American International Assurance Co Ltd v Wong Cherng Yaw and Others [2009] SGCA 26

Case Number	: CA 42/2009
Decision Date	: 26 June 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA
Counsel Name(s)	: Quentin Loh SC, Elaine Tay and Shannon Tan (Rajah & Tann LLP) for the appellant; Quek Mong Hua and Esther Yee (Lee & Lee) for the respondents
Parties	: American International Assurance Co Ltd — Wong Cherng Yaw; Tan Siew Mui Junie; Lim Wee Chee; Liaw Chong Kiaw; Wong Shyh Yaw; Tie Ah Chai; Low Bee Hong; Goh Chong Wee Jasper; Tan Tiong Thye; Ong Swee Boon

Civil Procedure – Interim payments – Circumstances when ordered – Capital investment held in joint stakeholder's account pending determination of claim by insurer for alleged overpayment – Whether investors entitled to return of their capital investment from proceeds of their policies – Whether interim payment ought to be ordered in view of appellant's cross-claims – Order 29 r 12(c) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

26 June 2009 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The appellant in this appeal was at all material times an insurer that offered insurance policies known as "investment-linked policies". Each investment-linked policy offered by the appellant (referred to hereafter in the singular as "ILP" and in the plural as "ILPs") provided a cover on the life of the insured and allowed the policyholder to invest the premiums in the appellant's investment funds. The appellant was at all material times the trustee of all the units in its investment funds.

2 The respondents in this appeal were policyholders/investors in the ILPs. A dispute arose between the respondents and the appellant around June 2008 concerning the ILPs, culminating in the filing of a suit ("the Suit") by the appellant, in its own capacity as well as in its capacity as trustee for other policyholders, against the respondents. After the filing of the Suit, the respondents' investments in the ILPs were liquidated and the proceeds ("the Stake") were held in a joint stakeholder's account pending the resolution of the Suit. The respondents subsequently requested for the release of certain sums of moneys from that account but the appellant refused to accede to the request.

3 In response, the respondents brought an application for interim payment of certain sums of money ("the Application"). This appeal arose from the decision of the High Court judge ("the Judge") on the Application. In his decision, the Judge ordered an interim payment of $1,019,300 to the respondents (see *American International Assurance Co Ltd v Wong Cherng Yaw* [2009] SGHC 89 ("the GD")). Before proceeding further, it would be apposite to summarise the salient facts of this dispute.

Background facts

4 The first and second respondents were agents of the appellant and sold ILPs to the third to tenth respondents. The sixth to tenth respondents subsequently assigned their ILPs to the first to

fifth respondents. The respondents collectively invested a total of $1,059,300 under 21 ILPs with the appellant.

5 Under each of the ILPs, premiums paid by the policyholder were used to invest in units in funds listed in a "Schedule of Funds" annexed to each of the contracts. The funds listed differed between different ILPs. The number of units in a fund which a policyholder could purchase with any given sum under an ILP depended on the price at which the units were to be issued. When a policyholder liquidated his or her units in the fund, the proceeds due to the policyholder were determined by the price at which the units were to be redeemed. Under the ILPs, policyholders were also entitled to switch between funds as many times as they wanted, chargeable at $25 for every switch after the first four switches which were free. These fund switches were done by the policyholders submitting a formal request to the appellant. The policyholder's right to switch funds was set out in each of the ILPs as follows:

FUND SWITCH

> [The policyholder] may, from time to time, instruct [the appellant] to switch all or any of the Units of a Fund via a Fund Switch in writing in such manner and subject to such conditions as [the appellant] may from time to time impose. [The appellant] reserve[s] the right to revise at any time in [its] discretion any minimum fund switch amount imposed and to terminate or suspend this Fund Switch facility. [The appellant] shall not be responsible for any losses arising from or attributable to [its] decision to terminate or suspend this facility.
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> ...
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> [The policyholder has] 4 free switches per policy year, and the switches thereafter shall be subject to a Fund Switch Fee of S$25 per switch payable by [the policyholder] through the cancellation of Units. No Fund Switch Fee, however, will be payable on any fund switch into or out of the AIA S$ Money Market Fund [which was one of the funds from which policyholders could choose]. Any unused free switches will be forfeited at the end of the policy year.

6 Through numerous fund switches over the course of two years from July 2006 to August 2008, the respondents were able to make large profits. Their investments peaked on 7 August 2008 with the ILPs valued at a total of $18,759,523.27, giving the respondents a paper gain of $17,700,223.27, representing a 1,671% rate of return.

7 According to the third respondent, Mr Lim Wee Chee, in his affidavit filed on 13 October 2008 on behalf of the other respondents, he purchased his first ILP effective from 24 March 2006 and incurred losses within the first few months. He started analysing the fund movements and their underlying markets. By keeping up with the trends of fund prices, he was able to take calculated risks by switching from one fund to another to avoid adverse fluctuations in prices and to ride on positive trends. He alone made more than 300 fund switches over the span of two years. The other respondents also made similar fund switches in reliance on his decisions.

8 On 8 August 2008, the third respondent applied to withdraw $495,420 from one of his ILPs. The appellant refused to allow the withdrawal. Attempts by the third respondent and other respondents subsequently to partially withdraw or surrender their ILPs were similarly unsuccessful. Furthermore, the respondents' applications made from 25 August 2008 to 29 August 2008 to switch funds were rejected.

9 Eventually, the third respondent's solicitors wrote to the appellant on 3 September 2008

demanding payment of the partial withdrawal that the third respondent had sought. After an exchange of correspondence, the appellant commenced the Suit. The basis of the Suit, that emerged later, was that the appellant had made a mistake in valuing the funds by using one-day-old bid prices (unit prices) to effect the fund switches and this resulted in the respondents being given a larger share of the units or liquidated proceeds than what they should have been entitled to, at the expense of other policyholders. In support of the appellant's case, Mr Martin Knight ("Mr Knight"), the appellant's vice-president of the Actuary Department, filed an affidavit on 21 November 2008, in which he explained the mistake and how it led to the respondents making enormous gains artificially from the switches.

10 The appellant claims that the respondents had knowingly exploited the mistake *vis-à-vis* the bid prices. The appellant investigated the respondents' fund switching activities between March 2008 and May 2008 but the appellant's case is that it did not discover its mistake at that time. According to Mr Knight's affidavit, the appellant only realised its mistake in late July 2008 when it looked into the large amounts being switched and the excessively high returns recorded under the respondents' ILPs.[note: 1]

11 In its written submissions before the Judge, the appellant contended as follows:

(a) that the appellant had made a mistake in valuing the relevant funds by using one-day-old bid prices in determining the bid prices for the fund switches and that the respondents had been unjustly enriched by exploiting the appellant's mistake in determining the bid prices for the fund switches;

(b) that the respondents had exploited the appellant's mistake, and thereby knowingly caused a loss of about $11,040,000 to the other policyholders;

(c) that the respondents were liable as constructive trustees for the loss and damage caused to the other policyholders;

(d) that the respondents were liable to the appellant for damages for tortious conspiracy;

(e) that the first and second respondents were in breach of their fiduciary duties and contracts to the appellant in their capacity as agents of the appellant;

(f) that the appellant was entitled to an account and an inquiry to trace and recover the units and/or the proceeds on liquidating the units;

(g) that the appellant was entitled to recover the sums of $239,945.50 and $189,490.93 previously paid out to the second and fourth respondents respectively; and

(h) that the appellant was entitled to an indemnity from the respondents for any liability that the appellant might incur to the other policyholders.

12 After the Suit was filed on 9 September 2008, the respondents agreed with the appellant on 22 October 2008 to liquidate their positions in the ILPs they held on a "without prejudice" basis. As a result, the proceeds of liquidation amounting to $10,323,621.71, *ie*, the Stake, were put in a joint stakeholder's account pending the disposal of the Suit. The appeal before us stemmed from the Application, which was for, *inter alia*, the following orders:

Without prejudice to the parties' respective positions in the Suit, the [appellant] do release to

the [respondents] an interim payment in the sum of:-

a. $1,579,098.65 being the sums [sought by the respondents through their request for partial withdrawal and/or full surrender of the ILPs they held]; or alternatively

b. $1,059,300 being the [respondents'] capital invested with the [appellant]; or alternatively

c. such other sum as the [c]ourt shall deem fit.

13 The respondents took out the Application as they claimed they needed the money to repay the bank loans which they had taken to invest in the ILPs and that they needed funds to obtain expert evidence on the disputed issues and to pay for legal services to conduct the current litigation.

The rules on interim payment

Order 29 rule 2

14 Before the Judge below, counsel for the respondents decided not to ground his submissions on O 29 r 11 or r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"), which pertains specifically to interim payments. Instead, he invoked the court's inherent jurisdiction, and, in the alternative, O 29 r 2(4). We can immediately dismiss as irrelevant O 29 r 2 (which relates to the detention, custody or preservation of any property which is the subject matter of a cause or matter) since the parties have already placed the liquidated proceeds with a stakeholder on a "without prejudice" basis.

Order 29 rule 12(c)

15 Despite counsel for the respondents' decision not to ground his submissions on O 29 r 11 or r 12 of the Rules, the Judge considered the Application under O 29 r 12(*c*) and made an order for interim payment, which is the subject matter of this appeal. Order 29 r 12 provides as follows:

Order for interim payment in respect of sums other than damages (O. 29, r. 12)

12. If, on the hearing of an application under Rule 10, the Court is satisfied —

(*a*) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid;

(*b*) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or

(*c*) that, *if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs*,

the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

[emphasis added]

The Judge's application of Order 29 rule 12(c)

16 With reference to the judgment of Neill LJ in *Schott Kem Ltd v Bentley* [1991] 1 QB 61 ("*Schott Kem*"), the Judge applied a two-stage test to determine whether to order an interim payment under O 29 r 12(*c*) of the Rules. Having regard to the evidence before him, he was satisfied that the respondents would obtain judgment for a substantial sum, after taking into account the claims of the appellant. He then decided that he was justified in exercising his discretion to order interim payment of $1,019,300 to the respondents. In the course of reaching his decision, the Judge also commented on the English Court of Appeal decision in *Shanning International Ltd v George Wimpey International Ltd* [1989] 1 WLR 981 ("*Shanning*"). The Judge read *Shanning* as having decided that any independent counterclaim was *also* a relevant consideration at the *first* stage (see the GD at [23]), and expressed his dissent from such approach. He took the view that, in an application under O 29 r 12(*c*), the court should consider, under the first stage, any defences and counterclaims which qualify as set-offs, but not *all* counterclaims.

17 In our view, it may well have been unnecessary for the Judge to have disagreed with *Shanning*. In *Civil Procedure 2009*, vol 2 (Sweet & Maxwell, 2009) ("the English White Book"), the authors explained the effect of *Shanning* in this manner (at para 15-103):

> The application should be considered by the court in two stages (*Schott Kem Ltd v Bentley* [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA). The court must first be satisfied that, if the action proceeds to trial, the claimant will obtain judgment for a substantial sum, and, if so, the court should then consider whether, in its discretion, it should order an interim payment. At the first stage the claimant must satisfy the court on the balance of probabilities, but to a high standard, that he will obtain judgment for a substantial sum; *the likelihood of a set-off or any other defence succeeding must be considered by the court*. At the second stage the rules also require … the court to take into account any set-off claimed by the defendant, *and any counterclaim arising out of some other transaction and not available as a defence* (*Shanning International Ltd v George Wimpey International Ltd* [1988] [*sic*] 1 W.L.R. 981; [1988] 3 All E.R. 475, CA). [emphasis added]

18 The authors of the English White Book do not appear to read *Shanning* to hold that independent counterclaims should be considered by the court at the first stage. However, the authors of *Commercial Litigation: Pre-Emptive Remedies* (Sweet & Maxwell, 4th Ed, 2002, Looseleaf, Release 9, April 2007) (Iain S Goldrein QC ed) hold a contrary view (see para A6-185). There is also another English Court of Appeal decision, namely, *Smallman Construction Ltd v Redpath Dorman Long Ltd* (1988) 47 BLR 15, which expressed the view that independent counterclaims must be considered by the court at both the *first* stage and second stage.

19 It is not necessary for this court to decide what the true position under our O 29 r 12(*c*) is at present. In our view, the result would be the same in relation to the Application, regardless of the approach adopted.

Our decision

20 Were the respondents entitled to obtain judgment for a substantial sum of money on the evidence before the court? The Judge held that they were, because even after taking into account the appellant's cross-claims against the respondents' claims, there would still be a substantial sum left from the Stake representing the capital of their investments in the ILPs (their "capital investment").

The respondents were entitled to recover their capital unless the appellant could show that it had a genuine claim on those moneys. As the appellant's claim was effectively based on the respondents' alleged unjust enrichment, the claim, even if successful, would not have an impact on the respondents' claim to the return of their capital investment.

21 Before us, the appellant argued that the Judge erred in his reasoning as the respondents' investments in the ILPs were not capital guaranteed. Counsel for the appellant also submitted that the amounts prayed for in the appellant's cross-claims could exceed the Stake. He referred to the affidavit filed on 21 November 2008 of Mr Knight, who had estimated the loss suffered by the other policyholders (as a result of the dilution of their positions due to the respondents' fund switches) to be about $11m.[note: 2]

22 Counsel also contended that the interim payment procedure in O 29 r 12 of the Rules was not appropriate where the factual issues were complicated or where difficult points of law arose, as in the present case (see the English White Book ([17] *supra*) at para 15-95 citing *Schott Kem* ([16] *supra*), *Chiron Corporation v Murex Diagnostics Limited (No 13)* (1996) 23 FSR 578 ("*Chiron*") and *Bovis Lend Lease Ltd v Braehead Glasgow Ltd* (2000) 71 Con LR 208).

23 We are in agreement with this submission. This case does disclose, on the face of the pleadings, sufficient complex issues of fact and law to require a full trial to resolve them. However, this factor alone would not prevent the court from ordering an interim payment in respect of "part of a complex claim where (without venturing too far into disputed areas of fact or law) there is evidence establishing with reasonable certainty the minimum sum likely to be recoverable" (English White Book at para 15-113 citing *Chiron per* Robert Walker J at 584). It is necessary to note that, in the present case, it is *not* the appellant's case that the respondents are not entitled to the return of their capital investment. The appellant's case is that there might be no capital to be returned, because of its cross-claims and, further, because the capital was not guaranteed. Its counsel submitted that its cross-claims might exceed the Stake. This submission is speculative because the only claim of the appellant that would affect the amount of the capital investment returnable to the respondents would be general damages which the appellant has claimed in respect of the alleged conspiracy to injure the appellant. But beyond recovering what the other policyholders have allegedly lost from the appellant's own mistake, it is difficult to see what loss the appellant itself has suffered on its own account. Accordingly, while it is relevant, we are not prepared to place too much weight on this submission.

24 If, as here, the respondents are entitled to recover their capital investment, which itself is a substantial sum, it is our view that the burden is on the appellant to satisfy the court why it should not order interim payment of any sum that is in law repayable to the respondents. The court should try to assess the irreducible sum that can be paid in the exercise of its discretion. The respondents should not be denied their own moneys to defend what appears to be a complex (and therefore costly) case on law and finance. Of course, it is possible that the court, in exercising its discretion to order interim payment, may err in paying out too much. The interim payment scheme under O 29 of the Rules provides for such a contingency, as O 29 r 17 states as follows:

> **Adjustment on final judgment or order or on discontinuance (O. 29, r. 17)**
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> **17**. Where a defendant has been ordered to make an interim payment or has in fact made an interim payment, whether voluntarily or pursuant to an order, the Court may, in giving or making a final judgment or order, or granting the plaintiff leave to discontinue his action or to withdraw the claim in respect of which the interim payment has been made, or at any other stage of the proceedings on the application of any party, make such order with respect to the interim payment as may be just, and in particular —

(*a*) an order for the repayment by the plaintiff of all or part of the interim payment;

(*b*) an order for the payment to be varied or discharged; or

(*c*) an order for the payment by any other defendant of any part of the interim payment which the defendant who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to or connected with the plaintiff's claim.

Order 29 r 17 shows that the role of the court in an application under O 29 r 12(*c*) is primarily to determine liability first. If the court makes a mistake in the amount awarded under an interim payment, it has wide powers under O 29 r 17 to make the necessary adjustment in the final judgment or order. The court will be mindful that, in making an interim payment award, it must take into account the applicant's ability to repay should a mistake in the amount awarded occur (see the English White Book at para 15-106).

25 We turn now to the facts on record. The appellant has conceded that the amount of money it can recover from the respondents, based on its claim for unjust enrichment by the respondents, would be the amount to which the respondents have been unjustly enriched. Mr Knight made this point clear in his affidavit filed on 21 November 2008, where he said:[note: 3]

> The [respondents'] "gains" were made at the expense of other policyholders who held units in the Affected funds at relevant times during the Frequent Fund Switching Period (hereinafter referred to as the "Affected Policyholders").

These gains are now comprised in: (a) the amount of the Stake; and (b) the sum of $429,436.43 (which includes the capital sum of $40,000) withdrawn by the second and fourth respondents under two ILPs. However, the Stake would also include the capital investment of the respondents which amounted to $1,019,300 (being the balance of the initial total investment of $1,059,300, after taking into account the $40,000 capital withdrawn earlier). The Judge ordered the sum of $1,019,300 to be paid out to the respondents because the appellant had conceded that the respondents were entitled to the return of their capital.

26 Before us, the appellant advanced two arguments that the Judge was wrong in ordering interim payment of the capital sum of $1,019,300. The first is that it has a claim for damages for conspiracy, and, if successful, it will be entitled to set off the damages against the capital sum in the Stake. The second is that the investments are not capital guaranteed, and therefore the capital sum might not be $1,019,300 at the material time (which has yet to be determined).

27 As to the first argument, counsel admitted that he was unable to estimate what the damages were likely to be. We have earlier indicated that we are not persuaded of the prospect of the appellant being able to prove that it had suffered substantial loss personally, given that the real basis of the appellant's claim appeared to rest on unjust enrichment (the amount of which claim is now preserved in the Stake). However, counsel has also suggested that the appellant would have to incur considerable costs and expenses in pursuing the Suit in the form of expert and legal services. We do not think that costs and expenses are matters that the court is obliged to take into account at this stage of the proceedings or for the purposes of determining the amount of an interim payment order. They are speculative, as the appellant may not succeed in its claim.

28 There is another way of looking at the relative rights of the appellant and the respondents with respect to their capital investment. The respondents are entitled to recover their capital investment

(although the appellant has argued that the ILPs are not capital guaranteed). But subject to any such capital loss as may be proved and to any sum which might be awarded to the appellant on its claim for damages for conspiracy, the appellant has effectively been given a security for its claim on the respondents' capital investment. The position is analogous to that of the appellant having obtained a Mareva injunction to freeze the assets of the respondents to meet its claim. As pointed out by counsel for the respondents, even in a Mareva injunction scenario, the affected party would be entitled to withdraw sufficient funds from the "frozen" funds to defray his legal and other expenses in order to defend the action against him. We think there is substance in this argument. Indeed, if the appellant had applied for a Mareva injunction in the circumstances of this case, we do not think that such an injunction would have been granted. There is no reason why the appellant should have the benefit of what is, in effect, a Mareva injunction in the light of the circumstances of this case.

29 As to the argument based on the potential loss of capital, the appellant has contended that, had the correct bid prices been applied at all material times, the value of the respondents' ILPs as at 31 July 2008 (being the last dealing day in which one-day-old bid prices were used for all the relevant funds) would have stood at $994,999 and would have dropped to $566,604 when the ILPs were finally liquidated on 22 October 2008. Like the Judge, we are also of the view that the relevance of these computations is dubious. What the true figure would have been is entirely speculative because any such figure would have to be based on the assumption that the respondents would have switched and continued to switch funds if the appellant had used the correct bid prices at all material times. It should be borne in mind that the appellant's case is that the respondents knew that the appellant had made a mistake in its terms of switching and that the respondents had taken advantage of the mistake. But when did this take place? Since the appellant is claiming that the respondents had been unjustly enriched by their fraudulent or tortious switches, the court will need to know the relevant date or dates from which the unjust enrichment is alleged to have started. The appellant has not identified the starting point of time but has only pleaded that the switching activities started sometime in July 2006 and continued until August 2008. Against this background of the appellant's claims and the pleadings, it is not necessary at this stage of the proceedings to decide whether counsel or the Judge is right. What we have on record are three figures that the appellant has produced in evidence, *viz*: (a) $1,059,300 (less $40,000); (b) $994,999 (as at 31 July 2008); and (c) $566,604 (as at 22 October 2008).

30 As the appellant has failed to show *prima facie* that the amount that it is likely to be able to recover would be more than the Stake (after taking into account the respondents' capital investment), we consider it proper and reasonable to exercise our discretion in favour of the respondents and to order interim payment of as much money as is prudent, having regard to the relative strengths of the claims of the parties to the respondents' capital investment, and also the capacity of the respondents to repay any amount that might eventually turn out to be overpaid. In our view, we consider that a lump sum of $600,000 would be fair to both parties, as there is no evidence to suggest that each of the respondents would not be good for up to the amount of $60,000. We therefore propose to vary the Judge's interim payment order accordingly, subject to any order necessary under O 29 r 17 upon the final determination of the issues in the Suit.

31 Before we conclude our judgment, we would like to make an observation on one aspect of the Judge's decision in order to clarify a matter which is obviously a matter of grave concern to the appellant. The Judge, in ordering interim payment, had also embarked on a construction of the provisions in the ILPs (see the GD at [46]–[49]) that pertained to fund switching ("the Switching Provisions") and had come to the conclusion that the appellant had not made any mistake, as it had alleged, in allowing the respondents to switch funds applying one-day-old bid prices (see the GD at [46]–[53]). However, as this interpretation would completely undermine the appellant's claims, the appellant has raised this issue for the decision of this court. Its contention was that the Judge's

construction of the Switching Provisions was wrong. In our view, we regard the Judge's determination on the construction of the Switching Provisions as *obiter* as it was not necessary for him to embark upon this exercise since the order for interim payment could have been justified on the amounts conceded by the appellant as being recoverable by the respondents from their capital investment (see [29] above). In fact, the Judge had relied on this latter ground and the construction of the Switching Provisions was merely an alternative basis for the interim payment order made by him. We therefore do not propose to examine this issue at this stage of the proceedings. We have indicated to counsel for the appellant that this issue should be determined at the substantive hearing of the Suit.

Conclusion

32 For the above reasons, we order that the sum of $600,000 be paid to the respondents as interim payment. As the appeal has, in substance, been dismissed, costs are awarded to the respondents with the usual consequential orders.

[note: 1]At para 20.7.

[note: 2]At para 8.4.

[note: 3]At para 8.4.