Tay Eng Chuan v Ace Insurance Ltd
[2008] SGCA 26

Case Number : CA 95/2007

Decision Date : 27 June 2008

Tribunal/Court : Court of Appeal

Coram : Andrew Ang J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Appellant in person; Teo Weng Kie and Lorraine Ho (Tan Kok Quan Partnership) for the respondent

Parties : Tay Eng Chuan — Ace Insurance Ltd

Arbitration – Agreement – Agreement to refer matter to arbitration – Scott v Avery clauses – Whether reference of dispute to arbitration is condition precedent to liability of insurer

Contract – Contractual terms – Interpretation – Contra proferentem rule – Particular pertinence of contra proferentem rule to insurance policies

Insurance – General principles – Claims – Double recovery – Whether loss of lens and loss of sight separate types of loss

Insurance – Policyholders – Protection – Duty of insurers to inform policyholders of areas insurance cover did not extend to

27 June 2008 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Background

1 This is an appeal against the decision of the High Court judge ("the Judge") dismissing the action of Tay Eng Chuan ("the appellant") in Originating Summons No 859 of 2007 ("OS 859/2007") against Ace Insurance Limited ("the respondent") to be indemnified, under an insurance policy known as a "Double Guarantee Protector Policy"issued by the respondent ("the Policy"), in the sum of $300,000 for the alleged total loss of sight in his left eye (see *Tay Eng Chuan v Ace Insurance Limited* [2007] SGHC 212 ("the GD")).

2 The action in OS 859/2007 was commenced following a comment made by V K Rajah J in an earlier proceeding by the appellant against the respondent, *viz*, Originating Summons No 2254 of 2006 ("OS 2254/2006"). That was an application by the appellant for, *inter alia*, an extension of time to commence arbitration proceedings against the respondent under the Policy. In dismissing the application on the ground that the appellant had not made out a case for extension of time, the learned judge made an observation ("the Note"), which was recorded in the certified transcript of the notes of arguments of the hearing (at p 5) as follows:[note: 1]

> Note: It remains open to [the appellant] to argue that his right to maintain an action in law in the courts survive the extinction of the right to proceed by way of arbitration …

3 On the basis of the Note, the appellant commenced OS 859/2007 for the following prayers:

(a) that, pursuant to the Note and the Policy, he "be allowed to proceed by way of an action in law … to claim from the [respondent] the insurance benefit under the [Policy] for the

loss of sight in his left eye"[note: 2]; and

(b) that, pursuant to the Policy, "the [respondent] do pay [him] the sum of S$300,000 being the insurance benefit for the loss of sight in … [his] left eye"[note: 3].

The action in OS 859/2007 was commenced on the basis that the appellant had suffered a total loss of sight in his left eye. The respondent contested this contention on the ground that the medical reports dated 16 May 2003, 13 August 2003 and 29 October 2003 by Dr Khoo Chong Yew ("Dr Khoo"), the ophthalmologist whom it appointed to examine the appellant's left eye, indicated that, as at 14 May 2003 (the date on which Dr Khoo examined the appellant), the appellant could, via his left eye, perceive light and hand movements at a distance of 6ft, although he could not count the number of fingers on Dr Khoo's hand. A further medical report dated 5 February 2004 by Dr Tong Heng Nam, who had examined the appellant on 3 February 2004 in relation to the latter's claim against another insurer for the injury to his left eye, described the appellant's vision in that eye as good enough for "counting fingers at a distance of five feet"[note: 4].

4 This factual dispute as to the extent of the loss of sight (if any) in the appellant's left eye ("the Dispute") was not taken up further by the respondent in the court below. Instead, it made an application (via Summons No 2829 of 2007 ("SUM 2829/2007")) to strike out OS 859/2007 on the grounds set out in O 18 rr 19(1)(*a*), 19(1)(*b*), 19(1)(*d*) and 19(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), *viz*, that the originating summons: (a) disclosed no reasonable cause of action; (b) was scandalous, frivolous or vexatious; and (c) was otherwise an abuse of the process of the court. The Judge agreed with the respondent's submission and struck out OS 859/2007 without considering the Dispute.

The appellant's eye injury and his claims against the respondent

5 The salient facts relating to the appellant's eye injury and his subsequent claims against the respondent in respect of that injury are simple. On 12 November 2002, a piece of wire mesh which the appellant was carrying in his house got caught between the wall and a pipe in the storeroom and struck his left eye. As a result, that eye bled and the appellant was taken to hospital, where he was found to have suffered cornea laceration, iris laceration and traumatic cataract in his left eye. An emergency operation was performed on the same day. The appellant was subsequently discharged from hospital on 20 November 2002, but was re-admitted from 9 December 2002 to 12 December 2002 for another operation to remove the lens in his left eye. According to the appellant, Dr Khoo had confirmed that his left eye was "non-functional"[note: 5] and "blind by WHO [World Health Organization] definition".[note: 6] The appellant also deposed that Dr Yii Hee Seng, an eye specialist appointed by yet another insurance company against whom he had made a claim in respect of his eye injury, had advised that insurance company's loss adjustor that the condition of his left eye fulfilled the criteria of "Loss of Sight" as defined in Part 3 of the Policy.[note: 7]

6 On 29 July 2003, the respondent admitted liability for "Accidental Hospital Income Benefit" under Part 1, cl 3 of the Policy and paid the appellant the sum of $3,300 for 11 days of hospitalisation. Under Part 1, cl 1 of the Policy ("the Accidental Disability Benefit Clause") (see [38] below), two other types of insurable losses were relevant in cases of eye injury, *viz*, (a) "Total Loss of Lens in One Eye" and (b) "Total Loss of … Sight in One Eye". In respect of each of these losses, a sum of up to 50% of the benefit amount specified in the schedule to the Policy ("the Policy Schedule") was payable. On 11 December 2003, the respondent paid the appellant $300,000 (being 50% of the benefit amount applicable to the latter) for the total loss of the lens in his left eye, but disavowed the latter's claim for the alleged total loss of sight in that eye. The appellant was asked to sign a discharge voucher waiving all claims whatsoever that he might have against the respondent.

The appellant refused to do so because he took the view that he was entitled to make a separate claim for the alleged total loss of sight in his left eye. Eventually, he acknowledged receipt of a cheque for $300,000 from the respondent, but reserved his right to make a claim for his alleged loss of sight.

The issues before the High Court and the Judge's decision thereon

7 In deciding whether to strike out OS 859/2007 pursuant to the respondent's application in SUM 2829/2007, the Judge effectively had to rule on two questions, namely:

(a) whether the appellant had lost the right to bring a legal action based on the Policy for the alleged total loss of sight in his left eye since he had failed to refer the Dispute to arbitration under the terms of the Policy ("issue (a)"); and

(b) whether the appellant was entitled to recover for the alleged total loss of sight in his left eye (assuming he could prove such loss) when he had already been indemnified for the total loss of the lens in that eye ("issue (b)").

8 With regard to issue (a), the respondent relied on Part 10, cl 7 of the Policy ("the Arbitration Clause") read with Part 9, cl 3 of the Policy ("the Condition Precedent Clause") to contend that the appellant, having failed to comply with the Arbitration Clause, had thereby lost his right to bring a legal action in respect of the alleged total loss of sight in his left eye. The Arbitration Clause read as follows:

> **Arbitration**
>
> If any dispute or difference arises between the Company [*ie*, the respondent] and any of the parties hereto concerning any matter arising out of [the] Policy, such dispute or difference shall be referred to arbitration in accordance with the provisions of the Arbitration Act, Chapter 10 of Singapore and any statutory modification or re-enactment thereof then in force within three (3) months from the day such parties are unable to settle the differences among themselves.

As for the Condition Precedent Clause, it stated:

> **Terms and Conditions**
>
> The due observance and fulfilment of the terms, provisions and conditions of [the] Policy insofar as they relate to anything to be done or complied with by the Insured Person, the Policyholder and/or the Policy Payer shall be a condition precedent to the liability of the Company to make any payment under [the] Policy.

9 The appellant, on the other hand, contended that, notwithstanding his breach of the Arbitration Clause, he was still entitled to commence OS 859/2007 in view of Part 10, cl 10 of the Policy ("the Legal Action Clause") and Part 10, cl 8 of the Policy ("the Governing Law Clause"). These clauses were set out in Part 10 of the Policy as follows:

> **8. Governing Law**
>
> [The] Policy shall be governed by and interpreted in accordance with Singapore Law. The Singapore courts shall have exclusive jurisdiction.
>
> …

10. Legal Action

Subject to Clause 7 of this Part [*ie*, the Arbitration Clause], no action shall be brought to recover on [the] Policy prior to the expiration of sixty (60) days after written proof of claim has been filed in accordance with the provisions of [the] Policy.

10 The Judge ruled in favour of the respondent on issue (a). He held that the appellant's claim was barred as compliance with the Arbitration Clause was a condition precedent to the respondent's liability to make payment under the Policy and the appellant had not complied with that clause. Reading the Condition Precedent Clause together with the Arbitration Clause (reproduced at [8] above), the Judge held (at [22] of the GD) that:

> The [A]rbitration [C]lause is not an option. It is a mandatory requirement before he [*ie*, the appellant] can compel the [respondent] to pay (assuming of course that he succeeds in the arbitration). Put succinctly, "No arbitration, no liability".

11 The Judge further rejected the appellant's arguments that:

(a) the Arbitration Clause did not exclude his right to commence an action in court within the normal six-year limitation period applicable to actions founded on contract;

(b) the Arbitration Clause was inconsistent with the Legal Action Clause; and

(c) the Governing Law Clause indicated that legal action was not barred by the Policy.

He held that neither the Legal Action Clause nor the Governing Law Clause assisted the appellant's case, reasoning as follows (at [25] of the GD):

> The said clauses 8 [*ie*, the Governing Law Clause] and 10 [*ie*, the Legal Action Clause] do contemplate the possibility of legal proceedings in court. As the [respondent] contended, both parties could agree to waive arbitration and refer a question or dispute for determination by the court. Neither party waived arbitration in this case. Further, there could be applications made to the court for interlocutory relief or for leave to appeal against or to set aside an arbitral award pursuant to the Arbitration Act [(Cap 10, 2002 Rev Ed)]. Arbitration proceedings would still have to take place first. Clause 10, which is subject to clause 7 [*ie*, the Arbitration Clause], could cover a situation where the [respondent] acknowledges liability but is tardy in payment. In such a case, the claimant has to wait 60 days before enforcing payment by action in court. Where court action is permissible, the agreed forum is Singapore and no other court in the world. These clauses do not detract from the fact that where there is a dispute or difference, arbitration is still the mandatory mode of resolution (unless the parties agree otherwise).

12 With respect to issue (b), the Judge likewise found in favour of the respondent and ruled that the appellant could not make a separate claim under the Policy for the alleged total loss of sight in his left eye as such a claim, if allowed, would result in double recovery, which was expressly prohibited under sub-cl (b) of the Accidental Disability Benefit Clause ("the Double Recovery Sub-clause"). This sub-clause provided as follows:

> If a Benefit Amount is payable for loss of a whole member of the body, then Benefit Amounts for parts of that member cannot also be claimed.

At [28] of the GD, the Judge reasoned that the Double Recovery Sub-clause meant that:

> Although the $300,000 paid to the [appellant] was for the loss of the lens (a part rather than the whole), he would not be entitled to claim for loss of sight (the whole) as well. It is the reverse situation from that set out in the said clause [*ie*, the Double Recovery Sub-clause] but the principle involved is the same – an insured cannot also claim for a broken window if he claims for destruction of the entire house. The "whole" here would encompass total loss of sight or loss of the entire eyeball. If the [appellant] succeeds in claiming for total loss of sight, then he must return the money paid for the loss of the lens.

The issues on appeal

13 The appellant appealed against the Judge's decision on both issue (a) and issue (b). On issue (a), he reiterated the arguments referred to at [9] and [11] above, which the Judge had rejected. He further argued that since the Arbitration Clause did not state which party had to commence arbitration proceedings first, it was not a condition precedent that *he specifically* must first refer his claim for the alleged total loss of sight in his left eye to arbitration. The respondent could have commenced arbitration to seek a declaration that it was under no liability to make any payment in respect of this injury, but had not done so.

14 With regard to issue (b), the appellant argued that he was entitled to make a separate claim for the alleged total loss of sight in his left eye as the Policy conferred, in respect of this particular injury, a benefit separate and distinct from the benefit relating to the loss of the lens in that eye. He argued that the words "Total Loss of Lens in One Eye" in the Accidental Disability Benefit Clause covered the physical loss of the lens in an eye only, and that the affected eye could still have functional vision if the lens were later replaced by surgery. Conversely, the words "Total Loss of … Sight in One Eye" in that same clause covered the loss of functional vision in the eye only as there were situations where the lens in the affected eye might remain intact despite the loss of functional vision. In other words, the appellant argued that the loss of the lens in an eye and the loss of sight in an eye were separate and distinct losses which he was insured against under the Policy, and, where both functional vision and the lens in an eye were lost (which the appellant claimed was the position in his case), he was entitled to be indemnified for both losses.

15 In reply, the respondent's argument on issue (a) was that the Judge was correct in law in deciding that the appellant had lost his right to make a claim under the Policy for the alleged total loss of sight in his left eye as compliance with the Arbitration Clause was a condition precedent to the respondent's liability to make payment under the Policy for this particular injury. On issue (b), the respondent argued that the Judge was likewise correct in law in deciding that since the appellant had already been indemnified in respect of the loss of the lens in his left eye, he could not (on the basis that he was blind in the absence of a functional lens in that eye) make a separate claim for the alleged total loss of sight. According to the respondent, if such a claim (for the alleged total loss of sight) were allowed, it would result in double recovery of benefits under the Policy, contrary to the Double Recovery Sub-clause.

16 We will now consider these issues and arguments.

Our decision

Issue (a): Had the appellant lost the right to sue on the Policy because of non-compliance with the Arbitration Clause?

The respondent's contention

17 In arguing before this court that the appellant had lost his right to commence OS 859/2007 as he had not complied with the Arbitration Clause, the respondent relied on the same two provisions which it had raised before the Judge, namely, the Arbitration Clause and the Condition Precedent Clause (reproduced at [8] above). Reading these two clauses together, the respondent contended that, under the Arbitration Clause, the appellant had to refer the Dispute to arbitration. Therefore, the referring of the Dispute to arbitration was something to be done by him according to the terms of the Condition Precedent Clause, which stipulated that the doing of that very thing was a condition precedent to the respondent's liability to make any payment under the Policy. Since the appellant had not referred the Dispute to arbitration, he was in breach of, *inter alia*, the Condition Precedent Clause and the respondent was therefore under no liability to make any payment under the Policy. In support of this argument, counsel referred to the following passage in Poh Chu Chai, *Principles of Insurance Law* (LexisNexis, 6th Ed, 2005) at pp 387–388 on the effect of a breach of a condition precedent in a policy of insurance:

> If an insurer wishes to disclaim liability when an insured breaches a term in the policy, the term has to be made a condition precedent to the liability of the insurer. …
>
> …
>
> When a term is stipulated as a condition precedent to the liability of an insurer, the insurer comes under no liability to the insured if he fails to observe the term.

The respondent further submitted, in response to the appellant's argument that the Arbitration Clause was inconsistent with the Legal Action Clause, that there was no such inconsistency as:[note: 8]

> The [L]egal [A]ction [C]lause is expressly "[s]ubject to" the [A]rbitration [C]lause. It is subservient to the [A]rbitration [C]lause. *Therefore, if a dispute or difference [arises] between the parties and they are unable to settle the difference amongst themselves, no party may commence legal action unless the [A]rbitration [C]lause has been complied with.* [emphasis added]

Our analysis of the respondent's contention

18 The apparent logic of the respondent's argument in relation to the Arbitration Clause read with the Condition Precedent Clause is not difficult to appreciate. The Judge accepted the argument and concluded succinctly (at [22] of the GD): "No arbitration, no liability" (see [10] above). However, there are counter-arguments against the respondent's contention. The first is that its force is derived solely from a selective reading of the Arbitration Clause and the Condition Precedent Clause in isolation, without reference to the purpose of the Legal Action Clause and its effect on these two clauses. In our view, the Arbitration Clause and the Condition Precedent Clause cannot be construed as if they were stand-alone clauses isolated from the overall context of the Policy. The second counter-argument is that the respondent's contention fails to take into account case authorities relating to the form and nature of what are commonly known as "*Scott v Avery* clauses" (this area of the law was in fact not raised before the Judge at all). This omission is significant as the effect of the respondent's argument based on the Condition Precedent Clause and the Arbitration Clause, although it was not expressed in these terms, was that the two clauses collectively amounted to a *Scott v Avery* clause. The third counter-argument is that the respondent's contention fails to take into account the *contra proferentum* rule of contractual interpretation (a point which was likewise not brought up before the Judge). We will now address each of these counter-arguments in turn.

(1) The Legal Action Clause

19 The Legal Action Clause (which is reproduced at [9] above) provides that the appellant may bring an action based on the Policy upon the expiration of 60 days after he has submitted to the respondent written proof of his claim. Its meaning is perfectly clear in the context of the general principle of insurance law that an insured has a right to be indemnified by his insurer under a policy of insurance and may enforce that right by way of legal action. In the present case, the appellant's right under the Legal Action Clause is *not* affected in any way by the Condition Precedent Clause (since the latter concerns only the respondent's liability *to make payment* under the Policy). Under the general law, the appellant may sue on the Policy, in respect of the alleged total loss of sight in his left eye, at any time within "6 years from the date on which the cause of action accrued" (see s 6(1) of the Limitation Act (Cap 163, 1996 Rev Ed)). According to the Legal Action Clause, a cause of action would accrue in favour of an insured only upon "the expiration of sixty (60) days after written proof of claim has been filed in accordance with the provisions of [the] Policy". In the present case, the appellant's written proof of claim, although dated 20 November 2002, was received by the respondent on 26 December 2002 (see para 19 of Lim Lay Yan's affidavit filed on 2 July 2007 as well as Exhibit "LLY-3" thereof). Therefore, the appellant's right to bring an action in respect of his alleged total loss of sight in the left eye would expire only on 26 December 2008 (taking the date on which the respondent received the appellant's written proof of claim as the date on which that claim was "filed" for the purposes of the Legal Action Clause).

20 The Legal Action Clause is, however, affected by the Arbitration Clause as the former is expressed to be "[s]ubject to" the latter. The respondent had argued before the Judge that no action could be brought under the Legal Action Clause until the appellant had first proceeded with arbitration as required by the Arbitration Clause. The Judge did not expressly state whether he agreed or disagreed with this argument, but his subsequent analysis (at [25] of the GD (reproduced earlier at [11] above)) suggested that he agreed with the respondent. In other words, the Judge construed the opening words "Subject to Clause 7 of this Part" in the Legal Action Clause ("the Qualifying Words") as entailing that a dispute or difference had to be referred to arbitration first before any court action in respect of such dispute or difference could be commenced. It would follow, on this interpretation of the Qualifying Words, that since the appellant had not complied with the Arbitration Clause in the present case, he had no right of action under the Legal Action Clause.

21 In our view, the Judge's interpretation of the Qualifying Words, *viz*, that the appellant could not rely on the Legal Action Clause to commence OS 859/2007 until the Dispute had been referred to arbitration, is not the only possible meaning of those words. There is an alternative meaning – namely, that since the appellant failed to refer the Dispute to arbitration within the period stipulated in the Arbitration Clause, he lost his right to arbitration, *but nothing more*; *ie*, he could still rely on the Legal Action Clause to bring a legal action notwithstanding his breach of the Arbitration Clause. This alternative interpretation of the Qualifying Words is supported by the following passage from *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.049:

> Contractual time bars may apply to bar either the claim or the arbitration. *Where a contractual time limit bars only the right to proceed to arbitration, the parties may nevertheless proceed to litigate* the dispute in the forum where the jurisdiction could be established over the parties. [emphasis added]

On this interpretation of the Qualifying Words, breach of the Arbitration Clause would not negate the right of action conferred by the Legal Action Clause.

22 We should add that regardless of whether the Judge's interpretation of the Qualifying Words

or the alternative interpretation thereof (as set out at [21] above) is adopted, the respondent could in any case still have referred the Dispute to arbitration despite the appellant's breach of the Arbitration Clause. The appellant had lost his right to arbitration as he had not complied with that clause, but the respondent had not lost that right. Indeed, there was nothing to prevent the respondent from applying to the court to stay OS 859/2007 in favour of arbitration. However, the respondent chose instead to apply (via SUM 2829/2007) to strike out the originating summons on the grounds referred to at [4] above. In doing so, the respondent took a step in the proceedings and thereby waived its right to arbitration.

23 The difficulty which we have with the respondent's interpretation of the Condition Precedent Clause read with the Arbitration Clause (which interpretation the Judge accepted) lies in the fact that there is nothing in either of these clauses which states that the appellant has no right of legal action unless the Arbitration Clause has been complied with. If these two clauses are seen as having such an effect (because of the wording of the Condition Precedent Clause), it would lead to an inconsistency with the Legal Action Clause, and it is this very inconsistency which forms the crux of the first counter-argument against the respondent's contention on issue (a).

24 In the interest of completeness, we should also mention that although the appellant had earlier applied unsuccessfully (in OS 2254/2006) for an extension of time to commence arbitration against the respondent, the decision in that action did not necessarily imply that the reference of the Dispute to arbitration was indeed a condition precedent to the appellant's right to sue on the Policy or that the appellant accepted that the Policy contained such a provision. On this specific issue, the appellant's application in OS 2254/2006 did not constitute and was not capable of giving rise to an estoppel against him. Indeed, Rajah J recognised this in commenting (in the Note) that his decision did not mean that the appellant had no right of action under the general law in respect of the alleged total loss of sight in his left eye (see [2] above).

(2) Scott v Avery clauses

25 The second counter-argument against the respondent's contention on issue (a) is related to the point highlighted earlier at [23] above – namely, there is nothing in either the Condition Precedent Clause or the Arbitration Clause which states that the appellant has no right of legal action unless he has first complied with the Arbitration Clause. This omission is significant for, as we noted earlier (at [18] above), the respondent effectively relied on these two clauses as constituting a *Scott v Avery* clause. The effect of a clause of this nature is described in David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) as follows (at para 2-022):

> The parties to a contract may agree that no action shall be brought upon it until an arbitration award has been made, or (what amounts to the same thing) may agree that the only obligation arising out of a particular term of the contract shall be to pay whatever sum a tribunal may award. This is known as a *Scott v Avery* clause. It does not prevent litigation being initiated on a contract containing a clause of this type, but the condition precedent is a defence to the action.

26 The leading case on such clauses is *Alexander Scott v George Avery* (1856) 5 HL Cas 811; 10 ER 1121 (commonly cited as "*Scott v Avery*") itself. In that case, the clause in question (which was contained in a marine insurance policy) read as follows (see 813–814; 1122–1123):

> [T]he sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before

> … And if a difference shall arise between the committee and any suffering member, relative to the settling [of] any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for 14 days to make such selection, the suffering member shall select two, and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute … And in all cases where arbitration is resorted to, the settlement of the committee [is] to be wholly rescinded, and the statement begun *de novo*. Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association), that *no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute … have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining [of] the decision of such arbitrators on the matters and claims in dispute … is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.* [emphasis added]

The House of Lords held that the effect of the clause was to make arbitration a condition precedent to the bringing of any action founded on the insurance policy. As Lord Campbell explained (at 851–854; 1137–1138):

> [T]he contract … is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between [the insurers and the insured]. It is declared to be a condition precedent to the bringing of any action. …
>
> …
>
> … [I]t is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever.

27 Another example of a valid and effective *Scott v Avery* clause is that considered by the English High Court in *Viney v Bignold* (1888) 20 QBD 172. There, the relevant provision stipulated that in the event of any dispute arising between the insurer and the insured as to the adjustment of a loss:

(a) the amount to be paid by the insurer was to be submitted to arbitration;

(b) the award of the arbitrator would be conclusive evidence of the amount of the loss;

(c) *the insured would not be entitled to commence any legal action based on the insurance policy until the amount of the loss had been referred to and determined by arbitration*; and

(d) any action commenced by the insured thereafter could only be for the amount awarded by the arbitrator.

It was held that these provisions were good and entailed that the determination by arbitration of the amount payable by the insurer was a condition precedent to the insurer's liability to make payment under the policy. Wills J explained at 174:

> The principle on which cases such as the present ought to be decided is very clear, and it is this.

> The Court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a *collateral* provision that the amount shall be ascertained by arbitration, such arbitration is *not* a condition precedent to the maintenance of an action on the covenant, but *if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover.* The real question comes to this, what have the parties covenanted to do?
>
> In the present case … the meaning of [the] provision … [is] that in case of difference the amount to be paid shall be determined by arbitration, and until this is done no liability shall arise; in short, the condition means what it says; the only contract on the part of the [insurer] which is applicable where, as in the present case, a difference has arisen is that [it] will pay such amount as shall be awarded by arbitrators or their umpire.
>
> [emphasis added]

28 In the Singapore context, an example of a *Scott v Avery* clause can be found in the High Court case of *Lim Kitt Ping Lynnette v People's Insurance Co Ltd* [1997] 3 SLR 1018 ("*People's Insurance Co Ltd*"). The material clause in that case ("condition 8") read as follows (*id* at [17]):

> 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 company.* [emphasis added]

The defendant insurer pleaded in its defence that a decision by the arbitrator was a condition precedent to its liability to make payment under the policy, and, since no arbitral decision had been obtained by the insured before the action was commenced, it (the insurer) was under no liability to the insured at all. Kan Ting Chiu J accepted that such a defence could be pleaded (*id* at [19]) – *ie*, he affirmed the insurer's stance that condition 8 constituted a *Scott v Avery* clause – but ultimately rejected this defence on the facts of the case (the judge found that the dispute between the insurer and the insured was not a dispute arising out of the policy and, thus, condition 8 did not apply to begin with (*id* at [24])).

29 It is evident from the above precedents that in the normal *Scott v Avery* clause, all the provisions that state that the obtaining of an arbitral award is a condition precedent to the insured's right to bring an action based on the insurance policy are *set out in the same clause* so that the insured is left in no doubt as to their legal effect (see the wording of the clauses considered in *Scott v Avery* ([26] *supra*), *Viney v Bignold* and *People's Insurance Co Ltd*, respectively). In contrast, in the present case, the respondent's position is, effectively, that the Arbitration Clause is part of a *Scott v Avery* clause, with the other part to be found in the Condition Precedent Clause. In our view, this contention is unacceptable given the way in which *Scott v Avery* clauses are usually (and have been, for so many years) worded.

30 More importantly, the above precedents on *Scott v Avery* clauses show that these clauses have always *expressly* stated (in the context of insurance contracts specifically) that the obtaining of an arbitral award is a condition precedent to the insured's right to sue on the contract. In the present case, there is no such express provision in either the Condition Precedent Clause or the

Arbitration Clause (or, for that matter, the Legal Action Clause (see further [31]–[32] below)). The Condition Precedent Clause merely states that compliance with, *inter alia*, the Arbitration Clause is "a condition precedent to the liability of the Company *to make any payment under [the] Policy*" [emphasis added]. In our view, the respondent's liability to make payment under the Policy cannot be equated with the appellant's right to sue on the Policy so as to restrict such right of action where any of the terms or provisions of the Policy have not been adhered to. This is because just as the insured is under a legal obligation to disclose fully to the insurer, on an *uberrima fides* basis, all material facts relating to his personal conditions and circumstances, the insurer must also inform the insured of any unusual clause(s) in an insurance policy that may deprive the latter of his right to make a claim. As Woo Bih Li J stated in *NTUC Co-operative Insurance Commonwealth Enterprise Ltd v Chiang Soong Chee* [2007] SGHC 222 ("*NTUC Co-operative Insurance*") (at [50]):

> Besides highlighting what the cover of each policy extends to, insurers should also highlight the more obvious areas which the cover does not extend to, although this may be counter-intuitive to them …

31 Even if the Legal Action Clause, which specifically refers to the insured's right of action, is taken into consideration (although the respondent did *not* in fact rely on this provision to support its contention that the appellant had lost his right to commence OS 859/2007), it does not advance the argument that the Policy contained a *Scott v Avery* clause for two reasons. The first is that the Condition Precedent Clause, the Arbitration Clause and the Legal Action Clause are set out as *disparate* provisions in the Policy (see in this regard the point which we made earlier at [29] above). No insured person can be expected to know that he must read all three clauses together and, further, understand them (read collectively) to mean that he will forfeit his right to sue on the Policy if he fails to refer any dispute or difference to arbitration within three months from the day on which he and the respondent are unable to settle the dispute or difference among themselves. Indeed, it would not be far-fetched for us to state that it might even be difficult for a *lawyer* who is not familiar with a *Scott v Avery* clause to read these three clauses together and understand them to constitute, collectively, a *Scott v Avery* clause.

32 Second, the Legal Action Clause suffers from the same defect as that pointed out earlier (at [25] above) in respect of the Condition Precedent Clause and the Arbitration Clause – *ie*, the Legal Action Clause does not state that the appellant's right to commence an action in court arises only upon compliance with the Arbitration Clause. In our view, the Qualifying Words *per se* are not sufficiently clear to import such an effect into the Legal Action Clause in view of the insurer's legal obligation to inform the insured clearly of any provisions which might deprive the latter of his right to make a claim under the insurance policy. We earlier referred (at [30] above) to Woo J's observations on this particular point in *NTUC Co-operative Insurance* at [50]. We would also draw attention to the English Court of Appeal's comments in *In re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 ("*Bradley*") at 430–431 (*per* Farwell LJ) as follows:

> Contracts of insurance are contracts in which uberrima fides is required, not only from the assured, but also from the company assuring. … It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed "contra proferentes" applies strongly against the company: [*In the matter of an arbitration between Etherington and The Lancashire and Yorkshire Accident Insurance Company* [1909] 1 KB 591]. … It is, in my opinion, incumbent on the company to put

clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefits of the insurance.

33 In our view, the passages quoted from *NTUC Co-operative Insurance* and *Bradley* (at, respectively, [30] and [32] above) are apt to apply to any argument, whether based on a collective reading of the Condition Precedent Clause and the Arbitration Clause alone (which is the respondent's position) or a collective reading of these two clauses together with the Legal Action Clause (which is the alternative stance posited at [31] above), that the Policy contained a *Scott v Avery* clause. Farwell LJ's comments in *Bradley* also bring us to the third counter-argument against the respondent's contention on issue (a), *viz*, the *contra proferentum* rule.

(3) The contra proferentum rule

34 In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, Lord Mustill described the *contra proferentem* principle (at 77) as follows:

> [A] person who puts forward the wording of a proposed agreement may be assumedto have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is a reason to supposethat he is not.

In *Bradley*, Cozens-Hardy MR, who delivered the leading judgment of the court, stated (at 422) that "[a] policy of this nature [*ie*, an insurance policy], in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder" (see also our earlier reference (at [32] above) to Farwell LJ's pronouncement on this particular issue in *Bradley* at 430).

35 The *contra proferentem* rule is particularly pertinent in insurance policies because these policies are invariably drafted and/or vetted by experts for the benefit of insurers so as to protect the latter's interest.Invariably, the insured has no choice but to accept whatever terms and conditions, especially general terms and conditions, are imposed by the insurer. In our view, the rule applies in the present case. The meaning of the Qualifying Words and their effect on the right of legal action conferred by the Legal Action Clause are unclear. As we pointed out earlier, these words could mean that in the event of a breach of the Arbitration Clause, the appellant would either: (a) lose the right of action conferred by the Legal Action Clause (see [20] above), or (b) lose only his right of arbitration but not his right of legal action (see [21] above). The former interpretation favours the respondent, while the latter favours the appellant. In these circumstances, the *contra proferentum* rule entails that the respondent should not be allowed to construe the Qualifying Words as negating the appellant's right to sue on the Policy on the basis of the latter's breach of the Arbitration Clause. Similarly, the Condition Precedent Clause, which refers to only the respondent's "liability … to make any payment under [the] Policy" without mentioning the appellant's right to sue on the Policy (a point which we highlighted earlier at [30] above), should likewise be construed against the respondent; *ie*, this clause cannot be read together with either the Arbitration Clause alone or both the Arbitration Clause and the Legal Action Clause so as to nullify the appellant's right to sue on the Policy despite his breach of the Arbitration Clause.

Summary of our ruling on issue (a)

36 To summarise, compliance with the Arbitration Clause is a condition precedent to *only* the respondent's liability to make payment under the Policy. Thus, where issue (a) is concerned, the appellant did have the right under the Legal Action Clause to commence OS 859/2007 even though he had not complied with the Arbitration Clause. The appellant's right in this regard was not affected by

the Condition Precedent Clause.

Issue (b): Was the appellant entitled to recover for his alleged loss of sight when he had already been indemnified for the loss of the lens in his left eye?

37 We will now consider issue (b), *viz*, whether the appellant is entitled to recover for the alleged total loss of sight in his left eye, given that he has already been indemnified in respect of the total loss of the lens in that eye. The respondent's contention before this court was that the appellant's claim for his alleged loss of sight was barred by the principle against double recovery for the same injury. In analysing this issue, it is necessary to first examine the Accidental Disability Benefit Clause and the Double Recovery Sub-clause in greater detail.

38 The insured benefits which the appellant could potentially claim as a result of his eye injury relate to the total loss of the lens in his left eye (for which the respondent has already accepted liability and made payment under the Policy (see [6] above)) and the alleged total loss of sight in that eye. These benefits, along with the Double Recovery Sub-Clause, are set out in the Accidental Disability Benefit Clause as follows:

> **ACCIDENTAL DISABILITY BENEFIT**
>
> If … the Insured Person sustains Bodily Injury which results in his/her Permanent disability within one hundred and eighty (180) days from the date of the Accident, the Company [*ie*, the respondent] will pay the Accidental Disability Benefit up to the limit set out in Item 7.1 of the Policy Schedule; subject to the following percentage for each category of loss set out below:
>
> *Limit (percentage of such Benefit Amount)*
>
> …
>
> Total Loss of … Sight in One Eye 50%
>
> Total Loss of Lens in One Eye 50%
>
> and provided that:–
>
> a. The total Benefit Amount payable in respect of all categories of loss shall not exceed 100% of the Benefit Amount specified in Item 7.1 of the Policy Schedule for any Insured Person whilst in the lifetime of [the] Policy.
>
> b. If a Benefit Amount is payable for loss of a whole member of the body, then Benefit Amounts for parts of that member cannot also be claimed.

39 The original benefit amount which the appellant was entitled to claim as "Accidental Disability Benefit" under the Policy was stated in Item 7.1 of the Policy Schedule to be $500,000. Item 7.5 of the Policy Schedule provided that:

> The Benefit Amount for all benefits stated [in Item 7 of the Policy Schedule] … will increase by 20% on each anniversary of the Effective Date of the Policy as stated above, up to the 5th anniversary of such Effective Date, provided that the maximum amount shall not in any event exceed 200% of the original Benefit Amount shown above, subject to the terms of the Policy.

In this regard, Item 3 of the Policy Schedule listed the appellant's "Effective Date of Insurance" as

11 April 2001. Accordingly, the benefit amount for the appellant in respect of "Accidental Disability Benefit" had increased by 20% ($100,000), *ie*, from $500,000 to $600,000, by the time of the accident on 12 November 2002.

40 As the appellant has recovered only $300,000 for the loss of the lens in his left eye, the recovery of another $300,000 for the alleged total loss of sight in that eye would not exceed the total amount of "Accidental Disability Benefit" which he is entitled to claim under the Policy. The only issue is whether recovery in respect of this alleged loss would amount to recovery for a loss for which he has already been paid under the Policy.

41 It will be recalled that the Judge held that the principle against double recovery applied on the basis the appellant had already recovered $300,000 for the loss of the lens in his left eye, which was loss of part of "a whole member" within the meaning of the Double Recovery Sub-clause. He reasoned, graphically, that an insured could not also claim for a broken window if he claimed for destruction of the entire house (see the GD at [28] (reproduced earlier at [12] above)). On this basis, the Judge held that since the "whole member" in this context encompassed either the total loss of sight or the total loss of the entire eyeball of an eye, if the appellant succeeded in recovering for his alleged total loss of sight in his left eye, he would have to return the money paid for the loss of the lens in that eye.

42 In the written submissions which it filed for this appeal, the respondent argued in support of the Judge's decision as follows:[note: 9]

> The whole member of the eye must mean the entire eye itself in the natural meaning of the word. If one loses the entire eyeball, it will consequently follow that one will lose his sight [in] that eye completely. The losing of complete and absolute sight [in] the eye amounts to losing the entire purpose and function of the whole member of the eye. In that circumstance, whether the lens remains intact or otherwise becomes irrelevant since the eye can no longer see. The parts of the eye like the lens, iris, retina and cornea all come together to form the whole member of the eye. If one loses a part of the eye, for example the lens, it does not necessarily follow that the person will lose the sight in his eye, as there are available corrective surgeries. The [a]ppellant's lens in this case was replaced by an artificial one for exactly that purpose. Therefore, the claim was doomed to fail …

43 With respect, we do not think that the Judge's interpretation of the structure and intent of the Accidental Disability Benefit Clause is correct. The benefit payable in respect of the total loss of *sight* in one eye is categorised *differently* from the benefit payable in respect of the total loss of the *lens* in one eye, although the amount payable for each loss is limited to 50% of the applicable benefit amount. In other words, the Policy expressly provides that the total loss of the lens in an eye (which is a *physical* loss) is a type of loss which is *different* from the total loss of sight (which is a *functional* loss). In this regard, the appellant's argument on issue (b) (see [14] above) is consistent with the structure and intent of the Policy. As these two types of losses (*ie*, loss of the lens in an eye and loss of sight in an eye, respectively) are separate and distinct, where both the lens and sight in an eye are lost, the loss of the lens does *not* constitute part of the loss of sight for the purposes of the Double Recovery Sub-clause; conversely, the loss of sight is *not* part of the loss of the lens. In the present case, although the appellant has been paid in respect of the (physical) loss of the lens in his left eye, he has not been paid yet for the (functional) loss of sight which he claims to have suffered in that eye. With respect, the Judge was wrong in comparing apples (*viz*, loss of the lens in an eye, which is a physical loss) with oranges (*viz*, loss of sight in an eye, which is a functional loss).

44 We would pose the following hypothetical example to illustrate the difference between the

two types of claims (*viz*, for the loss of the lens in an eye and for the loss of sight in an eye, respectively). Suppose the appellant had expended the $300,000 which he recovered in respect of the total loss of the lens in his left eye on a series of operations to replace that lens so as to restore his sight in that eye (which he claims has been totally lost), but the operations failed. In such a situation, can it be the position that since the appellant has been paid "Accidental Disability Benefit" for the loss of the lens, he cannot then recover such benefit for his alleged loss of sight? If the answer is yes, then the appellant would, in substance, have recovered nothing for the loss of sight in his left eye. Is this what is contemplated by the Accidental Disability Benefit Clause, which (as we pointed out at [43] above) classifies the loss of the lens in an eye and the loss of sight in an eye as separate and distinct types of insurable losses? We think not. In our view, this is another situation where the *contra proferentum* rule dictates that any ambiguity in the extent of insurance coverage provided by the Policy should be construed against the respondent. As such, the appellant, despite having already been paid $300,000 in respect of the total loss of the lens in his left eye, is entitled to recover a further sum of $300,000 for the alleged total loss of sight in that eye *provided* he can prove the latter in a court of law.

Conclusion

45 For the reasons given above, we are of the view that the Judge was wrong in striking out OS 859/2007 and that the appellant is entitled to commence this action against the respondent. We set aside the Judge's decision and his order of costs against the appellant, with the usual consequential orders. As the appellant represented himself at the hearing before this court, there is no need for us to make any order as to costs for his counsel. The appellant will, however, be entitled to recover his reasonable disbursements from the respondent.

46 Finally, as the factual issue of whether the appellant has indeed suffered a total loss of sight in his left eye (*ie*, the Dispute) has yet to be determined, we remit this action to the Judge to rule on this issue. In this regard, we direct that, for the purposes of determining whether the appellant has suffered a total loss of sight, the Judge should appoint an eye specialist from the Singapore National Eye Centre to give expert testimony on this issue in lieu of allowing the parties to appoint their own experts.

[note: 1]See vol 2, p 129 of the core bundle filed by the appellant ("ACB") for this appeal.

[note: 2]See prayer (a) of OS 859/2007 (at ACB, vol 2, pp 29–30).

[note: 3]See prayer (b) of OS 859/2007 (at ACB, vol 2, p 30).

[note: 4]See ACB at vol 2, p 297.

[note: 5]See para 7 of the appellant's affidavit filed on 9 June 2007 (at ACB, vol 2, p 39).

[note: 6]*Ibid*.

[note: 7]See Dr Yii Hee Seng's e-mail dated 23 May 2003 (at ACB, vol 2, pp 71–72).

[note: 8]See para 82 of the written case filed by the respondent for this appeal.

[note: 9]See para 44 of the respondent's skeletal arguments filed on 27 March 2008.