding Works (4) Mechanical Piping and Related Works (5) Engineering, Construction, Installation, Consultants, Designers and Builders (6) Integrated Maintenance and Repair Services";

(b) The "Place/Places of Employment" covered is defined as "At the above address [*ie*, 61 Jurong Island Highway, Singapore 627860] and *anywhere in Singapore* as governed by the Workmen's Compensation Act" [emphasis added]; and

(c) The categories of employees for the purposes of calculating the Total Estimated Annual Earnings are (i) "Managers/Management Staff"; (ii) "Clerical Staff" and (iii) "*all other employees*" [emphasis added]. It should be noted that against each category of employee a figure was set out under the rubric "Estimated Annual Wages, Salaries and other Earnings". These figures were as follows:

(i) On Managers/Management Staff S$11,737,779

(ii) On Clerical StaffS$814,863

(iii) On All Other EmployeesS$7,574,805

13 A plain reading of the annual policy therefore does suggest that it covers the risk of injury being sustained by all employees of the various companies within the Group, in whatever capacity they may be employed, including employment for a specific project such as that undertaken for UT. There is nothing on the face of the annual policy to suggest that it excludes the risk of injury to employees engaged in specific projects. Indeed, Lonpac recognises this in its submissions where it argues that "the cover provided by the two policies were not intended to overlap although a plain reading of the said two policies without any explanation may suggest so".

14 Nevertheless, this is not automatically fatal to Lonpac's position. Although there is a presumption that words in an insurance policy, as with any other contract, should be construed in their ordinary sense (*MacGillivray on Insurance Law* (11th ed) (Sweet & Maxwell, 2008) ("*MacGillivray*") at 11-006), this presumption may be rebutted if it can be shown that the context in which they appear indicates that the parties to the contract cannot have intended them to be read

in their usual sense (MacGillivray at 11-017).

15 Lonpac's case is that the term "all other employees" did not mean precisely that because the figures under "Estimated Annual Wages, Salaries and Other Earnings" did not reflect all the earnings of all employees who could conceivably be covered by the term and that this was deliberately arranged by REL which had or was taking out specific insurance to cover its project employees. It argues the term "all other employees" should therefore be read as only referring to those employees whose estimated earnings comprised the $7,574,805 reflected in the column next to the term.

16 Before the Assistant Commissioner, Lonpac seems to have presented its case on the basis that the project policy covered the Risk "more specifically" than the annual policy did. Differing levels of specificity are, however, irrelevant to the question of whether there is double insurance: it is perfectly possible for a more general policy and a more specific policy to both cover the same risk if the risk falls within the more specific policy, as it does here. What is crucial is not different levels of specificity of the policies but whether the classes of employees covered under the two policies are mutually exclusive. In this case, that means that the annual policy and the project policy must cover different categories of employees. Lonpac's submissions on appeal come closer to this: it argues that the annual policy covers the "general employees of the company" whereas the project policy covers "employees involved in the Project works". Nothing in the annual policy, however, indicates this scope apart from the quantum of estimated earnings. In order to show the full context of the annual policy, therefore, Lonpac would have to rely on extrinsic evidence.

17 Lonpac seeks to adduce evidence to prove *inter alia* that:

(a) It was the practice of the Group to take up an Annual Work Injury Compensation Policy (of which the annual policy here was one) for the "general business" of the whole group; but as and when members of the Group secure specific projects, the particular member company would take up a separate and more specific Work Injury Compensation Policy in respect of that specific project (like the project policy here);

(b) The annual policy was therefore intended to indemnify against claims from the general employees of the company whereas the project policy was intended to indemnify against claims by the employees employed in the Project Works;

(c) The premium paid for the annual policy was calculated based on the actual annual salary disbursed by the respective members of the Group to their general employees for that particular year. It did not include the salaries paid by any of the members for project employees;

(d) The management of REL did not declare the wages of those employees who were employed in the project when the Group purchased annual workmen's compensation policies for the years 2006, 2007 and 2008. This was because REL had obtained and paid for the project policy and did not want to take out double insurance or pay double premiums. The premium paid for the project policy was based on the estimated wages of all employees working on the project for UT.

18 Lonpac seeks to adduce this evidence in the form of affidavits from employees of the Group and its insurance broker.

19 The Assistant Commissioner found that such extrinsic evidence was inadmissible because the terms of the annual policy were complete and unambiguous on their face, and "there was no need to risk rendering unclear that which was unclear" (at [30] of the Decision). AHA has made similar submissions in this appeal. Lonpac on the other hand argues that the parol evidence rule is only

relevant as between the contracting parties - since the Group agrees with its position, AHA as a third party cannot rely on the parol evidence rule to exclude evidence that would support an interpretation of the annual policy as agreed upon by the contracting parties.

Analysis

20 The admission of extrinsic evidence to vary, contradict or add to the terms of a contract is governed by the Evidence Act (Cap 97, Rev Ed 1997) ("the Act"). The relevant provisions are ss 93 and 94 which read as follows:

> **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
>
> 93. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
>
> ...
>
> **Exclusion of evidence of oral agreement**
>
> 94. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions: ...

21 The question that arises in relation to these sections is whether they mean that the parol evidence rule, as Lonpac argues, applies only between contracting parties. In this regard, there is a difference between s 93 and s 94. This difference was discussed by Andrew Phang JC (as he then was) in *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR(R) 509 ("*China Insurance*"). Phang JC recognised that while s 94 expressly applies only "as between the parties to any such instrument", *the parol evidence rule as embodied in s 93 of the Evidence Act still applies where third parties are concerned* (*China Insurance* at [31], [32] and [34]). This same reasoning was employed by the Assistant Commissioner at [23] of the Decision.

22 The observation quoted above, however, does not help us when establishing whether a third party can invoke the parol evidence rule to exclude extrinsic evidence. On its terms, s 93 is about proving the terms of a contract which has been put into documentary form. Section 93 bars the proof of the terms of a document otherwise than by the production of the document itself. It is s 94 that addresses the question of how, having proven the terms of a written document, these terms are to be construed.

23 There is no issue in this case of proving the terms of the annual policy – there is no dispute that the terms of the annual policy are as provided in the written document. The issue is about how to *construe* these terms. Therefore, the proposition that the parol evidence rule as embodied in s 93 applies does not really assist in this case or in any case where the construction rather than the proof

of terms of a document is in issue.

24 Lonpac relies on *China Insurance* in support of its submission that extrinsic evidence should be admitted. The facts of *China Insurance* are similar to those of this case: the insured in *China Insurance* took out two Workmen's Compensation Policies. There was strong extrinsic evidence that the insured had taken out the second policy only because they were informed by their insurance broker that their first policy *did not* cover liability to workmen injured while onboard a vessel. Phang JC found that there was no double insurance because the two policies covered different risks. In the course of his judgment at [31], he observed that s 94 was irrelevant where third parties were concerned:

> Although a plain construction of the documentary evidence alone adequately supports the defendant's case, the affidavit evidence referred to at [20], [27] and [28] above conclusively determined, in my view, the case in the defendant's favour as it was relevant, admissible and persuasive. Further, even assuming that a comparison of the policies alone was insufficient to determine the case in the defendant's favour, the admission of the affidavit evidence would have clearly done so. This is why, as already noted, counsel for the plaintiff was at pains to argue that such evidence ought to be excluded as extrinsic evidence under the parol evidence rule in general, and s 94 of the Evidence Act in particular. Section 94 of the Evidence Act, however, did not apply to the fact situation here. The phrase "as between the parties" in s 94 clearly precluded its application to the present fact situation. That this is so is acknowledged in all the leading textbooks: see, for example, *Sarkar's Law of Evidence*, (Wadhwa and Company, 15th Ed, 1999), vol 1 at pp 1273, 1309-1312 as well as 1319, and *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis Butterworths, 17th Ed, 2002), vol 3 at pp 3230, 3247-3248, 3333-3334, 3339-3340 and 3381-3382. Indeed, a literal, albeit reasonable, reading of s 94 itself will demonstrate amply that the provision does not apply to fact situations such as the present where both parties are essentially strangers to each other's contracts/policies.

25 AHA attempts to limit the significance of *China Insurance* on the basis that the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") recognised that the remarks of Phang JC with regards to the admissibility of extrinsic evidence were merely obiter because he was able to find, on a plain construction of the two policies, that they covered different risks. The Assistant Commissioner made the same observation in the Decision at [24]. In my view, it is, however, wrong to suggest that the Court of Appeal in *Zurich* confined *China Insurance* to its facts. Although it is true that the Court of Appeal in *Zurich* at [96] recognised that the remarks of Phang JC on the admissibility of extrinsic evidence were obiter, it went on in the same paragraph to state: "*Be that as it may, they do shed further light on the position in Singapore vis-à-vis the use of extrinsic evidence to interpret a written contract* [emphasis added]". The Court of Appeal then went on to affirm (in Zurich at [97]) the significance of *China Insurance* as "add[ing] to the growing body of local case law adopting the contextual approach to contractual interpretation while affirming, at the same time, the continued existence of the parol evidence rule (as statutorily embedded in the Evidence Act)". Whilst *Zurich* deals, in some detail, with the circumstances in which extrinsic evidence is admissible to explain a contractual term, most of such discussion is not relevant to this case as it relates to the situation in which s 94 is applicable.

26 It can also be seen from the extract of the *China Insurance* quoted above that the restricted application of s 94 to the parties to the particular contract to be construed is well established and accepted by leading textbook writers on the law of evidence as it applies in India from whose Evidence Act our own Act is derived. It therefore appears to me that there is no legal restriction on the admission of oral evidence to explain or even vary or contradict the written terms of a contract

when the issue is between persons who are essentially strangers to the contract. In this case, AHA is a stranger to the contract/policy which Lonpac had with REL. There is nothing therefore to stop Lonpac from introducing extrinsic evidence to explain what risks that policy was intended, as between Lonpac and REL, to cover. In *China Insurance*, Phang JC did not need to look at the extrinsic evidence because the construction of the two policies showed that they covered different risks. In this case, the two policies appear to cover the same risks. If extrinsic evidence is not admitted, Lonpac will have to contribute to the loss. Admitting the extrinsic evidence will give Lonpac a chance to show exactly what its policy was intended to cover. If the extrinsic evidence admitted is sufficient to show that the annul policy was not intended to cover employees working on projects like that for UT, then Lonpac will escape such liability.

27 It is not my role at this stage to decide what effect the extrinsic evidence to be produced by Lonpac will have on the construction of the policy. That will be a decision for the Assistant Commissioner. All I decide was that it was not correct for the Assistant Commissioner to have shut out the adduction of extrinsic evidence when undertaking the task of construing the annual policy.

Conclusion

28 For the reasons given above, I set aside the Decision and remit the matter back to the Commissioner of Labour for re-hearing and consideration of any extrinsic evidence which Lonpac, and maybe AHA as well, may wish to introduce. The costs of this OS must be borne by AHA. If parties are agreeable, I am willing to see them and fix the costs after hearing short submissions on quantum. Otherwise, Lonpac's costs shall be taxed in the normal fashion.

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