JK Pte Ltd *v* Lonpac Insurance Bhd
[2011] SGHC 72

Case Number : Suit No 55 of 2009

Decision Date : 30 March 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Axel Chan (Attorneys Inc. LLC) for the plaintiff; Nigel Bogaars and Savliwala Fakhruddin Huseni (Bogaars & Din) for the defendant.

Parties : JK Pte Ltd — Lonpac Insurance Bhd

Contract

30 March 2011 Judgment reserved.

Lai Siu Chiu J:

1 In this case, JK Private Limited ("the plaintiff") sued Lonpac Insurance Bhd ("the defendant") for failing to pay for services the plaintiff had rendered to the defendant, pursuant to a letter of appointment dated 1 August 2008 ("the LOA").

2 The plaintiff is a Singapore company with its office at 135 Middle Road #05-10, Bylands Building. The plaintiff's managing-director is one Goh Jong Kan ("Goh") whose initials presumably appear in the plaintiff's name. The defendant is a Malaysian insurance company with an office in Singapore which was at 100, Beach Road #19-00, Shaw Tower at the material time.

3 Between 14 and 24 April 2008, the defendant had issued nine marine policies ("the policies") to a company called Idea Giant Ltd ("the shipper") and to other Singapore companies including Super Coffeemix Manufacturing Ltd ("Super Coffeemix"), insuring various types of products shipped to S.S.L Trading Co Ltd ("SSL") and Malikha Automobile Co Ltd ("Malikha") (collectively "the consignees") in Yangon, Myanmar. The products shipped to the consignees consisted of malt cereal, glucose creamer, coffee powder, non-dairy creamer and coffee mixes popularly known as 3-in-1 or 2-in-1 (collectively "the goods") which were manufactured by companies in the Super Coffeemix group.

4 The goods were shipped to Yangon on three vessels known as "Kota Tegap", "Kota Tabah" and "Kota Tampan" (collectively "the vessels"). The vessels arrived at Yangon between 17 and 28 April 2008. Because of a lengthy holiday in Myanmar between 12 and 22 April 2008, the consignees had to wait for a considerable period for documentation for customs clearance to be completed. Unfortunately, a cyclone named "Nargis" struck the Irrawaddy River and other regions of Myanmar between 2 and 3 May 2008 with a wind force of over 120mph. As a result, the port terminal at Yangon was closed until 9 May 2008, several roads were blocked by fallen trees and those roads were only reopened gradually between 12 and 16 May 2008. The goods which were water-stained to varying degrees were eventually cleared from the port between 21 and 25 May 2008 and delivered to the consignees' warehouse.

5 The defendant appointed the Singapore office of claim adjusters WK Webster (International) Pte Ltd ("Webster") to survey the damaged goods after they had been delivered to the consignees. (Webster also acted as the defendant's settling agent subsequently). In turn, Webster appointed

Captain Min Sein ("Captain Min") of Myanmar Marine Company Limited ("MMCL") to conduct the actual surveys. The surveys were carried out by Captain Min in the presence of representatives of the consignees, the supervisors of the warehouse and one Dr Moe Myint Zaw Win ("Zaw Win") who was allegedly the Department Head of Divisional Health in Yangon. After the surveys were completed, Zaw Win ordered the goods to be destroyed. The goods in plastic bags were apparently burnt on 28, 29 and 30 May 2008 at the Shwe Pyi Tahr township ("the township") in the presence of representatives of the police, the fire brigade and MMCL.

6 In June 2008, the defendant received claims under the policies ("the claims") in respect of losses the consignees had sustained on the goods arising out of cyclone Nargis. The defendant's principal officer Terence Teo Chin Poh ("Teo") spoke to one Henry Tan ("Tan") of Insurance Education & Claims Consultants Pte Ltd and inquired whether Tan had any contacts in Myanmar or whether Tan knew of anyone who had contacts in Myanmar. Tan (who was described by the defendant as a consultant) suggested that the defendant should meet Goh.

7 Tan arranged a meeting sometime in late July 2008 to introduce Goh to Teo. A second meeting was arranged by Tan on 1 August 2008 ("the August meeting") with Goh. This time the meeting was attended not only by Teo and Tan but also by the defendant's group Chief Operating Officer Tee Choon Yeow ("Tee"). At the August meeting, Goh indicated he could accept the defendant's assignment to conduct checks on the parties involved in the claims and the extent of the flooding caused by cyclone Nargis after he was briefed on the defendant's requirements.

8 The discussion then turned to the issue of remuneration. Tee inquired as to Tan's usual charges for consultancy services. Tan replied he usually charged 25% to 30% of the quantum saved on a claim *viz* the difference between the original amount claimed and the sum actually paid out. Tee asked Goh for the charges for his fees. Goh said they would be 10% of the quantum saved. Goh inquired if he could be paid a bonus amounting to another 5% if he completed the assignment within three months; Tee agreed.

9 The attendees agreed that the terms of Goh's assignment should be reduced into writing. The terms were drafted by Tee with Teo's assistance and typed out by Teo's secretary and this was done in Goh's presence.

10 The typed document was the LOA which was addressed to Goh and copied to Tee. As the parties disagreed on the interpretation of this document, I shall set out its text in full. It reads:

> Dear JK,
>
> **LETTER OF APPOINTMENT**
>
> This is to certify that Mr JK Goh of JK Pte Ltd is appointed as a consultant to look into the claims in the following claim files:-
>
> 1) 08/08/08/MM20/003757
>
> 2) 08/08/08/MM20/003758
>
> 3) 08/08/08/MM20/003759
>
> 4) 08/08/08/MM20/003760

5) 08/08/08/MM20/003761

6) 08/08/08/MM20/003762

7) 08/08/08/MM20/003763

8) 08/08/08/MM20/003764

9) 08/08/08/MM20/003765

In consideration of the above, it is hereby agreed that the remuneration for the said assignment would be as follows:

(i) 10% on the quantum saved for the amounts adjusted as S$2,165,798.90;

(ii) A 5% bonus on the amount saved would be paid if the matter is concluded within 90 days from the date appointed;

(iii) Full payment would be effected upon legal completion of these claims.

Yours faithfully,

(signed Terence Teo).

Principal Officer

11 Goh requested an advance from the defendants. Tee inquired as to the amount and how long Goh's investigation would take. Goh indicated he would be in Myanmar for three days and that his expenses would be $2,500 per day. The defendant handed Goh a cheque for $7,500 for his expenses.

12 At Goh's request, the defendant subsequently issued him a letter of authorisation dated 6 August 2008 which reads as follows:

Dear Mr Goh

Letter of Authorisation

We hereby confirm that you are authorised to check and report on the various Marine claims duly advised to you separately arising from the Cyclone "Nargis" event on May 2 2008.

Yours sincerely,

(signed Terence Teo)

Principal Officer

13 Goh left for Myanmar on 12 August and returned to Singapore on 16 August 2008. While he was in Myanmar, he contacted a lawyer U Zaw Lin who gave him a copy of the State Law and Order Restoration Council National Food and Drug Law ("the SLORC"). Goh then consulted U Win Hlaing, a retired judge, who advised him that the claims of the consignees were highly doubtful and suspicious.

14 After his return, Goh discussed his findings in Myanmar with Tan who agreed that the claims

made on the defendant were either fraudulent or could be rejected in toto. This was confirmed in an email from Tan to the defendant on18 August 2008 which was copied to Goh. Goh followed up with his own email to Tan on 20 August 2008, thanking Tan for introducing him to the defendant and offering Tan 50% of the net fee he would receive from the defendant based on 10% of the quantum he saved the defendant. Tan did not reply to Goh's email.

15 On 21 August 2008, Tan wrote to the defendant (copied to Goh) forwarding documents he had received from Goh. Tan concluded his letter as follows:

> Separately, we will discuss the merits of these documents and its application to form a basis of denial in respect of the 9 claims submitted by insured.

The enclosures in Tan's letter included a letter dated 14 August 2008 from Zaw Lin (referred to in [13]) to Goh forwarding an English version of the SLORC.

16 Goh issued the plaintiff's tax invoice to the defendant on 21 August 2008 ("the plaintiff's invoice") in the sum of $347,610.71 which comprised:

10% on the quantum saved	$216,579.89
5% bonus on amount saved	$108,289.94
7% GST	$22,740.88
	$347,610.71

The plaintiff's invoice concluded as follows:

> Please pay in full on legal completion of the above-mentioned claims and thank you for the advance of S$7,500.00

17 Goh followed up on the plaintiff's invoice by sending an email to Teo on 22 August 2008 stating it was a great achievement on his part to have completed the defendant's assignment within 21 days and that Goh had provided the defendant with the requisite documents to reject the claims. Goh concluded his email with a request for $50,000 advance against the plaintiff's fees because the plaintiff was GST registered and would have to submit its third quarter returns by 30 October 2008. No payment was made on the plaintiff's invoice. Goh's request for $50,000 advance was also not acceded to by the defendant.

18 On 22 October 2008, Goh wrote on the plaintiff's behalf to the defendant (addressed to Teo) referring to the claims and stating *inter alia*:-

> Our assignment is now complete with the following:
>
> (1) Submitted to you legal documentation from Yangon listed in Henry Tan's letter of 21st August 2008.
>
> (2) To be submitted Flood Reports which would indicate that there were no floods in Yangon & Tilawa ports.
>
> I urge you to formally communicate with the Insured in this regard.

Finally, I wish to notify you that I have completed my Assignments much earlier than the 90 days provided in our appointment letter to claim our bonus. As such, I look forward to the closure of this claim because the Insured's claim was

1) Fraudulent

2) Failure to substantiate loss

3) Unofficial abandonment of goods by burning

I look forward to your early settlement after your legal completion which should be immediate. Thank you

The defendant did not pay the plaintiff's invoice.

19 On 24 November 2008 Goh had a meeting at the defendant's office where he requested an advance of $150,000 from Tee. As the loan was not part of the terms of the LOA, Goh's request was refused. Tee counter-offered $7,500 which Goh rejected. Goh followed up the meeting with two emails to the defendant, dated 26 and 29 November 2008.

20 In his email of 26 November 2008, Goh described the defendant's counter-offer of $7,500 as "peanuts" and added that "peanuts are for monkeys". He reiterated that based on the documentation he had brought back from Myanmar and the views of his contacts (who included ministers and a retired judge), the defendant could "throw out 100% of this claim". In his email reply dated 26 November 2008, Tee disagreed with Goh's views.

21 In his email of 29 November 2008, Goh reiterated his opinion that the defendant could reject the claims immediately as being unfounded, based on what his counsel in Yangon had told him and based on the valuable documents he had given the defendant. Goh repeated his request for a loan of $150,000 which he said, was intended to maintain the goodwill that he enjoyed in Myanmar.

22 On his part, Tan separately advised the defendant in his email dated 3 December 2008 to reject the claims as the consignees had not proven their loss.

23 On 12 December 2008, another meeting took place at the defendant's office. According to Teo, on the pretence that he needed to have the plaintiff's documents endorsed by the Myanmar Embassy in Singapore, Goh took back the originals that he had previously forwarded to the defendant through Tan on 21 August 2008. His taking back of the documents was confirmed in Goh's email on the same day to Tee. The documents were never returned to the defendant.

24 In his email dated 12 December 2008 to the defendant, Goh recorded that his request for an advance payment of $150,000 had been refused by the defendant. Goh added that he had agreed with the defendant to meet Webster's representatives on 15 December 2008 and to make a presentation to the latter that there was no claim. However, Goh required the defendant to advance him a higher loan of $300,000 which amount had to be paid to him before the meeting.

25 The defendant did not advance $300,000 or any other sum to Goh despite meeting with Webster's representatives on or 15 December 2008.

26 On 16 December 2008, Webster prepared draft letters to the consignees rejecting their claims. Webster then wrote to the consignee Malikha on 19 January 2009 to reject its claims. No evidence

was adduced that the defendant and/or Webster sent a similar letter to the other consignee SSL. Between December 2008 and January 2009, Goh pressed the defendant as well as Tan to close the claims and to pay the plaintiff's invoice.

27 Notwithstanding the disclaimer of liability by the defendant through Webster, the defendant entered into negotiations with the consignees and on 26 June 2009, agreed to pay them US$770,000 ("the settlement sum") on the claims.

28 Goh on his part lost patience with the defendant and on 19 January 2009, the plaintiff filed this suit claiming the balance of $340,110.71 of the invoice amount (after deducting the defendant's advance of $7,500).

The pleadings

29 In the statement of claim, the plaintiff averred that it completed its investigations on or about 21 August 2008 and handed to the defendant all documents and supporting evidence necessary to legally complete the matter by rejecting the claims. The plaintiff relied on an email from Webster dated 16 December 2008 that agreed with the plaintiff's assessment and recommendation of rejecting the claims. The plaintiff alleged that by virtue thereof, it had completed and discharged its duties pursuant to the LOA. Consequently, by completing and discharging its duties within 90 days from the date of its appointment, the plaintiff contended it was eligible for a 5% bonus.

30 In its defence (Amendment No 3), the defendant averred that the plaintiff's provision of documents to the defendant on 21 August 2008 and the defendant's subsequent rejection of the claims did not bring the matter to legal completion in the context of the LOA. Further, the plaintiff's representative Goh had retrieved the documents from the defendant on or about 12 December 2008.

31 The defendant pleaded that Webster's email dated 16 December 2008 forwarded to the plaintiff only two draft letters of rejection to the consignees.

32 The defendant contended that payment to the plaintiff under the LOA could only be made after the quantum saved, on the consignees' claim of $2,165,798.90, if any, had been ascertained. Accordingly, the defendant averred, the plaintiff had no basis to issue the plaintiff's invoice on 21 August 2008. Further, the LOA was given on a "no cure no pay basis" as was confirmed in Goh's email to the defendant dated 19 September 2008.

33 The defendant pleaded that on or about 26 June 2009, it reached agreement with the consignees to pay the settlement sum on their claims and that was paid on or about 12 January 2010.

34 In its reply, the plaintiff averred that in rejecting the claims, the defendant had thereby admitted the plaintiff had fully discharged its obligations under the LOA. The plaintiff further contended it was not bound by the settlement between the plaintiff and the consignees as it had been made without reference to the plaintiff while the decision on the quantum was a unilateral act on the part of the defendant.

35 After the defendant had filed its defence, the plaintiff applied for summary judgment on its claim. By an order of court made on 2 September 2009, the plaintiff was awarded judgment in the sum of $157,394.84 which included the 5% bonus ("the judgment sum") excluding interest and costs, thereby reducing its claim to $182,715.87 for the trial. The judgment sum was calculated based on 10% of the amount saved by the defendant *viz* the difference between the settlement sum and the original sum claimed by the consignees. No breakdown of the sum was furnished to the court by the

parties either in their pleadings or in the affidavits of evidence-in-chief ("AEICs"). The breakdown appeared in an affidavit filed by Goh on 26 August 2009 for the summary judgment application. He deposed that the exchange rate of the US dollar to the local currency was $1.45 as of 26 June 2009 (date of the settlement). Goh's computation of the judgment sum which was accepted by the court below was as follows:

Claims of consignees	$2,165,798.90
Less: US$770,000 @ S$1.45 to US$1.00	($1,116,500.00)
Amount saved by the defendant	$1,049,298.90
Plaintiff's entitlement @10%	$104,929.89
Add: 5% bonus ($1,049,298.90 x 5%)	$ 52,464.95
Total sum paid to the plaintiff:	$157,394.84

The evidence

36 The plaintiff called only one witness for its case, Goh, even though an advocate cum qualified chemist from Myanmar, one U Min Sein, had filed an AEIC to confirm *inter alia* that the English translation of the Myanmar documents that Goh brought back from Myanmar were accurate. U Min Sein's AEIC also confirmed the credentials of U Win Hlaing ("Hlaing"), a Myanmar retired judge, whom Goh had consulted and who had rendered an opinion to the defendant on the consignees' claim. The plaintiff did not call Hlaing to testify, nor any of the persons who had witnessed the burning of the goods. The plaintiff had subpoenaed Webster's director, Christina Lau, but decided not to call her to the stand. The defendant had three witnesses in Tan, Teo and Raymond Ong ("Ong"), who was its claims manager.

37 I turn first to the evidence presented by Goh for the plaintiff's case.

(i) The plaintiff's case

38 I would first make a preliminary observation that Goh's AEIC was short on crucial facts after his visit to Myanmar, but long on arguments, particularly where he dwelt at length on what he considered was the true interpretation and meaning of the LOA, usurping the function of this court. Goh further complained of and criticised the conduct of the defendant *in extenso*. In his AEIC Goh went on to question the defendant's payment of the settlement sum, pointing out that the cheque was issued by Travelex Singapore Pte Ltd to Idea Giant Ltd and drawn on the Bank of New York in America; he pointed out that with the embargo imposed by the United States and other governments on bank transactions involving Myanmar companies, no payment could have been made in New York to Idea Giant Ltd (if it was a Myanmar company) as the funds would have been frozen. Goh disbelieved the payment was genuine. For added measure, Goh questioned the signatories to the Release and Subrogation form as their authority to represent the consignees was not produced. None of his speculative comments was supported by documentation.

39 Goh had highlighted without modesty, his close ties since 1978 with Myanmar officials and businessmen. That being the case, one would have thought he would/could have brought from Myanmar witnesses who would testify for his claim including U Min Sein but he did not.

40 As Goh's AEIC was not particularly helpful, I turn my attention instead to his cross-examination

during which significant matters were revealed by him. Goh disclosed that he had lied when he told the defendant he took back his documents to have them legalised by the Myanmar Embassy. Indeed, he never sent the documents to the Myanmar Embassy at all. Goh admitted he intended to and did use the documents as a bargaining chip in his attempts to obtain advances/loans from the defendant. Unless the defendant acceded to his demands and paid him, Goh said he would not return the documents. Although he (and his counsel) contended that the defendant could have but did not ask for the return of the documents, I very much doubt Goh would have acceded to the defendant's request had he been asked.

41 The court had pointed out to Goh that his action was illogical when, after the defendant refused his initial request for a loan of $50,000, Goh renewed his request by asking for higher advances first of $150,000 and then of $300,000. Until he was advised by the court, Goh was unaware that foreign law had to be proved as a fact in Singapore courts. Consequently, notwithstanding his counsel's submission that the SLORC was in the English language, that did not dispense with the need for an expert in Myanmar law (be it U Win Hlaing or anyone else) to testify in a Singapore court had the defendant been sued by the consignees.

42 It was equally clear from Goh's cross-examination that notwithstanding his professed experience of one year's duration as a claims manager in a Malaysian insurance company which no longer exists, Goh had no experience whatsoever of evaluating and processing marine insurance claims. He was also unaware of the law involved. Consequently, apart from his repeated assertion that the claims were fraudulent or "very suspicious", Goh acknowledged after being pressed by the court, that he did not know the basis on which marine claims could be rejected. He eventually conceded that the defendant could not have repudiated the claims based solely on the documents he had brought back from Myanmar. Despite this concession, the plaintiff's closing submissions were premised on the misconception that the defendant's decision to reject the claims was based on the plaintiff's documents – purely because the defendant and/or its solicitors did not ask for more information or documents from Goh subsequently. Goh had also acknowledged that apart from the bald statements in his AEIC and/or his own surmise, he had no evidence that Idea Giant Ltd was a Myanmar company or that the funds under the cheque for the settlement sum would have been frozen due to United States' or other countries' sanctions against the Myanmar government.

43 Indeed, Goh's cross-examination proved that the defendant was justified in not relying on either his documents or his advice to reject the consignees' claims. He had acted with unseemly haste in sending the invoice to the defendant on 21 August 2008 for his commission when the merits of the claims had not even been considered. Contrary to the stand he took in his AEIC that the words "legal completion" in the LOA meant that the plaintiff was entitled to be paid upon completion of his work in Myanmar, Goh agreed under cross-examination that legal completion took place on or about 26 June 2009 when the defendant reached a settlement with the consignees. I conclude that he would have been an unreliable witness if Goh was called to testify for the defendant had the consignees sued to recover the claims.

(ii) The defendant's case

44 Tan who is a chartered insurance practitioner stated in his AEIC that it was agreed with Goh at the August meeting that the words "10% on the quantum saved for the amounts adjusted as $2,165,798.90" in the LOA meant the difference between the amount originally claimed by the consignees and the amount paid out when the case was legally completed. If at the legal completion stage, the defendant did not have to pay a single cent on the claim, then the quantum saved would be the entire sum of $2,165,798.90. I should add that Goh's interpretation of the words "amount saved" during re-examination accorded with Tan's – Goh clarified that the words meant that if the

defendant could save some money, they pay him less commission. In this regard, his counsel's closing submission that Goh was confused and gave wrong answers is rejected. I do not believe he was at all confused.

45 Tan deposed that to him the words "legal completion" envisaged a situation where the claimant had either withdrawn its claim or that the claim had been settled either amicably between the parties or by way of a judgment in court; in other words, when the defendant's file was closed. He added that it was never the parties' intention that "legal completion" meant the point in time (as the plaintiff/Goh contended) when an initial repudiation/rejection letter had been sent out to the claimant. Common sense dictated that an initial letter of rejection of a claim that was submitted did not amount to the matter being legally completed. As Goh had offered to share his fee with him, Tan pointed out that it was also to his benefit if the defendant paid Goh early. Tan said he had advised Goh not to be unduly worried about his fees as the defendant being an insurance company would always act in good faith. He had advised Goh not to do so, when Goh told Tan that he intended to complain to the Monetary Authority of Singapore and to take legal proceedings. Tan's involvement in the claims ceased thenceforth and he had no further dealings with either party thereafter. I should point out that Tan received no remuneration for the help that he extended to the defendant.

46 Tan explained he had urged the defendant to send a letter to the consignees to deny liability in order to test the ground as the documents submitted by Goh was only one basis to deny the claims. During cross-examination, Tan's attention was drawn to his AEIC where he had deposed:

> If, at the legal completion of this matter, the defendants do not have to pay out a single cent on the claim, then the quantum saved would be the whole amount of S$2,165,798.90 and I am certain that the plaintiffs will be paid 10% of that sum plus the 5% bonus.

Counsel for the plaintiff suggested to Tan that the words "do not have to pay" meant that the defendant was not under a legal obligation to pay. Consequently, if the defendant (as was the case here) chose to settle the claims amicably with the consignees, such voluntary payment was outside the scope of the words; Tan disagreed. Counsel for the plaintiff in his submissions appeared to have overlooked Goh's testimony during cross-examination, where Goh had agreed that under the LOA, the defendant was at liberty to settle the claims without referring to him/the plaintiff. Tan also disagreed with counsel for the plaintiff that once Webster rejected the claims, the plaintiff would be paid in accordance with the LOA.

47 As for his own letter to the defendant dated 21 August 2008 where he opined that the claims had not been substantiated and could be fraudulent, Tan explained that he only meant that as an opener and a tactic for the defendant to reject the claims – more investigations needed to be carried out before the defendant could form an opinion whether it could rebut the claims on their merits. Tan categorically denied Goh's allegation that he (Tan) had drafted the plaintiff's letter dated 22 October 2008. While he acknowledged that the words "after your legal completion which should be immediate" were in his handwriting, Tan explained that Goh had shown the letter which Goh had drafted to Tan and had inquired whether it was "ok"; Tan added the handwritten words and made other amendments to correct Goh's grammatical errors.

48 When Teo took the stand, for the defendant, he confirmed Tan's version of what had transpired at the August meeting. In his AEIC, Tan deposed that Tan's letter of 21 August 2008 contained a letter in English dated 14 August 2008 from one Zaw Lin who was purportedly an advocate of the chief court in Yangon. The other enclosures in Tan's letter appeared to be in the Burmese language without any translations. Teo deposed he was very surprised to receive the plaintiff's invoice around 21 August 2008 as the plaintiff had made the following erroneous assumptions in the invoice:

(a) that the defendant could successfully reject the claims based on the plaintiff's documents alone;

(b) that the plaintiff's documents would be the sole basis on which the defendant could reject the claims;

(c) the quantum saved on the claims would be the whole amount of S$2,165,798.90.

49 Teo pointed out that the defendant did not even have an opportunity to verify the authenticity of the plaintiff's Burmese documents. Further, as of 21 August 2008, the claims had not been legally completed. For insurers, legal completion under the LOA took place when the defendant's claim files had been closed. Teo referred to the fact that Goh resorted to asking for advances (from $50,000 to $300,000) as evidence that Goh was aware that the claims had not been legally completed and the plaintiff's fee was not yet due.

50 Teo explained that the defendant instructed Webster to write to the consignees on 19 January 2009 to reject the claims as a strategy to preserve the defendant's position pending further investigations. It was what every prudent insurer in the position of the defendant would do. Sending out a rejection letter in the initial stages did not mean that the defendant as the insurer had shut out negotiations for a settlement later if it was warranted on the facts.

51 Teo reiterated that the defendant did not deny that the plaintiff was entitled to be paid for work done pursuant to the LOA. The defendant's position was that the plaintiff would be paid only when the claims were legally completed *ie*. when the defendant closed its files and the quantum saved had been ascertained. That took place only after the defendant reached agreement with the consignees to pay the settlement sum on or about 26 June 2009. Based on the settlement sum, the plaintiff's entitlement under the LOA was $157,394.84 (based on $2,165,798.90 less US$770,000) which the defendant had paid. In fact, on 2 October 2009, the defendant paid the plaintiff $174,503.47 under the order dated 2 September 2009 at [35] as costs and interest were also paid.

52 Consequently, Teo contended the plaintiff's claim for the balance of $182,715.87 was unfounded and he asked for the claim to be dismissed with costs.

53 Ong joined the defendant as claims manager in February 2009 after the plaintiff had commenced this suit. Consequently, he had no personal knowledge of the events that transpired in 2008 and which led to the filing of the suit. What Ong did was to look at the claims afresh as to whether the consignees had breached the policies' conditions as alleged in Webster's letter of rejection to Malikha dated 19 January 2009. That consignee had written to the defendant on 30 December 2008 inquiring as to its claims. Presumably no response was received by Malikha since, on 3 March 2009, a firm of Singapore solicitors wrote a letter of demand on its behalf to the defendant for payment of the insured sum of US$1,023,588 within 14 days failing which legal proceedings would be commenced. A similar letter was not received from solicitors representing SSL the reason being (according to Ong) that it made its claim through Webster. The defendant's voluntary payment to SSL without a demand from the latter was criticised in the plaintiff's submissions.

54 Upon taking over the claim file, Ong sought legal advice. The defendant's legal advisers Ang & Partners ("A&P") gave their views in a letter dated 18 March 2009 to the defendant. Contrary to the simplistic view taken by Goh that the claims were fraudulent and should be rejected, A&P rendered a seven page opinion setting out in detail the events leading to the destruction of the goods and the evidence the defendant needed to obtain if it was to be able to successfully reject the claims. The weaknesses in the defendant's position were also pointed out. It was noteworthy that A&P opined

that the position taken by Webster by its appointed agent MMCL (who participated in the survey of the damaged goods and witnessed their destruction) was contradictory to that taken by Goh.

55 Ong revealed that the defendant held several rounds of discussions with A&P after receiving its letter dated 18 March 2009. The defendant was faced with the uphill task of obtaining more evidence in a country which was neither open nor accessible to foreigners and mindful that securing the assistance of Goh if the claims went to trial was highly improbable (as he had sued the defendant and it no longer had his original documents).

56 On Ong's recommendation, the defendant's management decided to explore the possibility of settling the claims with the consignees. Ong was given the mandate to settle the claims at 40% of the total sum insured. The consignees had appointed as their representative Zaw Win (see [5]) so Ong contacted him in May 2009 to negotiate which negotiations eventually led to the settlement sum. The settlement sum in actual fact amounted to 46% of the total sum insured which was US$1.6m.

57 In cross-examination, Ong testified that the consignees had given prior notification to MMCL of the destruction of the goods but the latter failed to inform Webster in turn and/or to obtain the defendant's consent for the goods to be destroyed. Consequently, MMCL acted without authority in witnessing the burning of the goods and, had the consignees sued the defendant, may well have prejudiced the defendant's position thereby.

58 I should make one observation at this juncture – the defendant's Release and Subrogation Form dated 25 November 2009 agreeing to accept the settlement sum was signed not only by the consignees but also by the shipper, Idea Giant Ltd. Ong was not questioned on this curious fact but presumably it was because (according to A&P's letter dated 18 March 2009) the shipper had title to sue as the consignees had assigned to the shipper all nine policies on 26 June 2008.

59 Notwithstanding the misgiving and doubts voiced by Goh over the propriety of the settlement sum and its payment to the shipper and the consignees (see [38] above), Ong confirmed when questioned by the court, that no party had come back to the defendant to make any claims under the policies after the settlement sum was paid.

The submissions

60 Counsel for the plaintiff had made much of the fact (both at the trial and in his closing submissions) that as the defendant had drafted the LOA, the *contra proferentum* rule should apply against the defendant in the event there was any ambiguity in its terms.

61 The plaintiff's closing submissions complained that the defendant's conduct had been unconscionable and that in drafting the LOA, the defendant had taken advantage of Goh. The plaintiff argued that to interpret the LOA to mean the plaintiff would only be paid when the defendant had settled the claim was grossly unfair to the plaintiff as the act of settling the claims was entirely an act within the defendant's control. It would also render the quantum of the plaintiff's remuneration uncertain. The plaintiff submitted that it could not have been the parties' intention that either of them could rely on its own breach of duty to obtain a benefit therefrom. Finally, the plaintiff alleged that this suit arose because of the defendant's unilateral act of settling a claim which it could have legally rejected.

62 The defendant submitted (which submission I accept and which Goh had conceded to during cross-examination) that under the terms of the LOA, there was no obligation or legal requirement on its part to refer to the plaintiff where the settlement of claims and its quantum was concerned.

63 The defendant also submitted that the *contra proferentum* rule would not apply. It was pointed out that Goh was given every opportunity at the August meeting to read and make amendments to the LOA when it was drafted. Contending that drafting of the document was a joint effort, the defendant submitted that the *contra proferentum* rule has no application here, citing *The Interpretation of Contracts* by Kim Lewison (Sweet & Maxwell, 3rd Ed, 2004) at p 209 and the cases *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 and *Levison and others v Farin and others* [1978] 2 All ER 1149. The defendant asserted that in any case, there was no ambiguity in the terms of the LOA.

The issues

64 The issues for determination are:

(a) Was the plaintiff entitled to its commission of 10% and 5% bonus commission?

(b) Is the plaintiff entitled to the balance commission it now claims?

(c) If the answer to (a) and/or (b) is in the positive, when was the plaintiff entitled to be paid?

The findings

65 I had earlier (at [38] to [43]) made certain observations on Goh's testimony. On the whole, I did not find him a credible witness. I disagree with his counsel's description that Goh "is a straight talking honest businessman" who knew nothing about contracts and who had no hand or input in the drafting of the LOA. Goh prided himself on being a successful businessman and was certainly not naive – he should not be allowed to contradict himself when it suited his purpose. Even if he gave no input on other aspects of the LOA, he most certainly would have given his views on his remuneration and when he would be paid. I prefer the testimony of the defendant's witnesses Tan, Teo and Ong, who came across as far more reliable and credible.

66 As stated earlier (at [42]), Goh had no idea of how claims under marine insurance policies could be repudiated. I entertain little doubt that had the defendant repudiated the claims based only on Goh's Burmese documents (which he claimed they could), it was highly unlikely they would have succeeded had the consignees sued them in Singapore. I need only highlight one instance of Goh's lack of knowledge/expertise of the burden of proof needed to successfully reject marine insurance claims. Tee had posed the following question to Goh in his email dated 26 November 2008 referred to at [20]) in reply to Goh's earlier email of the same day:

> With due respect, I wish I could turn down the claim based on the translation of the law and the comments given by the retired judge provided by you. And that the adjuster would share our view. You mentioned I could show the letter to the adjuster or the claimant? In the meeting you mentioned that I could show the letter to the adjuster, can I show it to the claimant as you are confident that they will withdraw the claim when they see this letter. If that is the case, I will show the letter to the claimant.

In his email reply three days later, Goh did not give an affirmative answer to Tee; instead he said:

> …If your strategy is to work with M/s Webster the adjuster to reject the claim in total, then you can show to the adjuster that SLORC law & the Retired Judge letter with the hope they would advise you that the claim is not payable. Once the claim is not payable from the Adjuster point,

that what is the need to show to the claimant.

The SLORC Law & the letter from the Retired Judge can stand the requirements of the courts in Singapore when you reject the claim…

67 In its letter dated 23 September 2008 to the defendant, Webster had set out the events leading to the consignees' claims. One premise if not the entire premise for Goh's bold assertion that the defendant could reject the claims was the information Goh had received from his Myanmar sources that there had been no flooding in the area where the goods were stored upon their arrival from Singapore. He had also received the tidal tables of Myanmar in May 2008 from his sources. What Goh completely overlooked was the fact that cyclone Nargis caused almost continuous rainfall lasting 24 hours in Myanmar including the material areas. The goods came into contact with rain, and not seawater, due to poor storage and or inadequate packing.

68 Consequently, it was reasonable and indeed prudent of the defendant to decide it should negotiate with the consignees and reach an out-of-court settlement with the latter which it did. In this regard, it bears remembering (which the plaintiff obviously did not) that the consignee Malikha had engaged Singapore solicitors to pursue its claim and the defendant on its part also had a firm of shipping lawyers as its advisers. I had earlier (at [54]) alluded to the advice of A&P where they set out the many gaps in the evidence that the defendant needed to plug should it decide to contest the consignees' claims in court.

69 It would be appropriate at this juncture to take a closer look at the correspondence between the defendant and Webster as well as at A&P's letter dated 18 March 2009.

70 First, I refer to Webster's letter dated 23 September 2008. Webster's letter was based on information it had received from its surveyors (presumably that would be MMCL). Webster advised that Myanmar has four ports which included Asia World Port ("Asia Port") and Myanmar International Terminal Thilawa ("MITT") which were the only two ports at which the consignees' goods were discharged. All warehouses in Myanmar are owned and controlled by the Myanmar Port Authority/the government. Both ports were then open yards. Webster's surveyors could not comment on how the containers which held the goods were stacked in the container yard to which the surveyors had no access. What the surveyors were certain of was that the containers were stored at the open yard. The goods which comprised coffee powder, malt cereal and creamers appeared to be packed in plastic bags and placed into cardboard boxes or bagged while the consignment of foils was shipped bare. Because of the long holiday in Myanmar between 12 and 21 April 2008 due to a water festival, cargo owners had to wait their turn for customs clearance after 22 April 2008.

71 One day before the cyclone struck Myanmar, the public was given warning in the local newspaper. On 2 May 2008, there was continuous rainfall from 11pm until 8am or 9am of 3 May 2008. On 3 May 2008, the government of Myanmar declared five divisions (including Yangon) as disaster zones. As Myanmar does not have independent health authorities, the department head of the divisional health in Yangon issued all the destruction certificates for the cargo. The cargo was wet. In the case of the foils, they came into contact with dirty water while the coffee and related items were wet presumably from the flooding that took place at Asia Port where the waters rose to 1.5 to 2 feet. (There were no records of flooding at MITT). The surveyors estimated damage to be 40%. Salvage was not possible because the cargo emitted a bad odour. Moreover, the Myanmar authorities were reluctant and in fact rejected the surveyors' request for salvage. Laboratory test of the goods showed no seawater was present but the cargo was wet, presumably due to rainwater contact at the open yard. Further, Webster understood from the representative of Malikha (Zaw Win) who met with Webster on 25 November 2008 that not all government bodies in Myanmar issued documents with

their letterheads.

72 At this juncture, I need to digress and look at the legal opinion rendered by Hlaing (see [36]) upon which Goh had advised the defendant that the claims of the consignees could be rejected. Needless to say, had the consignees sued in Singapore, Hlaing would have been a most material witness for the defendant. Hlaing's undated opinion was part of Goh's exhibit in his AEIC. Hlaing pointed out that not all the goods were affected by typhoon Nargis particularly when the two ports Asia Port and MITT were not the main areas affected. He opined there was insufficient proof and no supporting documents that the goods supposedly damaged were actually destroyed. Hlaing doubted whether proper procedure was adopted in the destruction of the goods as he questioned the instructions of a township medical officer in this case to destroy the goods when the SLORC required the goods to be first examined and analysed in a laboratory and the goods surveyed by a licensed surveyor followed by the rendering of a chemical assay report. Hlaing noted that there was no documentation to show that the medical officer's report (that the goods were contaminated) and his directive to destroy the goods (to stop the spread of disease) were supported by his superiors and other authorised personnel. Further, there were no independent witnesses confirming that the goods were indeed destroyed by the police force and fire brigade members.

73 Next, I turn to A&P's letter dated 18 March 2009. It was clear therefrom that the defendant needed to do considerably more groundwork should it decide to repudiate the consignees' claims.

74 The defendant's solicitors noted that apart from what Goh said, there was no evidence of what the proper procedure in Myanmar was for the destruction of the goods, let alone that the burning exercise on 28 to 30 May 2008 was carried out without such proper procedures. The position taken by Webster and MMCL (which seemed to favour the consignees) was completely contradicted by the stand taken by Goh and unless the defendant accepted at face value what Goh reported, the defendant's solicitors had nothing to rely on.

75 The defendant's solicitors requested the defendant to look for investigators to verify the following:

(a) the movement of the goods after discharge from the vessels until their alleged destruction;

(b) how the goods were stored after discharge;

(c) the actual condition of Asia Port and MITT in the week of 2 May 2008 as well as the weather during that period;

(d) in relation to the destruction of the goods, the authenticity of the documents said to be issued by the Department Head of Divisional Health, Yangon division, the Shwe Pyi Tahr police station and the township's fire services camp (where the goods were burnt);

(e) the procedure and documentary requirements for moving cargo from MITT and Asia Port; and

(f) the allegations made by Goh in his report.

76 As was pointed out earlier (at [57]) as well as in the defendant's solicitors' letter, the conduct of Webster's Myanmar agents MMCL in witnessing the burning of the goods would have prejudiced the defendant. It should be noted that a representative from the consignees was also present when the goods were destroyed, in the persons of Bay Dar and Miyint Lwin, who were directors of SSL and

Malikha respectively.

77 Legally, it would have been difficult for the defendant to disavow the conduct of MMCL whose Captain Min Sein attended the burning operation. Even worse, it appeared that MMCL had on 26 May 2008, without the prior knowledge of Webster/the defendant, written to Malikha offering to "witness on behalf of our principals in case you destroy the cargo" and rendered its "certificate of destruction" to Malikha on 2 June 2008. MMCL failed to alert its principal Webster on 26 May 2008 of the authorities' intention to destroy the goods. In the survey report of MMCL dated 18 June 2008 addressed to Webster, Captain Min's excuse for not objecting to the burning of all the goods was the refusal of the health inspector (presumably Zaw Win) to allow Captain Min to sort out and remove the bags which were not wet or had unpleasant odour. Zaw Win had indicated the permission had to be obtained from higher authorities and Captain Min must be prepared to accept responsibility for the consequences (which he obviously was not).

78 The defendant was thus faced with the daunting task of verifying the information/documents set out in [75] above in a country which has a reclusive government. There was not only lack of documentation but also lack of transparency in the manner in which the goods were surveyed, condemned and purportedly destroyed. Consequently, I accept the defendant's submission that if the defendant had repudiated the claims on the strength of the plaintiff's Burmese documents, the documents would not have stood up to scrutiny in court when challenged by the defendant's insured. At best, as Goh conceded the plaintiff's Burmese documents suggested that the procedure for destroying the goods were suspicious, not fraudulent.

79 I can imagine the uphill task the defendant would face had it been sued by one or both consignees in a Singapore court. The defendant would have no answer if the consignees were to allege (as it would most likely do) that the defendant had acquiesced in the destruction of the goods and witnessed its total loss in the presence of Captain Min from MMCL representing Webster, who in turn represented the defendant, at the burning operation. I cannot imagine that a court would be sympathetic towards the defendant for the predicament that was caused by its claims adjuster's Myanmar agent.

80 Consequently, it is not surprising that the defendant decided to negotiate a commercial settlement with the consignees rather than face them in a court of law. I note in this regard that the goods by the estimate of Webster were only damaged to the extent of 40% whereas the settlement sum equated to 46% of the insured sum. Factoring in legal costs had the claim come to court, the extra 6% paid by the defendant over and above the 40% damage was a small price to pay. The court had clarified with Teo that the consignees made their claims on a total loss basis but the defendant settled and paid on a partial loss basis.

The decision

81 Having reviewed the evidence in court, I would answer the questions posed in [64] above as follows:

(a) the plaintiff was entitled to its claim of 10% commission but not its claim of 5% bonus commission;

(b) the plaintiff is not entitled to the balance sum claimed of $182,715.87; and

(c) the plaintiff was entitled to be paid its commission only after the defendant reached agreement with the consignees on the settlement sum in June 2009.

82 On the clear and unambiguous wording of the LOA at [10], (to which the *contra proferentum* rule has no application) the plaintiff was entitled to be paid upon legal completion of the claims. In the insurance industry, claims are paid either pursuant to judgments in court proceedings or when amicably settled following negotiations or settled out of court *ie*.when the insurer closes its file. Goh's interpretation (that his entitlement to be paid accrued after he completed his investigations) was without basis.

83 The plaintiff was not entitled to a bonus payment under clause (ii) of the LOA because Goh did not achieve a conclusion of the claims within 90 days from his appointment on 1 August 2008. The defendant had in effect overpaid the plaintiff $52,464.95.

84 Based on the evidence adduced from Goh (see [44] above), the plaintiff is not entitled to the balance of its claim of $182,715.87. The defendant's settlement of the consignees' claims at US$770,000 (see [27] above) saved the defendant $1,049,929.89. Goh was not entitled to make the plaintiff's claim based on the insured sum of $2,165,798.90 as he had done.

85 Consequently, the plaintiff's claim for $182,715.87 is dismissed with costs to the defendant to be taxed on a standard basis unless otherwise agreed.