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Singapore: Trends & Developments

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Trends and Developments

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Introduction

The past year has seen significant developments in insurance-related litigation, not least because of the impact of COVID-19 and the resultant push towards digitalisation. This article will briefly summarise some of the recent developments in Singapore in areas such as business interruption claims, work injury compensation claims, personal data protection and cybercrime.

COVID-19 Related Business Interruption Claims

As a general response to the COVID-19 pandemic, governments across the world issued blanket closure orders mandating the closure of many businesses. In the Singapore context, the Singapore government implemented the "circuit breaker" in April 2020 mandating the closure of all non-essential businesses in Singapore.

Insurance coverage obtained by businesses would generally include coverage for business interruption (BI) losses suffered due to the closure of the business in compliance with orders issued by the relevant authorities as a result of a manifestation of an infectious disease at the insured location.

In this regard, a common issue in the context of COVID-19 closure-related BI claims is the requirement that there be a causal link between the outbreak of the infectious disease at the insured location and the issuance of the closure order by the authorities.

While there has yet to be a reported decision in Singapore on how the Singapore courts would deal with this issue, the authors, Siraj Omar, SC and Allister Tan, recently acted for the owners of Le Meridian Phuket ("Hotel"), a luxury hotel in Phuket, Thailand, in a coverage dispute with its insurers, QBE Insurance (Singapore) Pte Ltd and MS First Capital Insurance Limited where the High Court provided some guidance on this issue.

In this case, the Hotel was one of many forced to close from April 2020 after a closure order ("Closure Order") was issued by the Phuket authorities in response to the COVID-19 pandemic. The owners of the Hotel then filed a claim under their insurance policy ("Policy") seeking an indemnity for BI losses, which was declined by the insurers. In this regard, the Policy inter alia provided coverage for BI losses resulting from the closure of the Hotel by order of a public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the premises.

Although there was no dispute that the Closure Order was issued by a "public authority" within the meaning of the Policy, the insurers (among various other grounds) sought to argue that liability under the Policy had not been triggered as there was no evidence that the Phuket authorities had specifically considered the single COVID-19 case which occurred at the Hotel premises (the "COVID-19 Case") when issuing the Closure Order, which meant that the COVID-19 outbreak at the Hotel was therefore not a proximate cause of the issuance of the Closure Order.

This was rejected by the High Court which held that although there was no direct evidence to

show that the COVID-19 Case was specifically and individually considered by the local authorities, it was more likely than not that it formed part of their deliberation leading to the decision to issue the Closure Order. The COVID-19 Case was therefore one of many concurrent causes of the Closure Order and this was sufficient to establish a causal link for the purposes of the insurance claim.

In doing so, the High Court agreed with the findings of the UK Supreme Court in The Financial Conduct Authority v Arch Insurance (UK) Ltd and Ors (2021) UKSC 1 (the "FCA Test Case"), which was a test case brought by the UK's Financial Conduct Authority, which regulates insurers in the UK, to seek legal clarity on the meaning and effect of selected sample BI insurance policy wordings in the context of COVID-19 claims.

On this basis, the judge then found that on the facts, it was more likely than not that the COVID-19 Case formed part of the deliberation of the Phuket authorities leading to the decision to issue the Closure Order and that the COVID-19 Case could therefore be regarded as one of the many concurrent causes of the Closure Order.

This is likely to be one of the first cases where the Singapore Courts have had the opportunity to consider BI policy wordings in the context of COVID-19 claims, which has been of increasing importance in the wake of the COVID-19 pandemic, as well as the extent to which the findings of the FCA Test Case would apply in Singapore. At the date of publication, the insurers' appeal against the High Court's decision is pending.

It should also be noted that although the FCA Test Case was previously cited in Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd (2021) SGHC 189, which was a case relating to delays in a construction project, the Singapore High Court did not apply the approach set out by the UK Supreme Court as it was mindful that the principles of causation that are applied in insurance law may not be straightforwardly applicable in other areas of contract law.

Work Injury Compensation Claims

Although the Work Injury Compensation Act 2019 (Act 27 of 2019) ("WICA 2019") came into effect on 1 September 2020, two new cases highlight the continued relevance of its predecessor, the Work Injury Compensation Act (Chapter 354, 2009 Revised Edition) ("WICA 2009").

In Sompo Insurance Singapore Pte Ltd and another v Tay Jia Yi and others and another appeal (2022) SGHC 120, the court was asked to determine whether the insurer was liable for an employer's (ie, the insured's) claim for work injury compensation under the applicable insurance policy in respect of an employee who died from cardiac arrest while at work. On the facts, the employee had underlying risk factors that predisposed him to heart attacks. The main issue was whether the heart attack was an injury by "accident" arising out of and "in the course of employment" within the meaning of Section 3(1) of the WICA 2009, which was the applicable statute as the incident took place before the WICA 2019 had come into force.

The court found that:

- an employee who suffers a heart attack while carrying out their work may be considered to have suffered an injury by "accident"; however
- there must also be an occurrence "in the course of employment" which precipitates the injury being suffered.

The court dismissed the claim on the facts and held that the insurer was not liable to pay the employer's claim. Firstly, the employers were not able to prove that anything happened in the course of employment which triggered or was causally linked to the employee having a heart attack. Secondly, the employers were not able to show that the heart attack only started after the employee arrived at the workplace. He was already experiencing chest pains on the morning of and on the days leading up to the incident. As such, the court found that there was no accident in the course of employment.

More importantly, while the court found that it was Section 3(1) of the WICA 2009 which governed the claim, the court went on to observe that Section 7(1) of the WICA 2019 adopts similar wording, and that the case law on and principles applicable to the old provision are likely to continue providing helpful guidance for cases where the new provision applies. The outcome of this case will thus remain relevant to future cases pertaining to Section 7(1) of the WICA 2019.

The second case is MTM Ship Management Pte Ltd v Devaswarupa and others (2022) SGHC 178, where the court dealt with the issue of whether the WICA regime would bar an employee from recovering additional compensation from their employer where the employee had already received compensation from an insurance payout. The court clarified that settlement agreements made "in full and final settlement" of workplace injury claims suffered by an employee will not automatically bar further claims by the employee under the WICA 2009. However, the Commissioner for Labour ("Commissioner") is empowered to take into account such settlement sum in assessing the amount of compensation payable in respect of the claim, if it is fair and reasonable in the circumstances to do so.

This was an appeal against the decision of the Commissioner who had ordered MTM (ie, the employer) to pay compensation to its deceased employee's next of kin, despite the fact that MTM had already paid them an insurance payout in accordance with the terms of the employee's employment contract, and they had executed a deed of discharge in full and final settlement of the matter. The Commissioner declined to take this insurance payout into account in assessing the appropriate compensation, as it was only raised belatedly after his order had been issued.

In the appeal, the court had to decide the following two main issues.

- Did MTM have a right of appeal?
- If so, should the Commissioner's order be set aside for failing to take into account the insurance payout when assessing the sum of compensation payable?

The court ultimately granted the appeal and set aside the Commissioner's order.

As a starting point, the court found that the applicable legislation was the WICA 2009 because the employee had died in an accident before the commencement of the WICA 2019. However, the court still made an effort to provide guidance on both sets of legislation.

In relation to the first issue, the court relied on Section 29(2A) of the WICA 2009 and Section 58(1) of the WICA 2019. The court said that in both instances, an order of the Commissioner may only be appealed if the appeal involves "a substantial question of law". The court found

that this test would be satisfied if a case involved novel issues of statutory interpretation.

In relation to the second issue:

The court found that there was nothing in the WICA 2009 which required the Commissioner to take into account the insurance payout as a factor in assessing the appropriate amount of compensation. Even if the insurance payout was characterised as compensation under the Merchant Shipping (Maritime Labour Convention) Act 2014 (Act 6 of 2014) ("MLCA 2014") – on which the court declined to make a specific finding – Sections 20(e) to 20(f) of the WICA 2009 only permit reductions to be made in respect of compensation paid under the MLCA 2014 for the purposes of medical treatment, and not compensation paid in the event of death. The court expressed that this may be evidence of a gap in the law, but did not find it appropriate to resolve the issue in this case. The court also declined to address how the MLCA 2014 might potentially interplay with the WICA 2019.

Further to the above, the court found that the Commissioner did not have any residual powers to amend the order after it was made (based on Sections 25A, 25B and 25C of the WICA 2009). However, as the present appeal had come before the court by way of a rehearing (see Order 55 Rule 2(1) of the Rules of Court), it was prepared to consider whether the insurance payout should have been taken into account.

In this regard, the court found that Section 33(1) of the WICA 2009 only prevents an employee from seeking work injury compensation if the employee has already recovered damages from their employer in court. The provision would not prevent an employee from making a claim under the WICA regime if they received out-of-court settlement payments. That said, based on the plain wording of Section S9(1A)(b) of the WICA 2009 and its legislative history and intent, the Commissioner still has the power to take such settlement payments into consideration if it is fair and reasonable to do so. The court did not see any reason to differentiate between insurance payouts and settlement payments for the present purposes.

The court found that it would only be fair and reasonable for the insurance payout to be deducted from any amount of compensation to be paid. The WICA regime was enacted to serve a compensatory purpose, and not to give workers the right of double recovery for the same injury. On the facts, the employment contract also stated that if the employee was able to recover work injury compensation, they would receive only the difference between the amount paid under the WICA and the amount payable under the employment contract, if the latter amount was higher. As the insurance payout exceeded the compensation that the Commissioner had assessed to be payable, the employee was not entitled to further compensation. Further to the above, the employee's next of kin had already signed a deed of discharge acknowledging that the insurance payout they received would be in full and final settlement of any claim for compensation.

It should also be noted that while there is no provision in the WICA 2019 that is in pari materia with S9(1A)(b) of the WICA 2009, the court was of the opinion that it was possible for the power to have been subsumed in other provisions such as Sections 51(2) and 54(1)(c) of the WICA 2019. The court also expressed hope that the WICA 2019 would continue to encompass the power, and even suggested that legislative amendments be made if it does not.

Impact of Digitalisation on Insurance Litigation

Data protection

A comprehensive set of proposed amendments to the Personal Data Protection Act 2012 (PDPA) was introduced in November 2020. While most of the amendments came into effect on 1 February 2021, one key amendment was held back due to economic uncertainty brought on by the COVID-19 pandemic – the increase in the maximum financial penalty for breaches of the PDPA. Instead of being capped at SGD1 million, an organisation may be fined up to 10% of its annual turnover in Singapore or SGD1 million, whichever is higher. The government subsequently determined that sufficient lead time had been given to businesses, and the new penalty framework took effect from 1 October 2022.

The increase in the maximum financial penalty under the PDPA signals the importance placed by the Singapore government on data protection; this is echoed by the consistent approach taken in decisions by the Personal Data Protection Commission (PDPC), summaries of which have also been made publicly accessible to provide guidance so that organisations (including individuals) can implement measures to avoid contravention(s) of the PDPA. Some recent examples of decisions by the PDPC involving insurance companies and agents are as follows.

- In Aviva Ltd (2018) SGPDPC 4, a general insurance company was fined SGD30,000 for failing to make reasonable security arrangements to prevent the unauthorised disclosure of personal data of policyholders, such that underwriting letters meant for three different clients were sent by post to another client. The company had previously been fined SGD6,000 for a similar incident, which led to a higher penalty being imposed.
- In AIA Singapore Private Limited (2019) SGPDPC 20, a general insurance company was fined SGD10,000 for failing to make reasonable security arrangements in its letter-generation process, which led to the potential unauthorised disclosure of individuals' personal data when 244 letters meant for various customers were sent to two individuals.
- In Case No DP-2109-B8857, three individuals were issued warnings in relation to two incidents involving the unauthorised collection and disclosure of individuals' personal data. A former insurance financial adviser looking for agents to take over his clientele had sold a list of approximately 1,000 clients' personal data to two other insurance financial advisers.

As one of the aims behind the recent PDPA amendments was to support and accelerate using data for innovation, the use of AI to improve processes within the insurance industry, also known as insurtech, will continue to proliferate. Some existing examples include automated underwriting and claims processing, as well as new products such as usage-based insurance and subscription-based insurance. With the introduction of the legitimate business interest and business improvement exceptions in the PDPA, insurance companies are now permitted to collect, use or disclose personal data in order to improve their processes without having to obtain express consent from customers.

While the use of AI for automated insurance and claims processing can result in time and cost savings for customers, concerns have been expressed about inherent bias within data, models or algorithms. The increased speed at which decisions are made through automated processes may potentially also lead to insurers being exposed to greater legal and reputational risks.

Insurance companies looking to use AI in their processes should therefore take note of the following regulatory practices and frameworks which have been developed in Singapore.

In 2018, the Monetary Authority of Singapore (MAS) released a set of principles to promote fairness, ethics, accountability and transparency ("FEAT Principles") in the use of AI and data analytics in finance. The FEAT Principles provide guidance to firms offering financial products and services on the responsible use of AI and data analytics, to strengthen internal governance around data management and use.

In 2020, the PDPC released the second edition of the Model AI Governance Framework, which provides guidance to private sector organisations in addressing key ethical and governance issues when deploying AI solutions. The two guiding principles set out in the Model AI Governance Framework are that decisions made by AI should be explainable, transparent and fair, and that AI systems should be human-centric. This applies to all organisations (including insurance companies) that use AI solutions in their operations.

In 2022, the Veritas Consortium (comprising the MAS and members of the financial industry) concluded the second phase of its project which aims to develop methods for financial institutions to incorporate the FEAT Principles. Five white papers were released, detailing assessment methodologies for adoption by banks in credit-risk scoring and customer marketing, as well as by insurance companies in insurance predictive underwriting, insurance fraud detection and customer marketing.

Cybercrime

In September 2021, the Infocomm Media Development Authority (IMDA) announced that it had partnered with cyber-insurers to offer premium discounts on cyber-insurance for organisations with Data Protection Trustmark (DPTM) certification. This certification recognises organisations with accountable data protection practices, which translates into lower risk exposure to cyber and privacy threats, and provides insurers with the assurance that applicants have robust and sound data protection policies and practices in place. With the increase of the maximum financial penalty under the PDPA and the incentive for organisations to obtain the DPTM, it is likely that more organisations will take steps to strengthen their existing IT systems against cyber and privacy threats, and that there will be an increased interest in and demand for cyber-insurance policies.

Insurers should thus keep abreast of the potential issues which have arisen in litigation involving commercial crime/cybercrime-related insurance policies. These include issues concerning the difficulty of filing proceedings against persons unknown, and of recovering non-physical assets such as cryptocurrency.

In AA v Persons unknown (2019) EWHC 3556 (Comm), a Canadian company had its computer systems hacked, and the hackers demanded a ransom. As the company was insured against cybercrime attacks, the insurance company ended up paying the ransom in bitcoin to secure reinstatement of the insured's computer systems. Subsequently, the insurance company applied for a proprietary injunction in respect of the bitcoin, and the English court had to deal with the novel issue of whether bitcoin and other cryptocurrencies can be considered "property" under English law, such that they may be the

subject of a proprietary injunction. The English High Court answered in the affirmative and granted the injunction.

While this was not the first case of its kind in the English courts, it was the first case which accepted the UK Jurisdiction Taskforce's Legal Statement on the proprietary nature of cryptocurrency. This case was more recently approved in Wang v Darby (2021) EWHC 3054 (Comm). It was also cited in the Malaysian case of Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Another (2021) 7 MLJ 178.

We expect that the Singapore courts will reach a similar decision in a future cyber-insurance case. The Singapore courts have already shown that they are prepared to grant proprietary injunctions against persons unknown to prohibit them from dealing with, disposing of, or diminishing the value of identified crypto-assets – see CLM v CLN and others (2022) SCHC 46. However, as this case concerned an application for an interlocutory proprietary injunction, which did not require the court to engage in complex questions of law or fact, it remains to be seen whether the court will reach a different conclusion outside of interlocutory proceedings.

Drew & Napier LLC has been providing exceptional legal service since 1889 and is one of the largest full-service law firms in Singapore, with four senior counsels. It is pre-eminent in dispute resolution, international arbitration, competition and antitrust, corporate insolvency and restructuring, IP (patents and trade marks), tax, and telecommunications, media and technology, and has market-leading practices in M&A, banking and finance, and capital markets. The firm has represented Singapore's leaders and top government agencies, as well as foreign governments, in landmark, high-profile cases. It is also appointed by Fortune 500 companies, multinational corporations and local organisations. Experienced in international disputes before the Singapore International Commercial Court, the firm covers the full range of commercial litigation matters, including building and construction, constitutional law, debt recovery, defamation, fraud, insurance, and white-collar crime. Its insurance disputes practice has an enviable record of successfully representing insurers, reinsurers, brokers and insureds in a wide variety of matters across all insurance lines. These matters include insurance coverage, insurance defence (D&O, public liability, product liability and professional liability), insurance recovery, and policy wording and insurance regulatory-related matters.

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