MALAYSIAN MOTOR INSURANCE POOL

v.

TIRUMENIYAR SINGARA VELOO

Federal Court, Putrajaya
Ahmad Maarop CJM, Zainun Ali, Ramly Ali, Azahar Mohamed, Alizatul Khair Osman Khairuddin FCJJ
[Civil Appeal No: 02(f)-121-10-2017(W)]
15 October 2019

Insurance: *Motor insurance — Indemnification — Plaintiff claimed it was not liable to indemnify 1st defendant under insurance policy due to exception in policy and provisions of Road Transport Act 1987 — Whether court should depart from common law position affirmed in United Oriental Assurance Sdn Bhd v. Lim Eng Yew — Whether plaintiff was statutorily and contractually liable to indemnify 1st defendant — Whether 3rd defendant could not be indemnified as he was amenable to workmen's compensation — Whether common law liability existed — Road Transport Act 1987, ss 90(1), 91(1)*

This was an appeal by the insurer, Malaysian Motor Insurance Pool ('the plaintiff') for the determination of whether it was liable to indemnify the 1st defendant in the light of the exceptions under an Insurance Policy ('the policy') read together with the statutory exceptions under the Road Transport Act 1987 ('RTA'). In this case, the 3rd defendant ('the respondent') claimed that when he was performing his duty as a lorry attendant, the 1st defendant negligently reversed the lorry insured by the plaintiff into him resulting in his injuries. The plaintiff subsequently filed an action for a declaration that the scope of the policy issued by the plaintiff did not cover the incident as asserted by the 3rd defendant, since the 3rd defendant was an employee of the 2nd defendant at the time of the incident and hence fell under the statutory exception under s 91(1) of the RTA.

Held (dismissing the appeal with costs):

(1) In the present case, the plaintiff urged the court to depart from the common law position that the policy created two contracts – one in respect of the policyholder (the insured) and another in respect of the authorised driver, on the basis of the Federal Court's decision in *Saw Poh Wah v. Ooi Kean Heng & Anor (Asia Insurance Co Ltd As Third Party)*. However, the said Federal Court's decision was delivered without any written judgment. Without a written judgment, the Federal Court's reasons were purely speculative, and could not be regarded as authoritative and/or binding. Even going by the Editorial Note, the Federal Court in the said case reversed the High Court on the basis that there was no cross-appeal against the finding that the relevant person was not a passenger. That with respect had nothing to do with exception under the policy discussed in this case. (paras 80-83)

(2) In the circumstances of this case, there was no reason to depart from the common law position as affirmed by the Supreme Court in *United Oriental Assurance Sdn Bhd v. Lim Eng Yew*. The changes to the RTA which the plaintiff contended rendered the common law cases inapplicable or non-binding were not material to the issue at hand as ss 90(1) and 91(1) of the RTA remained unaffected. (para 93)

(3) Applying the common law and the language of the relevant provision in the policy meant that the name of the policyholder was simply removed and substituted with the name of the authorised driver. In that sense, it was akin to rewriting the contract by removing all references to the 2nd defendant as the contracting party and replacing it with references to the 1st defendant. If that was the case, the exceptions stipulated in as much as they apply to the 2nd defendant, would also apply to the 1st defendant. Further, as there was no other exception in the policy that was applicable, it necessarily followed that the plaintiff was liable statutorily (under the RTA) and contractually (under the policy) to indemnify the 1st defendant. (paras 95-96)

(4) There was no merit in the plaintiff's strict interpretation of the policy to exclude liability simply because the 3rd defendant was amenable to workmen's compensation. In the context of this case, workmen's compensation was open to the 3rd defendant as against his employer (the 2nd defendant) in as much as indemnity was available to him *vis-à-vis* the 1st defendant. (para 106)

(5) There was no such thing as a 'common law liability' in this context. The policy and its exceptions were both modelled after the RTA. All liability was therefore contractual and read subject to the statutory provisions in the RTA. The common law was applicable insofar as it had interpreted those provisions of the RTA and to the extent that the policy herein was substantially the same as those in the said English, Singaporean, and Malaysian decisions. This was not to say that there exists some sort of common law 'liability'. (para 108)

Case(s) referred to:

AmGeneral Insurance Berhad v. Iskandar Mohd Nuli [2016] 2 MLRA 94 (distd)

Chan Kum Fook & Ors v. Welfare Insurance Co Ltd [1975] 1 MLRH 511 (refd)

China Insurance Co Ltd v. Teh Lain Lee & Anor [1976] 1 MLRA 672 (refd)

Digby v. General Accident Fire and Life Assurance Corporation Ltd [1942] 2 All ER 319 (folld)

Inshan Bacchus And Another v. Ali Khan And Others [1982] 34 WIR 135 (refd)

Izzard v. Universal Co Ltd [1937] 3 All ER 79 (refd)

Jones v. Birch Brothers, Ltd [1933] 2 KB 597 (refd)

Lim Eng Yew v. United Oriental Assurance Sdn Bhd [1989] 2 MLRH 41 (refd)

Manap Bin Mat v. General Accident Fire & Life Assurance Corporation Ltd [1971] 1 MLRA 786 (refd)

Richards v. Cox [1942] 2 All ER 624 (folld)

Saw Poh Wah v. Ooi Kean Heng & Anor (Asia Insurance Co Ltd As Third Party) [1985] 2 MLJ 387; [1982] 1 MLRH 566 (not folld)

Tan Keng Hong & Anor v. New India Assurance Co Ltd [1977] 1 MLRA 102 (refd)

Tattersall v. Drysdale [1935] 2 KB 174 (refd)

United Oriental Assurance Sdn Bhd v. Lim Eng Yew [1991] 1 MLRA 258 (folld)

Vandepitte v. Preferred Accident Insurance Corporation of New York [1933] AC 70 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s 78(1)

Road Transport Act 1987, ss 2, 90(1), 91(1)(aa), (bb), (cc), (3), 96(3)

Road Traffic Act 1930 [UK], ss 35, 36(1)(b)(ii)

Other(s) referred to:

MacGillivray on Insurance Law, 12th edn, pp 317-318

Counsel:

For the appellant: Reuben Netto (JS Naicker, G Logananth, Silva Velu & Rosmaria Daud with him); M/s Naicker & Associates

For the respondent: M Menon (Manoharan Veerasamy & Prakash Ramadas with him); M/s Mano Veera & Co

[For the Court of Appeal, please refer to Tirumeniyar Singara Veloo v. Malaysian Motor Insurance Pool [2018] 2 MLRA 169]

JUDGMENT

Alizatul Khair Osman Khairuddin FCJ:

Introduction

[1] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Zainun Ali and Justice Ramly Hj Ali have since retired. This is the unanimous decision of the remaining judges of the panel.

[2] For ease of reference, we shall refer to parties as they were referred to in the High Court. This is an appeal by the insurer Malaysian Motor Insurance Pool, the plaintiff in the suit below pursuant to leave granted by this court on 6 October 2017.

[3] The sole question allowed by this court is as follows:

> "Where a contract of insurance reproduces or substantially incorporates the exclusion of liability provided for under clauses (aa), (bb) and (cc) of the proviso to s 91(1), RTA, are those exclusions to be interpreted as applying equally to authorized drivers without the need for express exclusion of such liability."

Backgroud Facts

[4] The facts which led to the above question of law are for the most part undisputed and are as follows. The plaintiff is the insurer of motor lorry bearing Registration No: ACN 6836 from 26 January 2015 to 25 January 2016 under a commercial insurance policy no: 235-012-15-000846 ("the Insurance Policy"). The 1st defendant is the authorised driver of the said motor lorry. The 2nd defendant is the owner of the motor lorry and the insured. The 3rd defendant was, at the material time of the accident, travelling in the said lorry which was driven by the 1st defendant.

[5] The 3rd defendant (the respondent in this appeal) claimed that when he was performing his duty as a lorry attendant, the 1st defendant negligently reversed into him resulting in his injuries.

[6] The plaintiff appointed an Adjuster who, upon completing his investigations, discovered that the 3rd defendant was at the material time an employee of and was paid by the 2nd defendant.

[7] The 3rd defendant sued the 1st and 2nd defendants for negligence before the Sessions Court at Sungai Petani, Kedah, vide Suit No: A53 KJ-181-08-2005 (Suit 181).

(Note: Suit 181 was discontinued by the 3rd defendant on 1 March 2016 due to a technical error. It was subsequently refiled as Suit No: A53 KJ-38-02-2017).

[8] This then prompted the plaintiff to file an Originating Summons at the High Court of Malaya at Kuala Lumpur under s 96(3) of the Road Transport Act 1987 ("RTA") seeking the following relief:

> "1. **Deklarasi bahawa Polisi Insurans yang dikeluarkan oleh pihak plaintif dengan nombor 235-012-15-000846 terhadap pihak defendan kedua diisytiharkan dibatalkan dan tidak berkuatkuasa** dan plaintif berhak untuk mengelakkan tanggungan bersangkutan sebarang tuntutan yang timbul daripada kemalangan jalanraya yang dikatakan berlaku pada 25 March 2015 di sebatang lorong yang tidak dinamakan di belakang Jalan Teratai, Bandar Amanjaya, Sungai Petani, Kedah yang melibatkan defendan ketiga dan m/lori No: ACN6836 yang dimiliki oleh pihak defendan kedua dan dipandu oleh pihak defendan pertama.
>
> 2. Ganti rugi am;
>
> 3. Sebarang perintah atau relif lanjut yang difikirkan patut, sesuai dan adil oleh Mahkamah yang Mulia ini dalam kedaan ini."
>
> [Emphasis Added]

[9] As stated by the learned High Court Judge in her judgment, the plaintiff's claim in a nutshell was for a declaration that the scope of the Insurance Policy issued by the plaintiff does not cover the incident as asserted by the

3rd defendant. This was on the ground that the 3rd defendant falls within the exception provided by the law where the plaintiff, as the insurer, is entitled to avoid liability under the Insurance Policy and has no obligation to pay the 3rd defendant's claim since the 3rd defendant is an employee of the 2nd defendant.

[10] The High Court allowed Prayer 1 only to the extent of the portion highlighted above but dismissed the rest of the prayers. The Court of Appeal reversed the High Court's decision and set aside the order of the High Court. Pursuant to the Court of Appeal's decision on 14 April 2017, consent judgment was recorded between the 1st, 2nd and 3rd defendants and the plaintiff at the Sg Petani Sessions Court on 22 August 2017 whereby damages was awarded to the 3rd defendant.

The Issue

[11] Premised on the facts aforementioned, the issue before this court in relation to the question of law posed is whether the plaintiff is liable to indemnify the 1st defendant in the light of the exceptions under the Insurance Policy read together with the statutory exceptions under the RTA.

The Insurance Policy

[12] Before proceeding to discuss the judgments of the courts below, it would be pertinent to reproduce the material portions of the Insurance Policy as follows:

> "SECTION II – LIABILITY TO THIRD PARTIES
>
> 1. The Pool will subject to the Limits of Liability indemnify the Insured in the event of accident caused or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of:
>
> (a) death of or bodily injury to any person
>
> (b) damage to property
>
> 2. In terms of and subject to the limitations of and for the purposes of this Section the Pool will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver:
>
> (i) shall as though he were the Insured observe and fulfil and be subject to the Terms of this Policy insofar as they can apply
>
> (ii) is not entitled to Indemnity under any other policy…
>
> EXCEPTIONS TO SECTION II
>
> The Pool shall not be liable in respect of:
>
> …

(ii) death of or **bodily injury to any person in the employment of the Insured arising out of and in the course of such employment**

(iii) death of or bodily injury to any person (**other than a passenger carried** by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises…"

[Emphasis Added]

The Salient Provisions Of The RTA

[13] The exceptions in the Insurance Policy must be read subject to the RTA because generally speaking, the statute expressly requires that all users of motor vehicles be insured against third party risks. This is required by s 90(1) of the RTA which reads as follows:

"90. (1) Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part."

[14] Section 91(1) then goes on to prescribe what must be included in such policies and what may be statutorily excluded from the requirements of s 90(1), in terms of providing coverage for third party risks. For convenience, the material portions of that subsection (the general rule and the exceptions) read as follows:

"91. (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried

in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability."

Only Exception (ii) Of The Insurance Policy Is Relevant

[15] Having reproduced the exceptions above, it is apparent to us that the exception which falls for consideration on the facts of this case is s 91(1)(aa) of the RTA. Thus the present case is concerned only with Exception (ii) of the Insurance Policy (*ante*) which corresponds with the said s 91(1)(aa).

[16] Based on the facts of the case and the finding of the learned judge (which finding was accepted by the Court of Appeal), it is not disputed that the 3rd defendant was an employee of the 2nd defendant. The case put at the High Court and the Court of Appeal was not that the 3rd defendant was travelling in the vehicle as a passenger by reason of or in pursuance of a contract of employment. Consequently, Exception (iii) (or to be more precise, the exception to Exception (iii)) and s 91(1)(bb) are not relevant to the facts of this case. It follows therefore that the exception falling for consideration in this appeal is only Exception (ii). We will illustrate in due course the distinction between the two exceptions.

[17] With that, we turn to examine the decisions of the courts below.

The Decision Of The High Court

[18] The High Court after examining the statutory exceptions to s 91 of the RTA and the Exceptions under section II of the Insurance Policy made the following observations.

"It is observed that Section II, and exception (ii) to Section II of the Policy are consistent with the exception in s 91(1) proviso (aa) of the RTA. If it is proved that the 3rd defendant is an employee of the insured/2nd defendant in the course of such employment, then the plaintiff is not liable to pay for the 3rd defendant's injury.

Applying s 91(1)(aa) to the present case, the plaintiff, as the insurer, is not required under the Policy to cover any liability in respect of bodily injury sustained by the 3rd defendant arising out of and in the course of his employment."

[19] The learned judge went on to state as follows:

"The 3rd defendant contends that he does not fall within the exception to Section II of the Policy which excludes the Pool/insurer from liability if there is bodily injury to any person (ie the 3rd defendant) in the employment of the insured/2nd defendant in the accident arising out of and in the course of such employment.

The 3rd defendant further contends that he is not an employee of the authorized driver. Hence, the 3rd defendant does not fall within proviso (aa)

> to s 91(1) of the RTA. Instead, the 3rd defendant is a mere "passenger" and falls within proviso (bb) to s 91(1) of the same Act. Therefore, the plaintiff is liable for the 3rd defendant's bodily injury arising out of the use of the motor vehicle or lorry as a passenger."

[20] Reading and applying the statutory exceptions to s 91 of the RTA and the exception in Section II of the Insurance Policy together with the definition of "passenger" under s 2 of the RTA, the learned judge concluded, based on the facts of the case that:

> "… the 3rd defendant is the 2nd defendant's employee, and not mere passenger. The 3rd defendant therefore falls with the exception in proviso (aa) to s 91(1) of the RTA."

[21] The High Court in arriving at its conclusion, considered itself bound by the decision of the Federal Court in *Saw Poh Wah v. Ooi Kean Hang & Anor (Asia Insurance Co Ltd As Third Party)* [1985] 2 MLJ 387; [1982] 1 MLRH 566 ('*Saw*'). This decision of the Federal Court is discussed in greater detail below.

[22] In short, the High Court took the view that because the 3rd defendant was not just a mere passenger but an employee of the Insured (the 2nd defendant) at the time of the accident, he was not entitled to coverage under the Insurance Policy.

The Decision Of The Court Of Appeal

[23] The Court of Appeal reversed the High Court principally on three grounds:

(i) The insurance policy creates two contracts – one in respect of the policyholder (the insured) and another in respect of the Authorised Driver. The former covers the mandatory requirements under the RTA and the other covers the Authorised Driver's "common law liability". (See p 50, Record of Appeal, Jld 1). Reference was made to the case of *Manap Bin Mat v. General Accident Fire & Life Assurance Corporation Ltd* [1971] 1 MLRA 786 and the case of *Lim Eng Yew v. United Oriental Assurance Sdn Bhd* [1989] 2 MLRH 41 in support of this proposition.

(ii) The decision of the Federal Court in *Saw* was delivered without any written grounds. The High Court ought not to have relied on it because there were other decisions applicable as well as opinions by learned authors on the subject.

(iii) The RTA is 'to some extent' a social legislation attempting to provide 'some' statutory protection to road victims. The High Court Judge erred in construing the RTA in favour of the plaintiff without considering the social aim of the same.

Parties' Submissions

[24] The plaintiff's submission may be summarised as follows:

(a) the 3rd defendant was an employee of the insured (the 1st defendant) at the material time. He was therefore excluded from claiming by virtue of Exception (ii) of the Exceptions to Section II of the Insurance Policy;

(b) the common law cases cannot be considered as binding precedents in view of the changes made to the RTA 1987 and the availability of other forms of social legislation to compensate the 3rd defendant; and

(c) the Federal Court's decision in *Saw* is "on all fours" with the case before us.

[25] The essence of the plaintiff's plea before this court is for the decision of the Federal Court in *Saw* to be affirmed and for us to thereby depart from the common law position.

[26] The 3rd defendant, on the other hand contended that:

(a) the law is settled as regards:

(i) Proviso (aa) and (bb) of s 91(1) the RTA; and

(ii) Exception (ii) of the Exceptions to Section II of the Insurance Policy.

(b) the plaintiff is seeking this court to rewrite the RTA by suggesting it was the intention of the legislature that the proviso (aa) of s 91(1) of the RTA be applicable to an authorised driver.

In short, the gist of the 3rd defendant's argument is for the court to maintain the common law position.

[27] In the light of the Court of Appeal's judgment (*supra*), and the plaintiff's call for us to depart from the common law, we begin by examining the common law position on this issue.

Our Decision

The Position Of The English Common Law

[28] Before examining the English authorities on this issue, we think it necessary to set out the relevant provisions of the UK Road Traffic Act 1930, which was the law in force at the time these cases were decided.

"The Road Traffic Act 1930 Part II states the following:

PROVISION AGAINST THIRD-PARTY RISKS ARISING OUT OF THE USE OF MOROT VEHICLES.

Users of Motor Vehicles To Be Insured Against Third-Party Risks.

35. (1) Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.

(2) …

(3) …

(4) …

(5) …

(6) …

Requirements In Respect Of Policies

36. (1) In order to comply with requirements of this Part of this Act, a policy of insurance must be a policy which –

(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act;

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road:

PROVIDED that such a policy shall not be required to cover

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment, or

(ii) EXCEPT in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) any contractual liability."

As can be seen from the above these provisions are in *pari materia* with ss 90(1) and 91(1) of our RTA.

[29] Although the UK 1930 Act (subsequently amended by the Road Traffic Act 1934 which amendments are not relevant to the present case) was repealed by the UK Road Traffic Act 1960, no material changes were made to the repealed Acts.

[30] The seminal authority here is *Richards v. Cox* [1942] 2 All ER 624 ('*Richards*'). An employee of the Insured who rode with the authorised driver was injured in an accident resulting from the negligent driving of the said driver. The employee sought legal advice as to whether she could claim coverage under the relevant insurance policy. The law firm said she was not covered. She then received advice to the contrary and sued the law firm in negligence.

[31] The English Court of Appeal therefore had to construe the insurance policy to determine whether the advice given to the employee, ie that she was not covered, was indeed correct. In three separate judgments, the Court of Appeal was of the view that the employee in this case was covered and a *fortiori* the first legal advice she received was erroneous. For the purpose of this case, it must be noted that the insurance policy in *Richards* is word for word the same as the Insurance Policy herein.

[32] Now, because the plaintiff urges us to depart from the common law, the arguments necessarily merit careful consideration. We think it pertinent to reproduce *in extenso* the material portions of what each of the English Court of Appeal Judges held in *Richards*:

[33] At p 628, Goddard LJ held:

> "**We are not concerned with what they intended. We are concerned with what they said they would do in the terms of the policy, and in the terms of the policy I think they have said that they will treat an authorised driver as though he were the insured, making him at the same time subject to the conditions of the policy**. If he is to be treated as the insured, I can only read that as meaning that instead of the name of Dickersons appearing in the policy, when a claim is made against the authorised driver, the name of Robson will be substituted for the name of Dickersons."
>
> [Emphasis Added]

[34] Mackinnon LJ held at pp 627-628:

> "If a claim were made in Robson's name against the insurance company to recover an indemnity for the damages he had been ordered to pay Miss Richards, is there anything in the terms and exceptions and conditions of this policy which are so made to apply to Robson that would bar that claim? It is suggested that there is something in the earlier part. Counsel for the appellant chiefly relies upon the fact that the company are not liable in respect of bodily injury to any person in the employment of the insured.
>
> He says Miss Richards was in the employment of Dickersons and, therefore, Robson's claim in respect of liability to her must be barred; but I do not

agree with that. **When you are considering Robson's rights to recover under this policy, he is to be treated as though he were the insured and he is to be subject to the terms and conditions of the policy, and a claim made by him in respect of a liability to pay damages to Miss Richards would only be barred under that clause if Miss Richards was in the employment of Robson. The fact that she is in the employment of Dickersons, who are not making the claim, is quite irrelevant and immaterial.**"

[Emphasis Added]

[35] Lastly but most importantly, are the words of Scott LJ (at pp 626-627):

"The whole appeal before us turned on the wording of the policy. It is more or less in accord with the common form of motor accident policies since the Road Traffic Acts were passed, and contains a great number of different clauses. It begins with the ordinary form of recital referring to the insured as designated in the schedule, carrying on the business there described, and so on. Under s II of the policy, headed "Liability to third parties", there is this provision in para (1):

'The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of: Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto.'

Then certain provisoes are added:

'Provided always that the company shall not be liable in respect of ... (B) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment. (C) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises.'

Then follows a further para (2), the important provision in this case. It says this:

'In terms of and subject to the limitations of and for the purposes of this section the company will treat as though he were the insured person any person who is driving such vehicle on the insured's order or with his permission provided (A) that such person is not entitled to indemnity under any other policy. (B) that such person shall as though he were the insured observe fulfil and be subject to the terms exceptions and conditions of this policy **in so far as they can apply**.'

The last seven words [the ones underlined above] are necessarily added, in my opinion, because under this para (2) a person other than the primary insured is treated as also covered by the policy; and it is obvious that various provisions in the policy applicable to the primary insured, Messrs Dickerson Brothers, will not apply to the case of such other person. **In my view, the words "in so far as they can apply" mean that such of the terms, conditions and exceptions of Messrs Dickerson's insurance as are reasonably**

applicable to the insurance of their driver's liability are incorporated in the latter's cover; but, in so far as they are not so applicable, they are to be disregarded.

I think that the provision so made is quite clear, and a very natural provision to be made, having regard to the terms of the Road Traffic Act 1930, s 36; and I can see no escape from the conclusion that the liability of Robson was covered by the insurance, so that, if an action had been brought against him, the plaintiff in this case could have recovered the payment of his liability ultimately through the insurance company.

Counsel for the appellant has argued very strenuously that the provisos to the first paragraph of s II, which I have already read, shut out the interpretation of the second paragraph which I have just read. My first answer is that those provisions seem to me to be addressed to the case of Dickerson Brothers incurring the liability and to the insurance of them for their own protection under the statute; but, even if you read them as conceivably in some circumstances applicable to the case of the insurance of a driver authorised by them to drive the insured car, it does not seem to me that they are sufficient to affect the primary object of the quite separate para (2), which is the insurance of the driver.

The above view of the entirely separate character of the additional cover is emphasised, I think, by the provisions attached to it. The first one is: "That such person" --such other person, that is -- "is not entitled to indemnity under any other policy". The second one is: "That such person shall as though he were the insured"--ie, the primary insured--"observe and fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply". Then the third one is: "That such person holds a licence", and so on. **Section II(2) is, in my view, a definite insurance of the driver against third party liability, and it should have been obvious to the solicitor's managing clerk that no question as to the relationship of the person injured to the driver, or the issue of common employment, could arise there.**

The comparable provision in s II(1) where the primary insurance is of the employers is wholly out of place in para (2); I cannot see how the provision of para (1), relating to the insurance of the employer, could properly be introduced into para (2) relating to the insurance of his driver. **There are no words, in my view, to justify that incorporation in para (2)**."

[Emphasis Added]

[36] Principally, the English Court of Appeal was of the view that based on the wording of the policy (which is almost identical to the wording in the instant Insurance Policy) there were two separate contracts of coverage. One in respect of the policyholder and another in respect of the authorised driver. Since the injured person was not an employee of the authorised driver, the injured person was therefore not excluded from coverage *vis-à-vis* the authorised driver.

[37] The decision in *Richards* was based largely on a prior decision of the House of Lords in *Digby v. General Accident Fire and Life Assurance Corporation Ltd* [1942] 2 All ER 319 ('*Digby*'). The decision in *Digby* was arrived at with a narrow majority of 3-2.

[38] In *Digby*, the chauffeur claimed indemnity in his capacity as an authorised driver. The peculiar facts of this case was that the "third-party" injured as a result of the chauffeur's negligent driving was his own employer who also happened to be the policyholder.

[39] The question for the House of Lords was whether the policyholder could be treated as a "third-party" such that the chauffeur could seek indemnity against his employer's claim. The reasoning of the majority (which later buttressed the reasoning in *Richards*) can be gleaned from the various pronouncements of the Lords in the majority.

[40] Per Lord Atkin, as read out by Lord Wright (at p 327):

> "**Personally, I am fortified in this opinion by consideration of the Road Traffic Act 1930. It is under the provisions of that Act that the appellant himself can sue the insurers, and I agree with MacKinnon LJ, that this part of the policy is "obviously based upon the requirements of s 35 of the Act", and I would add s 36. The penal provisions of s 35 prohibit any person using a motor vehicle on the road** ...
>
> The requirements are expressed in s 36. The policy must be one which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle on a road. It will be noticed that there is no reference to policyholder or insured, but merely to "such person, persons or classes of persons as may be specified in the policy" and by subsection (4) a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.
>
> **I have no doubt that the insurers intended to issue and the policyholder to receive a policy which in respect of third-party risks complied with the requirements of the Act; and that they intended, therefore, that in terms of s 36 the persons specified should be insured in respect of any liability in respect of the death or bodily injury "to any person".** Otherwise the user of the vehicle would not be protected by the policy from the penal provisions of s 35.
>
> **I cannot help thinking that the judgments of those who think otherwise are unconsciously affected by the unusual and perhaps unexpected spectacle of master suing chauffeur and recovering heavy damages against him, no doubt with a view of eventual recovery from the insurance company.** This kind of insurance, however, is not limited to the rich owners of 37 hp Buicks. **It is given to the poor owner of a small runabout who may lend his car for**

a week-end or for days to an equally impoverished friend. If during that period the borrower were to run down and injure the owner it would be in no way strange that the driver should be indemnified from his liability and the injured owner should receive the benefit of the indemnity. Such a situation as it appears to me is demanded by the Act."

[Emphasis Added]

[41] Per Lord Wright (at pp 329-330):

"**The policy must be construed according to its terms, but there can be no doubt that the object of cl 3 was to comply with the Road Traffic Act 1930, s 35, which makes it a criminal offence for any person to use or to cause or permit any other person to use a motor vehicle on the road unless there is in force in relation to the user or that person or that other person a policy or security against third-party risks complying with the requirements of the Act, as set out in s 36, including, among other things, an insurance against third-party risks.** The policy might on its true construction fail to comply with the statute, but *prima facie* at least it may be assumed that it is intended to comply with the law. **It may go beyond what the law requires, thus the policy in question includes passengers, a provision which is not necessary under s 36(1).** Under this contract Miss Thompson is a passenger and the appellant is a person driving on her order. At first sight it might seem unusual that an employer should obtain judgment against her chauffeur; but an employee is generally as much liable to his employer if he causes his employer damage by negligence as is anyone else who does so. **Presumably the chauffeur has not means to satisfy the judgment against him at the suit of Miss Thompson; but the judgment is certainly a burden of which he would desire to be relieved by third-party insurance.** Nor is the policy to be construed as if the only possible case was that of a rich employer and a chauffeur not largely endowed with the word's goods. The person driving might be a wealthy friend and the policyholder for whom he was driving might be of moderate means, or the person driving might be, and would generally perhaps be, a friend or member of the household. **In any case, any person driving another's car at that other's request would desire and expect to be covered by insurance. It was to meet this desire and expectation that the extended insurance was introduced and was made available to such drivers by s 36(4), which imposes on the insurer the extended liability in favour of other parties if the policy purports to cover them, as this policy does. No doubt also the legislature intended to secure that any person driving a car should be provided by insurance with the means of compensating anyone who is injured by his negligence.**

I cannot find in the provisions of the policy anything to qualify these conclusions which I have stated. In effect Miss Thompson became *pro hac vice* the third party under the policy. The resulting position is, I think, in no way different from what it would have been if the appellant had been insured against third-party risks by a **separate policy issued to himself**.

The judgment of Lord Robertson in *General Accident Fire & Life Assurance Corpn v. Watson*, which I have considered in the copy supplied to your Lordships, depends, I think, on his view that there is only one contract, and

hence that the policyholder cannot be divested of her character of insured or become a third party. I read, however, as I have explained, s 3 **as creating a new contract in the particular contingency, supplemented as it is by s 36(4) of the Act, which is for the purpose of avoiding the difficulties of constituting someone a person insured under the policy other than the policyholder or the person who actually makes the contract**."

[Emphasis Added]

[42] Per Lord Porter (at pp 330 and 332):

"Originally different views prevailed in different tribunals as to the right of the authorised driver to recover under such a policy. Roche J, in *Williams v. Baltic Insurance Assocn* held that such a driver was entitled to take advantage of the protection given by it, whereas the Privy Council in *Vandepitte v. Preferred Accident Insurance Corpn of New York* held that in general he was not because he was not a party to the contract. **This difficulty has now been resolved by the Road Traffic Act 1930, s 36(1)(b), an Act which not only makes it a criminal offence for anyone to drive a car on the road unless covered against third-party liability by a policy of insurance, but also, by the section referred to, enables an authorised driver to rely upon the protection afforded by the terms of the policy when extended to cover him, though he did not personally take any part in effecting the contract of insurance. No question of this kind, however, arises in the present case since the respondents expressly admitted the appellant's right to sue, but not his right to recover** …

The majority of the Court of Appeal seem to have felt that to allow the appellant to recover would in some way recompense the employer twice over. It is, of course, true that she might in an appropriate case get the compensations provided by s 3 of the policy and also damages in respect of the same injury; but this result is not unusual. The insurance provided by s 3 is accident insurance and could not normally diminish the damages which she would get against a negligent driver. **If the driver of another car were responsible for the accident she would get both and so she would if the authorised driver of her own car had enough money to pay**. In truth her position is not material and does not come in question. **The authorised driver, not the policyholder, is the claimant upon the policy, and the fact, if it be a fact, that in a particular case he cannot pay unless he is indemnified is immaterial to the matter in issue.** The question is not whether as a result of this action she will receive compensation or even more than compensation for her injuries, it is whether the appellant is entitled to be indemnified against a claim legally enforceable against him. **In a policy such as that in question there is not, as I conceive it, one contract of insurance only. There is one with the policyholder and one also with each person driving on his order or with his permission. All these contracts are contained in one document, *viz*, the insurance policy, but nevertheless they do not cover the same persons or in the case of authorised drivers insure against the whole of the risks against which the policyholder is protected.**"

[Emphasis Added]

[43] Taking all the emphasised portions above together, it would appear that the majority of the House of Lords construed the policy to include the insured as a third-party based primarily on social policy consideration. Their Lordships were of the view that the insurers "intended" to include the driver as part of their coverage because:

(i) it was so required as part of the mandatory coverage scheme under s 35 of the UK Road Traffic Act 1930; and

(ii) in light of this aim, it was meant to protect the impoverished driver from third-party risks.

[44] The net result of their Lordships' construction indicated that they considered the relevant clause in the insurance policy in that case as creating a separate contract between the authorised driver and the Insurer. In fact, Lord Wright opined that there was as between the authorised driver and the Insurer a 'new contract'. And to Lord Porter, these separate contracts are simply manifested in that one document called the insurance policy.

The Malaysian Position

[45] In our view, the 'two contract approach' adopted by the Court of Appeal in *Richards (supra)* and the House of Lords in *Digby (supra)* is correct in that there may be two separate enforceable coverages in respect of the policyholder on the one hand, and the authorised driver on the other, though the overall coverage must still be subject to the limitations and exceptions contained in the policy.

[46] We think the starting point in addressing why the 'two contract approach' ought to be considered correct is based on s 91(3) of the RTA which reads:

> "(3) Notwithstanding anything in any written law, a person issuing a policy of insurance under this section shall be liable to indemnify the person **or class of persons specified in the policy** in respect of any liability which the policy purports to cover in the case of that person or class of persons."
>
> [Emphasis Added]

[47] The effect of the above provision is to bypass the requirement of privity of contract. Before the existence of such a provision, such an arrangement *vis-à-vis* an authorised driver would have been unenforceable for want of privity of contract. (See: *Vandepitte v. Preferred Accident Insurance Corporation of New York* [1933] AC 70, at pp 81-82.) However, after the introduction of the above provision, an authorised driver gained the right to claim indemnity notwithstanding that he has paid no consideration towards the policy. See: *Tattersall v. Drysdale* [1935] 2 KB 174, at p 182. That is the general rule.

[48] We now come to the specific question on motor insurance contracts. The well known Malaysian authority on this matter is Syed Agil Barakbah J's (as he then was) decision in *Saw (supra)*. The facts of that case were strikingly

similar to the one before us. The plaintiff in that case suffered injury as a result of the negligent driving of the authorised driver. Both the plaintiff and the said authorised driver were employees of the 2nd defendant. The question before the High Court was whether the third-party insurer was liable to cover the losses suffered by the plaintiff. The wording of the insurance policy in that case was the same as the ones in this case.

[49] Syed Agil Barakbah J held that there were two separate coverages. While the coverage as against the employer was exempted (the plaintiff being an employee), the third party was still liable to afford coverage to the authorised driver. This was because the plaintiff was not an employee of the authorised driver.

[50] In arriving at his decision, the learned judge relied on *Richards* and two judgments of the Courts of Singapore. One is the decision of Tan Ah Tah J in *Chan Kum Fook & Ors v. Welfare Insurance Co Ltd* [1975] 1 MLRH 511 ('*Chan Kum Fook*'). The other is that of the Singapore Court of Appeal in *China Insurance Co Ltd v. Teh Lain Lee & Anor* [1976] 1 MLRA 672 ('*China Insurance*'). Both Singapore cases followed the decision in *Richards*.

[51] The third party insurer in *Saw* appealed to the Federal Court which reversed the High Court without delivering any written grounds. We will comment on the decision of the Federal Court in due course.

[52] For completeness, we wish to highlight the Singapore decisions (*supra*). The first is *Chan Kum Fook,* the fact pattern of which is substantively the same as the appeal before us. In that case, the 1st and 2nd plaintiffs were the employees of the insured (the company). They were injured as a result of the negligence of one Yong Chan Seng – the authorised driver and also an employee of the company. The insurance policy in that case was much like the one here. Its terms excluded any indemnity to employers. But, it also created a separate contract indemnifying the authorised driver. The main issue before Tan Ah Tah J was whether the insured was liable to indemnify the 1st and 2nd plaintiffs *vis-à-vis* the authorised driver. In other words, was the 'employee' exception applicable as between the authorised driver and the 1st and 2nd plaintiffs? His Lordship on the simple application of *Richards*, held that the insurer was liable to indemnify. His Lordship's view at p 512 reads thus:

> "There is no doubt that Yong Chan Seng was the Authorised Driver of the motor van … The 1st and 2nd plaintiffs were clearly employees of the Company and not of Yong Chan Seng. As to the meaning of the phrase "the Terms of this Policy" it is relevant to refer to the words "Now this Policy Witnesseth That in respect of events occurring during the Period of Insurance and subject to the terms, exceptions and conditions contained herein or endorsed hereon (hereinafter collectively referred to as the Terms of this Policy)."

> It is clearly stated in clause 2 in Section II of the policy that the company, ie the Insurance Company will indemnify any Authorised Driver who is driving the motor vehicle provided that certain conditions are observed. In my opinion all the relevant conditions have been compiled with. **Judgment having been entered against Yong Chan Seng in the consolidated action, the defendants must now indemnify him against the claims of the three plaintiffs. The facts of this case bear some resemblance to the facts in *Richards v. Cox* [1942] 2 All ER 624**."
>
> [Emphasis Added]

[53] The other case of *China Insurance* is also apposite as it concerned a similar fact pattern. The policyholder was the employer of both the authorised driver and the other person riding in the motor vehicle. The said other person died in an accident as a result of the authorised driver's negligence. The contract of insurance was again worded along similar lines. The Court of Appeal, on the authority of *Richards* affirmed the decision of the Singapore High Court to find the insurers liable to indemnify the authorised driver as the said other person was not his employee. As succinctly put by Wee Chong Jin CJ at pp 673 & 675:

> "We are unable to accept this contention and are of the opinion that the appeal should be dismissed. The same point was raised and decided by the English Court of Appeal in *Richards v. Cox* [1942] 2 All ER 624…
>
> Instead of the words "the company will treat as though he were the insured person any person" in the English policy, the present policy contains the words "the company will indemnify any authorised driver". In our opinion the reasoning of Scott L.J. from the passage we have just quoted applies with equal force to the corresponding provisions of the policy in the present case. It is to be observed that if the contention of counsel for the appellants is correct the liability of the appellants as insurers to indemnify an authorised driver, **which is separate and distinct from the liability to indemnify the insured, does not extend to cover death or injury to employees of the insured and this, in our opinion, would be contrary to the provisions of s 4 of the Motor Vehicles (Third-Party Risks and Compensation) Act**."
>
> [Emphasis Added]

[54] There is another case from Singapore worth mentioning. The judgment of the Singapore Court of Appeal illustrates how this separate contract between the authorised driver and the insurer operates on a different plane from that between the policyholder and the insurer. We are here referring to the case of *Manap Bin Mat v. General Accident Fire & Life Assurance Corporation Ltd* [1971] 1 MLRA 786 ('*Manap*').

[55] These were the facts. There was a serious motor vehicle accident between the driver of a motor car and that of a motor lorry. The driver of the motor car was killed and four others were injured. On the facts, the driver was authorised to drive the motor car and the insurance for which was held in the

name of another. The estate of the deceased driver brought an action against the insurers for indemnity. Eight months after the accident, the insurers sent a letter to the policyholder repudiating the policy citing the policyholder's breach of Condition 3 thereof. The condition required the policyholder to 'to take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in an efficient condition and that due observance and fulfilment of the terms of the policy was a condition precedent to any liability of the Corporation to make any payment under the policy'.

[56] Condition 8 of the policy required all disputes to be settled by way of arbitration. So the estate of the deceased authorised driver accordingly initiated the arbitration. At the arbitration however, the insurers raised a preliminary objection that as they had repudiated the policy as between them and the policyholder, the requisite condition was that any claim had to be brought within 12 months from the date of the repudiation cum disclaimer of liability. The arbitrators dismissed the preliminary objection.

[57] The insurers appealed against the dismissal of the preliminary objection to the High Court. Chua J reversed the arbitrators and held that they ought to have upheld the objection. The High Court Judge decided that the repudiation of the policy essentially brought the whole contract to an end and accordingly the statutory liability of the insurers which operates 'against the whole world' also ended.

[58] The Court of Appeal however did not agree with the High Court. While the Court of Appeal did not refer to *Richards*, it did in fact refer to its progenitor in the majority decision of *Digby*. We think it is worth quoting what Wee Chong Jin CJ had to say at pp 790-791:

> "We are unable to agree with the learned judge's decision. *Digby*'s case, *supra*, is settled authority that in a policy such as that in question there is not one contract of insurance only. **There is one with the policyholder and one also with each person driving on his order or with his permission** (per Lord Porter at p 332) …
>
> In the policy we are considering, there are clauses and conditions similar to the ones considered and referred to by Lord Wright, *supra*, and we are similarly of the view **that in this policy of insurance throughout the conditions "insured" has to be read, so far as they can apply beyond the insured as meaning "insured or any other person who is insured by virtue of clause 2 of section II**". On this view, condition 8 would apply to such a person, not only to the extent that such a person would be bound to submit to arbitration but also, in our opinion, the words "shall disclaim liability to the insured" has to be read as meaning "**shall disclaim liability to the insured or any other person who is insured by virtue of clause 2 of section II** …"

> On these facts we accordingly hold that the appellant's claim against the respondents under the policy is not time barred and that the arbitration proceedings must proceed. The appeal is allowed with costs."
>
> [Emphasis Added]

[59] A plain reading of the learned Chief Justice's judgment re-emphasises the point that the nature of the words used in the insurance contract effectively create (to borrow the words of Lord Wright in *Digby*) a 'new contract'. Thus, in *Manap*, the insurer's repudiation of the insurance contract between them and the policyholder was only a repudiation of only that contract. Absent any express repudiation of the 'new' and separate contract between the insurer and the authorised driver clearly meant that the estate of the said driver was well within their rights to initiate the arbitration.

[60] We think the decision in *Manap*, is a good illustration how the formation of an insurance policy even if manifested in a single document might by virtue of the language used end up creating a new and separate contract between the insurer and authorised driver. In our observation, such new contracts (speaking strictly in the context of the language of the present Insurance Policy and those similar to it) exist independently of the initial contract between the insurer and the policyholder.

[61] Another decision worth discussing is that of our Court of Appeal's in *AmGeneral Insurance Berhad v. Iskandar Mohd Nuli* [2016] 2 MLRA 94 ('*Iskandar*'). An owner by the name 'Shahrul' had taken out a motor insurance policy on his car with the plaintiff. Shahrul then lent the car to the 2nd defendant who drove it to Singapore with his wife, Zuraini. Incidentally, the 2nd defendant met with an accident and Zuraini was injured. His wife then sued her husband at the High Court of Singapore, the 2nd defendant, for the losses she suffered. The 2nd defendant raised a point of law before the Singapore High Court that he was liable to be indemnified under the policy.

[62] While the wife's suit against the 2nd defendant was pending before the High Court of Singapore, the insurer filed a separate action against the 2nd defendant at the Kuala Lumpur High Court for a declaration that the insurer was not liable to indemnify him for injuries sustained by a Malaysian passenger in Singapore on the grounds that the policy did not cover passenger liability. The Kuala Lumpur High Court dismissed the plaintiff's claim and granted the declaration. The claim was dismissed on issues not relevant to this appeal, such as estoppel on the part of the insurer.

[63] What is relevant to note was what the Court of Appeal held on the contractual obligation on part of the insurer to indemnify the authorised driver. Also to note, there was a similar clause in that policy creating what the English and Singapore Courts call a separate or 'new' contract. At para 63, Vernon Ong JCA (as he then was) observed as follows:

> "We note that under para. (1) of "Section B: Liability to Third Parties" of the policy, the plaintiff *qua* insurer **will treat the insured's authorised driver as though he is the insured**. Further, under para 1(b), it is also provided that the authorised driver is required to comply with the terms of the policy insofar as they are applicable to him."
>
> [Emphasis Added]

[64] We observe that the insurance policy contains the exact same clause as found in the Insurance Policy here. On the proper construction to be accorded to clauses of such kind, Vernon Ong JCA continued to say as follows, at paras 64-65 (affirming the principle in *Digby*):

> "It is settled law that where an authorised driver comes within the terms of the policy, the effect of the clause extending cover to an authorised driver is **to create a second contract of insurance between the plaintiff *qua* insurer and the authorised driver. It has been postulated that this second or separate contract of insurance between the insurer and the authorised driver is only a notional contract** (S Santhana Dass, The Law of Motor Insurance at p 633 (Marsden Law Book 2010)).
>
> Accordingly, we hold that the words "you, your, yourself, policy holder and insured" in the policy should be construed to be read, as far as they can apply beyond the insured, as meaning the insured or any other person who is insured under the policy. **In *Digby v. General Accident Fire and Life Assurance Corporation Ltd (supra)*, the principle was invoked by the majority judgment of the House of Lords so as to entitle an authorised driver to be indemnified against damages awarded against him**."
>
> [Emphasis Added]

[65] *Iskandar* is however distinguishable from the present case and even *Digby*. This is because Vernon Ong JCA noted that the policy in *Iskandar* expressly excluded, in general terms, third party liability to passengers and that here was a special agreement requiring the insured (and by extension the authorised driver) to repay any monies which the insurer is required to pay. His Lordship also cited several other cases with approval. His Lordship's comments on those cases is worth reproducing here to illustrate how the common law has developed thus far in Malaysia (at paras 67-69):

> "The principle enunciated in *Digby*'s case was applied in *Manap Bin Mat v. General Accident Fire & Life Assurance Corporation Ltd (supra)*…
>
> In *Dato' Othman Hashim v. KKW Auto Centre (supra)*, the High Court applied both *Digby*'s case and *Manap*'s case to hold that the authorised driver should be deemed to be an insured under the policy and that as a result the insurer would not be entitled to exercise subrogation rights under it.
>
> In *Austin v. Zurich General Accident & Liability Insurance Co Ltd (supra)*, Lord Greene MR emphasised that an authorised driver is bound by the terms of the policy and must follow the same if he is to get any benefit under the policy. There is no excuse if the authorised driver did not know the terms of the policy."

Distinction Between Exceptions (ii) And Exceptions (iii) Of Section II Of The Insurance Policy

[66] We noted earlier how the two Exceptions are different. Although the factual matrix of this case does not require an in depth analysis on the differences between the two Exceptions we nonetheless think, for completeness, that we ought to highlight these differences.

[67] It bears repetition that s 90(1) of the RTA requires all users of motor vehicles to be insured against third-party risks. The idea behind the requirement, as can be gleaned generally from *Richards* and *Digby*, is to protect road users. Insurance companies can monetarily make good, losses to third-parties which an otherwise impoverished road user cannot.

[68] Now because insurance serves a very important role in providing indemnity, s 91(1)(a) of the RTA statutorily requires that not just anyone or any insurance company may issue a policy. Only those authorised under Part IV of the RTA may provide such coverage or indemnity. Subsection (b) of that section requires that any person or class of persons be insured in respect of any liability causing death or bodily injury. The only exceptions to what may be excluded from any given policy is as contained in sub-subsections (aa), (bb) and (cc) to the proviso to s 91(1). We are here concerned with sub-subsections (aa) and (bb) (or proviso (aa) and (bb)) only because they deal with employment.

[69] A plain reading of s 91(1)(aa) indicates that that section is intended to exclude liability to employees. We will address the rationale behind this shortly. It expressly excludes death or bodily injury of a person insured by the policy whereby such death or injury arose 'out of and in the course of his employment'. This suggests that the person suffering death or bodily injury was for all intents and purposes an 'employee' of the insured.

[70] Section 91(1)(bb) however is less than clear. Reading it carefully, it exempts coverage for death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise. But the said section contains an exception to the exception. So, under (bb), coverage must still be afforded to passengers carried:

(i) for hire or reward; or

(ii) by reason of or in pursuance of a contract of employment.

[71] The stark difference between sub-subsections (aa) and (bb) is that the former deals with persons 'actually' in the course of employment of the insured policyholder while the latter deals with those persons carried by the insured in pursuance of a contract of employment but who may or may not necessarily be in the employment of the insured. It should also be noted that subsection (aa) does not at all use the word 'passenger' whereas (bb) does.

[72] Thus far all the cases we have cited in support of the interpretation of the present Insurance Policy dealt with what we consider actual employees of the policyholder. They concerned the contractual counterpart of s 91(1)(aa) in Exception (ii). *Izzard v. Universal Co Ltd* [1937] 3 All ER 79 ('*Izzard*') is an apt illustration of Exception (iii) which is considered the contractual counterpart of s 91(1)(bb).

[73] The facts in *Izzard*, though complicated, were shortly these (as modified from the headnotes). The assured owned a motor vehicle insured against commercial risks but not against passenger risks. The policy contained what is essentially Exception (iii) of the present Insurance Policy which was also a reflection of s 36(1)(b)(ii) of the English Road Traffic Act 1930. That statutory provision is materially the same as our s 91(1)(bb) of the RTA.

[74] The controversy arose in the following way. The assured agreed to do haulage work for a company of builders. The agreement was that the assured agreed to transport the builders from the workmen's homes on the condition that the assured was to be paid for each journey notwithstanding whether the workers were actually transported or not. It so happened that in one of those journeys, the assured met with an accident resulting in a workman's death. The widow was awarded damages against the assured resulting in his bankruptcy. The widow then made a claim for indemnity against the insurance company.

[75] As is apparent from the facts the workman was clearly not an employee of the policyholder. In this sense, the English equivalent of s 91(1)(aa) would not have been applicable. That is why the House of Lords turned their attention to our equivalent of s 91(1)(bb). The argument by the insurers was that based on the facts of this case, the phrase 'contract of employment' ought to be limited to instances where there was a contract of employment with the insured and not with some other party. Their Lordships logically rejected this view because doing so would render the distinction between the two Exceptions superfluous in that there would essentially be no difference between the two provisos. To quote Lord Wright (at p 83), the distinction between what is essentially our provisos (aa) and (bb) is as follows and it warrants the most careful consideration:

> "It seems clear that provisos (b) and (c) [respectively and substantively Exceptions (ii) and (iii)] of the policy are intended to reproduce and follow the statutory terms. The former of these provisos seems calculated to exclude the necessity of covering claims which would fall within the Workmen's Compensation Acts, though it is true that these Acts would not embrace every case of death or injury to an employee arising out of or in the course of the employment. For instance, there might be such cases where the employee, by reason of the amount of his wages or salary, or otherwise, was outside the provisions of the Acts. It may be that, for some reason, the legislature thought that these cases were infrequent, and might be disregarded. But the second proviso is on a different footing. The general purpose of that statutory provision is to exclude from the compulsory

> insurance passenger risk in general with the exception in the first place of passengers carried for hire or reward. This is the form of passenger risk which, as already explained, is offered in the respondent company's proposal form under the heading of passenger risk. It need not be further discussed here. But the meaning of the other head is that on which the dispute here has turned."
>
> [Emphasis Added]

[76] At the same page, Lord Wright continued to opine:

> "I cannot accept the respondent company's contention that "contract of employment" should be construed in the Act as subject to the implied limitation "with the person insured by the policy". Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as an adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (i), though I am not prepared to say that there might not be, in certain events, an employee of the assured who could claim as a passenger."
>
> [Emphasis Added]

[77] In our view, the provisions of the RTA were drafted in less than satisfactory terms. Although s 91(1) contains a clear enough rule it can give rise to confusion as it provides for an exception to an exception (in the case of proviso (bb)). It is therefore not surprising that at least one eminent judge remarked: "I have read that section several times without understanding what it means". See: *Jones v. Birch Brothers, Ltd* [1933] 2 KB 597, at p 608 (per Scrutton LJ). The UK has since repealed the equivalent to our proviso (bb) of s 91 of the RTA (proviso (ii) of s 36(1) of the UK 1930 Act).

The Decision Of The Federal Court In *Saw*

[78] Our lengthy exegesis up to this point is to highlight how the common law has come a long way in developing the jurisprudence on this subject especially where the contractual clauses falling for consideration in these cases are materially the same as those in the Insurance Policy before us. At this juncture, what remains to be discussed is the Federal Court's decision in *Saw*.

[79] Unfortunately, we do not have the benefit of a written judgment from the Federal Court. What we have by way of assistance is the Editorial Note in the reported judgment of the High Court. The note indicates that the Federal Court reversed the High Court because: 'there was no cross-appeal by the respondents against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger'. As such the learned trial judge should

have held that the exceptions to Section II of the Policy applied. Hence, the insurer was not liable to indemnify the defendants'.

[80] Our analysis of the *Saw* decision is important as the plaintiff is urging us to depart from the common law position on the basis of the said decision. Having expounded the common law in the manner it has developed since *Digby* and *Richards*, we see no reason to depart from that position.

[81] Uppermost in our minds is the fact that the Federal Court's decision in *Saw* was delivered without any written judgment. What we have is merely the Editorial Note, the relevant portion of which reads as follows:

> "The Federal Court allowed the appeal of the insurer, without delivering any written judgement …
>
> The Federal Court held that there was no cross-appeal by the respondent against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger. As such the learned trial judge should have held that the exceptions to section II of the Policy applied. Hence the insurer was not liable to indemnify the defendant."

[82] Without a written judgment, the Federal Court's reasons for allowing the appeal as alluded to in the Editorial Note, is in our view purely speculative, and cannot be regarded as authoritative and/or binding. We would therefore disagree with the plaintiff that the Court of Appeal erred and "was in breach of *stare decisis*" when it did not consider itself bound to follow *Saw*.

[83] Secondly, assuming for a moment that the Editorial Note is accurate, the Federal Court's decision appears questionable on the facts of *Saw* itself. At the outset of this judgment, we indicated that the only exception in the Insurance Policy falling for consideration in this case is Exception (ii) and not Exception (iii) (or rather the exception to Exception (iii)). The former deals with employees. The latter deals with passengers carried for hire or reward or by reason of or in pursuance of a contract of employment. As we have noted the insurance policies and the fact pattern in both this case and in *Saw* are substantially the same. A proper reading and appreciation of the judgment of the High Court in that case reveals that the case was decided on the interpretation of Exception (ii). Going by the Editorial Note, the Federal Court reversed the High Court on the basis that there was no cross-appeal against the finding that the relevant person was not a passenger. That with respect has nothing to do with Exception (ii). If what the Editorial Note states is accurate, then the Federal Court had no basis for reversing the decision of the learned High Court Judge who determined the case by following *Richards*.

[84] Thirdly, the Supreme Court in *United Oriental Assurance Sdn Bhd v. Lim Eng Yew* [1991] 1 MLRA 258, (*Lim Eng Yew*) chose not to follow the Federal Court's decision in *Saw*, by distinguishing the latter on its facts. This was another decision which affirmed the application of *Richards* in our law. The

facts were these. One Lim Yoke Pah suffered injuries when the authorised driver of the motor lorry met with an accident. Both Lim Yoke Pah and the authorised driver were the employees of the insured. The policy in that case was principally the same as the one here and in *Richards*. On *Saw*, Gunn Chit Tuan SCJ had this to say at pp 260-261:

> "We were also referred by counsel to *Saw Poh Wah v. Ooi Kean Hang & Anor. (Asia Insurance Co. Ltd. as Third Party)*. That was again a case involving an insurance policy with a similar clause which excludes liability of the insurance company in respect of death of any person (other than a passenger carried by reason of or in pursuance of a contract of employment). In that case Syed Agil Barakbah J as he then was, held that the plaintiff, who was at all material times employed by the registered owner of the vehicle as an attendant, was covered by the insurance policy and that the insurers as third party should therefore indemnify the owner of the lorry and his driver on the judgment entered for the plaintiff. The third party, that is, the insurance company, appealed against the said decision and the Federal Court allowed the appeal of the insurer without delivering a written judgment. The Federal Court held that there was no cross-appeal by the respondents against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger and, as such, the learned judge should have held that the relevant clause of the policy applied and the insurer was not liable to indemnify the defendants. **That case is again distinguishable from the present one in that the learned judge there had made a finding of fact that the lorry attendant was not a passenger whereas, in our present case, the learned judge held that the plaintiff was "a passenger carried by reason of and in pursuance of a contract of employment". Dato' Wong Soon Foh, counsel for the plaintiff, merely referred to the exceptions to section II of the said policy and contended that the above-quoted exception (ii) did not apply and that exception (iii) applied in this case. He also pointed out that the facts in the two above-quoted Malaysian cases were distinguishable from the present one.**"
>
> [Emphasis Added]

[85] The Supreme Court appeared to have distinguished *Saw* by applying Exception (iii) of the Policy instead of Exception (ii). As we have stated and will explain further, Exception (iii) is not relevant to cases of this specie (based on the facts in *Saw*).

[86] However, the Supreme Court in upholding Ajaib Singh J's decision correctly held that Exception (iii) to the exception to Section II apply in the case in light of the facts before it. Before we discuss that part of the judgment of the Supreme Court which dealt with Exception (iii), it is pertinent for our purpose to refer to the Supreme Court's implicit affirmation of the two contract approach adopted in *Richards*. Speaking through Gunn Chit Tuan SJC, the Supreme Court observed as follows:

> "Now it is interesting to refer to the following passage at pp 513-514 in the judgment of Lord Goddard CJ in *Lees v. Motor Insurers Bureau*,[5] which was a decision concerning ss 35(1) and 36(1)(b) of the former UK Road Traffic

Act 1930, which provisions are in *pari materia* with ss 74(1) and 75(1)(b) of our Ordinance:

> "In *Richards v. Cox* [1942] 2 All ER 624 the same state of affairs arose as is present here, the person injured and the driver of the car being both in the employ of the owner of the car. The driver was negligent, and the plaintiff recovered damages in an action against him. The question then arose whether the policy obliged the underwriters to indemnify the driver, and it was held that it did by reason of its terms which provided:
>
> > In terms of and subject to the limitations of and for the purposes of this section the company will treat as though he were the insured person any person who is driving such vehicle on the insured's order or with his permission provided (a) that such person is not entitled to indemnity under any other policy.
>
> **It was held that there were in effect two policies in one document, a policy insuring the owner of the vehicle and a policy insuring the driver.** The owner of the vehicle would not have been able to recover against the underwriters because the policy did not cover his liability to his own servant, but as the terms of policy insured the driver himself, and as the injured person was not a servant of the driver, nevertheless the driver was covered by the policy and was entitled to an indemnity by the insurance company against the damages which he had to pay…"

[87] Although in *Lee* case, the Supreme Court noted that Lord Goddard did not find any such term in the policy, Gunn SCJ presciently held that:

> "It is therefore necessary in each case to examine the wording of the policy in question and in our present case, we have examined the policy issued by the defendant and we found the following important provision in it… [omitted] **which is practically identical with the relevant provision in the policy in *Richards v. Cox (supra)*, and which would oblige the defendant to indemnify the driver in this case, who was covered by the policy and was entitled to be indemnified by the defendant against the damages which he had to pay to the plaintiff.**"
>
> [Emphasis Added]

[88] In dealing with Exception (iii), the Supreme Court referred to the case of *Tan Keng Hong & Anor v. New India Assurance Co Ltd* [1977] 1 MLRA 102 where the Privy Council held that words 'by reason of his contract of employment' must be read in conjunction with the words 'in pursuance of'. In construing these words or expression, the Privy Council relied on Lord Wright's speech in *Izzard (supra)* (at p 104), where His Lordship said:

> "I think the Act (the language of which is the same as that of the policy) is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons."

[89] Although in *Tan Keng Hong*, the Privy Council found on the facts that the deceased forester was not on the lorry for business reasons, ie for his own

personal convenience, and therefore not entitled to coverage, the Supreme Court in *Lim Eng Yew* found in favour of the plaintiff. In distinguishing *Lim Eng Yew*, Gunn Chit Tuan SCJ noted:

> "In our present case, the plaintiff was working as a salesman for the registered owner of the said vehicle selling biscuits and going from place to place in the said vehicle. **He was therefore required by his contract of employment with his employer, the said Lim Yoke Pak, to travel on the lorry** (vide the notes of evidence in pp 27 to 28 of the appeal records). In the circumstances of this case, we therefore consider that the learned judge was right in deciding that, upon a proper construction of the policy of insurance dated 19 May 1972, and ss 75(1) and 80(1) of the Ordinance, the defendant was liable to pay the plaintiff the amount due under the judgment dated 15 June 1978."
>
> [Emphasis Added]

[90] In the course of its judgment, the Supreme Court also approved the High Court Judge's application of *Chan Kum Fook* and *China Insurance* (both *supra*).

[91] It is clear from an examination of the Supreme Court's decision in *Lim Eng Yew*, when it declined to follow *Saw* (albeit on the ground that the facts were distinguishable) and for the reasons stated earlier that *Saw* is no longer good law. Although *Lim Eng Yew* is concerned with Exception (iii) the affirmation by the Supreme Court of the two contract approach (in construing Exception (ii) of the Policy) in *Richards* indicates a distinct intention on the part of the Supreme Court to depart from the Federal Court's decision in *Saw*. The recent Court of Appeal's decision in *Iskandar (supra)* lends further support to this position.

[92] The 3rd defendant is correct in submitting that the law on the construction of Exception (ii) to Section II of the Insurance Policy and its statutory equivalent (s 91(1)(aa)) is settled in the light of the aforesaid cases referred to earlier.

[93] We find, in the circumstances no reason to depart from the common law position as affirmed by the Supreme Court in *Lim Eng Yew* and followed by the Court of Appeal in *Iskandar*. The changes to our RTA which the plaintiff contended render the common law cases inapplicable or non-binding are not material to the issue at hand as ss 90(1) and 91(1) remains unaffected.

Final Analysis

Interpretation of the Insurance Policy

[94] Having set out the law, we think the matter herein may be resolved by a simple application of the law to the facts. Taking the relevant portions of the policy again from Section II thereof, it simply reads:

> "In terms of and subject to the limitations of and for the purposes of this Section the Pool will indemnify any Authorised Driver who is driving the Motor Vehicle provided that … such Authorised Driver shall as though he were the Insured observe and fulfil and be subject to the Terms of this Policy insofar as they can apply …"

[95] Applying the common law, the language of the above provision means, for all intents and purposes, the name of the policyholder is simply removed and substituted with the name of the authorised driver. In that sense, it is akin to rewriting the contract by removing all references to the 2nd defendant as the contracting party and replacing it with references to the 1st defendant. If that were the case, the exceptions stipulated in as much as they apply to the 2nd defendant, would also apply to the 1st defendant.

[96] As stated, the exception concerning us is Exception (ii). At this stage, the question is whether the third-party (ie the 3rd defendant) is a person in the course of employment *vis-à-vis* the assured (ie the 1st defendant). If we were construing the policy *vis-à-vis* the 2nd and 3rd defendants, them being in an employer-employee relationship means that the plaintiff is exempted from having to indemnify the 2nd defendant. But, applying the same analysis in the backdrop of the 'new contract' between the 1st and 3rd defendants, the latter is not the employee of the former. So, it follows that if the two are not in an employer-employer relationship, the 3rd defendant cannot be said to have suffered 'bodily injury in the course of employment' *vis-à-vis* the 1st defendant. Therefore, as far as the contract of indemnity between the plaintiff and the 1st defendant is concerned, Exception (ii) does not apply. Hence in answer to the issue posed, it is our view that as no other exception in the Insurance Policy is applicable it necessarily follows that the plaintiff is liable statutorily (under the RTA) and contractually (under the Insurance Policy) to indemnify the 1st defendant.

[97] In addition to the common law, principles as espoused above, we think that the *contra proferentum* rule may be invoked to answer the issue posed here. It must be borne in mind that insurance contracts are generally regarded as being *sui generis*. Because of their unique character they are not always open to the same method of interpretation applicable to other contracts. For example, insurance contracts typically apply the *uberrimae fidei* rule – something not common to other contracts. See generally the judgment of the Court of Appeal of Guyana in *Inshan Bacchus And Another v. Ali Khan And Others* [1982] 34 WIR 135, at pp 146-147.

[98] Coming to the *contra proferentum* rule, it provides that where a term is ambiguous such ambiguity ought to be construed against the party who prepared it. In general contracts, common law courts have been quick to apply against 'unfair terms' like exclusion or exemption clauses. But the rule sees particular application in insurance contracts. This point is aptly summarised in *MacGillivray on Insurance Law* (12th edn), at pp 317-318:

> "The common law rule of construction, that *verba chartarum forties accipiuntur contra proferentum*, means that ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it. **It has been said that a party who proffers an instrument cannot be permitted to use ambiguous words in the hopes that the other party understand them in a particular sense and that the court which has to construe them will give them a different meaning, but the ambiguity usually arises inadvertently from including conflicting standard printed clauses in the same policy.**"
>
> [Emphasis Added]

[99] The plaintiff dedicated a significant portion of their written submission, as we understand it, to the argument that the reason why the RTA allows the exclusion of liability to employees is due to the recourse they have to workmen's compensation. There is a public policy layer attached to this argument which we will address shortly. In any case, the argument is that allowing the 3rd defendant to claim indemnity through the 1st defendant when he cannot do the same against 2nd defendant is to effectively defeat the purpose of workmen's compensation. In the result, the plaintiff's case appears to be that what cannot be claimed as against the 2nd defendant also ought to be construed as not being applicable as against the 1st defendant.

[100] Even if, on the off chance we were to take a view that there is ambiguity in the Insurance Policy, and that Exception (ii) applies to the 1st defendant in as much as it applies to the 2nd defendant, we think such a strained construction clearly runs foul of the *contra proferentum* rule. If the plaintiff intended to exclude coverage of this kind to the 1st defendant, they could have simply included that exemption in the Insurance Policy. It is not for us to rewrite the contract in a manner favourable to them. By default, the plaintiff cannot now escape liability to indemnify the 3rd defendant *vis-à-vis* the 1st defendant.

[101] Further, applying the view of the majority in *Digby*, where, in the case of motor insurance contracts there are two interpretations possible – one that favours coverage and one that does not, the court ought to take the interpretation which favours coverage. This is apparent in the speech of Lord Wright cited in para 39 of this judgment. For clarity, His Lordship said 'the policy might on its true construction fail to comply with the statute, but *prima facie* at least it may be assumed that it is intended to comply with the law'.

[102] The RTA too mandates coverage save and except for when its exceptions apply. Arguably, this case may even be resolved without resort to the *contra proferentum* rule because doing so would put the plaintiff in breach of the law. As the 3rd defendant is not an employee of the 1st defendant, no other proviso of the RTA nor any of the Insurance Policy even appears applicable. Thus, there is no statutory much less contractual basis for the plaintiff to deny liability to indemnify the 1st defendant given the plaintiff's 'new contract' with the same.

Workmen's Compensation And Public Policy

[103] As we noted, the plaintiff seeks to disclaim liability on the grounds that the 3rd defendant may avail himself of workmen's compensation. So, to the plaintiff, the statutory indemnity still applies. What remains to be addressed is whether it is inimical to public policy. We think it is not. The argument is premised on the assumption that allowing a person to claim workmen's compensation and indemnity would amount to double recovery.

[104] The rationale to exclude those in the course of employment from coverage appears to be because such persons may avail themselves of workmen's compensation. However, as noted by Lord Wright (quoted *in extenso* at paras 74 and 75 of this judgment in *Izzard*), we agree and adopt what His Lordship said. In Lord Wright's words: 'The former of these provisos [Exception (ii)] seems calculated to exclude the necessity of covering claims which would fall within the Workmen's Compensation Acts, though it is true that these Acts would not embrace every case of death or injury to an employee arising out of or in the course of the employment. For instance, there might be such cases where the employee, by reason of the amount of his wages or salary, or otherwise, was outside the provisions of the Acts. It may be that, for some reason, the legislature thought that these cases were infrequent, and might be disregarded'.

[105] And as is frequently the case, workmen's compensation is hardly adequate. In recounting the facts in *Richards*, Scott LJ noted at p 625:

> "That being so, the managing clerk advised her to get the best sum she could, which he told her was limited to a claim for workmen's compensation. She prosecuted that claim and it was compromised and she got a lump sum settlement inadequate to compensate her for the serious injuries which she had received."

[106] We agree with Lord Wright (see para 103, *ante*). We think that public policy favours the imposition of liability on the basis that the road traffic legislation mandatorily requires and assumes third-party coverage. We therefore see no merit in the plaintiff's strict interpretation of the Insurance Policy to exclude liability simply because the 3rd defendant is amenable to workmen's compensation. In the context of this case, workmen's compensation is open to the 3rd defendant as against his employer (the 2nd defendant) in as much as indemnity is available to him *vis-à-vis* the 1st defendant.

Conclusion

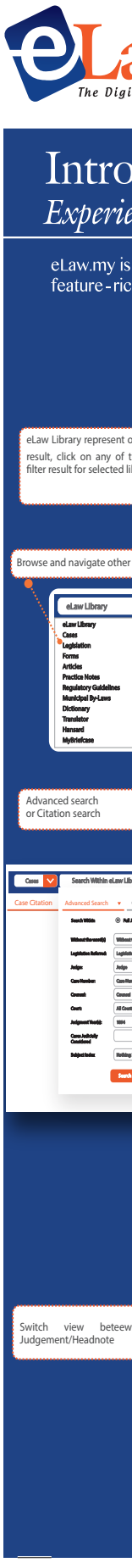
[107] In conclusion, we are constrained to agree with the Court of Appeal when it allowed the appeal of the plaintiff and set aside the decision of the High Court. We are however of the view that the Court of Appeal's observation that "It is now well established that the terms of the insurance policy under consideration has at least two contract of insurance … To put it in simple terms, one contract is to cover the mandatory coverage requirement

under the RTA and the other contract to cover the common law liability to some extent", is not an accurate statement of the law in this area.

[108] In light of what we have already stated, there is no such thing as a 'common law liability' in this context. The Insurance Policy and its Exceptions are both modelled after the RTA. All liability is therefore contractual and read subject to the statutory provisions in the RTA. The common law is applicable insofar as it has interpreted those provisions of the RTA (which is for the most part in *pari materia* with the relevant law in UK and Singapore) and to the extent that the Insurance Policy herein was substantially the same as those in the said English, Singaporean, and Malaysian decisions. This is not to say that there exists some sort of common law 'liability'.

[109] As for the leave question, we are mindful of the words of Gunn SCJ in *Lim Eng Yew* 'it is therefore necessary in each case to examine the wording of the policy in question'. In view of what we have said thus far it is unnecessary for us to answer the leave question.

[110] We therefore dismiss this appeal with costs.



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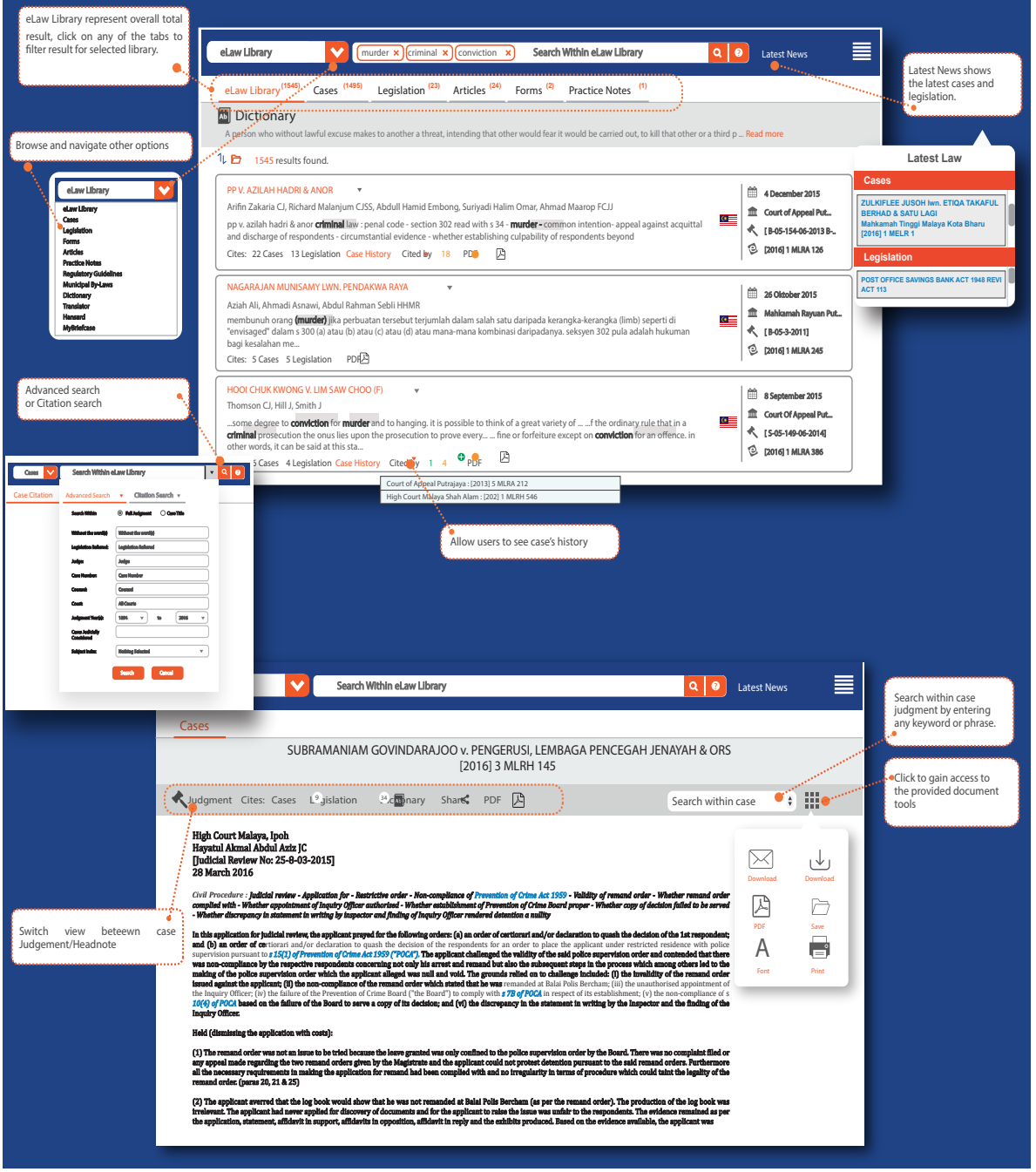

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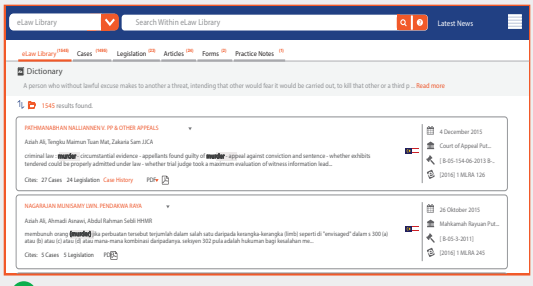

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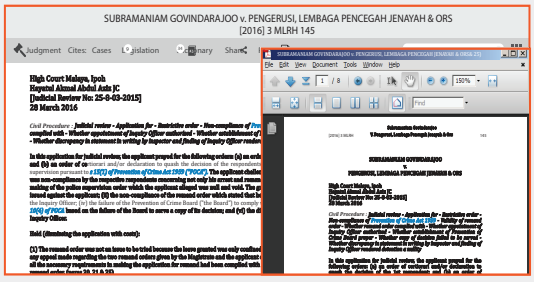

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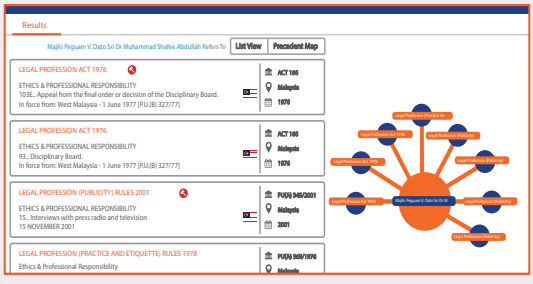

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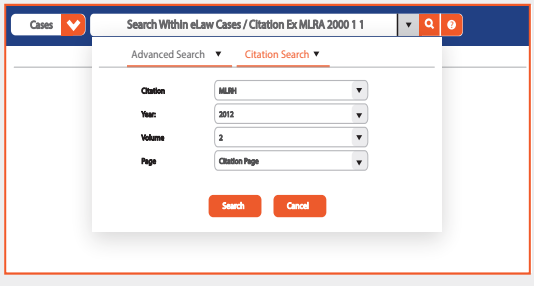

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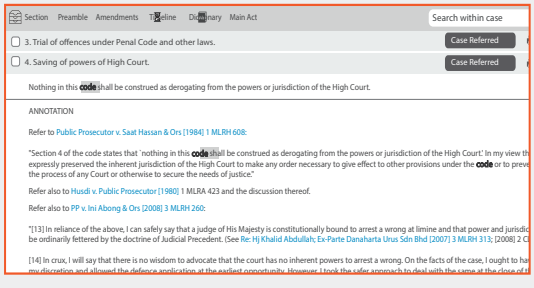

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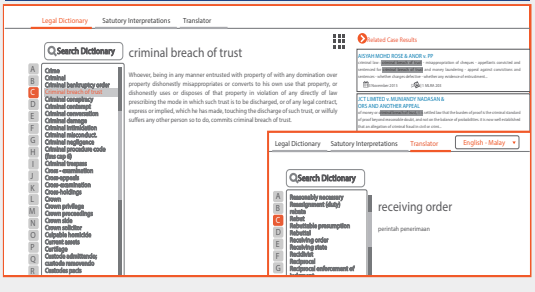

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