IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 45

Court of Appeal / Civil Appeal No 3 of 2023

Between

(1) QBE Insurance (Singapore) Pte Ltd
(2) MS First Capital Insurance Limited

… *Appellants*

And

Relax Beach Co Ltd

… *Respondent*

JUDGMENT

[Civil Procedure — Costs — Principles]
[Civil Procedure — Costs — Discontinuance of appeal]
[Courts and Jurisdiction — Court judgments — Parties settling before court hearing]
[Insurance — General principles — Business interruption policies covering loss resulting from outbreak of disease at the premises]
[Insurance — General principles — Claims for loss suffered in the context of COVID-19 pandemic and Government measures in response]
[Contract — Contractual terms — Notification of claim as condition precedent]

QBE Insurance (Singapore) Pte Ltd and another
v
Relax Beach Co Ltd

[2023] SGCA 45

Court of Appeal — Civil Appeal No 3 of 2023
Sundaresh Menon CJ, Tay Yong Kwang JCA and Andrew Phang Boon Leong SJ
15 November 2023

21 December 2023 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 When parties enter into a contract, they do so in order to record the terms of the bargain they have struck and the way in which they have agreed to allocate the risks between them. When a dispute arises in connection with a contract, one must therefore pay close attention to the precise words used in the contract to ascertain the meaning that the parties intended. The courts search for this meaning by undertaking an objective interpretive exercise of the text and the surrounding context. In doing so, the courts are guided by the language that the parties have chosen to capture their agreement and by other admissible extrinsic evidence, rather than by embarking on the endeavour to discover the parties' actual or subjective intentions (*The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at

paras 06.091–06.092). The present appeal concerns a particular species of contract which is the quintessential model of risk distribution – an insurance contract. In particular, the dispute centres around the interpretation of two specific clauses in the insurance contract. One clause relates to the proper notification of the details of the insurance claim as a condition precedent to obtaining compensation. The second clause describes the insured peril upon which the insured based its business interruption claim. These questions were tried in the General Division of the High Court and certain conclusions were reached in favour of the insured. The insurers appealed.

2 This court ultimately did not have to decide the merits of the appeal because the insurers withdrew their appeal on the eve of the scheduled hearing. The parties agreed that the appeal could be withdrawn save that they were unable to agree on costs and have made submissions on this. Hence, the only live issue left to be determined is what the appropriate costs order ought to be. This is the subject matter of the present judgment. However, as we will shortly explain, we also find it appropriate to provide our initial views on the merits of the appeal despite its discontinuance. This is because these views are relevant to the question of costs, and also pertain to a matter of public interest in the wider insurance market, namely, insurance claims arising out of the COVID-19 pandemic.

3 With this broad overview and context in mind, we first outline the relevant factual matrix.

Factual background

Parties to the appeal and the insurance contract

4 The respondent, Relax Beach Co Ltd, is a company incorporated in Thailand which owns and operates a luxury hotel in Phuket known as Le Meridien Phuket Beach Resort ("the Insured Premises"). The respondent is a named insured under the Insurance Policy No 8-F0005135-ISR-R004 ("the Policy") which provides coverage for the Insured Premises.

5 The first appellant, QBE Insurance (Singapore) Pte Ltd, and the second appellant, MS First Capital Insurance Limited, are co-insurers under the Policy and they agreed to indemnify the respondent in respect of business interruption losses suffered at, among other places, the Insured Premises. The period of insurance coverage under the Policy was between 1 January 2020 and 1 January 2021.

6 In particular, under s 2 of the Policy, the appellants agreed to provide the following indemnity:

> THE INDEMNITY
>
> In the event of any building or any other property or any part thereof used by the Insured at the Premises for the purpose of the Business being physically lost, destroyed or damaged by any cause or event not hereinafter excluded (loss, destruction or damage so caused being hereinafter termed 'Damage') and the Business carried on by the Insured being in consequence thereof interrupted or interfered with, the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement.
>
> …

7 One of the events covered by the Policy was the closure of the whole or part of the Insured Premises by an order of a public authority as a result of an

outbreak of an infectious or contagious disease. In this regard, cl 87 of the Policy (an infectious disease extension, or "the IDE") states as follows (extending the indemnity coverage provided under s 2 of the Policy):

> 87. INFECTIOUS DISEASE MURDER AND CLOSURE
>
> Notwithstanding anything contained in the within policy to the contrary including but not limited to the "material damage proviso" the Policy is extended under Section 2 to include **loss directly from interruption of or interference with the business** carried on by the Insured at the premises **in consequence of**:
>
> > (i) **Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease or consequent upon defects in the drains and/or other sanitary arrangements at the premises**.
> >
> > (ii) Murder or suicide occurring at the premises.
> >
> > (iii) Injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the premises.
> >
> > (iv) Threat of violent damage to the premises and/or injury to person therein.
> >
> > …
>
> [emphasis added in bold]

Limb (i) of the IDE is referred to as a "composite peril" clause in the insurance industry as it requires successive elements to be satisfied before a claim can be made (these being, business interruption loss arising from closure of the insured premises, by order of a public authority as a result of an outbreak of a notifiable infectious or contagious disease or defects at the premises). As we will explain below, there was some disagreement between the appellants and the respondent on whether the phrase "at the premises" at the end of Limb (i) of the IDE applies only to the immediately preceding words "defects in the drains and/or other sanitary arrangements" ("the Defects Limb") (the respondent's position) or whether it also extends to the prior words "outbreak of a notifiable human

infectious or contagious disease" ("the Disease Limb") (the appellants' position).

8 Pertinently, the Policy also requires, under Condition 7 ("the Notification Clause") that the insured notify the insurers of any claim that arises and, importantly, to provide additional particulars of the claim in order to be entitled to be indemnified thereunder:

> 7. NOTIFICATION OF CLAIMS
>
> On the happening of any loss … the Insured shall forthwith give notice thereof in writing to the Insurer(s) and **shall (within thirty (30) days after such loss … or such further time as the Insurer(s) may in writing allow**), at the Insured's own expense, **deliver to the Insurer(s) a claim, in writing containing as particular an account as may be reasonably practicable of** the several articles or portions of property loss, destroyed or damaged and of **the amount of loss**, destruction or damage thereto, having regard to their value at the time of the loss, destruction or damage, together with details of any other insurances on any property hereby insured.
>
> The Insured shall use due diligence and do and concur in doing all things reasonably practicable to minimise any interruption of or interference with the Business to avoid or diminish the loss and **shall also deliver** to the Insurer(s) a statement in writing of any claim certified by the Insured's auditor, with all particulars and details reasonably practicable of the loss and **shall produce and furnish** all books of accounts and other business books, invoices, vouchers and **all other documents, proofs, information, explanations and other evidence** and facilities **as may reasonably be required for investigation and verification of the claim** together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. [*ie*, "**Second Condition**"]
>
> No claim under this Policy shall be payable unless the Insured has complied with the terms of this condition.
>
> [emphasis added in bold]

It is not disputed between the parties that the Notification Clause is a *condition precedent* to any liability under the Policy. For convenience, we refer to the second paragraph of the Notification Clause as the "Second Condition".

Closure of the Insured Premises and notification of the insurance claim

9 On 26 February 2020, COVID-19 was first declared a dangerous communicable disease by the Thailand Government under the Communicable Diseases Act 2015. Following this declaration, businesses were required to notify the health authorities of any cases of COVID-19 at their respective premises.

10 Thereafter, there was an increase in the number of COVID-19 infections in Thailand (including Phuket). As a result of the outbreak of COVID-19, the Thailand Government and the Governor of Phuket Province ("Governor") (collectively, "the Public Authority") implemented a series of escalating measures in Phuket to control the impact of the COVID-19 pandemic. These measures were implemented between 18 March 2020 and 9 April 2020.

11 *Crucially*, on 2 April 2020, the Governor observed that "[w]ith regards to Phuket province, it is noticed that the number of cases is increasing at a fast rate" and thus ordered the complete "[c]losure of all types of hotels and similar establishments" in Phuket until further notice ("the Closure Order"). However, occupied hotels were permitted to continue business until such time as all the guests had vacated their rooms. In compliance with this, the Insured Premises were gradually shut down and *completely closed* by 7 April 2020 (after the last guests vacated their rooms). The respondent's luxury hotel business was thus shuttered from this point onwards until further notice. This formed the basis of the respondent's claim for business interruption losses.

12 On 26 May 2020, the respondent submitted a claim notification to the first appellant and sought to be indemnified in respect of its business interruption losses under the Policy ("the Claim"). On the same day, the first appellant replied and sought further information from the respondent relating to

the Claim (such as whether there was any outbreak of COVID-19 at the Insured Premises):

> …
>
> As we do not have much information/documents at this stage, we would like to request the following:
>
> - Authority order: We have received the attached circular from the authorities, please let us have a translation of the main points
> - The risk management standard operating procedures and/or guidelines maintained by the insured when it comes to Business Continuity Plan
> - What % of the hotel operations are still running? E.g. Occupancy, volume of staff still working at the premise
> - Has there been any outbreak of the virus at the insured premises? If yes, please provide relevant documentation to support
>
> …

13 On 27 May 2020, the respondent replied to the first appellant stating, among other things, that there had *not* been any outbreak of COVID-19 at the Insured Premises. Regarding the other queries, the respondent explained that it would need time to reply. Nevertheless, no further information was provided to the appellants on the queries relating to risk management procedures and the extent of hotel operations that were still running.

14 Following this, the first appellant wrote to the respondent on 29 May 2020 ("the 29 May 2020 Letter") to highlight that coverage under the Policy only applied upon "[c]losing of the whole or part of the premises by order of a Public Authority *as a result of an outbreak* of a notifiable human infectious or contagious disease … *at the premises*" [emphasis added]. Since the respondent had informed that there was no outbreak of COVID-19 at the Insured Premises, the respondent had not satisfied the criteria in the IDE for coverage under the

Policy. The 29 May 2020 Letter then concluded by requesting that the respondent furnish further information to support the Claim within 21 days, failing which the Claim would be rejected. We reproduce the material portions of the 29 May 2020 Letter here for convenience:

> We acknowledge receipt of your claim notification dated 26 May 2020 and subsequent provision of information on 27 May 2020.
>
> With reference to our policy, we would like to draw your attention to the relevant section which stipulates the following:
>
> [citation of the IDE clause in full]
>
> …
>
> The coverage applies only upon "***Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease… at the premises***".
>
> Marsh (Thailand) has advised that there was no outbreak of COVID-19 at the premises.
>
> You must be able to satisfy the criteria defined under the [IDE] Clause in order for your claim under the policy to be triggered.
>
> As such, we request that you provide further information to support the above claim for our consideration within 21 days, failing which we shall close our file accordingly.
>
> [emphasis in original]

15 It transpired that the appellants never received any further information from the respondent after the 29 May 2020 Letter was sent.

Initiation of court proceedings below

16 On 5 February 2021, after a period of more than eight months had passed following the 29 May 2020 Letter, the first appellant received a letter from the respondent's lawyers, requesting that the first appellant retract the rejection of the Claim. The respondent's lawyers stated that the rejection of the Claim was without basis as it was not a prerequisite for there to be an outbreak of COVID-19 at the Insured Premises for the coverage under the Policy to apply.

In response, on 8 February 2021, the first appellant confirmed by email that it would not be retracting the 29 May 2020 Letter rejecting the Claim.

17 On 31 March 2021, the respondent commenced HC/OS 299/2021 ("OS 299") in the General Division of the High Court, seeking the following primary reliefs, among others:

(a) a declaration that the respondent has a valid claim under the Policy for business interruption suffered in respect of the Insured Premises; and

(b) a declaration that the appellants are liable to indemnify the respondent in respect of such business interruption losses in accordance with the terms of the Policy.

18 Notably, the respondent's supporting affidavit filed in respect of OS 299 stated *for the very first time* that one of its hotel employees, who we refer to as "Mr K", had tested positive for COVID-19 sometime around 26 March 2020. Materially, this meant that there was a COVID-19 infection on the Insured Premises just days before the Closure Order was announced by the Governor on 2 April 2020. The emergence of this fact is crucial to the respondent's legal case, which was that Mr K's singular case of COVID-19 on the Insured Premises would suffice to trigger liability under Limb (i) of the IDE.

The Judge's key findings in the decision below

19 On 7 March 2022, the learned judge in the General Division of the High Court ("the Judge") delivered his decision in OS 299 at a hearing in chambers, which was recorded in his Notes of Evidence (without any written grounds setting out his full reasoning). The Judge found in favour of the respondent and

ordered that the appellants were liable to indemnify the respondent for the loss suffered at the Insured Premises when it closed down.

20 On the anterior issue of whether the respondent had complied with the Notification Clause in the Policy, the appellants had argued that the respondent failed to satisfy the condition precedent in the Notification Clause because the respondent did not inform the appellants of Mr K's COVID-19 infection and furnish additional particulars of business interruption losses. On this basis, it was contended that the respondent was not entitled to compensation. However, the Judge disagreed and found that the Notification Clause merely required the respondent to give notice of the "happening of any loss, destruction or damage". It did not require the respondent to give notice of the underlying causes of such losses. Thus, the failure to notify the appellants of Mr K's case was immaterial. Instead, the Notification Clause obligation was fulfilled by the respondent giving notice that business interruption had arisen due to the closure of the Insured Premises pursuant to the Closure Order.

21 Regarding the provision of additional particulars of business interruption losses, the Judge opined that it was difficult to see how the appellants could insist on the respondent providing these particulars after summarily rejecting the respondent's Claim on 29 May 2020. The appellants' reliance on the statement in its 29 May 2020 Letter requesting further information to support the Claim rung hollow because, read in context, that was a request for the respondent to further justify the *validity* of the Claim (in light of the reasons the appellants gave for rejecting it) and not a request for *details* of the loss suffered.

22 On the substance of the Claim, the Judge agreed with the appellants that Limb (i) of the IDE referred to the outbreak of a notifiable human infectious or

contagious disease *at the premises*. Reading all four limbs of the IDE together and considering the overall context, it was more consistent with a plain and grammatical reading to construe the phrase "at the premises" as applying to both defects in drainage and/or sanitary arrangements (meaning the Defects Limb) and also to the outbreak of infectious disease (meaning the Disease Limb).

23 Next, on the issue of whether the Closure Order was "as a result of" the outbreak at the Insured Premises, the Judge opined that while there was no direct evidence that Mr K's case was specifically and individually considered by the Governor in making the Closure Order, there was nothing in principle or in the concept of causation which precluded an event, when combined with many other similar events (including the other COVID-19 cases occurring outside the Insured Premises), from being considered a proximate cause of the resulting consequence. On this point, the Judge referred to *Financial Conduct Authority v Arch Insurance (UK) Ltd and others (Hiscox Action Group intervening)* [2021] 2 WLR 123 ("*FCA Test Case*") at [191].

24 The Closure Order stated that it had been noticed that the number of COVID-19 cases in Phuket was increasing at a fast rate and that the Governor had acted pursuant to a meeting of the Committee of Communicable Disease of Phuket held on 31 March 2020. In the circumstances, the Judge found that it was "more likely than not" that Mr K's diagnosis on 26 March 2020 "formed part of the statistics informing the deliberation" of the Committee and the decision of the Governor. Thus, Mr K's case might be regarded as *one of the many concurrent causes* of the Closure Order. Consequently, the Judge held that the insured peril as described in Limb (i) of the IDE was made out in the sense that the Closure Order was "as a result" of Mr K's case. The Judge hence ordered the appellants to indemnify the respondent for the Claim.

Withdrawal of the appeal against the decision below

25 The present appeal in CA/CA 3/2023 ("CA 3") was initially begun by way of AD/CA 35/2022 in the Appellate Division of the High Court. The appeal was then transferred to the Court of Appeal in CA/OA 18/2022 ("OA 18") upon the application of the appellants (filed with the consent of the respondent) as the Court of Appeal found that the issues in the appeal would raise points of law of public importance and the consideration of a landmark decision of the United Kingdom Supreme Court in the *FCA Test Case* concerning the interpretation of insurance contracts with business interruption clauses in the context of the COVID-19 pandemic.

26 The hearing for the appeal in CA 3 was scheduled for 16 October 2023. However, on the afternoon of 13 October 2023, the appellants filed a last-minute withdrawal of the appeal in CA 3. It appears that the respondent did not object, save that there was an outstanding issue of costs for CA 3 and OA 18.

27 As alluded to above, the parties were unable to agree on costs and have made submissions on costs. This is the key subject matter of the present judgment which we now address.

The parties' submissions on costs

28 The respondent seeks costs amounting to a total of S$279,886.17 from the appellants in respect of CA 3 and OA 18. This amount comprises S$259,534.02 in legal fees and S$20,352.15 in disbursements, the latter of which includes a sum of S$15,722.85 for a legal opinion from an English King's Counsel ("KC Opinion") in respect of the issues raised in CA 3.

29 Although Appendix G of the Supreme Court Practice Directions 2021 ("SCPD 2021") provides a range of between S$30,000 to S$150,000 for costs in an appeal such as CA 3, the respondent argues that there are circumstances that would justify our departing from those guidelines in the exercise of our discretion:

(a) First, the appellants unilaterally decided to withdraw CA 3 on the last working day before the actual hearing and must be taken to have acknowledged that the appeal lacked any merit. The appeal should thus never have been filed.

(b) Second, the appellants made no effort whatsoever to amicably resolve the dispute even when invited by the Court to attempt alternative dispute resolution. This is despite the appellants having lost in the proceedings below.

(c) Third, CA 3 raised novel and complex issues of law relating to coverage and causation in the context of COVID-19 related business interruption insurance claims. CA 3 would have important industry-wide implications for both insurers and insured. Also, the respondent's conduct in procuring the KC Opinion was reasonable given that the parties' written submissions had relied on English case law pertaining to these legal issues.

(d) Fourth, the appellants have allegedly taken every opportunity to delay the payment of the Claim (summarily rejecting the Claim initially, contesting proceedings below in OS 299 and initiating the appeal in CA 3, and so on). The withdrawal of CA 3 at the very last-minute is to be taken as a sign that the appeal was unmeritorious and was simply the

appellants' latest ploy to delay and frustrate a valid claim under the Policy.

30 The appellants' riposte is that the respondent is only entitled to costs on a standard basis, the sum of which should be no more than S$40,000, and the respondent is not entitled to recover the cost of the KC Opinion at S$15,722.85. The appellants have no objections to the respondent's other disbursements of S$4,629.30.

31 The appellants' arguments on costs are as follows:

(a) It appears that the respondent is seeking costs on an indemnity basis given the significant quantum sought in excess of what is contemplated under the costs guidelines. However, there is no basis for the respondent to seek costs on an indemnity basis because such costs are appropriately granted only in exceptional circumstances. The discontinuance of CA 3 does not necessarily connote an acceptance that the case was, is or has become hopeless. Nor does the fact that the withdrawal occurred shortly before the hearing itself justify indemnity costs.

(b) The costs claimed by the respondent are wholly excessive compared to taxed costs and costs awards in other insurance-related appeals, which often range between S$40,000 and S$80,000 only.

(c) The present appeal arose out of an Originating Summons and, unlike many other insurance-related appeals, did not involve substantial disputes of facts but only narrow issues of law. Thus, the record of appeal was less voluminous when compared to other such appeals. There

were also no full grounds of decision issued below, and the appeal in CA 3 did not proceed to an oral hearing.

(d) In these circumstances, the costs of CA 3 should be on the lower end of the range of costs awarded based on Appendix G of the SCPD 2021 and previous cases, and hence S$40,000 would be appropriate (being double the costs awarded below for OS 299).

(e) The sum of S$40,000 also more than covers the costs of OA 18 (which should be no more than S$500) as it was uncontested, and the respondent did not file affidavits or make any submissions.

(f) The respondent is not entitled to recover the sum it paid for the KC Opinion this being S$15,722.85. This sum was not reasonably incurred because the Policy was governed by Singapore law and the respondent is already represented by Senior Counsel with notable experience in insurance disputes.

The issues raised before this court

32 Whilst the main subject matter of the present judgment concerns costs, we have noted above (at [2]) that it is also appropriate to provide our preliminary views on the merits of the discontinued appeal in CA 3 because this was potentially relevant to the assessment of the respondent's claim for costs, and also because these views bear on questions of public importance to the wider insurance industry on the interpretation of business interruption clauses and adjudication of claims in the wake of the COVID-19 pandemic. Indeed, as the respondent recognises in its submissions, CA 3 would have raised issues which had important industry-wide implications and the novelty of these issues were a key basis upon which the appeal was transferred from the Appellate Division

to the Court of Appeal pursuant to OA 18. Like the *FCA Test Case* which provided guidance under English law, CA 3 was the first case before an appellate court in Singapore addressing the issues of causation in business interruption claims involving incidents of disease (in particular, a global pandemic leading to widespread lockdowns), and the interpretation of composite perils in a hybrid clause in this context.

33 Pertinently, we note that after the Judge gave his oral decision below in OS 299, and also after the appeal in CA 3 was withdrawn, the long-drawn legal skirmish between the appellants and respondent (including the fact that CA 3 was withdrawn) was widely reported in the mainstream media and had garnered significant attention in the market. It seems likely that the impression conveyed to the public by these events is that the decision below was correct and that other insured parties may therefore successfully claim COVID-19-related business interruption losses governed by similarly-worded insurance policies if there was just a single COVID-19 case on the insured premises, without having to give further details which were required as a condition precedent to liability under the relevant policy. It is against this backdrop, and with the benefit of the parties' full written submissions that were already before the court, that we find it appropriate to deal with the issue of costs, in the light of our preliminary views on the merits of the appeal.

34 We proceed then to consider the two main issues before us:

(a) First, whether the granting of indemnity costs is appropriate in this appeal. Although the respondent did not explicitly say it was seeking a costs order on an indemnity basis, having regard to the amount of costs sought which exceeded the costs guidelines in the context of a matter that did not involve complex factual disputes, we think the respondent

must have proceeded on this basis. In considering this, it will be necessary to examine the applicable principles on indemnity costs and whether the substantive merits of a discontinued appeal are relevant in the exercise of the court's discretion to award such costs.

(b) Second, what the appropriate costs order should be in this appeal.

Issue 1: Whether granting indemnity costs is appropriate

Applicable law on indemnity costs

35 In the context of a court exercising its discretion to award costs, and, in particular, when dealing with a claim for indemnity costs, the merits of the case can become especially important because it goes to the heart of the question of whether the position taken was wholly without basis, thus resulting in a waste of time and resource. The starting point is O 21 r 2(2) of the Rules of Court 2021 ("ROC 2021") which provides that in exercising its power to fix or assess costs, the court "must have regard to all relevant circumstances". A non-exhaustive list of factors is then provided, referring to matters such as the efforts made by the parties at amicable resolution, the complexity of the case and the difficulty or novelty of the questions involved, and so on. This is wide enough to encompass the court taking into account the merits of a discontinued appeal when deciding on the appropriate costs order.

36 With regard to indemnity costs in particular, it is well-established that such an order is only granted in exceptional circumstances and needs to be specifically justified (*BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] 1 SLR 1648 at [83]). The fact that a case is withdrawn shortly before the hearing itself does not, as a matter of course,

justify imposing indemnity costs (*Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd* [2005] All ER(D) 170 at [10]).

37 In deciding whether to make an order for indemnity costs, a court will have regard to *all the circumstances of the case*, with the touchstone being that of unreasonable conduct as opposed to conduct that attracts moral condemnation (*Lim Oon Kuin and others v Ocean Tankers (Pte) Ltd (interim judicial managers appointed)* [2022] 1 SLR 434 ("*Lim Oon Kuin*") at [36]). Thus, it may be appropriate, and indeed necessary, for the court to consider the *merits* of the case when deciding whether to grant indemnity costs against a party, in so far as a complete lack of merits *may* indicate that an action was brought in bad faith, or as a means of oppression, or for other improper purposes, or that the action was speculative, hypothetical or clearly without basis, thus amounting to unreasonable conduct (*Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 ("*Airtrust*") at [23]; *Lim Oon Kuin* at [36]). In recent times, this court in *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [29] observed that the existence of an appeal mechanism "should not be interpreted as giving litigants (and counsel) *carte blanche* to pursue arguments that are wholly unmeritorious, devoid of any legal and factual basis", and eventually held in that case that indemnity costs should be granted to the respondent which had to bear the expense of resisting an "unmeritorious appeal".

38 A "completely unmeritorious action" brought purely to intimidate and harass the counterparty is not only clearly without basis, but also commenced with intent to oppress rather than out of a legitimate desire to vindicate one's rights (*Airtrust* at [24]). In *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (at [71]), this court found on the facts that "the appellants should not have pursued this entirely unmeritorious appeal, causing

the respondent to incur additional costs", and hence dismissed the appeal with an order for indemnity costs.

39 The key point from the foregoing review of cases is that the court is entitled to look at the merits of the case when assessing whether indemnity costs should be granted.

Relevance of the merits of the case even where the case is discontinued

40 More specifically, even in the context of a *discontinued* case, the merits may be relevant in considering the issue of costs. In *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [2006] SGHC 195 ("*Karaha Bodas*"), the High Court summarised the key principles for deciding costs in the context of a withdrawn application for enforcement of an arbitration award (in particular, the applicant, on its own motion, sought to set aside an *ex parte* order to enforce an arbitral award made in its favour). These principles were stated as follows (*Karaha Bodas* at [11], see in particular, para (e), (f) and (h)):

> (a) Costs in such instances ultimately remain a matter for the discretion of the court.
>
> (b) In considering the exercise of such discretion, the court may usefully have regard to of the reasons for which a particular matter is withdrawn, discontinued or set aside without a final determination on the merits.
>
> (c) Where the withdrawal (which term for convenience I use also to refer to discontinuance or setting aside in circumstances such as the present) takes place in circumstances that are indicative of an acknowledgement of defeat or likely defeat then the withdrawing party should pay the costs.
>
> (d) Where the withdrawal follows what in effect is a surrender on the part of the party against whom the action has been brought, then that party against whom the action was brought should bear the costs.

> (e) Where the withdrawal takes place in circumstances where it is **not directly related to the merits of the case** and especially where it is a consequence of a **neutral event** that has made the proceedings academic or unnecessary to prosecute then it would be appropriate to make no order as to costs and **let the costs lie where they fall**.
>
> (f) All of these principles are to be applied **with due regard to the reasonableness with which the parties have conducted themselves**.
>
> (g) Where the case is not litigated to a conclusion because the parties have come to a settlement save as to costs, the terms of the settlement should be disclosed to the court for any bearing it may have on the court's determination of the appropriate order as to costs.
>
> (h) Where the only issue left in a litigation is one of costs, then **as a general rule, the court will not embark on an in-depth investigation of the merits of the case, though occasionally, where it is possible *readily* to discern the likely outcome had the matter been litigated to a conclusion, the court may choose to consider this**.
>
> (i) However, the court may have regard to all the circumstances before it, including the conduct of the parties, and may draw the appropriate inferences from this in order to determine what the appropriate order as to costs should be.
>
> [emphasis added in bold]

41 The principles in *Karaha Bodas* were considered and applied in *Ong Chai Hong (executrix of the estate of Chiang Chia Liang, deceased) v Chiang Shirley and others* [2016] 3 SLR 1006 ("*Ong Chai Hong*"). When exercising the discretion to order costs under O 59 of the previous Rules of Court (Cap 322, 2014 Rev Ed), Edmund Leow JC cited the principles in *Karaha Bodas* (*Ong Chai Hong* at [31]), and found that it was relevant to consider the merits of the first defendant's claim (among other factors such as the first defendant conducting her case unreasonably) in deciding to award costs *despite the settlement reached* (*Ong Chai Hong* at [33], [34] and [42]):

> 33 As for the first defendant, she was mostly unsuccessful in her claims against the second to fourth defendants and against the plaintiff. In my opinion, **she only settled the case**

> **because she knew that she was headed for defeat on the merits of her various claims**. **The settlement of the action took place in circumstances that were indicative of likely defeat**.
>
> 34 The first defendant conducted her case unreasonably and without due regard to the rules and procedures of court, thereby causing the other parties in the litigation to incur unnecessary costs. …
>
> …
>
> 42 Taking into account the first defendant's conduct of the proceedings, **the terms of the Consent Judgment reflecting that she had failed on the merits of her various claims**, and the relevant legal principles, I was of the view that she should bear 90% of the plaintiff's costs and 70% of the second to fourth defendants' costs. …
>
> [emphasis added in bold]

42 In the same vein, the decision of the Court of Appeal in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 ("*Ng Eng Ghee*") illustrates how the court's discretion to award costs may be influenced by a consideration of the merits of the case, even if the party with the meritorious case has chosen not to appeal. In that case, the Court of Appeal was faced with an interesting question: "[w]here a lower court or tribunal has made a decision against two or more parties with overlapping interests and the appeal succeeds on grounds earlier raised by parties who have chosen not to appeal, should the parties who have chosen not to appeal be also awarded their costs below by the appellate court?" (*Ng Eng Ghee* at [11]). The court answered the question in the affirmative, reasoning that had the lower tribunal came to the right decision in the first place, the non-appealing parties would have been entitled to their costs. The fact that they did not appeal was not critical because other appellants were able to appeal and succeed before the court on precisely the same issues (*Ng Eng Ghee* at [17]). The court therefore awarded some of the costs of the proceeding below to the non-appealing parties (*Ng Eng Ghee* at [19]).

43 Quite apart from being relevant to the issue of indemnity costs, the court may also issue its judgment commenting on the merits of a discontinued case where it would be in the *public interest* to ventilate legal points of general interest and significance. In *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2019] 1 SLR 10 ("*Bumi Armada*") (a case concerning "subject to contract" clauses and liability for inducing breach of contract), following the conclusion of the hearing of the appeal and at a time when the judgment was close to completion, the parties belatedly informed the Court of Appeal that they had settled their differences. Despite this, the Court of Appeal held that "the court has a discretion whether or not to issue its judgment" (*Bumi Armada* at [62]). The court's written judgment was eventually published because, among other reasons, there were legal points being considered in that judgment which were "each potentially of some significance" (*Bumi Armada* at [62]; see also, *Tan Ng Kuang Nicky (the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation)) and others v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [81]).

44 Regard may also be had to the recent decision of *Management Corporation Strata Title Plan No 4701 v MCL Land (Vantage) Pte Ltd (in members' voluntary liquidation)* [2023] 4 SLR 1529 ("*MCL Land*"). There, the General Division of the High Court was scheduled to hear the parties on an expedited basis concerning the dissolution of a company, but before the hearing took place, the parties agreed to record a consent order thus ending the matter (*MCL Land* at [2]). Nevertheless, Goh Yihan JC (as he then was) held that there had not been a local decision providing guidance on a provision within the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") pertaining to court orders deferring the dissolution of a company, and hence, it would be appropriate to issue grounds of decision providing judicial direction

(*MCL Land* at [3]). Goh JC also thought it appropriate to issue written grounds because the consent order in that case *was not* a private commercial agreement settling a dispute between the parties, but was made pursuant to s 180(7) of the IRDA such that the court must apply its mind and be independently satisfied that it was exercising its discretion in a manner that was consistent with the law (*MCL Land* at [4]). Grounds of decision were therefore issued despite the fact that the parties had not made full arguments before the court (at [6]):

> 6 For these reasons, including the provision of guidance on the application of s 180(7) in the absence of any local precedent in this regard, I decided to issue these grounds despite the parties having agreed to record a consent order without having made full arguments before me.

It is not clear to us what material by way of submissions the court had received from the parties, and *we have reservations as to the appropriateness of such a course if there had been an absence of any such submissions*. But it may be noted that the need to clarify a legal point of significance was again cited as a factor that may drive a court to set out its views even in the face of a settlement of a pending matter.

45 We are therefore satisfied and find it appropriate in the circumstances of this case to set out our preliminary views on the merits of the discontinued appeal in CA 3. This is for two reasons: (a) the merits of CA 3 are relevant to the exercise of our discretion in awarding costs, especially when considering indemnity costs; and (b) the issues raised in CA 3 potentially touch on important questions of wider interests to the insurance community (as we have explained above at [32]–[33]). We are mindful of the fact that there was no disposal of the appeal on the merits. Nevertheless, we did have the benefit of the parties' extensive written submissions in this appeal that we had carefully reviewed in preparing for the appeal, and on the basis of which we had formed our preliminary views. For completeness, we reiterate that in preparing for a hearing

or appeal, it is expected that judges will have read the material placed before them and will have formed preliminary views or impressions. As we have repeatedly observed this is not in the least objectionable, the key requirement being that a judge in such a situation must maintain an open mind. This, obviously, does ***not*** mean a vacant or empty mind (*Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [39]; *BOI v BOJ* [2018] 2 SLR 1156 at [110]).

Preliminary views on whether there was no merit in the appeal

46 Turning to the substantive issues in the case, it is clear to us that CA 3 was not a case that was devoid of merit and consequently warranted the grant of indemnity costs in the context of a withdrawn appeal.

47 Our preliminary view on the merits is that the Judge is likely to have erred in at least two material aspects.

48 First, there is the anterior issue of whether the respondent had complied with the Notification Clause by providing proper notification of the Claim. The parties do not dispute that this obligation in the Notification Clause is a condition precedent to liability that must be satisfied, failing which no claim under the Policy shall be payable. If the obligation under the Notification Clause is not fulfilled, then this provides a *complete defence* to liability under the Policy such that an insurer is not liable to indemnify the insured (see *PT Adidaya Energy Mandiri v MS First Capital Insurance Ltd* [2022] 4 SLR 371 at [169]; see also, *George Hunt Cranes Ltd v Scottish Boiler & General Insurance Co Ltd* [2002] 1 All ER (Comm) 366). The appellants argued that the respondent breached the Notification Clause when it failed to inform the appellants of Mr K's case at the Insured Premises. On a preliminary basis, and assuming the loss in this was case was within the scope of the IDE, we are inclined to agree

with the appellants' view. In particular, the Second Condition in the Notification Clause did not seem to be satisfied because it required the provision of *all other information, explanations and other evidence* "as may reasonably be required for investigation and verification of the claim" (see above at [8]).

49 Our preliminary view is that the notification ought to have extended to the facts said to give rise to the underlying insured risk. If the risk encompassed an outbreak of an infectious or contagious disease at the premises, and if Mr K's illness constituted an outbreak, then it was a necessary part of any notification of loss that is said to be covered by the Policy, that the existence of Mr K's case occurring at the Insured Premises be notified to the appellants. However, this was not done by the respondent until after the proceedings in OS 299 were commenced about a year later (see above at [13] and [18]). The purpose of such a condition precedent is to enable the insurer to investigate and ascertain the *bona fides* of the claim within a reasonable time of the loss, take steps to mitigate the consequences and to preserve the evidence where necessary (*Law Relating to Specific Contracts in Singapore* (Steven Chong editor-in-chief & Cavinder Bull gen ed) (Sweet & Maxwell Asia, 2nd Ed, 2016) at para 9.12.17). It would therefore have been vital for the respondent to promptly inform the appellants of Mr K's case to enable the latter to properly investigate the validity of the Claim and decide whether the insured peril had occurred. As this was not done, it seems that the condition precedent was likely not to have been satisfied. If our eventual conclusion had remained the same following full arguments, this would have provided the appellants a complete defence to liability.

50 Further, contrary to the Judge's finding (see above at [21]) that the appellants' statement in its 29 May 2020 Letter rang hollow and amounted to a summary rejection of the Claim, we do not see it that way. Rather, it seems to us that the appellants were inviting further information on the Claim in the

29 May 2020 Letter, but no such further information was provided. We elaborate on this.

51 The Judge opined that the respondent could not be faulted for not providing further particulars after the appellants had *already* rejected the Claim in the 29 May 2020 Letter, and thus there was no further opportunity for the respondent to comply with the Notification Clause. We are inclined to disagree with this view. The material portion of the 29 May 2020 Letter concluded with the statement: "we request that you provide further information to support the above claim for our consideration within 21 days, failing which we shall close our file accordingly" (see above at [14]). A plain reading of the 29 May 2020 Letter suggests that this was not meant to be a *summary rejection* of the Claim, but rather a request for further information, *failing which* the Claim would subsequently be rejected (meaning that there was still the opportunity to provide further particulars). We do not see why the respondent could not have simply replied to the 29 May 2020 Letter to inform the appellants of the requested-for details such as risk management procedures, current hotel operations still running, and crucially, of Mr K's case. Instead, nothing further was put forward as to the particulars of the loss or the accounts or other information that may be required for investigation and verification of the Claim (see above at [15]).

52 As the fulfilment of the obligation in the Notification Clause is a condition precedent to liability under the Policy, the absence of proper notification on the respondent's part would have been fatal to the Claim based on our *initial view* on this issue.

53 Second, it seems to us that the Judge likely erred in finding that Mr K's case was a proximate cause of the Closure Order resulting in the closure of the Insured Premises. In particular, we were troubled by the view that Mr K's

singular case could be considered an "outbreak" under Limb (i) of the IDE, so as to trigger liability under the Policy.

54 As we intimated above (at [1]), the parties' commercial risk allocation is encapsulated in the language used in the terms of the Policy which must be given careful consideration. Limb (i) of the IDE stipulates that there must be an "outbreak" of a notifiable human infectious or contagious disease at the premises (see above at [7]). It was not clear to us how a singular case occurring at the Insured Premises could be said to constitute an "outbreak", which is a term that ordinarily contemplates the infection of *more than one person* on a plain and commonsensical meaning, and an increase from zero to one infected person might not readily be understood as an "outbreak" (see *BSD-360, LLC d/b/a the Goddard School v Philadelphia Indemnity Insurance Company* 580 F Supp 3d 92 (ED Pa, 2022) at 102). It therefore seems to us that Mr K's solitary case would likely not have been sufficient to trigger coverage under Limb (i) of the IDE.

55 In so far as the Judge opined that Mr K's case might be regarded as *one of the many concurrent causes* of the Closure Order (when considered together with the more general COVID-19 statistical figures in Phuket, including cases occurring *outside* the Insured Premises) (see above at [23]– [24]), we think this is problematic. It is not clear to us, even if we are to accept the Judge's reasoning, how treating Mr K's case as part of the *general statistics* of COVID-19 cases considered by the Thailand Government would translate to an insured risk under the Policy, because the relevant "outbreak" must have occurred "at the premises" under Limb (i) of the IDE, and thus would not include those cases occurring outside the premises.

56 In this connection, the parties disagreed over whether the phrase "at the premises" applies only to the Defects Limb at the end of Limb (i) of the IDE, or whether it applies to *both* the Defects Limb and the Disease Limb (see above at [7]). On this, we are inclined to agree with the Judge that the qualifier applied to both limbs such that only the COVID-19 cases occurring at the Insured Premises could be considered in the analysis under the Disease Limb. This is based on a plain and grammatical reading of the IDE and is consistent with the internal context of the other sub-clauses of the IDE (each of which contemplates a set of incidents that must occur at the Insured Premises). Where several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language would suggest that the clause be read as applicable to all (*Great Western Railway Co. v Swindon and Cheltenham Extension Railway Co* (1884) 9 App Cas 787 at 808 ("*Great Western Railway*"); *United States v Standard Brewery, Inc* (1920) 251 US 210 at 218). For example, as the English House of Lords illustrated in *Great Western Railway*, in the expression "horses, oxen, pigs, and sheep, from whatever country they may come", the latter qualifying phrase would apply to horses as much as to sheep.

57 Viewed in that light, even if Mr K's case could be considered a *concurrent cause* of the Closure Order applying the Judge's analysis, that solitary case was not an outbreak at the Insured Premises; and it was ultimately not relevant to consider other COVID-19 cases occurring more generally in Phuket because these other cases clearly *did not occur* at the Insured Premises. We reiterate the point that an insurance contract serves as the parties' agreed mechanism for risk apportionment. Text and context are of the first importance. It seems to us from the language chosen by the parties in the IDE that it did not cross the parties' minds that a nationwide lockdown due to a global pandemic, combined with just one case on the Insured Premises, would be a covered event

under the Policy. On this basis too, the respondent's Claim under the Policy would have failed if we did not change our initial views after hearing counsel.

Indemnity costs not appropriate

58 In the circumstances, we do not find that the appeal in CA 3 was an unmeritorious ploy intended to delay and frustrate a valid insurance claim. We also do not consider that it was unreasonable to pursue the appeal such that the granting of indemnity costs would be appropriate. In fact, had the appeal in CA 3 been pursued to its logical conclusion, the appellants may well have gotten its costs if, as seems likely, it had succeeded in the appeal. The appeal has, however, been withdrawn, and the parties are agreed that the appellants should pay costs. As the appellants contend, we hold in these circumstances that such costs should be assessed on a standard basis.

Issue 2: What the appropriate costs order should be

59 Considering the circumstances of the case, including the non-exhaustive factors set out under O 21 r 2(2) of the ROC 2021, our view is that the costs orders proposed by the appellants are reasonable (see above at [30]–[31]). We therefore order the appellants to pay the respondent costs of S$40,000 for CA 3 and OA 18, and disbursements amounting to S$4,629.30 (which the respondent seeks, and the appellants do not challenge). We do not think that an additional sum of S$15,722.85 incurred for the KC Opinion is warranted as the Policy in question is governed by Singapore law, and English authorities concerning the issues raised in CA 3 would only have been persuasive at best. There was thus no need for an English expert's view on this matter.

Conclusion

60 For the reasons set out above, we order that the respondent is to have the costs and disbursements in the amount proposed by the appellants.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Andrew Phang Boon Leong
Senior Judge

Toby Landau KC (Duxton Hill Chambers) (instructed), Rachel Low Tze-Lynn (Rachel Low LLC) for the appellants;
Siraj Omar SC, Allister Brendan Tan Yu Kuan, Chan Yun Wen Charmaine and Hendroff Fitzgerald L (Drew & Napier LLC) for the respondent.