

**Foundation Contractor and  
Engineering Sdn Bhd**

... **Appellant**

AND

**Cosmic Insurance Corporation Sdn Bhd**

... **Respondent**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 18 of 2011)**

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Before: Mortimer P, Davies and Leonard JJ A.  
**7<sup>th</sup> December, 2011.**

Mr Balendran Balasingam and Ms Sarojini Muthusamy Veerasamy of Veerasamy Associates for Appellant.

Mr Rudi Lee Kim Boon of Fathan, Rudi Lee, Annie Kon & Associates for Respondent.

**Cases referred to in the judgment:**

*China Insurance Co., (Singapore) Ltd vs Liberty Insurance Pte Ltd  
(formerly known as Citystate Insurance Pte Ltd) [2005] 2 SLR 509 [2005]  
SGHC 40*

**Leonard JA**

This is an appeal from a judgment of the Chief Justice given on 5 September, 2001 in Originating Summons No 87 of 2007 in which he awarded to Foundation Contractor and Engineering Sdn Bhd (*the appellant*) a sum of money which he held to be due to it from Cosmic Insurance Corporation Sdn Bhd (*the respondent*) under a workmen's compensation policy. The appellant had claimed from the respondent a sum of \$220,000.00 damages and \$60,000.00 costs which, after it had been held liable in negligence, it had paid in settlement of a claim in HCCS no 174 of 2003 brought by a workman named Muniyandi Balakrishnan (*MB*) who had been injured on 4 June 2003 whilst working on an industrial worksite at which the appellant was carrying out subcontract works. The whole amount was not awarded because the Chief Justice found that there was an endorsement to the policy, namely endorsement W 231 under which any claim would be reduced proportionately if the appellant had understated the wages paid or payable to the workmen. He held that those wages had been stated to be \$200,000.00 whereas they should have been stated to be \$1,020,000.00. Taking \$220,000.00 as the settlement sum, he awarded 19.6% thereof, i.e., \$43,120.00. In addition he ordered that the respondent was liable to pay costs incurred by the appellant in enforcing its rights under the workmen's compensation policy, to be taxed if not agreed. His third order was that the costs of the application be paid by the respondent to the appellant, to be taxed if not agreed.

The background to the case is as follows. A business was carried on by Foundation Engineering, an unincorporated firm, which employed MB. It took out with the respondent a policy of workmen's compensation insurance, number WCBU0344/B (*the*

policy') which was expressed to run from 22 July 2001 to 21 July 2004. The estimated total earnings of the employees of Foundation Engineering (the insured when the policy was issued) were stated in the policy to be \$200,000.

The policy was in a standard printed form. Condition 6 of the policy reads:

*"6. The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid by the Insured to employees during each Period of Insurance. The name of every employee together with the amount of wages salary and other earnings shall be properly recorded and the Insured shall at all times allow the Corporation to inspect such records and shall supply the Corporation with a correct account of all such wages, salaries and other earnings paid during any Period of Insurance within one month from the expiry date of such Period of Insurance. If the amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the Corporation or by a refund by the Corporation as the case may be."*

That provision appears to make sense in relation to a business which may experience fluctuations in the size of the workforce and in any case it would be reasonable to expect changes in the level of remuneration over a three year period.

The first page of the Schedule to the policy shows that the premium is "as arranged". Those words which have evidently been typed into the printed form of schedule are followed by the printed words: "Subject to adjustment in the terms of condition 6." Printed below the reference to condition 6 are the words: "The estimated amount of wages salaries and other earnings on which the Premium is based". There follow two printed columns headed "Estimated number of employees" and "Description of employees" across which the following words are typed: "On all employees whilst engaged in connection with the insured's business". In an adjoining column headed "Estimated total earnings' the sum of \$200,000.00 has been typed. In a column next to that and headed "Subject to Endorsements" appears the entry "W.76 and W.231."

There follows a typed entry across the form saying "Subject to the attached Electronic date (sic) exclusion Clause and Deferred Premiums clause." Those clauses appear at the second and third page of the schedule respectively. In the deferred premiums clause the premium is to be paid by three annual instalments of \$2,000.00 but that would be adjustable if necessary under clause 6, assuming that clause 6 was part of the policy.

In the copy of the policy adduced in evidence by the appellant there is no endorsement W.76 or W.231. There is evidence that a policy in that form, without the endorsements is the only one supplied to the appellant. A copy of a policy adduced for the respondent in these proceedings does not include endorsement W76 but it does contain a plain sheet of A4 paper bearing the following words, apparently typed rather than printed:

*"ENDORSEMENT NO. W231*

*"Notwithstanding anything stated to the contrary in this Policy, and subject to Condition 6 being deleted it is understood and agreed that if the wages herein stated are less than the actual wages (as defined in the Workmen's Compensation*

*Ordinance currently in force) paid or payable to the workman hereby insured corresponding to the period of insurance, the liability of the company in respect of any claim under this Policy shall be proportionately reduced and the Insured shall be considered as his own insurer for the difference.”*

We observe that the entry on the sheet in question is quite different in form from any copy endorsement produced by the appellant in this case.

To take one example, there is a Terrorism Exclusion clause in the appellant’s copy. It is accompanied by a document under the respondent’s letterhead, giving particulars of the policy and of the insured and stating:

*“It is hereby declared and agreed that with effect from 01<sup>st</sup> January, 2002, the within policy is subject to the attached TERRORISM EXCLUSION ENDORSEMENT....”*

The document is signed by the respondent and by its agent Richland Insurance services (*‘Richland’*). The accompanying endorsement itself is likewise on the respondent’s letterhead and bears particulars of the policy. The wording of the endorsement is set out in full and it is signed as before by the respondent and its agent. At the foot of the endorsement appear the words

*“Endorsement is not valid unless countersigned by Richland Insurance Services Sdn Bhd.”*

The purported copy of the alleged endorsement W 231 does not appear under the respondent’s letterhead, gives no particulars of the policy and does not bear the signature of anyone.

Another purported copy of the policy was adduced in evidence for the present respondent in a related case, OS No. 91 brought by the respondent against the Asia Insurance Co. Ltd., (*‘Asia’*). It is different from the copy policy adduced in evidence for the respondent before the Chief Justice in these proceedings. It includes the text of endorsements W76 and W231 but instead of being on A4 sheets they are on separate strips of paper just big enough to accommodate the text of a given endorsement. Neither is dated; neither endorsement is on the respondent’s letterhead; neither is signed by anyone and neither bears the provision that it is not valid unless countersigned by Richland Insurance Services Sdn Bhd. Moreover, the deferred premium clause is also on a similar strip of paper devoid of anything other than the text of the clause whereas in the copy produced by the appellant it is on a printed page of the schedule.

Another exhibit was adduced in evidence for the present respondent in OS 91 of 2005 (proceedings taken by the respondent against Asia). It is exhibited to an affidavit of Chan Kok Pheng, Underwriting Manager of Richland and is a letter dated 24<sup>th</sup> July 2001 from Richland to the firm Foundation Engineering setting out what appear to be the intended terms of the policy which was later issued and dated the 27<sup>th</sup> July 2001 by the respondent to Foundation Engineering. It includes a reference to Endorsements W76 and W 231. That letter is signed by the firm Foundation Engineering under the words *“Signed and Confirmed”* There is no evidence that Foundation Engineering had been told what W76 and W231 were about or that the appellant’s notice was drawn to the reference in the policy to W231 or W76. The signature invites an inference that the firm accepted the

terms set out in the letter but the appellant maintains that whatever the letter says, the fact is that the two endorsements never formed part of the policy that is dated 3 days after the date of the letter.

On 6 August, 2002 the appellant was formed as a limited company. On the same day, Foundation Engineering gave to the Registrar of Business names a Notice under Section 11 of the Business Names Act Cap 92. In the notice it says in the printed words of the form that it *“has ceased to carry on business”* and *“has abandoned the use of such business name.”* It has inserted above the printed words the following: *“CONVERT TO SDN BHD.”* The change of name on the insurance policy did not take place until 30 November, 2002. There is no evidence as to when application was made to the respondent for the change of name.

On 4 January 2003 a subcontract agreement was signed between Syarikat Pembangunan HJ Ibrahim PPW Haji Mohammad Sdn Bhd (*“SPA”*) and an entity described as

*“Foundation Engineering, a firm registered in Negara Brunei Darussalam under Business Names Act...”*

SPA was the main contractor of the government project in Temburong where MB was working at the time of the accident. The respondent maintains on the basis of the wording of the subcontract that it was Foundation Engineering and not the appellant that was carrying out the subcontract works and that MB must still have been employed by Foundation Engineering which was not then covered by the policy. That argument was rejected by the Chief Justice.

The Petition of Appeal runs to 20 pages and contains detailed arguments. The grounds of appeal which we glean from it are that the Chief Justice erred:

1. in determining that the respondent’s liability was subject to and delimited by the endorsement W231 (called by the Chief Justice the average clause);
2. in taking a starting figure of \$220,000.00 instead of \$280,000.00;
3. in his calculation of the apportionment;
4. in ordering that the costs incurred by the appellant in enforcing its rights under the Cosmic Policy as a part of the proceedings of HCCS No 174 of 2003 should be taxed if not agreed.

In the Notice of Appeal objection was taken to the determination by the Chief Justice that the appellant had under-declared the total wages of its employees and that the respondent’s submissions as to the appellant’s total earnings were correct. We take that objection to be part of 3 above. Complaint was also made that the Chief Justice had wrongly admitted documentary evidence within a *“Bundle of authorities and additional documents”* filed by the respondent on or about 12 May 2011, *“which had never been pleaded by affidavit”* and had been objected to by the appellant. We have seen those documents which we are told the Chief Justice admitted. Some are copy authorities but some are copy documents that should have been authenticated by affidavit, One is another example on plain paper of the wording of Endorsement W231 and it takes the case no further. The other is a letter from HSBC which is relied upon by the respondent

to show that the number of foreign workers which formed the basis for the respondent's calculation of the hypothetical wages bill was the correct number. In fact the number of foreign workers the appellant was permitted to employ is not disputed.

A Respondent's Notice is before us. The respondent contends that it has wrongly been held liable under the policy and we have received submissions in support of that contention. The respondent says that

1. it is a policy issued by the Asia Insurance Company that is "*the relevant policy*", rather than the respondent's policy.
2. the transfer on 30 November 2002 of the workmen's' compensation policy from the firm Foundation Engineering to the appellant was invalid, Foundation Engineering having given notice of cessation some time before the transfer;
3. Foundation Engineering misrepresented or concealed a relevant fact, namely that it had already ceased business operations.
4. There was no transfer of MB's employment to the appellant, so that MB was still an employee of Foundation Engineering, not of the appellant, at the time of the accident.

There seems to be a suggestion in 2 above that Foundation Engineering transferred, i.e. assigned the policy to the appellant. There is no evidence of a transfer. The policy was endorsed as for a change of name but the legal effect appears to have been to issue a new policy to the appellant on the same terms, so far as applicable, as before.

In his judgment the Chief Justice refers to remarks by Findlay J.C., as to issues of fact. Those remarks were made in the context of an interlocutory hearing to decide whether an order should be made to convert the proceedings from an originating summons to a writ. The Commissioner was not there making a final order on the merits determining the rights of the parties and any findings of fact he might have appeared to be making could not properly be described as coming under the heading of *res judicata*. In so describing them, the Chief Justice misdirected himself. Much has been made of this but it is of no consequence because the Chief Justice went on to say that he had himself considered the evidence and it is clear that he also considered the submissions made before him. Having done that he made his own findings, saying that he agreed with Findlay J.C. The Chief Justice was quite entitled to say that. But it is with the findings of the Chief Justice that this court must concern itself.

The Chief Justice found on the evidence the following facts.

1. That the respondent had insured the appellant.
2. That MB was the appellant's employee and that he was injured in the course of his work for the appellant:
3. That the appellant was found liable in HCCS 174 for the injuries suffered by MB on 4 June, 2003.

As to the respondent's contention that the policy issued by Asia covering the workforce on the site was the appropriate policy under which to claim, the Chief Justice rightly said that in a situation of double insurance it was open to the insured to claim against either insurer for the full amount of his loss. Mr Lee has sought to persuade us otherwise on the basis that though the policy in this case did give general cover to the employees of the appellant, the Asia policy referred specifically to the contract during the execution of

which MB was injured and so the appellant should have claimed against Asia. If he meant that the appellant was obliged to claim from Asia rather than the respondent that is nowhere specified in the respondent's policy and Mr Lee would have to show that there was an implied term to that effect. He cited the case of *China Insurance Co., (Singapore) Ltd v Liberty Insurance Pte Ltd (formerly known as Citystate Insurance Pte Ltd) [2005] 2 SLR 509 [2005] SGHC 40* because in that case there was some discussion as to policies which cover specific as distinct from general risks. That was a case about contribution between insurers and it has nothing to do with the question whether in the present case there was an implied term. There is no evidential or legal basis for saying that there was. The appellant, if it was the insured, was entitled to claim against the respondent though the respondent would naturally have preferred that they had instead claimed against Asia.

Mr Lee also seeks support in the fact that the main contractor SPA made a claim against Asia for \$3,383.38 and Asia paid that sum to SPA "in full and final settlement" for medical expenses and injuries suffered by MB. That does not assist the respondent. Asia was there paying SPA, not the appellant or MB, because it was obliged to indemnify SPA for money it had paid to MB. The appellant was claiming against the respondent on the basis that as an insured under the respondent's policy it was entitled to be indemnified for liabilities covered by that policy.

We should mention, though the matter was not adverted to at the hearing, that there appears to be is a specific provision, endorsement B in the Asia policy, which reads:

*"Endorsement "B" – It is hereby understood and agreed that the indemnity herein granted is intended to cover the legal liability of the Insured to Workmen in the employment of the contractors performing works for this insured whilst engaged in this business and occupation in respect of which the policy is granted but only so far as regards to claims under any Workmen's Compensation Enactment for the time in force in the State of Brunei" (emphasis supplied)."*

Thus Asia's cover would appear not to extend to common law claims whereas the respondent's policy covered in addition common law claims. MB's action against the appellant was a common law claim for damages. In argument before us Mr Lee referred to page 540 of the Supplementary Record of Appeal, Vol. 2, which is a copy of the front page only of the Asia policy and on which there is a reference to Endorsement B. A full copy of the policy, containing a copy of Endorsement B, appears in the bundle, starting at page 525. As the endorsement was not mentioned by either party either here or, so far as we are aware, below and we have heard no argument we express no concluded view with regard to it and its existence does not form part of the reasons for this decision.

With regard to the submission that the appellant was not the subcontractor and that MB was not its employee the Chief Justice found to the contrary. That is not surprising in view of the general weight of the evidence showing that the appellant took over the business of the firm when the firm gave notice that it had ceased business. He had before him a letter dated 16<sup>th</sup> April 2007 to Veerasamy Associates, the solicitors for the appellant, from the Director of Roads, Public Works Department, stating that SPA had a contract to carry out the contract in question and that

*"to our knowledge Foundation Contractor and Engineering Sdn Bhd had carried out the physical works on site as a domestic sub-contractor."*

There was ample other evidence to support that statement, which reflected the practical reality of the situation, notwithstanding the apparent inadvertent misdescription of the appellant in the subcontract. It would have been flying in the face of commonsense, having regard to the evidence in general, to have found otherwise. When MB sued the appellant, the respondent exercised its right of subrogation, took over the defence for a period of 18 months and appointed solicitors who wrote to MB's solicitors confirming that the appellant was insured by the respondent and then in the Defence filed in the action admitted that at all material times MB was employed by the appellant as a labourer. It hardly lies in the mouth of the respondent in such circumstances now to deny that MB was the appellant's employee and that it is liable under the policy.

Having considered the evidence we find that there is no ground for interfering with the findings of fact set out above.

We now turn to the question of the alleged endorsement W231. There were, as it seems to us, several questions that needed to be resolved. The first question was whether the physical endorsement had actually been made. If the answer was in the affirmative, the next, question was whether, having been made, it had come into effect. If it had, what were the consequences? If the consequence was that the award should be reduced, was the basis of calculation put forward by the respondent correct in principle and fact? In his judgment the Chief Justice does not mention the absence of the endorsement from the appellant's copy of the policy and the differences between the alleged true copies produced for the present respondent in two separate proceedings. He says nothing about curious form of the purported copy endorsements produced for the respondent, which lack the characteristics of other endorsements exhibited for the appellant as set out above. Nor does he mention the fact that whereas the alleged endorsement is in terms "*subject to Condition 6 being deleted*" condition 6 appears undeleted in the purported copy policies produced by both sides, 3 in all. The entry in the schedule referring to endorsement W231 evidently existed from the beginning of the term of insurance. If the endorsement was from the beginning a part of the terms of the policy, why is there a reference to condition 6 in the schedule and why did condition 6 appear at all in the policy from the outset? The endorsement and condition 6 are mutually contradictory. Though the alleged endorsement includes the words "*it is understood and agreed that*", there is no evidence whatever, documentary or otherwise, that the appellant agreed to the endorsement W231 in the form in which it appears in the respondent's copies. Even if this alleged endorsement had borne the same signatures as those which appear on other endorsements, neither signatory represented the appellant. One was an executive director of the respondent and the other was its agent. There was affidavit evidence from that agent before the Chief Justice that it was not the insurance adviser of the appellant, though the appellant evidently thought that it was.

If the policy had actually been endorsed as alleged and if the endorsement was effective, it changed fundamentally an important aspect of the bargain between the parties. It seems to us that in view of the matters we have mentioned above it was incumbent upon the Chief Justice to consider the evidence in detail and explain the reasoning which led him to find that the policy had in fact been endorsed with the alleged endorsement W231. He recited the wording of the alleged endorsement and said:

*"From the wordings of the (respondent's) policy, the policy expressly provides that the Workmen's Compensation Policy is subject to endorsement 231..."*

He did not explain why he found, as is implied in his decision, that the endorsement was actually made. In the circumstances we have concluded, despite our general reluctance to interfere with findings of fact by a trial judge, that this is one of those exceptional cases where it is necessary for us to address afresh the evidence on the question of endorsement W231.

Having regard to the evidence of the usual practice followed by the respondent when producing endorsements, the appearance of a sheet of paper upon which there is no identification of the parties or of the policy, that sheet being unsigned and lacking the statement

*“Endorsement is not valid unless countersigned by Insurance Service Sdn Bhd policy”*

strikes us as suspicious. Likewise, the unexplained differences between the alleged true copies of the policies and endorsements, one exhibited in OS 91 and one in OS 87, both of which differ from the copy policy exhibited in these proceedings by the appellant, strike us as suspicious. The fact that condition 6 remains undeleted and is still referred to in the schedule reinforces that suspicion. Had the endorsement been made it would not have taken effect unless and until condition 6 was deleted. That is the plain meaning of the unambiguous words *“...subject to Condition 6 being deleted”*. The burden of proving that the endorsement W231 was actually made lies upon the party alleging it, namely the respondent. We have come to the conclusion that the evidence does not show on a balance of probabilities that the endorsement was ever made to the policy, notwithstanding the various references to endorsement W231. It follows that the relevant condition was condition 6. There was no justification for reducing the claim on the basis of W 231.

There is in the judgment no explanation for the award of \$220,000.00 instead of \$280,000.00. The policy provides that

*“... if at any time during the period of Insurance any employee in the Insurer’s immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the Insured in the Business and if the Insured shall be liable to pay compensation for such injury either under the Workmen’s Compensation (Amendment) Enactment 1978 (State of Brunei) or at Common Law, then subject to the terms exceptions and conditions contained herein or endorsed hereon the Corporation will indemnify the Insured against all sums for which the Insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation...”*

On 4 July 2005 the respondent for a misconceived reason abandoned the appellant, having taken over its defence in HCCS 174 some 18 months earlier. From 4 July 2005 to 28 February, 2008 when judgment was given against it and thereafter the appellant had to conduct its case at its own expense. When MB notified the appellant that he would accept \$118,000.00 in full and final settlement, the appellant so informed the respondent by letter dated 5 February 2008. There was no response. As it turned out the appellant when it was held liable had to settle for \$220,000.00 and \$60,000.00 costs. Taxation causes delay and expense and agreement as to costs is to be encouraged. Having made it clear that they would not answer any request for approval because they denied liability under

the policy, the respondent cannot be heard to say that the expense was incurred without its permission. We can see no reason why the appellant should not have the full \$280,000.00. In addition it is entitled to the legal costs incurred in defending the claim in HCCS 174.

We turn finally to the order made by the Chief Justice that the respondent was liable to pay costs incurred by the appellant in enforcing its rights under the workmen's compensation policy, to be taxed if not agreed. It is not possible to glean from the wording any particulars of the costs that the Chief Justice had in mind. Both counsel, though differing over the question of taxation, have asked this court to clarify the position so as to avoid satellite proceedings of which there have been quite enough already. There is a breakdown of the various claims put forward by the appellant under this head before the Chief Justice in its submissions which appear in the Record of Appeal, Vol. II at pp. 406 and 407 as follows:

*“2.17 As of date, in addition to the sum of B\$280,000.00, which has been paid to **MB** by the Plaintiff, the Plaintiff estimates its losses consequent to the Defendant's abandonment of the Plaintiff's Defence of HCCS No 174 of 2003 and institution of this Summons to be as follows:*

- (i) Costs of instituting the Plaintiff's Defence of HCCS No 174 of 2003, including the cost of securing expert/necessary witnesses for the 6 day trial before Barnett J.C, together with the costs of instituting a discovery action as a part of HCCS No 174 of 2003 and thereafter proceeding to appeal the order of the Honourable Registrar as to discovery (B\$250,000.00);*
- (ii) Costs paid in lieu of the termination of the third party proceedings, B\$60,000.00 (including the sum of 37,114.86 paid directly to the said Third Parties as a consequence of the termination of these proceedings);*
- (iii) Costs associated with the Plaintiff's defence of the Assessment of Damages 12<sup>th</sup> November 2008, B\$80,000.00;*
- (iv) Costs of the Plaintiff's Appeal against the first preliminary objection raised by the Defendant to Originating Summons No 87 of 2007, (Civil Appeal Number 11 of 2009), B\$130,000.00;*
- (v) Costs associated with the Defendant's application to convert Originating Summons No 87 of 2007 with (sic) a Writ, B\$60,000.00;*
- (vi) Costs associated with the hearing of the Defendant's application for leave to appeal to the Court of Appeal – B\$25,000.00;*
- (vii) Costs associated with and consequent to the Plaintiff's institution of Originating Summons No 87 of 2007 (B\$60,000.00).*

**Total: B\$945,000.00”**

As the Chief Justice did not deal with these matters in detail it is necessary for us do so. The respondent's position is that the sums claimed as costs are exorbitant. We think it right that the respondent should pay costs that the appellant has properly incurred as a result of the respondent's failure to honour its obligations under the policy but in the absence of agreement there should where appropriate be taxation of those costs and it should where appropriate, if there has not already been an order for costs, be on an indemnity basis, that is to say on a solicitor and own client basis rather than as between party and party. In the respondent's submissions, after a general objection as to the allegedly exorbitant sums claimed, the respondent makes detailed objections to some items as follows:

(ii). As to the appellant's two sets of third party proceedings which failed, the respondent should not bear the costs. We agree and there will be no order as to that

(iv). Here the costs order in a judgment of which a draft was signed by the parties was "*Respondent/defendant to pay the Appellant/Plaintiff costs here and below to be taxed if not agreed...*" We find no ground for interfering with that order.

(v) and (vi). In each matter there was an order "*costs to be taxed if not agreed*". We find no ground for interfering.

As to items (i) and (iii) there will be an order that the costs be taxed on an indemnity basis if not agreed and paid by the respondent.

As to item (vii) the Chief Justice has already made an order as to costs with which we decline to interfere.

The appeal is allowed to the extent that the award of \$43,120.00 will be set aside and an award of \$280,000.00 will be substituted therefor. The Chief Justice's order "that the defendant is liable to pay the costs incurred by the Plaintiff in enforcing its rights under the Workmen's Compensation Policy issued by the Defendant to be taxed if not agreed will be varied to an order as indicated under (i) and (iii) above. The appellant's costs of this appeal are to be taxed if not agreed and paid by the respondent.

**Mortimer, P.**

**Davies, J.A.**

**Leonard, J.A.**