Chiu Teng Construction Co Pte Ltd v The Hartford Insurance Company (Singapore) Ltd (formerly known as The People's Insurance Co Ltd) [2001] SGHC 119

Case Number	: Suit 603/2000/G
Decision Date	: 30 May 2001
Tribunal/Court	: High Court
Coram	: Woo Bih Li JC
Counsel Name(s)	: Michael Eu Hai Meng (Cooma Lau & Loh) for the plaintiffs; Teo Weng Kie and Patrick Yeo Kim Hai (Khattar Wong & Partners) for the defendants
Parties	: Chiu Teng Construction Co Pte Ltd — The Hartford Insurance Company (Singapore) Ltd (formerly known as The People's Insurance Co Ltd)

JUDGMENT:

Cur Adv Vult

BACKGROUND

1. The Plaintiffs Chiu Teng Construction Co Pte Ltd (Chiu Teng) are building contractors. They were at all material times the main contractors of a housing development known as The Countryside at Yio Chu Kang Road/Lentor Road, Singapore.

2. Brentford Construction (S) Pte Ltd (Brentford) were at all material times the contractors doing the installation and extraction of sheet piles for a proposed nursing home on a site adjacent to the Countryside.

3. The Defendants are The Hartford Insurance Company (Singapore) Ltd, formerly known as The Peoples Insurance Co Ltd (HI). They were at all material times the insurers of Brentford under a Contractors All Risk Policy No D95/333/02788 issued on or about 8 May 1995.

4. Chiu Teng claimed that on or about 12 January 1996, their project manager had felt a vibration and on further investigation, the vibration was attributed to sheet pile extraction works carried out by Brentford. This caused soil movement and resulted in damage. The affected houses were Block 12, nos. 191 to 196 of the Countryside i.e six houses. The numbers referred to were presumably derived from a site plan (at PBD 63) and may not be the numbers of the addresses allocated by the relevant authority. The extent of the damage varied.

5. The bakau piles in the Countryside site had been inserted into the soil. They are friction piles and the soil was supposed to grip round the circumference of each pile so as to enable it to carry a certain load. The concrete retaining wall on top of the bakau piles is to retain the earth on the side of the Countryside. The bakau piles are embedded into the base of the retaining wall for 75 mm. The boundary wall is sitting on the retaining wall. The boundary wall is a stretch of brick wall with brick posts at intermediate stages. As the houses affected are terrace houses, there are party walls also made of bricks.

6. The party walls, the boundary wall, the retaining wall and the bakau piles are at the rear of the affected terrace houses.

7. There was no significant visible damage to the bakau piles. Also no major cracks were observed on the retaining wall.

8. However, there were cracks on some of the brick posts and on some of the party walls. Some of the party walls were also separated from the brick posts on the one side and/or torn away from the houses on the other side. Also, some party walls had cracks near their bases.

9. The underground sewerline which was within the rear backyard was cracked and dislocated at the joints to the distribution pipes. The sewerline was also out of alignment.

10. There were cracks in the soil of one or some of the backyards of the affected houses and there was settlement of up to 50 mm.

11. Furthermore, as a result of the soil movement, part of the retaining wall and some of the brick posts at the rear of the affected houses had shifted so as to encroach onto the Brentford site. Where there was encroachment, the extent of the encroachment was not uniform probably because of deviations in construction.

12. The maximum encroachment by a brick post was 65 mm (at B reading) and by the retaining wall was 60 mm (at C reading). However the retaining wall and the brick posts were set-back from the boundary line so the distance of the movement would be more. The actual distance of the set-back is in some doubt but it is not necessary for me to determine this. Also, even where there was no encroachment, it is likely that there was still some movement of the retaining wall and the boundary wall for some of the affected houses.

13. Chiu Teng had to rectify the damage.

14. The rectification works included installation of 30 micropiles to replace the function of the bakau piles as Chiu Tengs professional engineer had doubts about the frictional resistance of the bakau piles in view of the possible loosening of the soil. This was the most costly item amounting to $224,601 of the total cost of $446,600.08 i.e slightly over 50%.

15. The other rectification works comprised:-

(a) trimming and rectifying the encroached part of the retaining wall

(b) demolishing and rebuilding the affected boundary wall

(c) demolishing and rebuilding the affected party walls

(d) reconstructing the affected sewer-line

(e) the apron and turf in the backyard had to be reinstated.

16. On or about 24 April 1998, Brentford was wound up by order of court in Companies Winding Up No 275 of 1997. Accordingly, Chiu Teng sought and on 12 February 1999 obtained leave of court to commence action against Brentford for the cost of rectification works notwithstanding the winding up order against Brentford.

17. On 16 March 1999, Chiu Teng filed a Writ of Summons in Suit No 442 of 1999 against Brentford (the Brentford action).

18. On 11 May 1999, Chiu Teng obtained an interlocutory judgment with the consent of the Official Receiver who was the liquidator of Brentford. Chiu Tengs damages were to be assessed by the Registrar with interest and costs to be reserved to the Registrar.

19. The date for the assessment of damages was 30 May 2000. The Official Receiver chose not to participate in the assessment. Two witnesses attended on Chiu Tengs behalf and confirmed their affidavit evidence. Chiu Tengs Counsel then made his submissions after which final judgment was awarded against Brentford for $446,600.08 with interest at 6% per annum from the date of service of the Writ to date of final judgment.

20. After further submission by Chiu Tengs Counsel, costs of the action fixed at $5,500 was awarded against Brentford.

21. On 11 August 2000, Chiu Teng commenced the present action (the HI action) against HI relying on Section 1 of the Third Parties (Rights Against Insurers) Act (Cap 395) (the Act) and the final judgment it had obtained in the Brentford action.

22. The Act is a repetition of the English Third Parties (Rights Against Insurers) Act 1930 which was made applicable to Singapore by the Application of English Law Act (Cap 7A) of 12 November 1993.

23. Section 1(1) of the Act states:

> 1(1) Where under any contract of insurance a person (referred to in this Act as the insured) is insured against liabilities to third parties which he may incur, then
>
> > (a) in the even of the insured becoming bankrupt or making a composition or arrangement with his creditors; or
> >
> > (b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding up being passed, with respect to the company, or of a receiver or manager of the companys business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge,
>
> if, either before or after that event, any such liability is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

24. Section 1(4) of the Act states:

> (4) Upon a transfer under subsection (1) or (2), the insurer shall, subject to section 3, be under the same liability to the third party as he would have been under to the insured, but [the provisos are not relevant.]

DEFENCES OF HI

25. HI have two main defences.

26. First, its position is that Chiu Teng stands in the shoes of Brentford vis--vis HI and accordingly, HI can, in principle, rely on the terms of the insurance policy to deny Chiu Teng any relief against HI.

27. If this issue is answered in HIs favour, HI have two sub-defences arising therefrom, i.e proviso 2(c) of Endorsement 105.1 of the policy schedule and/or Clause 8 of the Conditions of the policy.

28. HIs second main defence was that the final judgment in the Brentford action was not binding on it and Chiu Teng are obliged to prove all over again the quantum of their damages. The liability of Brentford to Chiu Teng was not disputed by HI who were, however, alleging that the rectification cost was more than was reasonable.

WHETHER, IN PRINCIPLE, HI CAN RELY ON THE TERMS OF THE INSURANCE POLICY AS DEFENCES

29. Mr Michael Eu for Chiu Teng submitted that so long as two pre-conditions are satisfied, Chiu Teng are entitled to an

indemnity under the Act against HI.

30. The two pre-conditions are:

> (a) First, the insured must be wound up, relying on *Normid Housing Association Ltd v Ralph* [1989] 1 Lloyds Law Rep 265.
>
> (b) Secondly, the victim must have clearly established the insureds liability by getting the insured to admit liability or by getting a judgment against the insured, relying on the Court of Appeal decision in *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 and the House of Lords decision in *Doris Bradley v Eagle Star Insurance Co Ltd* [1989] 1 Lloyds Law Report 456.

31. The two pre-conditions mentioned by Mr Eu are referred to in Insurance Law in Singapore, Second Edition 1997, by Professor Tan Lee Meng (now Justice Tan Lee Meng) at p 10 to 13. However they are only pre-conditions. It does not necessarily mean that once such pre-conditions are satisfied, the victim is automatically entitled to judgment against the insurer.

32. At this stage, I would mention that I have some reservation about the decisions in *Norwich Union Fire Insurance* and *Eagle Star Insurance* in so far as they are authority for the proposition that the victim must first obtain an admission of liability from the insured or judgment against the insured before suing the insurer.

33. On this point, the decisions were not unanimous decisions. However it is not necessary for me to elaborate on my reservation as Chiu Teng have obtained a final judgment against Brentford.

34. As to whether HI can, in principle, rely on the terms in the policy as defences, none of the three cases cited by Mr Eu for the two pre-conditions are authority for the proposition that so long as the victim has obtained a judgment against the insured, the insurer would be prevented from raising the terms as defences.

35. I will refer to such defences as policy defences.

36. Indeed, of the three cases cited by Mr Eu, *Norwich Union Fire Insurance* is authority for the proposition that the victim steps into the shoes of the insured and that the insurer is entitled to raise policy defences.

37. Lord Denning in that case said, at p 580, that:

> When the rights of the insured are transferred to the injured person, they are transferred on the ordinary understanding, that is, subject to such conditions as the contract provides.

38. In the same case, Harman LJ said, at p.581:

> but even so, the contract contains not only rights, but limitations of those rights. One cannot, I think, assign to somebody part of the rights under the contract without assigning to him the condition subject to which those rights exist. Consequently, the Post Office are saddled with the inability of Potters to sue direct themselves before the liability is ascertained, because that would amount to a breach of condition 3 of the policy (6) which would in itself be a defence to the defendants.
>
> Therefore, I would decide this case on the narrow ground that the rights assigned to the Post Office by the statute must be coupled with the rest of the particular rights and obligations which make up the contract of insurance. One

> cannot pick out one bit pick out the plums and leave the duff behind.

39. I am in agreement with this aspect of the decision in *Norwich Union Fire Insurance* in view of the terms in the Act.

40. I reiterate that s 1(1) of the Act states that the insureds rights against the insurer under the contract in respect of the liability shall be transferred to and vest in the third party to whom the liability was so insured. [Emphasis added.]

41. I also reiterate s 1(4) which states:

> Upon a transfer under subsection (1) the insurer shall, subject to section 3, be under the same liability to the third party as he would have been under to the insured
>
> [Emphasis added.]

42. I agree with the argument of Mr Teo Weng Kie, for HI, that s 1(1) (and s 1(4)) is not the same as s 9(1) of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189) under which policy defences are not available to the insurer against a victim who has obtained a judgment.

43. Section 9(1) states:

> **Duty of insurers to satisfy judgments against persons insured in respect of third-party risks**
>
> 9(1) If after a certificate of insurance has been issued under section 4(9) to the person by whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the Public Trustee as trustee for the persons entitled thereto
>
> > (a) any sum payable thereunder in respect of the liability including any amount payable in respect of costs; and
> >
> > (b) any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> [Emphasis added.]

PROVISO 2(C) TO ENDORSEMENT 105.1

44. The first policy defence that HI relied on is proviso 2(c) to Endorsement 105.1. Endorsement 105.1 and proviso 2(c) state:

> **E128 ENDT 105.1 VIBRATION REMOVAL OR WEAKENING OF SUPPORT**
>
> Notwithstanding anything contained to the contrary in Special Exclusions 3 to Section II of the Policy, it is noted and agreed that the indemnity granted under Section II of the Policy is extended to include liability in respect of damage to

property, land or buildings caused by collapse, subsidence, vibration or by the removal or weakening of support or lowering of underground water.

Provided that:-

1)

2) The Insurers shall not be liable for:

a)

b)

c) claims in respect of loss or damage to buildings or other structures caused by cracking or otherwise unless the stability of the building or structures or the safety of its users is impaired.

45. The amended particulars of HIs Amended Defence state that HIs definition of the words the stability of the building or structures is impaired is that the underlying foundations of the building or structures is undamaged (*sic*) or and in no need of any rectification works. The "safety of its users" refers to an endangerment to the lives of the users of the building or structure. [Emphasis added.]

46. Ms Chong Sook Huen was the professional engineer who testified for Chiu Teng. She said that, in engineering terms, the party walls and the boundary wall should not be referred to as structures. However the retaining wall and the bakau piles were structures.

47. Mr Ho Eng Hean, the professional engineer who testified for HI, said that, in engineering terms, a structure would be a key structural element and anything which carried a load was a key structural element. By this definition, the party walls and the boundary wall would not be structures.

48. Aside from engineering terms, Mr Ho would not agree that the basic meaning of a structure is a thing constructed and he gave the example that a chain link fence or a pavement would not be considered a structure. However he did not go so far as to say that the party walls and the boundary wall (all of which were made of brick) were not structures, if engineering terms were ignored.

49. Therefore, there was no difference of opinion between Ms Chong and Mr Ho as to what a structure in engineering terms means. However their opinions demonstrated that the meaning of a structure is not confined to the foundation as alleged in HIs amended particulars.

50. I now refer to *Socfin Co Ltd v Chairman, Klang Town Council* [1964] 30 MLJ 325.

51. In that case, the Chairman of the Klang Town Council had, in making his rating assessment of the annual value of Socfins buildings, taken into account bulk storage tanks on Socfins land. The storage tanks were used for storing palm oil and were vertical cylinders resting on pre-cast concrete pillars which stood freely on a reinforced concrete platform foundation.

52. Under the Town Board Enactment, building includes any house or any structure connected with the foregoing.

53. Ong J said that he agreed that, words should ordinarily be given their everyday meaning. They must, nevertheless, be considered in their proper context.

54. He then went on to say at p 89, right column:

> The basic meaning of "structure", as I understand it, is a thing constructed. The appellants tanks were constructed, or built up, on prepared sites by assembling and riveting pre-cast bottom, side and roof steel plates. They are clearly not buildings in the ordinary sense, but, without any undue extension of the meaning, would it not be perfectly true to described them as structures? As Lord Evershed said: "Not every structure is a building, though it may well be that every building is a structure.

55. I am of the view that the ordinary meaning of structures should be used and not its meaning in engineering terms. There was no evidence that the policy was intended to be for use in engineering contracts only or that the policy terms were drafted by an engineer. In its ordinary meaning, structures would include brick party walls and brick boundary walls.

56. Secondly, it will be recalled that proviso 2(c) of Endorsement 105.1 refers to claims in respect of loss or damage to "buildings or other structures caused by cracking or otherwise unless the stability of the building or structure or the safety of its users is impaired. [Emphasis added.]

57. I am of the view that structures would mean something else other than buildings. In the present case, structures would include the party walls and the boundary wall in addition to the retaining wall and bakau piles outside the houses.

58. Thirdly, if there was any ambiguity, the contra proferentem rule should apply against HI.

59. As regards the question of the stability of the party walls and whether safety of the users was impaired by damage to the party walls, Mr Ho had said, in the context of photo 9 and 10 of p 12 of Defendants (HIs) Bundle of Photos (DPH) that if somebody was standing beside the party wall and somebody from next door gave a shove to the wall, then the person standing on the wrong side would be injured if he did not get away (see NE 101 line 1 to 3). He reiterated this in the context of photo 6 of DPH (NE 125 line 3 to 5). This meant that the stability of these party walls had been impaired. Also, the safety of the users of the houses had been impaired. After all, occupants of the houses, especially children and babies, should not be expected to abstain absolutely from standing, walking, crawling, playing or sitting near the party walls.

60. Furthermore, the evidence from Mr Ho at NE 125 line 20 to NE 126 line 4 was:

> Ct to DW4 Is it your position that no rectification works need to be done and the houses would be safe?
>
> DW4 That is not my position. I did recommend that the party wall has to be reconstructed from houses 1 to 7. The boundary wall has to be reconstructed. The rectification of retaining wall as proposed by Ms Chong has to be done. The sewer pipes have to be rectified. The backyard of the 4 houses is to be topped up and re-turfed.

61. On another point, I note that in Mr Teos closing submissions at para 219, he was advocating that rectification works for the boundary wall, retaining wall and micropiles should be excluded by reason of proviso 2(c) to Endorsement 105.1

62. It appeared that Mr Teo was taking the point that even if the stability of the party walls had been impaired or the safety of the users of the houses had been impaired by damage to the party walls, HI were liable for the cost of rectification of those walls only but not others.

63. This was not a stand taken in the Amended Defence.

64. Paragraph 7 of the Amended Defence states:

> 7. The Defendants aver that the stability of the Plaintiffs building and/or structure and/or safety of the users of the property known as the Countryside in paragraph 1 of the Statement of Claim was not impaired and the Defendants disclaimed liability under the Policy. The Defendants gave notice of their repudiation of liability to Brentford under the Policy under cover of their solicitors letter to the Official Receiver dated 24 March 1999. The Defendants gave further clarification to the Official Receiver of their basis of repudiation under cover of their solicitors letter to the Official Receiver dated 3 April 1999 in that the Defendants were relying on the provision of the Policy mentioned in paragraph 6 above.

This defence is stated generally without the distinction mentioned in para 62 above.

65. Furthermore, I reiterate the amended particulars of HI which define proviso 2(c) to mean that the foundation of the structures is undamaged or and in no need of any rectification works.

66. I have already said that the reference to the foundation only is not correct as that is not even the evidence of their own expert witness Mr Ho. Neither is it the ordinary meaning of structures.

67. However the reference to undamaged and no need of any rectification works binds HI. In my view, the boundary wall, which I have found to be a structure, was damaged in two ways. First, there were cracks on some of the brick posts (see eg DPH 3 bottom photo, DPH 21 Photo 6), and also at the junction between the brick posts and the retaining wall (see Ms Chongs second report dated 11 March 1996 para 3.1(b)). Secondly, the boundary wall had moved so that part of it encroached upon the Brentford site.

68. Likewise, the retaining wall was damaged in that it had moved so that part of it also encroached upon the Brentford site.

69. It is not disputed that rectification works had to be undertaken for the boundary wall and the retaining wall, aside from the policy defences.

70. Even if I were to leave aside the definition in the amended particulars, there is still the question whether the stability of the boundary wall and the retaining wall was impaired. On this point, the bakau piles should also be considered.

71. Ms Chong was of the view that the stability of all of the three structures had been impaired but she did not elaborate for the boundary wall, probably because as an engineer, she did not consider the brick wall as a structure in the first place.

72. For the retaining wall and the bakau piles, she was of the view that their stability had been affected even though the soil was supposed to have settled by the date of her second report of 11 March 1996.

73. Ms Chong took this position for various reasons:

> (a) The soil had already been loosened. The soil gripping the bakau piles was not as good as before (NE 49 line 4 to 5).
>
> (b) If the remaining sheet piles on the Brentford site were extracted, then there would be cyclic displacement of the soil. This in turn would affect the stability of the soil and the bakau piles.
>
> (c) Even if the remaining sheet piles were not extracted, she was of the view that the soil was not stable in the long run. In future, there might be permanent displacement and this had to be taken into account.

74. Ms Chong also referred to Exhibit P6 which was a fax in or about February 1996 from Brentford to Beca Carter Hollings & Ferner, the professional engineers for the nursing home. In that fax, Brentford referred to their discussion with their own professional engineer, who Ms Chong identified as Mok Yew Meng.

75. The fax states:

> BECA CARTER HOLLINGS & FERNER
> 51 ANSON ROAD
> #12-51 ANSON CENTRE
> SINGAPORE 0207
>
> ATTN: MR LOW KAM FOOK
>
> Dear Sirs
>
> RE: PROPOSED 4 STOREY NURSING HOME AT LENTOR AVENUE
> - COUNTRY SIDE RETAINING WALLS & PARTY WALLS
>
> We refer to your letters dated 6 & 7 February 96.
>
> Having discussed in depth with our P.E., appended below are the proposed repairs to be carried out as the existing ground have stabilise and there is no further movements.
>
> A. Party Walls between contryside units
>
> 1. .
>
> B. Boundary Walls between Lot 1288 & 1286
>
> i)
>
> ii)
>
> iii) By means of hydraulic jacks, jack/push boundary walls back to lot 1288 original position).
>
> iv) Take survey to verify the positions.
>
> v) Jet-grout piling to base of boundary wall for <u>stabilisation purpose</u>.
>
> vi)
>
> vii)
>
> viii)
>
> ix)
>
> We hope that the above proposals meets the requirement and look forward to your further instruction.

Thank you.

Yours faithfully

BRENTFORD CONSTRUCTION (S) PTE LTD

LIM KENG LEONG

DIRECTOR

[Emphasis added.]

76. In Ms Chongs view, the proposed repairs supported her view that the stability of the bakau piles had been impaired.

77. Mr Teo suggested that item B(v) i.e the proposed jet grouting to the base of the boundary wall for stabilisation purpose might have been because of item B(iii) i.e the use of hydraulic jacks to push the boundary wall back to its original position.

78. However Ms Chong disagreed.

79. She also understood that there was no response from Beca Carter as a result of which Chiu Teng had to engage her services.

80. I would add that the professional engineers of the developers of the Countryside, Chan Chee Wah Consultants, were also concerned about future settlement due to possible loosening of soil.

81. Accordingly they sent a letter dated 14 March 1996 which states:

Dear Sirs

RE: PROPOSED REMEDIAL PROPOSALS TO THE EXISTING BOUNDARY RETAINING WALLS AND FENCE WALLS AT THE REAR OF PLOTS 191 TO 196 OF THE CONVENTIONAL HOUSING DEVELOPMENT AT LENTOR LOOP/ LENTOR AVENUE/ YIO CHU KANG ROAD

We refer to your remedial proposal submitted on 13/3/96.

(1) Please clarify what measure you will be taking to minimize future settlement due to possible loosening of soil below the base of the retaining wall and also the toes of the Bakau piles.

(2) Please submit calculation check on the r.c. retaining wall design due to reduction in wall thickness.

(3) Please submit detail method of statement including backfilling procedure.

Your early reply is appreciated.

Yours faithfully

For CHAN CHEE WAH CONSULTANTS

82. It was pursuant to this letter that Ms Chong eventually submitted her proposal for the use of micropiles.

83. On the other hand, Mr Ho was of the view that the stability of the bakau piles had not been impaired.

84. His reason was that soil slips in a circle and the radius of the circle can be calculated. In his view the circle did not extend to below the base of the retaining wall. Hence the soil below the base of the retaining wall was not loosened or disturbed and the stability of the bakau piles was also not affected.

85. As for the lateral movement of the retaining wall which encroached up to 65 mm onto the Brentford site, he was of the view that the lateral movement was within tolerable limits.

86. Mr Ho did not investigate whether the bakau piles had moved laterally as to do so would require excavation which he could not do. However he did not disagree that as the bakau piles were embedded by 75 mm into the base of the retaining wall, they would move laterally along with the retaining wall unless they had tilted.

87. As for the extraction of the remaining sheet piles on the Brentford site, Mr Ho agreed that that would cause damage but apparently they were eventually not extracted. They were cut and the ground back-filled.

88. Mr Ho did not expect any future major settlement of the soil. He explained that settlement would occur if lateral support was removed. This would be in the form of excavation works but the basement of the nursing home on the Brentford site had been completed by the time of his inspection. There should not be any more excavation works.

89. Settlement would also occur if the water table was lowered. This could be caused, for example, by a trench excavation where the ground water flows into the trench and the water is required to be pumped out so that a labourer can go down to work. Again this was not expected in view of the state of works at the Brentford site.

90. I am of the view that although the maximum encroachment onto the Brentford site was 65 mm, the distance of movement by the retaining wall was probably more bearing in mind a set-back from the boundary in the first place.

91. More importantly, notwithstanding that the soil appeared to have settled and Mr Hos evidence about the slip circle, I am of the view that the soil beneath the retaining wall must have been loosened. The retaining wall had moved. The bakau piles which were embedded 75 mm into the retaining wall would have moved laterally along with the retaining wall. The soil around the bakau piles must have loosened. I reiterate Ms Chongs evidence that, The soil gripping the bakau piles is not as good as before (NE 49 line 4 to 5).

92. If the bakau piles had not moved laterally, then they must have tilted, although slightly as Ms Chong did not observe any significant cracks in the bakau piles.

93. In either case, I am of the view that the stability of the boundary wall which sits on the retaining wall and the retaining wall and bakau piles was impaired even though the impairment may be slight. Whether the impairment was such so as to justify the use of micropiles is another matter.

94. Accordingly I am of the view that HI are not absolved from liability under proviso 2(c) in respect of the rectification works for the party walls. HI are also not absolved from liability under proviso 2(c) for the rectification works to the boundary wall and the retaining wall and for the use of micropiles.

CLAUSE 8 OF THE CONDITIONS OF THE POLICY

95. Clause 8 of the Conditions of the policy states:

> 8. If a claim is o r if a claim is made and rejected and no action or suit is commenced within three months after such rejection or in case of arbitration taking place as provided therein within three months after the Arbitrator or Arbitrators or Umpire have made their award all benefit under this Policy shall be forfeited.
>
> [Emphasis added.]

96. On 9 February 1999, the Official Receiver (OR) sent a fax to HIs solicitors, Khattar Wong & Partners (KWP) stating:

> Dear Sir
>
> **BRENTWORD CONSTRUCTION (S) PTE LTD**
> **IN COMPANIES WINDING UP NO 275 OF 1997**
>
> **RE: SUMMONS IN CHAMBERS 594 OF 1999**
>
> We refer to the above matter.
>
> We understand that you are acting for The Peoples Insurance Co. Ltd, the insurers for Brentford Construction (S) Pte Ltd, for the project known as "The Countryside" located at Yio Chu Kang Road/Lentor Road.
>
> Please let us have your position on whether you are admitting to the liability disclosed in the claim against the company.

97. I should mention an error in the fax. Brentford were not working on the site of the Countryside but on the adjoining site.

98. There does not appear to be any reply from KWP to this fax.

99. On 19 March 1999, the OR sent another telefax to KWP. It states:

> Dear Sir
>
> **BRENTWORD CONSTRUCTION (S) PTE LTD**
> **IN COMPANIES WINDING UP NO 275 OF 1997**
>
> **RE: SUMMONS-IN-CHAMBERS 594 OF 1999**
> **SUIT NO 442 OF 1999**
>
> We refer to the above matter.
>
> We forward you herewith a copy of the Writ of Summons served by Chiu Teng Construction Co Pte Ltd. We have no objection if your clients would like to enter appearance on behalf of the Company.
>
> The Companys director has not attended at our office despite being requested to do so. The Official Receiver is therefore not in a position to defend the claim unless there are merits in disputing the claim.

Please let us have your decision as soon as possible as the Company has only 8 days to enter an appearance.

100. On 24 March 1999, KWP replied stating:

Dear Sir

BRENTWORD CONSTRUCTION (S) PTE LTD
IN COMPANIES WINDING UP NO. 275 OF 1997

SUIT NO. 442 OF 1999

1. We refer to your letter dated 19 March 1999.

2. As you are aware we act for the Peoples Insurance Co Ltd.

3. Please take notice that we have our clients instructions to disclaim liability under the policy of insurance with the insured in respect of this matter.

101. On 1 April 1999, the OR responded stating:

Dear Sir

BRENTWORD CONSTRUCTION (S) PTE LTD
IN COMPANIES WINDING UP NO 275 OF 1997

RE: SUIT NO 442 OF 1999

We refer to the above matter.

Please let us have the reasons for disclaiming your clients liability under the policy on an urgent basis.

102. KWP then replied on 3 April 1999 relying on Endorsement 105.1 of the policy to disclaim liability. That reply is not material for present purposes.

103. Mr Teo submitted that:

(a) The fax dated 19 March 1999 from the OR which enclosed the Writ of Summons in the Brentford action was clearly asking for an indemnity under the policy. By implication, Mr Teo was suggesting that this fax constituted a claim under the policy. He further submitted that this fax must be read in the context of the earlier fax dated 9 February 1999 from the OR.

(b) The reply dated 24 March 1999 from KWP had rejected the claim.

(c) The ORs response dated 1 April 1999 did not say that the OR was not claiming for an indemnity. As the response sought the reasons for KWPs disclaimer, it showed that the OR had indeed been making a claim for indemnity under the policy.

Fax dated 9 February 1999 from the Official Receiver to KWP

104. In *Shimizu Corporation v Lim Tiang Chuan* [1993] 3 SLR 77, L P Thean J (as he then was) had to consider a clause in identical terms as the Clause 8 before me. He said, at p 85C, that in connection with the insurers defence, it was necessary to refer to their pleadings, to see precisely what they have pleaded. At p 87D, he stated the well-known principle that parties are bound by their pleadings.

105. Paragraphs 12 and 13 of HIs Amended Defence states:

> 12. The Defendants will rely on Clause 8 of the Conditions of the Policy to show that the Plaintiffs are now time barred from making any claim under the Policy. The said Clause 8 is set out below:-
>
> [The clause is then quoted in its entirety.]
>
> 13. The Defendants aver that 17 months have passed since the Defendants repudiated liability. If, which is denied, the Plaintiffs were entitled to rely on Section 1 of the Third Parties (Rights Against Insurers) Act (Cap 395) which entitles the Plaintiffs to have the rights of Brentford against the Defendants to be indemnified under the terms of the Policy to be vested in the Plaintiffs, the Plaintiffs and/or Brentford have failed to commence action against the Defendants within three months of the repudiation pursuant to Clause 8 of the Conditions of the Policy.

106. I note that para 13 of the Amended Defence does not even identify the alleged claim which was allegedly rejected.

107. Neither is there an assertion in para 13 that HI have rejected a claim. The mere assertion that HI have repudiated liability does not amount to an assertion that HI have rejected a claim.

108. However, HIs amended particulars (under para 12 of its Amended Defence) state:

> Answers
>
> (a) The Defendants are relying on the portion of Clause 8 of the Conditions of the Policy which makes reference to the fact that a claim had been made and was rejected by the Defendants and that Brentford and/or the Official Receiver had failed to commence an action/suit against the Defendants within three months after such rejection.
>
> (b) See answer (a) in paragraph 3 above.
>
> (c) (i) ~~On or about 16 September 1997 when the claim by the Plaintiffs solicitors against Brentford which was then forwarded to the Defendants under cover of Brentfords letter to the Defendants dated 16 September 1997.~~ The claim was made on or about 19 March 1999 by the Official Receiver in their letter dated 19 March 1999 which was sent to the Defendants solicitors office enclosing the Plaintiffs Writ of Summons in Suit No. 422 of 1999.
>
> (ii) ~~See answer (i) above. The said letter was signed by Mr Oh Cheng Meng and the said letter was forwarded to the Defendants for their "necessary action".~~

> The claim was made by writing in the said letter of 19 March 1999 which was signed by Ms Sharizah Shariff for the Official Receiver and this was sent to the (*sic*) Defendant Solicitors office enclosing the Writ of Summons in Suit No. 422 of 1999.
>
> (iii) ~~The Defendants rejected the claim on or about 23 March 1999. See answers (a), (b) and (c) under paragraph 2 above~~. The Defendants rejected the claim on or about 24 March 1999 through the (*sic*) Defendant Solicitors letter dated 24 March 1999. In a further letter dated 4 April 1999 through the (*sic*) Defendant Solicitors, the rejection of the claim was reiterated.

I presume that the reference to a further letter dated 4 April 1999 was meant to refer to KWPs fax dated 3 April 1999 instead as no letter dated 4 April 1999 was brought to my attention.

109. As can be seen, the original particulars did not assert that the 19 March 1999 fax from the OR had made a claim. This allegation was inserted only in the amended particulars.

110. Even then, there was still no reference in the amended particulars to the earlier fax dated 9 February 1999 from the OR. Furthermore the next fax dated 19 March 1999 from the OR makes no reference to the earlier fax dated 9 February 1999. Therefore a reference to the 19 March 1999 fax cannot include a reference to the earlier fax dated 9 February 1999.

111. Mr Teo submitted that firstly HI need not have pleaded the earlier fax dated 9 February 1999 as having made a claim. He said this constituted evidence and need not be specifically pleaded.

112. I do not agree. The amended particulars had identified and pleaded the fax dated 19 March 1999 as having made a claim on the policy. Having done so, HI are not entitled to rely on any other fax as having made a claim.

113. Mr Teos other submission on this point was that even if the earlier fax dated 9 February 1999 had to be pleaded, there was no prejudice to Chiu Teng as Chiu Teng was aware of this fax. In my view, whether Chiu Teng was aware of this fax is irrelevant. As HI have chosen to identify the 19 March 1999 fax only, as having made a claim, they are bound by their amended particulars.

114. I am of the view that HI are not entitled to rely on the earlier fax dated 9 February 1999 as constituting a claim made under Clause 8.

115. If, for the sake of argument, the earlier fax dated 9 February 1999 had been pleaded, the next question would be whether it had made a claim. On this point, I refer again to the judgment of Thean J in *Shimizu Corporation*.

116. In that case, the insured defendants had submitted a claim form. In the claim form the insured defendants had stated the estimated amount of the direct loss of or damage to their property. The claim form also indicated that damage had been caused to a third party i.e the plaintiffs, who were the contractors of blocks of apartments and that the amount of damage caused to the plaintiffs was then unknown. In these circumstances, Thean J decided that no claim had been made by the insured defendants for the amount which they were called upon to pay to the plaintiffs and there was therefore no claim for the purpose of clause 8.

117. Thean J also referred to a South African case and a local case.

118. At p 86 B to p 87 A, he said:

> In the South African case of *Boshoff v South British Insurance Co Ltd* the motor insurance policy contained, among other things, condition 10 which so far as material provided:

> in the event of the company disclaiming liability in respect of any claim and an action or suit be not commenced within three months after such disclaimer or , all benefits under this policy in respect of such claim shall be forfeited.

After the accident the attorney of the insured wrote to the insurance company informing them of the accident and forwarding the third partys claim. The insurance company by their attorney denied liability. The insured settled the third party claim and instituted proceedings after three months from the date of repudiation of liability by the insurance company. The magistrates court dismissed the claim on the ground that it was time-barred by condition 10. On appeal , the Transvaal Divisional Court held that the insureds letter was not a claim and accordingly the insurance companys letter was not a letter disclaiming liability in respect of any claim. Clayden J (with whom Bresler AJ concurred) said, at p 487:

> In cl 10 claim must mean something in respect of which there can be a repudiation of liability, and by virtue of which there can be benefit under the policy. To that extent there is guidance in the context. Its natural meaning as I have said is a demand for something as due; an assertion of a right to something. All that can ever be due to the insured under the policy, all that he can ever have a right to is an indemnity; an indemnity against loss or damage or an indemnity against sums which he becomes legally liable to pay. He can only be indemnified, compensated, when the extent of his loss is known. He only becomes legally liable to pay a sum when a sum is fixed by a court or by agreement. It does not, therefore, seem to me that he can demand something as due, or assert a right to something, under this policy until he knows what that something is. I agree with Neser J, that before the amount of the indemnity under the policy is fixed he cannot claim it, although he can say that he will claim it.

The meaning which the parties intended the word claim to bear in its context in cl 10 was, I consider, its ordinary grammatical meaning. It means a demand for an indemnity in a particular amount

The decision in *Boshoff* was followed by the Court of Appeal here in *Federal Insurance Co v Nakano Singapore (Pte) Ltd*. There, the relevant condition in the policy was condition 8 and the terms thereof were identical with those of condition 8 here. One of the issues before the court was whether there was a claim made under the policy to the insurer for the purpose of condition 8. The Court of Appeal held, inter alia, that no such claim was made. Chan Sek Keong J, delivering the judgment of the court said, at pp 396-397:

> *Boshoff* decided a claim must contain the essential ingredient of a demand or an assertion of a particular right. In this case, condition 8 contains the words if a claim is made. In our view, the word made makes it explicit and

> reinforces the necessity of a demand for payment. Whether, in this case, the claim is for the respondents direct loss or indirect loss, as from a third party claim (and here the policy insured against public liability), an 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.

119. Before I go further, I should make an observation.

120. It seems to me that the judgment of Clayden J in *Boshoff* is authority for the proposition that (a) a claim against an insurer means a demand or an assertion of a particular right, (b) the demand must be for a particular amount and (c) the amount must be fixed by a court or by agreement.

121. However, I do not think that in *Federal Insurance Co v Nakano Singapore Pte Ltd* [1992] 1 SLR 390 (*Nakano*), our Court of Appeal had accepted the second and third elements of the proposition in *Boshoff.*

122. At p 396 B to D of the law report for *Nakano*, Chan Sek Keong J (as he then was) said:

> Undoubtedly, a claim arose the moment people were injured and property damaged as a result of the collapse of the scaffolding. But to assert that a claim was made as soon as Sanpete notified the appellants of the accident was to confuse the notification of the occurrence of an insured event giving rise to a claim and the making of a claim. Under condition 5 of the policy, the insured were under an obligation to notify the appellants immediately upon the happening of any event giving rise to a claim. This was what Sanpete had done in this case. It was entirely possible (but most unlikely as they would not then have known of the extent of their loss) that Sanpete could have made a claim at the same time that they notified the appellants of the accident. There was, however, no evidence before us that Sanpete did so, or that the respondents did so. It seemed to us more likely (but we make no finding on it) that GM were appointed to assess the losses as a result of claims having arisen rather than of claims having been made.
>
> [Emphasis added.]

123. From the passage of *Nakano* cited by Thean J, as referred to above, it seems to me that the Court of Appeal in *Nakano* had accepted the first element of the proposition in *Boshoff* only i.e that a claim must contain the essential ingredient of a demand or an assertion of a particular right.

124. In *Divcon International (H.K.) Pte Ltd v Union Des Assurances De Paris-Iard,* an unreported judgment of Amarjeet Singh JC (as he then was), a similar provision had to be considered.

125. In para 7 of his judgment, Amarjeet Singh JC said:

> 7. In the circumstances, I hold that the only *claim* as required by law was that *made* to the Defendants and contained in the Plaintiffs solicitors letter dated *27 February 1997* which expressly contained both the *amount* and *a demand* asserting that it be paid failing which proceedings would be commenced against

the Defendants.

126. I am disinclined to think that a claim must contain the amount being claimed.

127. For example, if an insurer were to repudiate liability in the face of a potential claim by a victim but the insured needs to know whether the insurer is entitled to do so because the insured is undergoing a financial restructuring, I would have thought that the insured could make a claim for a declaration that the insurer is not entitled to repudiate liability even before the insured knows the amount that the victim will be claiming.

128. Another example, is where the victim has claimed general damages against the insured. I would have thought that the insured would then be able to make a claim against the insurer for an indemnity for those general damages.

129. Coming back to the fax dated 9 February 1999, I am of the view that even if HI had pleaded this fax as having made a claim, the fax did not make a claim.

130. The heading of that fax referred to Companies Winding Up No 275 of 1997. This is the petition to wind up Brentford.

131. The heading of that fax also referred to Summons In Chambers 594 of 1999. That was Chiu Tengs application for Chiu Teng to be at liberty to commence proceedings against Brentford notwithstanding the order to wind up Brentford dated 24 April 1998.

132. The OR was simply asking KWP whether HI were admitting to the liability in the claim by Chiu Teng against Brentford. There was no demand by the OR for anything.

133. Lastly, KWPs fax dated 24 March 1999 which disclaimed liability referred only to the fax dated 19 March 1999 from the OR to KWP. It did not even refer to the earlier fax dated 9 February 1999 from the OR. So even if the 9 February 1999 fax had made a claim, there was no rejection of that claim.

Fax dated 19 March 1999 from the Official Receiver to KWP

134. The next question is whether the fax dated 19 March 1999 from the OR made a claim.

135. I am of the view that it did not. It was merely notifying KWP that (a) a claim had been made by Chiu Teng against Brentford, (b) the OR was in no position to defend the claim as a director of Brentford had not attended at the office of the OR and (c) the OR had no objection if HI wanted to take over the conduct of the matter with a view to defending the claim.

136. This fax did not contain any demand at all.

137. Accordingly although KWPs reply dated 24 March 1999 was to disclaim liability, it did not reject a claim because no claim had been made. Furthermore, just because the ORs reply dated 1 April 1999 did not say that no claim had been made does not mean that one had in fact been made. Likewise, just because the OR had sought the reasons for the disclaimer did not mean that the OR had made a claim in the first place.

138. As for KWPs telefax dated 3 April 1999 reiterating the disclaimer, this is irrelevant as no claim had been made by the OR.

139. Mr Eu also submitted that there was no evidence to show that KWP, as the solicitors of HI, were empowered to accept a claim. No doubt Mr Eu was relying on the decision of Amarjeet Singh JC in *Divcon International*, cited above. In that case the Judicial Commissioner held that even if certain letters to the loss adjusters of the insurer constituted a claim, the claim was not made to the insurers as there was no evidence that the insurers adjusters were empowered as the insurers agent to accept a claim.

140. In my view, it should be implied that KWP, as HIs solicitors, were empowered to receive a claim, if one had been made, especially since neither HI nor the OR had suggested otherwise.

MUST CHIU TENG PROVE THE QUANTUM OF THEIR DAMAGES AGAIN?

141. The policy defences have failed. As HI did not dispute that Brentford were liable to Chiu Teng for the damage caused, the next question is whether Chiu Teng must prove the quantum of their damages again, having already done so once in the Brentford action. More specifically, that question is whether Chiu Teng must again justify the use of the micropiles.

142. HIs position is that it was not necessary for micropiles to be used. Even if it was necessary to do so, the number of micropiles used should have been less.

143. Chiu Tengs position is that they are entitled to rely on the final judgment obtained against Brentford and need not have to establish the quantum claimed all over again. However, if the court does not agree, then their fall-back position is that it was reasonable to use micropiles and the number of micropiles in fact used.

144. Mr Teo relied on *Continental Casualty Co of Canada v Yorke* [1930] 1 DRL 609. In that case, the insured was one Mrs Schwartz. Her son, who was of 16 years of age, was driving her car. He ran down and injured a lady who sued her and her son and obtained judgment against them.

145. Not being able to obtain satisfaction of her judgment, the victim then sued the insurers of Mrs Schwartz under the Ontario Insurance Act. The relevant provision (which became s 85 at the time of the trial) reads as follows:

> In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

146. Lamont J, delivering the judgment of the Supreme Court of Canada, said from p 612:

> The respondents right of action against the appellant depends upon s. 85 above quoted. That section gives the person injured by an automobile in respect of which the owner has been insured against liability for injury, a "right of action" against the insurance company issuing the policy, provided such injured person has obtained a judgment against the person insured in respect of such injury and has issued execution thereon, and the execution has been returned unsatisfied.
>
> The first question that arises, therefore, is: On the material put before the Court by the respondent, had she established a prima facie case? Section 85 gives the respondent a right of action against the appellant in the same manner and subject to the same equities as the insured would have if she herself had satisfied the judgment. What is the "right of action" here given? In my opinion it is simply a right to sue. The statute gives the respondent a right to sue the appellant on its policy in the place and stead of the insured, which right she

would not have had but for the statute. The right to sue may be exercised by the respondent in the same manner as if the insured had paid the judgment and brought the action. This, I take it, refers to procedure. It is also to be exercised subject to equities which would prevail between the appellant and the insured. This, in my opinion, means that the respondent must establish liability on the policy against the appellant to the same extent as if the action had been brought by the insured, and that whatever defences the appellant would have been entitled to raise against the insured it may raise against the respondent. Had Mrs. Schwartz paid the judgment and brought action against the appellant, she must, in my opinion, in order to succeed, have established (1) the agreement to indemnify; (2) that the bodily injury to another insured against had been inflicted by her automobile, and (3) that she was legally liable in damages to the respondent for the injuries received by her.

In the present action the respondent established the agreement to indemnify by the production of the policy. The fact that an injury of the kind insured against had resulted from the operation of Mrs. Schwartz automobile, and Mrs. Schwartz liability therefor, the respondent attempted to establish by the production of her judgment. In my opinion neither the injury nor the liability can, as against the appellant, be established in this manner. In 13 Hals., pp. 542-3, para. 744, the author says:-

> "A judgment *in personam* is conclusive proof as against parties and privies of the truth of the facts upon which such judgment is based, but, excepting as above stated to prove its existence, date, and consequences, it is inadmissible in evidence as against strangers, except (1) where it determines a question of public right and is admissible as evidence of reputation; (2) in bankruptcy or administration proceedings; (3) in divorce cases; and (4) to some extent in patent actions."

In *Allan v. McTavish* (1883) 8 A.R. (Ont.) 440, at pp.442-3, Burton, J.A., points out that a judgment is conclusive upon third parties as well as upon the defendant to establish the relationship of debtor and creditor, and the amount of the debt and the date of its recovery; but that if furnishes no evidence whatever as regards third persons of the allegations in it on which recovery proceeded. "Those facts", his Lordship says (p.443) "if material to the plaintiffs case, have to be established by appropriate evidence". See also *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455; *Castrique v. Imrie* (1870}, L.R. 4 H.L. 414, at p.434; *Duchess of Kingstons Case* (1776), 2 Sm. L.C., 13th ed., p.644.

> If the judgment was evidence as against the appellant of the existence of the injury insured against and of the liability of the insured therefor, the appellant would be liable on the policy if the insured, having a good defence to the claim for damages, failed to set it up in her pleadings, and prove it at the trial, and judgment went against her on that account. This would be to expose the appellant to the obligation of indemnifying the insured not only where it had agreed to do so, but also where it had not agreed to do so

> but judgment had been obtained against the insured through failure on her part to set up or establish an available defence.
>
> The respondents judgment not being evidence as against the appellant of the circumstances upon which it was founded, there was no evidence before the Court that the conditions, upon which liability under the policy arose, had been fulfilled. Had the matter rested there the plaintiff would have been in the position of not having proved her case. The matter, however, did not rest there. At the trial counsel for both parties were of opinion that the appellant was precluded by the judgment from raising the question of Mrs. Schwartz liability to the respondent.
>
> In view of this admission it is not now open to the appellant to contend that the liability of Mrs. Schwartz to the respondent for injuries received has not been established by the judgment.

147. Lamont J then noted that the real issue was a policy defence which is not relevant to the facts before me.

148. Mr Teo also relied on *King v Norman* [1847] 4 CB 884. In that case B and C had agreed jointly and severally to indemnify A against all costs, charges etc which he might incur in consequence of A becoming a surety for C who was a collector of taxes. However C did not pay various sums of money exceeding in total to more than 500 to the receiver-general. A was then called upon by the receiver-general to pay a certain sum which he did pay. A then commenced action against B. The court held that the mere production of a judgment against A in a suit by the receiver-general was not evidence of the damage sustained by A in consequence of his suretyship.

149. However the report is a short one and no reasons were reported for this conclusion.

150. Mr Teo also cited textbooks and cases on the doctrine of res judicata, cause of action estoppel and issue estoppel to support his argument that a judgment in an action between A and B is not binding as against C in an action between A and C.

151. Mr Eu relied on three Canadian cases.

152. In *Bourbonnie v Union Insurance Society of Canton Ltd* [1959] 22 DLR (2d) 419, the plaintiff was the widow and administratrix of the estate of her husband. He was a passenger in a car driven by Hall. As a consequence of Halls gross negligence, the plaintiffs husband sustained injuries which resulted in his death. The plaintiff obtained judgment against Hall but the judgment was not satisfied. The plaintiff then commenced action against the insurer of Hall under s 302 of the Alberta Insurance Act which reads as follows:

> 302(1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, is, notwithstanding that such person is not a party to the contract, entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity, and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

153. The insurers raised various defences including (a) volenti, (b) contributory negligence and (c) a policy defence.

154. After noting that the particular defence in the *Yorke* case was a policy defence, Egbert J of the Alberta Supreme Court said, at p 428 to 429:

> But the question still remains what defences would the defendant be entitled to set up against the insured? Do those defences include the defences which the insured would have been entitled to set up against the claimant?
>
> In my view the point at issue can be determined only by a consideration of the nature of the plaintiffs action against the defendant. It is not an action based on the negligence or misconduct of the insured toward the plaintiff, nor is it an action based on the policy of insurance issued by the defendant to the insured. It is an action based on the judgment previously obtained in this Court by the plaintiff against the insured, and on the statutory right conferred by s.302(1) to sue to have the insurance moneys applied on that judgment, . Accordingly, in my view, there are not available to the defendant the defences which would be available if the action were based on the insureds negligence or misconduct, or even on the policy. There are available only those defences which are naturally or automatically available under the statute which confers the right, or the defences which are by the statute expressly left available. The defences naturally available under the statute are, as I have said, such defences as that the insurer is, in fact, not an insurer, that the alleged insured is not the person insured, that no judgment was in fact recovered against the insured by the plaintiff, that the car insured was not the car involved in the accident, that the judgment has been satisfied, etc. The other defences left available by the statute are only such defences as "the insurer is entitled to set up against the insured" (e.g., breach of a statutory condition).
>
> In my view the *Yorke* case is clearly distinguishable from this case. It was decided under a section so entirely different from s.302(1) of the Alberta Act, that they bear little resemblance either in wording or meaning. The Ontario Act involved in the *Yorke* case clearly afforded to the claimant only a right to be put in the place of the insured and to sue on the policy "in the same manner and subject to the same equities" as if the insured had sued the insurer. That is what the Supreme Court of Canada decided. That right is something entirely different from the right conferred by s.302(1) to have the moneys payable by the insured under the policy applied on the plaintiffs judgment and other judgments against the insured, and to maintain an action against the insurer "to have the insurance moneys so applied".

155. I am of the view that this part of Egbert Js judgment does not assist Chiu Teng because the provisions of s 1 of the Act are different from the Alberta Insurance Act. Under s 1 of the Act, Chiu Teng steps into the shoes of Brentford to sue HI. The cause of action is still based on the policy and not on the final judgment.

156. However, Mr Eu referred me to another part of Egbert Js judgment. At p 430 to 431, Egbert J said,

> May I add that in my opinion any other finding would create a deplorable situation. An injured person might be under the necessity of conducting a long and expensive trial against an insured, while the insurers, with full knowledge of the proceedings, sat back and did nothing. After being successful the plaintiff

> might then be in the position of having to repeat the long, expensive process involved in the first trial, with the added disadvantage that the insurers would then have complete knowledge of the plaintiffs evidence, and of his witnesses. There would be little point in the insurer ever defending or becoming a third party to an action against its insured, if it could thus sit by, and gain the advantage of complete knowledge of the plaintiffs witnesses and evidence, and be able to raise in an action against it, the very issues that have already been heard and determined by the Court. I cannot believe that any such manifestly unfair situation was ever intended by the *Alberta Insurance Act*.

157. In *Sedam v Simcoe & Erie General Insurance Co* 147 DRL (3d) 159, the facts of the accident were similar to those in the *Bourbonnie* case.

158. The insured Whitehead was the pilot of a small aircraft which crashed killing the plaintiff who was a passenger. The plaintiff obtained judgment against the administratrix of Whiteheads estate which judgment remained unsatisfied. The plaintiff then commenced action against the insurers of Whitehead.

159. A special case was referred to the British Columbia Supreme Court for the interpretation of s 26(1) of the Insurance Act R.S.B.C. 1979 c 200, which reads as follows:

> 26(1) Where a person incurs liability for injury or damage to the person or property of another, and is insured against that liability, and fails to satisfy a judgment awarding damages against him in respect of that liability, and an execution against him in respect of it is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

160. Essentially the question on the special case was whether the negligence of Whitehead had to be proved once again by the plaintiff in order to recover against the insurers.

161. At p 163, Lander J said:

> In a more recent decision of the Supreme Court of Canada in *Global General Ins. Co. v. Finlay* (1961), 28 D.L.R. (2d) 654, [1961] S.C.R. 539, [1961] I.L.R. para. 1-036, *Yorke, supra*, was distinguished and narrowed. Firstly,
>
> Secondly, in *Global General Ins. Co. v. Finlay, supra*, the court listed six exhibits which had been before the court in *Yorke*. One of the exhibits referred to was the judgment introduced by the respondent in that case. In this connection, Mr. Justice Cartwright said at p.663:
>
> > It will be observed that there was nothing in any of these exhibits to indicate the nature of the claim on which the plaintiffs judgment was founded beyond the fact that it was a claim for damages.
>
> This statement suggests that the formal judgment, which had been an exhibit in the *Yorke* action, was not even evidence of liability.
>
> Thirdly, the court in *Global General Ins. Co. v. Finlay considered the comments*

in Yorke made upon the admissibility of the use of the earlier judgment to be *obiter dicta*. The court noted that the defect in the evidence was remedied by admissions made at trial and hence the only issue in *Yorke* was whether the fact judgment had been given against the insured in an earlier proceeding was evidence that the insured let her underage son use the car with her knowledge, consent or connivance. Mr. Justice Cartwright, at p.663, stated as follows:

> Counsel for the defendant at first proposed to call Elizabeth Schwartz in an endeavour to prove the giving of consent but changed his mind and took the position that the giving of her consent was sufficiently proved by the judgment of Riddell, J., which had already been filed. This was the only point which this Court was called upon to decide or did decide.

In my view the above statement significantly limits the authority of *Yorke*. Mr. Justice Cartwright concluded at p.664:

> Turning now to the facts of the case at bar it is my opinion that the best evidence by which a party bringing action under s.214(1) of the *Insurance Act* [R.S.O. 1927 c.222] can establish the nature of the claim for which he has recovered judgment against an insured is to prove the formal judgment, the reasons therefor and the record, including of course the pleadings, in the action in which the judgment was recovered. All of these are admissible in evidence and nothing in the *Yorke* case or the *Dokuchia* cases [*Dokuchia v. Domansch,* [1944] 3 D.L.R. 559, [1944] O.W.N. 461; affd [1945] 1 D.L.R. 757, [1945] O.R. 141] decides, or indeed suggests, the contrary.

With the greatest respect, it seems to me that the logic evident in *Global General Ins. Co. v. Finlay* applies to the present facts. First, there is nothing in s.26(1) of the *Insurance Act* of British Columbia which restricts the manner by which an action can be brought against an insurer. Secondly, unlike *Yorke*, the pleadings in the earlier action against the insured are before this court and it is clear from the judgment that liability for negligence and the quantum of damages have been determined by Mr. Justice Trainor in the earlier proceedings. Thirdly, *Global General Ins. Co. v. Finlay* stands for the proposition that *Yorke* only decided that the judgment against the insured was not evidence that the insured knew that her car was being driven by her son.

I suggest that there is a heavy burden on the defendant insurer to show that s.26(1) of the *Insurance Act* ought to be given the interpretation that it desires. It would strike anyone as an absurd requirement to prove again what has already been proven in earlier proceedings at a great cost of time and money without a compelling reason for it. The public has an interest in seeing that there is an end to litigation. To achieve that end, there must be an incentive on interested parties to bring matters to a close. In *Bourbonnie v. Union Ins. Society of Canton, Ltd.* (1959), 22 D.L.R. (2d) 419, 30 W.W.R. 1, [1960] I.L.R. para. 1-348, Mr. Justice Egbert of the Alberta Supreme Court, at p.431, stated as follows:

> There would be little point in the insurer ever defending or becoming a third party to an action against its insured, if it could thus sit by, and gain the advantage of complete knowledge of the plaintiffs witnesses and evidence, and be able to raise in an action against it, the very issues that have already been heard and determined by the Court.
>
> It should be noted that in the case at bar a default judgment was entered. I am of the view that no different considerations apply as a result. It is always open to an insurer or other interested party to apply to the court to have the default judgment set aside pursuant to the Supreme Court Rules, Rule 17(11): see *Oakley v. Ashlie* (1976), 68 D.L.R. (3d) 546, [1977] I.L.R. para. 1-848.
>
> The answer to the question of law arising from the facts as set forth in the special case is that the plaintiff does not have to establish as a precondition to liability of the defendant Simcoe & Erie General Insurance Company, those matters, or any of them, set forth in para. 8A of the amended statement of defence.

162. I note that again the legislation in *Sedam* is different from that in *Yorke* and s 1 of the Act. However the judgment of Lander J is interesting for the observations made about *Yorke* and about not having to prove a case again even for a default judgment.

163. In *Carwald Concrete & Gravel Co Ltd v General Security Insurance Co of Canada* et al [1985] 24 DLR (4^{th}) 58, a general contractor P Ltd had contracted with C Ltd to supply and pour a concrete pad. C Ltd bought cement for the concrete from H Ltd. There was a defect in the cement and the concrete pad had to be removed and certain materials embedded in the concrete had to be made ready again for repouring of the concrete.

164. P Ltd sued C Ltd and H Ltd and recovered damages. C Ltd sued and recovered a judgment against H Ltd. H Ltd was insolvent. C Ltd then made a claim against the insurers of H Ltd under s 219 of the Insurance Act R.S.A. 1980 c. I-5 which reads as follows:

> 219. In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for the injury or damage and an execution against the insured in respect thereof is returned unsatisfied, the execution creditor has a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the judgment had been satisfied.

165. At p 68, Prowse JA delivering the judgment of the Alberta Court of Appeal said:

> I am of the opinion that sufficient evidence was adduced to support a judgment against Canadian Indemnity. It could not have been the intention of the Act to retry issues previously decided by the court. The judgment creditor has the onus of bringing itself within s.219. If an insurer seriously defends that action on the basis that the question of liability was not fully canvassed in the underlying action then if it adduces any evidence to that effect, the onus to adduce

> further evidence falls upon the judgment creditor. To retry any issue when no evidence is adduced requiring an answer would unduly lengthen litigation and increase its costs for no useful purpose.

166. This judgment appears to favour HI and not Chiu Teng, because HI have adduced evidence to contest the use of micropiles, subject to my ruling as to whether Chiu Teng must establish the quantum of its loss again.

167. However, the legislation in *Carwald Concrete* is again different from that in *Yorke* and from s 1 of the Act.

168. Mr Eu also relied on a passage from Halsburys Laws of England and three other cases.

169. The 4th Edition, Vol 16 of Halsburys Laws of England, para 995 states:

> **995. Quasi-privity**
>
> . In certain cases, although there is in strictness no privity between a party to a judgment and the person against whom it is set up, the relations between them are such that the latter is not allowed to dispute it. There is no privity of estate between the parties to a contract of indemnity or between a surety and the principal debtor or his trustee in bankruptcy, but a person who has covenanted to indemnify another against liabilities and actions in respect of them is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the party indemnified which has been defended with the covenantors knowledge and approval, not because the covenantor is a privy, but because that is the true meaning of the contract.

170. In *Parker v Lewis* [1873] LR 8 Ch App 1035, shareholders of a company sued a bank for a sum which the bank had allowed to have been dealt with improperly. They obtained judgment against the bank which then compromised the judgment by paying a lower sum than the judgment sum.

171. The bank then sued three of its directors. The suit failed for reasons which are not material to the present case before me. However one of the questions which had arisen was the effect of the judgment against and compromised by the bank on its claim against the directors.

172. At p 1059, Sir G Mellish LJ said,

> and I think that the law with reference to express contracts of indemnity is, that if a person has agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity. On the other hand, if he does not choose to trust the other person with the defence to the action, he may, if he pleases, go on and defend it, and then, if the verdict is obtained against him, and judgment signed upon it, I agree that at law that judgment, in the case of express contract of indemnity is conclusive. But I apprehend that it is conclusive on account of what the law considers the true meaning of such a contract of indemnity to be. It is obvious that when a person has entered into a bond, or bought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard, indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by

> reason of that contract of indemnity, the judgment is conclusive; but in my opinion it is conclusive because that is the meaning of the contract between the parties, for it unquestionably is not the general rule of law that a judgment obtained by *A.* against *B.* is conclusive in an action by *B.* against *C*. On the contrary, the rule of law is otherwise. It is quite plain that the ordinary rule of law is, that a judgment *in rem* is conclusive, but a judgment *inter partes* is conclusive only between the parties and the persons claiming under them.

173. Mr Teo sought to distinguish *Parker v Lewis* from the present case.

174. His first point was that the bank there was a party to both proceedings whereas in the case before me, HI were only parties to the HI action.

175. I do not agree with this argument.

176. HI are not in the same position as the bank in *Parker v Lewis*. In that case, the bank was the defendant in the first suit and it was the plaintiff in the claim against the three directors. In the case before me, HI are simply the defendants in the second action i.e the HI action.

177. On the facts before me, Chiu Teng had commenced action and obtained final judgment against Brentford in the Brentford action. Chiu Teng are now suing HI in the HI action.

178. The fact that Brentford is not, strictly speaking, a party in the HI action is irrelevant because Chiu Teng are stepping into the shoes of Brentford by virtue of s 1(1) of the Act. It is as though Brentford are the plaintiffs in the case before me. Had Brentford sued HI, Brentford would have been entitled to rely on the final judgment against it under the principle mentioned by Mellish LJ. The position is no different just because Chiu Teng are suing on Brentfords contract with HI. While Chiu Teng cannot be in a better position than Brentford, it also cannot be in a worse position.

179. Mr Teos second point was that the facts in *Lewis v Parker* related to fraud and breach of trust and not to a contract of indemnity.

180. That is true. However, the court there had to decide whether a judgment against the bank in the first action was conclusive in the suit by the bank against the three directors. Certain cases were relied upon to advance this proposition and Mellish LJ pointed out that those were cases based on express contracts of indemnity and he then went on to say what the principle was for express contracts of indemnity.

181. Mr Teo then submitted that the judgment of Mellish LJ which I have cited was orbita dicta. Even if this were so, it is, in my view, a correct analysis of the position under express contracts of indemnity.

182. Mr Teo also relied on the following judgment from Sir W M James LJ in *Parker v Lewis* from p 53 to 54:

> It was said and very strongly contended before us that it was not open to these parties to go into the merits of the case at all, but that the bank, having defended the suit in *Gray v. Lewis*, and having had a decree made against them, were at liberty to compromise it on the best terms they could, and that it was not open to the Defendants to shew that they could have obtained better terms. I think there is no foundation for this. It would seem to be a very strong proposition to say that the bank having had the decree against them for 230,000, in the absence of any one of the directors in that character, might have compromised it for 200,000, or for any other sum less than the 230,000, or any sum they thought fit, and that every one of those twelve directors would

> have been personally answerable, jointly and severally, for the whole amount so decreed against them, and so compromised by them without having an opportunity of being heard in this Court to say that there was no foundation for the decree at all. I cannot conceive that that can be the law, and I have heard no authority adduced to satisfy me that there is any foundation for it.

183. I am of the view that this judgment does not assist HI. Chiu Teng are not suing on a compromise but on a final judgment. Secondly, there was no express contract of indemnity as between the three directors and the bank, as Mr Teo himself had pointed out.

184. In *Mercantile Investment and General Trust Company v River Plate Trust, Loan and Agency Company* [1893] 1 Ch 578, the Mercantile Company were minority debenture-holders who had dissented from a resolution which was passed in favour of accepting shares in an English company, in lieu of the debentures. The English company had purchased the undertaking and property of an American company which had issued the debentures and covenanted to indemnify the American company against its debts and obligations. The Mercantile company sued the American company for arrears of interest due on the debentures. The English company assisted in the defence of the American company but the defence failed.

185. The Mercantile Company then sued the English company and the question was whether the English company was estopped by the judgment against the American company from adducing evidence to meet the claim.

186. At p 594, Romer J said:

> The first question to be considered is whether the Defendants, the *Mexican Land and Colonization Company, Limited* (a company I shall for brevity refer to as "the *English Company*"), are estopped by the judgment in the action brought by the Plaintiff company against "the *American Company*" the *International Company of Mexico*. Now, the *English Company* were not parties to that action and *prima facie*, are not bound by the judgment. The *American Company* defended that action. The *English Company*, by reason of the covenant of indemnity given by them, were interested in assisting the *American Company*, and accordingly they did assist the *American Company* in their defence and counter-claim, and, when the *American Company* failed, paid their costs. But this in itself did not put the *English Company* in the position of Defendants to that action, or estop them in the present action.

187. At p 595, he went on to say:

> Lastly, it was said that, inasmuch as the *American Company* defended with the knowledge and approval of the *English Company*, the latter would be estopped under their covenant of indemnity from disputing the judgment as against the *American Company* suing them on the express covenant of indemnity. That is quite true. But this is not an action on the covenant of indemnity. The estoppel last referred to is only between the party indemnifying and the party indemnified, and arises only by virtue of a term implied in an express covenant of indemnity, as was pointed out in the case of *Parker v. Lewis* (1). In the present case, not only are the *American Company* not suing, but they are not even parties to the action. The Plaintiffs are suing the *English Company* on grounds which, the Plaintiffs maintain, make the *English Company* directly liable to them, and not merely to the *American Company*. In such an action I can find no grounds for estoppel merely because the *English Company* may be estopped as against the *American Company* if and when the latter sue on their covenant of indemnity. .

[Emphasis added.]

188. Mr Teo argued that this case supported HIs position because Chiu Teng are in the same position as the Mercantile Company.

189. I do not agree. Unlike the Mercantile Company, Chiu Tengs present claim against HI is based on the contract of indemnity between HI and Brentford. As I have said, Chiu Teng are stepping into the shoes of Brentford, a point which Mr Teo himself had stressed when he sought to rely on the policy defences. As between Brentford and HI, HI are estopped by the judgment against Brentford from raising any evidence to refute Brentfords liability to Chiu Teng or the quantum of that liability. As I have said, Chiu Teng are in no better position than Brentford but, likewise, they are in no worse a position.

190. In my view, this principle applies whether HI had conduct of Brentfords defence or not. This is because the final judgment against Brentford is binding on HI in view of the nature of the contract between Brentford and HI and not because HI did or did not have conduct of Brentfords defence.

191. For example, if HI were a third party in the Brentford action but chose not to participate in the proceedings between Chiu Teng and Brentford, and a judgment was obtained against Brentford, could HI then validly argue that the judgment is not binding on it and hence require Brentford to prove its liability to Chiu Teng? I would have thought not.

192. The principle would also apply even if HI were not a third party in the Brentford action, as was in fact the case.

193. As I will elaborate below, there are enough avenues to protect HIs interest and if they choose not to avail themselves of any of such avenues, they should not be heard to complain.

194. Mr Teo had submitted that because HI had disclaimed liability, they had no obligation or interest in defending Brentford against the claim by Chiu Teng or to add themselves as a third party.

195. While I agree that HI had no obligation to defend Brentford or to ask that they be added as a third party, I do not agree that HI had no interest to do so.

196. This is because while HI had disclaimed liability, they could not be absolutely certain that their disclaimer would be upheld. If Chiu Tengs claim against Brentford had failed or the quantum of their claim was reduced by the court, HI would have consequently benefited.

197. As HI did not choose to defend Brentford against Chiu Teng, or to ask that they be added as a third party, they ran the risk of the very event that has now occurred i.e Chiu Teng obtaining a judgment against Brentford for a certain sum and HI failing in their policy defences.

198. As regards any suggestion that HI could not have defended Brentford because that would be contrary to HIs disclaimer of liability, I am of the view that HI could have done so with the agreement of the OR that this would be without prejudice to HIs disclaimer of liability under the policy. Indeed, even though there was no response to the ORs earlier telefax dated 9 February 1999, the OR had subsequently inquired in the telefax dated 21 March 1999 whether HI wanted to take over the matter with a view to defending the claim against Brentford.

199. Furthermore, even if, for the sake of argument, the OR had refused to allow HI to conduct Brentfords defence in view of HIs disclaimer of liability and if the OR had refused to join HI as a third party, I am of the view that HI would have been able to add itself as a party in the Brentford action as was done in *Wood v Perfection Travel* [1996] LRLR 233.

200. In addition, if Brentford were to sue HI for an indemnity, it does not make sense to me that HI should be entitled to require Brentford to establish Brentfords liability to Chiu Teng. After all, as between Chiu Teng and Brentford, Brentford is the defendant and not the plaintiff. How would Brentford establish its own liability to Chiu Teng? What would happen if Chiu Teng

had been dissolved after it had received payment from Brentford or Chiu Tengs evidence was no longer available?

201. Also, to allow HI to require Chiu Teng to prove the quantum of its loss all over again would mean a risk that there would be a different finding in the HI action from the Brentford action.

202. The principle enunciated in *Parker v Lewis* and reiterated with approval in *The Mercantile Company* case was applied in *Tee Liam Toh v National Employers Mutual General Insurance Associated Limited*, an unreported judgment of Ong J in Kuala Lumpur.

203. In that case, a merchant who owned a lorry took out a workmens compensation policy to cover, inter alia, the driver of the lorry. The driver subsequently collapsed and died of a heart attack while he was about to load some goods.

204. The drivers dependants made a claim under the Workmens Compensation Ordinance against the merchant who denied liability. As no agreement was reached before the Commissioner for Labour, the President of the Sessions Court, as arbitrator pursuant to the Ordinance, decided certain issues against the merchant and ordered him to pay compensation and costs.

205. The merchant than claimed to be indemnified by the insurers who invoked an arbitration clause in the policy.

206. In his award, the arbitrator, who was a practising advocate and solicitor, found, inter alia, that the drivers death was due to natural causes, that the insured had not breached Condition 2 of the policy, and that the insurers were not liable to indemnify the merchant.

207. The merchant then applied to the court to have the arbitrators award remitted for his reconsideration or set aside.

208. Ong J said that the matters which ought properly to have been referred to the arbitrator were misconceived by the legal advisers of both the merchant and the insurers. He was of the view that the only matter in difference which fell to be decided was the policy defence. On that point, the arbitrator had found in favour of the merchant.

209. Ong J then said:

> This finding meant that, with full notice of a claim against their insured, the insurance company elected to lift not a finger to assist their insured or protect themselves by defending the claim. Under condition three they had the right to take over conduct of the defence against the claim put forward by the dependants of the deceased, and, if dissatisfied with the decision, they should have appealed. Having left their insured to carry the burden, they nevertheless subsequently insisted on raising the very same questions before the arbitrator which had already been decided by a competent tribunal against their insured. Of course, they are precluded by the decision of the learned President, as arbitrator, from agitating these questions again.

210. He also cited with approval the same passage from Halsburys Laws of England (from the then 3rd Edition) which I have cited in para 169 above and the judgment of Mellish LJ in *Parker v Lewis* which I have cited in para 172 above.

211. I should mention that I note from the judgment of Egbert J in *Bourbonnie* that he said, at p 428:

> In concluding my review of the authorities, I would refer to one statement occurring in the judgment of Viscount Simonds, in *Lister v. Romford Ice & Cold Storage Co.,* [1957] 1 All E.R. 125. The complicated facts need not be recounted, but in referring to the matter of proof of liability by proving a judgment, Viscount Simonds said [p.131]: "I should note in passing that it was

> urged that the respondents had not proved the quantum of damage suffered by them by proving only that judgment had been given against them and that they had paid, or were liable to pay, the amount of the judgment and costs. This plea could not be sustained. It appears to me to be against reason and authority".

212. This statement would support Chiu Tengs position but I note that Viscount Simonds had referred to the case of *Green v New River Co* [1792] 4 Term Rep 589 for this point. Upon my considering the report of *Green v New River Co*, it appeared to me that it was not authority for the point made but for something else which is irrelevant for present purposes.

213. In so far as Mr Teo has raised another argument i.e that a report of Mr Ho was not disclosed to the court in the Brentford action, I am of the view that this is precisely why HI should have taken over the conduct of the defence for Brentford in the first place, i.e to ensure that such a report was disclosed.

214. In any event, Mr Teo did not suggest that the omission was done mala fides.

215. I think it is too late now for HI to complain about what was done or omitted in the Brentford action.

216. For the reasons that I have mentioned, I am of the view that *King v Norman* and *Yorke* should be considered as authorities for the proposition that the mere production of a judgment, without more, may not constitute sufficient evidence to establish the liability of the insured to the victim.

217. Before me, Chiu Teng produced more than a copy of the final judgment. A copy of the pleadings in the Brentford action had been produced as well as the Notes of Evidence on the assessment of damages. I am satisfied that the claim in the HI action is based on the same facts as in the Brentford action, leaving aside the policy defences. Indeed, Mr Teo did not suggest to the contrary.

218. I am of the view that *Parker v Lewis*, *The Mercantile Company* and *Tee Liam Toh* should be followed.

219. The textbooks and many cases that Mr Teo submitted on the doctrine of res judicata, cause of action estoppel and issue estoppel are not relevant as they do not pertain to a claim by an insured against an insurer for an indemnity on a judgment against the insured.

220. Accordingly, it is not necessary for Chiu Teng to prove again the quantum of their loss and more specifically the reasonable use of micropiles. Consequently it is not necessary for me to consider whether the use of micropiles was reasonable.

221. I therefore grant judgment in favour of Chiu Teng against HI for $446,600.08.

222. In addition, HI are to pay interest thereon at 6% per annum from 30 May 2000 as that is the date of the final judgment against Brentford for which HI are to indemnify Brentford.

223. As for the costs of $5,500 awarded to Chiu Teng against Brentford, Mr Eu submitted that the same should be payable by HI under the term of the policy. Section II of the policy states:

> In respect of a claim for compensation to which the indemnity provided herein applies the Insurers will in addition indemnify the Insured against
>
> (a) all costs and expenses of litigation recovered by any claimant from the Insured, and
>
> (b)

224. On the other hand, Mr Teo did not make any submission in respect of this item.

225. There is ambiguity as to whether recovered means actual payment of the $5,500 to Chiu Teng by Brentford or it is sufficient if Chiu Teng have obtained a judgment against Brentford for the $5,500 costs.

226. Supposing Brentford had sued HI, would HI have said that their liability for the $5,5000 does not arise until Brentford paid the $5,500 to Chiu Teng and insisted that Brentford first pay the $5,500? I doubt so.

227. In any event, applying the contra proferentem rule, I am of the view that as Chiu Teng have obtained a judgment against Brentford for the $5,500 costs, HI are liable to pay this sum to Chiu Teng under s 1(1) of the Act.

228. Accordingly HI are to pay the $5,500 costs to Chiu Teng as well. HI are also to pay Chiu Teng 90% of the costs of the present action before me to be agreed or taxed.

Woo Bih Li

Judicial Commissioner