IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 161

OS 470/1991

Between

N C Senan & Sons Pte Ltd

… *Plaintiff*

And

Cosmic Insurance Corporation Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 11 Sep 2026 (01:05 hrs)

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N C Senan & Sons Pte Ltd v Cosmic Insurance Corporation Ltd

[1992] SGHC 161

OS 470/1991
Goh Phai Cheng JC
09 June 1992

1 **Judgment:**

2 Coram: Goh Phai Cheng, JC

3 Cur. Adv. Vult.

4 JUDGMENT

5 In this originating summons, the plaintiffs, Messrs N.C. Senan & Sons Pte Ltd, claim against the defendants, Cosmic Insurance Corporation Ltd ("the insurers"), inter alia, the following orders:

6 (a) that the insurers under their public liability policy of insurance No. C81321A9077 issued to the plaintiffs on 15 January 1981 ("the policy") do indemnify the plaintiffs in respect of the claim against them in this court in Suit No 5173 of 1982 ("the suit") and, in the event of judgment against the plaintiffs in the suit, pay forthwith such judgment and costs and all other sums the plaintiffs are entitled to be indemnified under the policy; and

7 (b) that in the event of the insurers contesting the plaintiffs' prayer for the above order, this originating summons be heard together with (or immediately after) the trial of the suit.

8 When this originating summons was first heard by L.P. Thean, J. on 8 July 1991, a consent order was made for it to be heard immediately after the trial of the suit and by the same judge.

9 Suit No 5173 of 1982

10 The suit was brought by Messrs Eng Hin Contractors Pte Ltd ("the claimants") against the plaintiffs for losses and damages suffered by them arising from the structural damage caused to a stretch of the sewer mains at the Marina Centre which the claimants had constructed for the Sewerage Department of the Ministry of the Environment ("MOE"). It was heard by me. On 25 January 1992 interlocutory judgment was entered against the plaintiffs with damages and interest to be assessed by the Registrar. The claimants were also awarded taxed costs of the suit.

11 The following findings of fact were made by me in the suit:

12 (1) In December 1980 the claimants, who were sewerage contractors, were awarded a contract by the Sewerage Department of the Ministry of the Environment ("MOE") to supply and lay sewer mains running from Marina Centre to Beach Road. The claimants commenced their works in December 1980.

13 (2) In January 1981 the plaintiffs, who were civil engineering contractors, were awarded a contract by the Drainage Department of MOE to

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construct two drains for a drainage scheme at Marina Centre. The plaintiffs commenced their works in March 1981.

14 (3) In the course of their works, both the claimants and the plaintiffs had to carry out excavation works preparatory for the construction of the sewer mains and the drains by the two parties respectively. Part of the sewer mains in the vicinity of manholes 34 and 35 and one of the drains constructed by the plaintiffs ran parallel to each other with the nearest wall of the drains to the sewer line being approximately 6.7 metres away.

15 (4) The trench dug by the claimants for the laying of the sewer mains was carried out by the open cut method. The width and depth of the excavation were 1.7 metres and 4.9 metres respectively. The claimants constructed timber formwork to protect the integrity of their sewer trench.

16 (5) In or about April 1981, when the claimants had already completed the excavations for the sewer line, the timber formwork for the sewer trench for the stretch of the sewer line from manholes 34 to 35 tilted. At the site meeting held on 4 May 1981, it was agreed between the representatives of the Sewerage Department and the Drainage Department of the MOE, the claimants and the plaintiffs that the plaintiffs would stop work from 4 May 1981 in order to allow the claimants to complete their sewer line.

17 (6) On 29 June 1981 an agreement was reached between the claimants and the plaintiffs whereby a sum of $30,000.00 was to be paid by the plaintiffs to the claimants for the damage to the trench works without any admission of liability and it was further agreed that the claimants would proceed with their laying of sewer pipes and the plaintiffs would commence their work only after the claimants had completed their work.

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18 (7) The plaintiffs backfilled their drainage excavation to enable the claimants to repair their timber formwork and to complete their sewer line between manholes 34 and 35. Repairs were carried out to the claimants' timber formwork and the claimants proceeded to complete their work of laying the sewer line. The claimants completed their sewer line from manholes 34 to 35 to 36 in November 1981. The plaintiffs recommenced their work after the claimants completed their work of laying the sewer pipe for this stretch of the sewer line.

19 (8) A series of joint surveys were carried out to the completed sewer line between manholes 34 and 35 by the representatives of the claimants and the plaintiffs in November and December 1981 to determine the levels of the pipe laid between manholes 34 and 35 and to check the alignment of the sewer line. The alignment of the sewer line between manholes 34 to 35 was found to be satisfactory.

20 (9) At an inspection that was carried out on 30 June 1982 by the MOE, the sewer line from manholes 34 to 35 was found to be badly misaligned.

21 In addition to the above facts, the following facts are disclosed in the affidavit of Narayanan Chitrasenan filed on 22 May 1991 on behalf of the plaintiffs:

22 (1) On 2 August 1982 the plaintiffs received a copy of a letter dated 26 July 1982 sent by the claimants to their insurers, Nanyang Insurance Co Ltd ("Nanyang"). In that letter, the claimants notified Nanyang that the stretch of the Marina Centre sewer mains from manholes 34 to 35 constructed by them for MOE was out of alignment badly and that the claimants would be submitting details of their claim to Nanyang in due course.

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23 (2) By a letter dated 16 August 1982, the claimants informed the plaintiffs that they would hold the plaintiffs fully liable for making good the damage and they would be submitting their claims to the plaintiffs in due course.

24 (3) By a letter dated 6 September 1982, the claimants informed the plaintiffs that the estimated cost of the remedial works is about $200,000.00. The claimants said that if they did not hear from the plaintiffs within 7 days, they would hand the matter to their solicitors for appropriate action.

25 (4) All the above-mentioned letters which were sent by the claimants to the plaintiffs were promptly forwarded by the plaintiffs to the insurers for their necessary action.

26 (5) By a letter dated 24 September 1982, the claimants' solicitors informed the plaintiffs that the cost of repairs were estimated at about $200,000.00. The plaintiffs acknowledged receipt of the said letter and requested the claimants' solicitors to send all subsequent correspondence to the Claims Department of the insurers.

27 (6) The letter dated 24 September 1982 was forwarded by the plaintiffs to the insurers with their letter dated 18 October 1982 addressed to the Claims Department of the insurers, which reads:

28 "We refer to the attached letter of which a copy is c.c.'d (sic) to you and please note that the cost of rectification for the sewer line is preposterous.

29 However, your immediate and necessary action to prevent this claim against us is much appreciated.".

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30 (7) By a letter dated 14 October 1982, the claimants' solicitors demanded from the plaintiffs the payment of the sum of $201,762.50 in settlement of their clients' claim for the cost incurred in rectifying damage to the sewer line. The claimants' solicitors also sent a copy of the said letter to the insurers.

31 (8) The claimants subsequently issued a writ in the suit. Messrs Chan, Goh, Poh & Partners ("CGP") were instructed by the insurers to defend the plaintiffs in the suit. On 20 December 1982, CGP entered an appearance on behalf of the plaintiffs.

32 The Claimants' Statement of Claim in the Suit

33 The paragraphs in the statement of claim which was filed by the claimants in the suit on 22 October 1983 and are material to the determination of the issues in this summons read as follows:

34 "9 In or around the months of September, November and December 1981, representatives from the < claimants > and the <plaintiffs> conducted joint surveys of the sewer line between Manholes MH34 and MH35 and the alignment of the sewer pipes were found to be satisfactory.

35 10 Soon after the events of paragraph 9 above, the < plaintiffs > resumed their excavation work for the construction of the drain adjacent to the sewer line in the vicinity of Manholes MH34 and MH35.

36 11 The < plaintiffs > so negligently carried out their said excavation works that they damaged the < claimants' > adjacent sewer line construction by causing the same to go badly out of alignment.

37 Particulars of Negligence

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38 (1) Failing to take steps to stabilise the sides of the < plaintiffs' > excavation by means of proper timbering works.

39 (2) Failing to provide any or adequate timber lining to the said excavation.

40 (3) Failing to provide proper strutting to the < plaintiffs' > drain excavation.

41 (4) Causing or permitting the unchecked movement of earth in the vicinity of the said excavation.

42 (5) Failing to provide and/or adhere to any or adequate drawings/designs for the said excavation works.

43 (6) In the circumstances, adopting the wrong constructional techniques in the excavation for the drain construction.

44 12 As a result of the matters aforesaid, the < claimants > have suffered loss and damage.

45 . . .".

46 The Plaintiffs' Defence in the Suit

47 The defence of the plaintiffs in the suit was filed by CGP on behalf of the plaintiffs on 1 December 1983. The material paragraph of the said defence reads as follows:

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48 "6. As to paragraphs ten (10) and eleven (11) of the Statement of Claim, the < plaintiffs > deny that the work carried out subsequent to the 1st of December 1981 caused the damage to the sewer line.".

49 Insurers' Disclaimer of Liability under the Policy

50 Four and a half years later, Messrs Goh, Poh & Partners ("GPP"), who had taken over the conduct of the defence of the plaintiffs in the suit on the instructions of the insurers, sent a letter dated 3 July 1987 to the plaintiffs, which reads:

51 "We refer to our letters of the 19th November 1986, 20th April and 22nd May 1987. We have not received your response thereto. Further the incident giving rise to the claim in Suit No 5173 of 1982 was not reported to our clients. Accordingly, our clients are denying liability to indemnify you. < Emphasis added >

52 Kindly nominate solicitors to take over conduct of proceedings from us.".

53 The plaintiffs ignored the purported repudiation. On 7 April 1988 a notice of change of solicitors was filed in the suit by Messrs G Raman & Partners who had been appointed to act as the solicitors of the plaintiffs in the suit in place of GPP.

54 On 18 May 1991 the plaintiffs took out this originating summons seeking, inter alia, the orders which have been set out above. On 25 May 1991, GPP entered an appearance on behalf of the insurers in this summons.

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55 The reasons given by the insurers for disclaiming liability under the policy to indemnify the plaintiffs in respect of the claim against the plaintiffs in the suit are to be found in the letter dated 3 July 1987 from GPP and in the following paragraphs of the affidavit of Gerald Lee Kuan Whee which was filed on behalf of the insurers on 23 August 1991:

56 "4. In or about April 1981, the plaintiffs were excavating the ground near MH 34 and MH 35 but failed to provide adequate shoring for stabilising the sides of their excavation works, resulting in damage to the claimants' neighbouring works.

57 5. In or about June 1981, the plaintiffs admitted liability for the damage referred to in paragraph 4 herein and proceeded to perform and eventually completed remedial works.

58 6. Towards the end of 1981, the claimants completed that section of the sewer line in the vicinity of MH 34 and MH 35, whereupon representatives of both the plaintiffs and the claimants conducted the joint inspection referred to at pages 7, 8, and 13 of the exhibit marked "A" in the Affidavit of Narayanan Chitrasenan.

59 7. Shortly after the said inspection, i.e. at or about the end of 1981 or the beginning of 1982, the plaintiffs re-commenced works.

60 8. The claimants say that these subsequent works were again badly performed insofar as no or not adequate shoring had been provided for as before. They say further that despite their protests, the plaintiffs failed and/or neglected to provide proper shoring, resulting in the misalignment discovered by the Sewerage Department on 30th June 1982.

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61 9. The claimants' protests went unheeded. In due course they commenced the action in Suit No. 5173/82 against the plaintiffs. Despite the above, the plaintiffs failed and/or neglected to give to < the insurers > notice of the incident which gave rise to the action in Suit No. 5173/82, contrary to condition 2 of the policy of insurance made between the plaintiffs and < the insurers > .

62 10. The matters referred to in paragraphs 4 - 9 above appear in the technical report dated 30th August 1982 of the claimants' Consulting Engineer, Mr Fong Weng Cheong. The report is in the possession of the plaintiffs and I now annex hereto a copy of the same marked as "GLKW2".

63 11. On or about 3rd July 1987, the < insurers > repudiated liability to indemnify the plaintiffs on the grounds stated in the letter exhibited at page 31 of the Affidavit of Narayanan Chitrasenan. By condition 11 of the aforesaid policy, the plaintiffs were obliged to refer the claim to arbitration within twelve (12) calendar months from the date of the < insurers' > disclaimer, ie by 3rd July 1988, failing which "the claim shall for all purposes be deemed to have been abandoned and shall not be recoverable . . ."

64 12. By condition 12 of the said policy, the due observance and fulfilment of the aforesaid condition were made conditions precedent to any liability on the part of the < insurers > .

65 13. The plaintiffs had at no time referred or attempted to refer the claim herein to arbitration. In the premises, the plaintiffs' claim herein is, after 3rd July 1988, deemed to have been abandoned and the plaintiffs is barred from bringing this action.".

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66 It should be noted that the matters contained in paragraphs 4 to 9 of Mr Lee's affidavit are not facts which Mr Lee is able of his own knowledge to prove. The affidavit evidence of Mr Lee was objected to by the plaintiffs' counsel as hearsay. In my judgment, such affidavit evidence is excluded by O.41 r.5 of the Rules of the Supreme Court which reads:

67 "5.-(1) Subject to O.14, r.2(8), to para. (2) of this rule and to any order made under O.38, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

68 (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

69 The proceedings in our present case are not interlocutory proceedings. Paragraph 41/5/2/ of the Supreme Court Practice 1992, Vol. 1 states:

70 "`For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties'; Rossage v. Rossage < 1960 > 1 All E.R. 600, C.A.".

71 The prayers sought by the plaintiff in this action in effect determine the plaintiffs' rights under the policy. As the matters deposed to by Mr. Gerald Lee in paragraphs 4 to 9 of his affidavit are clearly hearsay evidence, I rule that they are inadmissible as evidence for the purposes of this summons.

72 Even if I were to admit the matters deposed in paragraphs 4 to 9 of Mr Gerald Lee's affidavit, my first observation is that the matters deposed in paragraph 5 of the said affidavit is clearly against the finding which I have made

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in the suit, namely, that on 29 June 1981 an agreement was reached between the claimants and the plaintiffs whereby a sum of $30,000.00 was to be paid by the plaintiffs to the claimants for the damage to the claimants' trench works without any admission of liability. Furthermore, the residual works were in fact carried out by the claimants and not by the plaintiffs. Mr Gerald Lee's affidavit evidence on this matter is based on the first paragraph under the heading of "Repair of Damage of Timbering" at page 3 of Mr Fong Weng Cheong's report which is reproduced as exhibit "GLKW 2" to Mr Lee's affidavit.

73 As for the matters deposed in paragraphs 8 and 9 of Mr Gerald Lee's affidavit, he relied on the following paragraphs in page 4 of Dr Fong's report which read as follows:

74 "Excavation for the Construction of U Drain

75 After the completion of the laying and joint inspection of the sewer line, < the plaintiffs > resumed their excavation work for the construction of the drain adjacent to the sewer line in the vicinity of manholes MH34, MH35 and MH36. Obviously, they had not learnt their lessons from their previous experiences of causing structural damages to the neighbouring works by their adoption of wrong constructional techniques in the excavation for their drain construction.

76 Again no serious attempt was made to stabilise the sides of the excavation by means of proper timbering works. A few timber planks were installed lining the excavation only one side nearer to the completed sewer lines.

77 < The claimants > drew the attention of the representatives of < the plaintiffs > to the inadequacy of the measures taken by the latter to protect the

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sides of the trench excavation for the construction of the drain but there was no improvement in the method of stabilising the sides of the trench excavation.".

78 It was pointed out by Mr Gopal, counsel for the plaintiffs, that Mr Fong was expressing an opinion when he said the plaintiffs were adopting wrong constructional techniques. I agree with Mr Gopal. Furthermore, when Mr Fong gave evidence in the suit, he confirmed that he was expressing an opinion: see page 35 letter F of the Notes of Evidence for the suit ("NE").

79 Is there a dispute between the parties?

80 It was contended by Mr Poon, counsel for the insurers, that there is a dispute between the parties as to whether the plaintiffs had given written notice of the incident giving rise to a claim pursuant to Condition No. 2 of the policy and that the insurers' disclaimer of liability under the policy, if proven, will absolve the insurers' from liability under Condition No. 12 of the policy. In support of his contention, he referred me to Poh Chu Chai's Law of Insurance, 2nd Ed., pp. 407 to 410.

81 Conditions No. 2 and 12 of the policy read as follows:

82 "2. The insured shall give written notice to the Corporation of any accident or claim immediately the same shall have come to the knowledge of the insured or his representative.

83 . . .

84 12. The due observance and fulfilment of the terms provisions conditions and endorsements of this policy by the Insured in so far as they relate to anything to be done or complied with by him and the truth of the statements

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and answers in the said proposal shall be conditions precedent to any liability of the Corporation to make payment under this Policy.".

85 It is clear from Condition No. 12 that compliance with the conditions of the policy, including Condition No. 2, is made a condition precedent to the liability of the insurers.

86 It was contended by Mr Gopal that the plaintiffs had complied with Condition No. 2. The plaintiffs notified the insurers of the claim when they received a copy of the claimant's letter dated 2 August 1982 addressed to Nanyang and the claimants' letter dated 16 August 1982. Mr Gopal further contended that the word "accident" in Condition No. 2 cannot apply to our present case and that was not disputed by Mr Poon. I find that the plaintiffs had complied with Condition No. 2 of the policy which requires them to give written notice to the insurers of a claim immediately the same shall have come to the knowledge of the plaintiffs. The word "claim" in Condition No. 2 clearly refers to a claim made by a third party and in the present case, such a claim was indeed made by the claimants in their letter dated 16 August 1982 addressed to the plaintiffs.

87 Even if the word "accident" applies to our present case, then I am of the view that it must be construed to mean either (a) the event giving rise to the claim made by the claimants against the plaintiffs (i.e. the inspection that was carried out by the MOE on 30 June 1982 when the sewer line between manholes 34 to 35 was found to be badly misaligned); or (b) the event that caused the sewer line to be damaged. The claimants discovered the damage after the occurrence of the event which caused the damage. The sewer line was completed by the claimants in November 1981 after the plaintiffs had backfilled their drainage trench after the first incident which resulted in the tilting of the

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formwork of the sewer trench in April 1981. The plaintiffs recommenced their drainage excavation works after November 1981. There is also no evidence before me of what caused the sewer line to be misaligned. In p. 6 of the report of Mr Fong which I have referred to earlier, he expressed the opinion that it was the lateral movement of the fill on the reclaimed land that caused the displacement of the sewer pipe and that the plaintiffs' failure to provide any or adequate timber works for their drainage trench caused the soil movement. In the suit although I preferred Mr Fong's explanation to the explanation given by Mr Bobby Ho, the expert witness who gave evidence for the plaintiffs in the suit, there was no evidence before me in the suit as to what caused the damage to the sewer line or when the said damage was caused.

88 Even if there was a breach of Condition No. 2 by the plaintiffs, I hold that the insurers have by their conduct waived their right to refuse to indemnify the plaintiffs under the policy on the ground that there is a breach of the condition of the policy. Mr Gopal referred me to MacGillivary & Parkington on Insurance Law, 8th Edition, para 2000 at p. 1999 which reads:

89 2000. Estoppel by conduct of defence. Where insurers discover a breach of condition or warranty, or a concealment on the part of the assured, which would permit them to avoid liability on that account, their undertaking or continuing the defence of the claim, whether to a judgment or settlement, is likely to be construed as a waiver of their right to refuse payment because of the assured's breach of duty. . . ."

90 In our present case, the plaintiffs notified the insurers in August 1982 of the claim which was made by the claimants against them. The insurers undertook the defence of the plaintiffs in the suit. The breach of duty by the plaintiffs which the insurers are now complaining of was pleaded in para. 11 of

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the statement of claim filed by the claimants in the suit on 22 October 1983. CGP who were instructed by the insurers to defend the plaintiffs in the suit knew what was pleaded in the statement of claim. Their knowledge can be imputed to their principals, the insurers. Therefore in October 1983, the insurers and their solicitors knew of the claimants' allegation that the plaintiffs performed their work negligently after December 1981, yet they continued to defend the plaintiffs in the suit until July 1987. Such conduct in my view constitutes a waiver of their right to refuse to indemnify the plaintiffs on the ground that there was a breach of duty by the plaintiff under the policy.

91 In his written submission, it was contended by Mr Poon that when the insurers' solicitors disclaimed liability under the policy on 3 July 1987, the plaintiffs ought to have referred the dispute to arbitration pursuant to Condition No. 11 of the policy. The plaintiffs having failed to refer the dispute for arbitration within twelve months of the disclaimer of liability under the policy, their claim is therefore deemed to have been abandoned.

92 Condition 11 of the policy reads as follows:

93 "11. All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Corporation. If the Corporation shall disclaim liability to the insured for any claim hereunder and such claim shall

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not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.". < emphasis added >

94 The first question which arises is whether there is a difference which arose out the policy between the parties which should have been referred to arbitration pursuant to Condition No 11. Mr Gopal referred me to Mustill & Boyd on Commercial Arbitration (2nd Ed.) at p. 122 which reads:

95 "2 Clauses requiring a `dispute' or `difference'

96 Arbitration clauses usually define the jurisdiction in terms of `disputes' and `differences'. Under clauses in this form, the existence of a dispute or difference is a condition precedent to the right to arbitrate. Two consequences flow from this:

97 (a) Undisputed claims

98 First, an action can properly be brought in the High Court in respect of an admitted claim, even though the contract contains an arbitration clause. The claimant may apply for summary judgment, under RSC Ord.14, and the defendant cannot either fend off judgment or obtain a stay simply by relying on the arbitration clause; . . ."

99 In Nova (Jersey) Knit Ltd v. Kammgarn Spinnerei GmbH < 1977 > 2 All E.R. 463 there was an appeal by the plaintiffs (appellants), Nova (Jersey) Knit Ltd, by leave of the House of Lords, against the decision of the Court of Appeal allowing an appeal by the defendants (respondents), Kammgarn

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Spinnerei GmbH, against the judgment of Bristow J whereby he affirmed an order of Master Ritchie refusing to order that all further proceedings in respect of the appellants' claim on six bills of exchange should be stayed pursuant to s. 4(2) of the Arbitration Act 1950 (subsequently re-enacted in s. 1 of the Arbitration Act 1975). The respondent relied on an arbitration clause in a partnership agreement for their application to stay their proceedings which reads:

100 "18. Arbitration agreement

101 All disputes arising from the partnership relationship or occasioned by (or `in connection with') the partnership between the partnership and the partners shall be decided by the arbitration tribunal provided for in a separate document."

102 The House of Lords allowed the appeal and held that the respondents were not entitled to have the appellants' action on the bill of exchange stayed for the following reasons:

103 (a) On the evidence of German law, the arbitration clause in the partnership agreement did not apply to a claim under a bill of exchange given in payment of the purchase price for goods sold by one partner to another since there was no clear indication in the arbitration clause that such a claim was to be submitted to arbitration. Accordingly, the action on the bills of exchange was not "in respect of a matter agreed to be referred to arbitration" within s. 1(1) of the Arbitration Act 1975;

104 (b) Moreover, even if the claim on the bills of exchange were liable to be submitted to arbitration, there was not any dispute between the parties with

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regard to the claim, within s. 1(1) of the Arbitration Act 1975, since a claim for unliquidated damages could not be raised by way of defence, set-off or counterclaim to an action on a bill of exchange and therefore could not create a "dispute" on a bill of exchange within the meaning of s.1(1). It followed that no admissible defence to the appellants' claim on the bills had been forward by the respondents.

105 In Elf Petroleum S E Asia Pte Ltd v Winelf Petroleum Sdn Bhd. < 1986 > 1 M.L.J. 177, the plaintiffs, a Singapore company, had supplied petroleum products to the defendants. On that account the defendants owed a large sum of money to the plaintiffs. When the plaintiffs demanded payment, the defendants agreed to clear the debt within 5 years. This was not acceptable to the plaintiffs who brought the action against the defendants. The defendants then applied to the court for an order that the writ of summons be struck off because of clause XIII of the agreement under which it was alleged that Malaysian courts have no jurisdiction and because of the arbitration clause in the agreement which reads as follows:

106 "XIV. Arbitration

107 Any claim or controversy arising out of this contract shall be settled by arbitration. The arbitration shall be held in Singapore and conducted in accordance with the Rules of the International Chamber of Commerce of Singapore. ...".

108 It was held, inter alia, by George J. of the Malaysian High Court that where a claim is admitted it does not call for settlement by arbitration. At p. 179, George, J. said:

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109 "In my judgment what we have is a mere refusal to pay upon a claim which had been admitted as being owing to the plaintiffs. There is nothing to be settled by arbitration. On a true construction of clause XIV only claims which are bona fide disputes or are bona fide controversies, that call for a settlement by arbitration. Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is for payment of the amount which can be by an action in the Courts as has been done in the instant case.".

110 In our present case, this action is brought by the plaintiffs against the insurers' in respect of a claim which was admitted by the insurers. In my judgment, the claim having been admitted by the insurers, there is nothing to be referred to arbitration. It was contended by Mr Poon that the claim had not been admitted by the insurers. I do not accept that. The insurers undertook the conduct of the defence of the claim made by the claimants for four and half years. The contractual time-bar provision in Condition No. 11 cannot in my view apply to a claim which has been admitted by the insurers. The words in Condition No 11 are "If the Corporation shall disclaim liability to the insured for any claim hereunder ...". The word "claim" in Condition No. 11 does not include a claim which has been admitted by the insurers.

111 Mr Poon referred me to Asia Insurance Co Ltd v. American International Assurance Co Ltd (1953) 19 M.L.J. 87 where Brown, J. held, inter alia, that a claim against an insurer failed because the insured failed to comply with the following condition in the insurance policy, which reads:

112 "If the claim be made and rejected and an action or suit be not commenced within three months after such rejection ... all benefits under this policy shall be forfeited".

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113 That case can be distinguished from our present case on its facts. In that case the claim was never admitted by the insurers whereas the claim in our case has been admitted by the insurers.

114 Mr Poon also referred me to Suhaimi Bin Ibrahim v. United Malaya Insurance Co Ltd < 1966 > 1 M.L.J 140 where MacIntyre J of the Malaysian High Court held, inter alia, that the plaintiffs' claim against the defendants, an insurance company, for indemnity under a policy of insurance in satisfaction of an award made under the Workman's Compensation Ordinance failed on the ground that there had been a breach of the condition of the policy in that the plaintiff had failed to refer the dispute to arbitration within twelve months of the date when the defendants disclaimed liability. Again I must say that the facts of that case show that the insurers never admitted the claim at all.

115 I have also considered two other cases cited by Mr Poon. The first is Lee Seng Heng & Others v. Guardian Assurance Co Ltd (1932) M.L.J. 17 where the court has held that the claim against the insurers under the policy of insurance failed on the ground that the writ was taken out after six months after the rejection of the claim and there is a condition in the policy similar to the one referred to in the Asia Insurance Co Ltd's case (supra). The second is the case of Wong Lang Hung v. National Employees' Mutual General Insurance Association Ltd. < 1972 > 2 M.L.J. 191 where the plaintiff failed to commence arbitration proceedings against the insurers within twelve months under a policy which has a condition which provides that the insurers shall in no case whatever be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or The policy also had a condition 18 that any question or difference as to amount of any loss or damage between the parties shall be referred to arbitration.

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These two cases can be distinguished from our present case on the facts, namely that the insurers did not admit the claims made under the respective policy.

116 It was contended by Mr Poon that Condition No. 11 of the policy provides, inter alia, that the making of an award by an arbitrator shall be a condition to any right of action against the insurers. As the dispute was not referred to arbitration and there is no arbitrator's award, the plaintiffs are precluded from making any claim against the insurers. He submitted that such a term is similar to a condition of a building contract which requires the issue of an architect's certificate as a condition precedent to the right of the contractor to be paid by the employer. He referred me to the case of Stevenson v. Watson (1879) 4 C.P.D. 148 and Donald Keating's Building Contract, 4th Edition at p.77. I do not accept his contention. In our present case, we are dealing with a condition which requires all differences to be referred to arbitration. If there is nothing to be settled by arbitration then the making of an award cannot be a precondition for the declarations sought by the plaintiffs in this action.

117 In his written submissions, Mr Poon also contended that this court does not have the jurisdiction to make the declarations sought by the plaintiffs because they are in effect seeking an award by the arbitrator who is appointed under Condition No. 11 of the policy. In my judgment such an argument is based on the premise that there is a dispute between the parties which have to be settled by arbitration. As I have mentioned earlier, the claim made by the claimants against the plaintiffs has been admitted by the insurers and I therefore reject the insurers' contention. The case of Northern Regional Health Authority v. Derek Crouch Construction Co Ltd < 1984 > 2 A E.R. 175 cited by Mr Poon is of no assistance to the insurers as it involves a building contract in the standard Joint Contracts Tribunal (JCT) form made between a building owner and a building

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contractor for the construction of a hospital and the rights and obligations under such a contract.

118 Accordingly for the reasons given above, I make an order in terms of the prayer (1) set out in the originating summons. The plaintiffs shall be entitled to their taxed costs for this action.

Goh Phai Cheng JC

Gopal Krishnan Nair for the plaintiffs
Daniel Poon for the defendants

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