IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 42

Civil Appeal No 137 of 2016

Between

Ngee Ann Development Pte Ltd

… *Appellant*

And

Takashimaya Singapore Ltd

… *Respondent*

JUDGMENT

[Landlord and tenant] – [Leases] – [Interpretation]

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v
Takashimaya Singapore Ltd

[2017] SGCA 42

Court of Appeal — Civil Appeal No 137 of 2016
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
17 April 2017

6 July 2017 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 This appeal arises from a dispute involving a lease of some 56,105 sqm of commercial space ("the Demised Premises") in Ngee Ann City, one of Singapore's most prestigious shopping complexes in the heart of the famed Orchard Road shopping belt. Since 1993, the Demised Premises have been leased from the appellant landlord ("Ngee Ann Development") by the respondent tenant ("Takashimaya"), a department store operator which also runs a sizable and well-known department store occupying about 38,000 sqm of the Demised Premises.[1] Both Ngee Ann City and Takashimaya's department store have, over the years, become iconic retail destinations of the Orchard Road shopping belt, even amidst the high concentration of retail outlets in the area.

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[1] ROA vol III (Part 5) p7 at para 12(a); vol V (Part 5) p132 at para 5.3.

2 The commercial relationship between Ngee Ann Development and Takashimaya has a considerable history. Their lease commenced more than 20 years ago in 1993. It comprises an initial term of 20 years and provides for six consecutive options to renew, each for a period of 10 years (save for the last option period which is to last for about 8.5 years). It is immediately apparent from the length of the lease alone that the parties contemplated a long term relationship which could extend to an aggregate period of almost 80 years. Bearing in mind that Takashimaya's parent company, Takashimaya Co Ltd ("Takashimaya Japan"), owns 26.3% of Ngee Ann Development, the length of the lease is hardly surprising.

3 The lease contained an express provision that the renewal rent of each option period shall be the "prevailing market rental value" of the Demised Premises. The parties were divided as to whether such rental value is to be determined on the basis of the "the existing configuration" of the Demised Premises as currently in use by Takashimaya or a hypothetical configuration that would yield "the highest and best use" of the Demised Premises, subject only to the terms of the lease. The difference between these two approaches is likely to have huge financial repercussions especially given the multiplying effect over the aggregate lease period should all the renewal options be exercised.

4 In deciding on the correct approach, it is important to bear in mind that ultimately the tenant is exercising an option to renew the lease for a further period of 10 years. Adopting Ngee Ann Development's interpretation would necessarily entail a notional valuation based on a hypothetical configuration of the Demised Premises which may well bear no resemblance to the existing configuration as currently in use by Takashimaya. This would invariably lead

to a further difficulty. Which hypothetical configuration should be adopted for the valuation since different hypothetical configurations would yield different valuations? According to Ngee Ann Development, the choice of the configuration should be left to the appointed valuer. Was this contemplated by the parties under the lease and would such an interpretation derogate from Takashimaya's right to exercise the option to renew the lease and effectively impair its prerogative to choose the configuration of the Demised Premises?

5 The rent renewal clause provides that the "prevailing market rental value" shall be determined by a licensed valuer who "shall act as an expert and not as an arbitrator" and whose "decision shall be conclusive and binding on the parties". Each party appointed a valuer. Unfortunately the valuation process was aborted due to an alleged breach of the terms of the valuers' appointments. Disagreement ensued between the parties as to the appropriate steps to remedy the alleged breach which eventually led to the present proceedings. In this connection, this judgment will examine the role of the court with respect to a valuation process in the context of an agreement which contractually provides for appointed valuers, acting as experts, to arrive at a conclusive and binding valuation.

Facts

The parties

6 The appellant, Ngee Ann Development, is a subsidiary of Ngee Ann Kongsi. Ngee Ann Development is the registered proprietor of the Demised Premises (which is comprised in Strata Lot U5784W of Town Subdivision 21 at 391 Orchard Road, Ngee Ann City, Singapore). Its Executive Director is

Mr Teo Chiang Long, who was the sole witness of fact for Ngee Ann Development at the trial in the High Court.

7 The respondent, Takashimaya, is a wholly owned subsidiary of Takashimaya Japan, a Japanese company well-known for its operation of large prestigious department stores.[2] Takashimaya's primary factual witness was Mr Masahiro Yoshino, a director of Takashimaya who moved to Singapore from Japan in 1990 to manage Takashimaya's business here.

The genesis of the parties' relationship

8 The parties' relationship began in 1989, when representatives from Ngee Ann Kongsi and Takashimaya Japan entered into discussions concerning the lease of the Demised Premises. On 18 July 1989, Ngee Ann Development and Takashimaya entered into a conditional agreement ("the Conditional Agreement").[3] Pursuant to the Conditional Agreement, the parties were to enter into an Agreement for Lease,[4] a document which was annexed to the Conditional Agreement. The terms of Takashimaya's lease of the Demised Premises were set out in a separate document titled "Lease"[5] ("the Lease"), which was in turn annexed to the Agreement for Lease. It is this document – the Lease – that contains the terms of agreement that are central to the dispute.

9 As part of the arrangements, Takashimaya Japan invested in Ngee Ann Development and came to own 26.3% of the latter's shares, with the remaining shares owned by Ngee Ann Kongsi. Takashimaya Japan also appointed four out

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2 ROA vol III (Part 5) p4.

3 ROA vol V (Part 1) pp28–34.

4 ROA vol V (Part 1) pp42–62.

5 ROA vol V (Part 1) pp63–98.

of the 13 directors in Ngee Ann Development.[6] Accordingly, both Ngee Ann Development and Takashimaya have a common major shareholder, *ie*, Takashimaya Japan.

The Lease

Terms governing the initial 20 year term

10 Under the terms of the Lease, Takashimaya would lease the Demised Premises from Ngee Ann Development for an initial term of 20 years, which would commence on 8 September 1993 and end on 7 September 2013. For the first five years of that 20 year term, Takashimaya would pay a fixed monthly sum at the rate of $9.70 per square foot ("psf"). It is unclear whether configuration of the Demised Premises played any role in arriving at this rate. Thereafter, to determine the rent payable for each successive five year period ("rent review period") up to the end of the initial 20 year term, a rent review would be conducted.

11 In summary, the rent review mechanism as described in cl 2(c) of the Lease operates in this manner. The parties would endeavour to agree on the "prevailing market rental value of the Demised Premises". If, by three months before the commencement of the relevant rent review period, the parties still have not reached agreement on the new rent, then Ngee Ann Development is to appoint a licensed valuer to determine the "prevailing market rental value of the Demised Premises". The licensed valuer is to be nominated by agreement between the parties, or, failing such agreement, by the President of the Singapore Institute of Surveyors and Valuers ("SISV"). The "prevailing market

6 ROA vol III (Part 5) p5 at para 8.

rental value of the Demised Premises" would be the new rent for that rent review period.

12 Additionally, cl 11 of the Lease permits Takashimaya as lessee to sublet the Demised Premises "on such terms and conditions as it shall determine". This is subject, under cl 11(d), to the retention of 10,000 sqm of the Demised Premises ("the Retained Area") for occupation by a single sub-lessee or by Takashimaya itself. The sub-lessee is to be acceptable to Ngee Ann Development, whose approval is not to be unreasonably withheld.

Terms governing the subsequent option periods

13 As earlier mentioned, Takashimaya is entitled to six consecutive options to renew the Lease. For the first five options to renew, each period of renewal ("option period") would each last for 10 years. The sixth (and final) option period would last for approximately 8.5 years ending on 30 March 2072.

14 In order to exercise its option to renew, Takashimaya is required to give notice to Ngee Ann Development. Thereafter, under cl 12(c) of the Lease, the parties are to endeavour to agree on the "prevailing market rental value of the Demised Premises" for the purpose of determining the "renewal rent" for the relevant option period in a procedure similar to the rent reviews for the initial 20 year term described above. Under cl 12(d) of the Lease, the "prevailing market rental value of the Demised Premises" thus agreed or determined by the licensed valuer would be the renewal rent for the relevant option period.

15 The Lease also provided that the rent for each option period would likewise be subject to review every five years. The rent review mechanism

described at [11] above would also apply to the rent review for the option periods.

The initial 20 year term and the rent reviews

16 The parties did not agree on the rent payable until several years after the initial 20 year term had commenced on 8 September 1993. No explanation was provided for the delay in reaching agreement on the rental. On 17 November 1998, they entered into a supplemental agreement[7] ("the Supplemental Agreement") governing these matters. Under this agreement, the parties accepted that the net floor area of the Demised Premises was 56,105 sqm,[8] and that the monthly rent to be paid by Takashimaya for the first five years of the initial 20 year term (from 8 September 1993 to 7 September 1998) was to be capped at $5,011,680,[9] varying the rental rate of $9.70 psf per month that was originally agreed in the Lease (see [10] above). The new rental rate worked out to be about $8.30 psf per month. The parties further agreed that the rent payable for the first rent review period (from 8 September 1998 to 7 September 2003) would be at the unchanged rate of $5,011,680 per month (equivalent to about $8.30 psf per month).[10]

The Second Rent Review

17 For the second five year rent review period from 8 September 2003 to 7 September 2008, the parties were unable to agree on the new rent. By way of a letter dated 9 July 2003,[11] Ngee Ann Development invoked the procedure

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7 ROA vol V (Part 1) pp154-170.

8 ROA vol V (Part 1) p158 at cl 2(a).

9 ROA vol V (Part 1) p158 at cl 2(b).

10 ROA vol V (Part 1) p160 at cl 3.

under cl 2(c) of the Lease to have the prevailing market rental value determined by a licensed valuer (see [11] above). The SISV nominated Dr Lim Lan Yuan, a former Council Chairman of the SISV, to carry out the rent review for this period ("the Second Rent Review").

18 On 10 September 2003, Ngee Ann Development wrote to inform Dr Lim of his appointment as valuer to determine the prevailing market rental value of the Demised Premises for the Second Rent Review period.[12] Copies of the relevant documents were provided to Dr Lim. Dr Lim thereafter produced a valuation report dated 3 December 2003,[13] in which he concluded that the prevailing market rental value was $4,090,000 per month or $49,080,000 per annum. This worked out to be $6.77 psf per month, which is lower than the rent that Takashimaya paid for the initial five years as well as for the first rent review period, under the terms of the Supplemental Agreement (see [16] above).

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11 ROA vol V (Part 1) pp190–191.

12 ROA vol V (Part 2) pp18–19.

13 ROA vol III (Part 4) pp112–119.

19 On 8 May 2007, the parties executed instruments in relation to the Lease as well as a Variation of Lease,[14] which essentially consolidated and formally incorporated into the Lease the terms of several subsequent agreements, including the Supplemental Agreement.

The Third Rent Review

20 For the third five year rent review period from 8 September 2008 to 7 September 2013, the parties were again unable to agree on the rent to be paid. Through a similar procedure, Dr Lim was appointed as valuer for the rent review for this period ("the Third Rent Review"). Dr Lim produced a valuation report[15] dated 29 May 2009, determining the rental value at $5,300,000 per month or $63,600,000 per annum (about $8.78 psf per month).

21 After Dr Lim had produced his report, a series of letters was then exchanged between Mr Teo, writing on behalf of Ngee Ann Development, and Dr Lim. These letters are relevant because they provide an insight into the nature of Ngee Ann Development's concerns as to how Dr Lim had carried out his valuations.

22 In his letter to Dr Lim dated 10 June 2009, Mr Teo observed that the new rent payable by Takashimaya had increased by only 5.75% from the previous rent review period, but the rent payable by Toshin Development Co Ltd ("Toshin") – which had separately leased the part of Ngee Ann City owned by Orchard Square Development Corporation Pte Ltd – had increased by 19.8%. Mr Teo sought "an explanation on the huge difference in rental rates between Toshin Development's $12.49 psf per month as against the new rental for the

14 ROA vol V (Part 2) pp49–53 and 84–87.

15 ROA vol III (Part 4) pp124–130.

area leased to Takashimaya Singapore at $8.78 psf per month".[16] On 11 June 2009, Dr Lim replied in writing, explaining that the rent payable by Takashimaya had in fact increased by 29.8%, (from $6.77 to $8.78 psf) and that in any event the valuation had been based "on an analysis of the prevailing market conditions taking into account the differences in size, floor level, location etc".[17]

23 Dissatisfied with Dr Lim's response, Mr Teo again wrote to Dr Lim on 24 June 2009, disputing Dr Lim's calculation of the percentage increase in rental and again seeking "an explanation on the huge difference between the new rental rates for Toshin and for Takashimaya Singapore".[18] On 25 June 2009, Dr Lim explained[19] that an "important factor affecting the rental rate [was] the difference in lettable areas", because Takashimaya leased an area that was 2.67 times that of the area leased by Toshin. As the area leased by Toshin was "much smaller", it was "not unreasonable" that the rate payable by Toshin was higher in terms of rent psf. No further reply or objection was forthcoming from Mr Teo or other representatives of Ngee Ann Development.

The First Option Period

24 The detailed facts concerning the events after 18 January 2013, which was the date on which Takashimaya gave notice to Ngee Ann Development of its intention to exercise its option to renew the Lease for a further 10 year term commencing on 8 September 2013 ("the First Option Period"), are set out

16 ROA vol III (Part 4) p132.

17 ROA vol III (Part 4) p134.

18 ROA vol III (Part 4) pp135–136.

19 ROA vol III (Part 4) p137.

comprehensively in the High Court's judgment ("the Judgment") at [24]–[37]. We do not propose to repeat them here in the same level of detail.

25 Suffice it to say that this was the point at which the parties' disagreement over the renewal rent first arose. Takashimaya took the position that the determination of the "prevailing market rental value of the Demised Premises" should be based on the *existing configuration* of the Demised Premises, or in other words, the current allocation of floor area to its department store and specialty retail stores. Ngee Ann Development's view was that the valuer was permitted to posit a *different configuration* for the purposes of the valuation exercise – more specifically, a configuration that would reflect the "highest and best use" of the Demised Premises. The negotiations between the parties on the renewal rent for the First Option Period broke down as a result of this disagreement. Ngee Ann Development commissioned a valuation report by Savills[20] and in reliance thereon proposed a renewal rent at $19.83 psf per month, more than double the then existing rent of $8.78 psf per month, which was promptly rejected by Takashimaya.

26 Ngee Ann Development nominated Ms Sim Hwee Yan of CBRE Pte Ltd ("CBRE") as valuer and Takashimaya in turn nominated Ms Low Kin Hon of Knight Frank Pte Ltd ("Knight Frank"). We will refer to Ms Sim and Ms Low collectively as "the Valuers". The parties then agreed to vary the procedure under cl 12 of the Lease for the determination of the renewal rent. The Valuers were to separately ascertain the "prevailing market rental value of the Demised Premises". The two rental values produced would then be averaged to determine the renewal rent. The parties have referred to this variation as "the Revised Rent Renewal Mechanism". We should add that it is common ground that the

[20] ROA vol V (Part 2) pp128–141.

valuation procedure was varied *only* to the extent of providing for an average of the two valuations instead of using a single valuation.

27 The parties then entered into negotiations on the drafting of a joint appointment letter ("the Joint Appointment Letter") to be sent to the Valuers. Ngee Ann Development sought to include a provision in the Joint Appointment Letter to specifically state that "there is no restriction in the Lease to restrict the prevailing market rental value of the Demised Premises to be determined by reference to the existing use of the Demised Premises". Due to Takashimaya's objection, this was eventually removed and substituted with a simple reproduction of cl 11(d) of the Lease, which merely sets out the requirement regarding the Retained Area (see [12] above). Under the terms of the Joint Appointment Letter,[21] each party was entitled to make written representations to the Valuers, but was required to provide a contemporaneous copy of those representations to the other party.

28 The Joint Appointment Letter was issued to the Valuers on 11 April 2014. It transpired, however, that Ngee Ann Development had sent written representations[22] to the Valuers on 22 April 2014 ("22 April representations"), arguing that it was open to the Valuers to consider a reconfiguration of the Demised Premises, and enclosing a copy of Savills' valuation report.[23] Crucially, Ngee Ann Development had omitted to provide a contemporaneous copy of those representations to Takashimaya as required under the terms of the Joint Appointment Letter.

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21 ROA vol V (Part 3) pp107–109.

22 ROA vol V (Part 5) pp154-157.

23 ROA vol V (Part 4) pp113–127.

29 Takashimaya came to learn of Ngee Ann Development's 22 April representations only after the Valuers had produced their valuation reports.[24] Upon receiving those reports, Takashimaya sent an email query to Knight Frank through their solicitors, enquiring why Knight Frank had stated in its report that "open market rental" was a term that Knight Frank "would define as intended to mean the best rental at which an interest in a property might reasonably be expected to be let at the date of valuation".[25] In its email reply, Knight Frank stated that its opinion of the "open market rental value" was "in accordance with the basis of valuation set out in [Ngee Ann Development's 22 April representations] to both CBRE Pte Ltd and Knight Frank Pte Ltd and copied Takashimaya Singapore Ltd". Knight Frank further referred to Ngee Ann Development's "stipulat[ion]" within those representations that (a) the prevailing market rental value should be determined in accordance with the Valuation Standards and Guidelines adopted by the SISV ("the SISV Guidelines") which required a valuer to estimate the "highest and best use" of the property in question; and (b) there was "no provision in the Lease to restrict the determination of the prevailing market rental value of the Demised Premises by reference to the existing or current use by Takashimaya of the Demised Premises".[26] It is clear from Knight Frank's reply that the valuation had been influenced by Ngee Ann Development's 22 April representations, which the Valuers had taken into account without the benefit of any response from Takashimaya. In fact, the absence of any response from Takashimaya would have given the Valuers the erroneous impression that Takashimaya had agreed to or at least had no objections to Ngee Ann Development's representations.

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24 ROA vol V (Part 5) pp48–150.

25 ROA vol V (Part 5) pp151–152.

26 ROP vol V (Part 5) p153.

30 Takashimaya then wrote to Ngee Ann Development,[27] seeking an explanation as to why the latter had omitted to inform Takashimaya of its 22 April representations and to provide Takashimaya with a copy of those representations, as required under the terms of the Joint Appointment Letter. After several chasers[28] from Takashimaya and an awkward delay of more than a month, Ngee Ann Development eventually explained that it had made an "administrative error and oversight" in failing to provide Takashimaya with a contemporaneous copy of its representations. Ngee Ann Development agreed, however, that a "fresh set of valuation reports should be obtained" at its cost.[29]

31 Thereafter, the parties reached an impasse as to how to proceed. Central to the gridlock was the parties' disagreement as to whether the fresh valuation should be conducted on the basis of the existing configuration of the Demised Premises, or if it was open to the Valuers to adopt a hypothetical configuration that would reflect the "highest and best use" of the premises.

Commencement of litigation

32 On 28 March 2015, Ngee Ann Development commenced Suit No 292 of 2015 against Takashimaya, claiming that Takashimaya was "[i]n breach of the agreement reached between the Parties as to the Revised Rent Renewal Mechanism… [by] refus[ing] to join [Ngee Ann Development] in instructing the Valuers to conduct the re-valuation exercise in accordance with the terms of the Joint Appointment Letter".[30] Ngee Ann Development sought, amongst other

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27 ROP vol V (Part 5) pp164-165.

28 ROP vol V (Part 5) pp171 and 173.

29 ROA vol V (Part 5) at pp186–187.

30 Statement of Claim at para 24: ROA vol II p22.

things, a declaration that Takashimaya was in breach of the Lease as varied by the parties.

33 Takashimaya denied Ngee Ann Development's claims and in turn filed a counterclaim, seeking a declaration that "the prevailing market rental value to be determined at the time of an option renewal must take into account and/or refer to the Existing Configured and Used Demised Premises".[31]

The High Court's decision

34 The High Court judge ("the Judge") dismissed Ngee Ann Development's claims in their entirety. She found at [49]–[52] of the Judgment that the text of the Lease did not provide for a plain and unambiguous definition of the contested phrase "prevailing market rental value". On this matter, she also considered the opinions of the parties' experts on valuation. In relation to the context of the agreement and the parties' intentions, however, the Judge found that the evidence demonstrated that "Takashimaya's interpretation of the 'prevailing market rental value' was what the parties had intended". She therefore rejected Ngee Ann Development's claim and allowed Takashimaya's counterclaim, granting Takashimaya the declaration it sought that the meaning to be ascribed to "prevailing market rental value" in the Lease and the Joint Appointment Letter "refers to a valuation based on the existing configuration of the Demised Premises": Judgment at [69]. She found at [62] that to adopt a "hypothetical reduced area designated for departmental store use" would fail "to cohere with its actual use".

35 Dissatisfied with the outcome, Ngee Ann Development appealed against the Judge's decision.

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[31] Defence and Counterclaim (Amendment No. 1) p33 at para 1(a): ROA vol II p56.

The issues in the appeal

36 The core issue for decision in this appeal is whether the parties intended that the "prevailing market rental value" of the Demised Premises should be determined on the basis of the existing configuration or a hypothetical configuration that would yield the "highest and best use" of the Demised Premises. More specifically, the dispute concerns the proportion of the floor area occupied by the anchor tenant (which is currently Takashimaya, by way of its department store), relative to the floor area occupied by specialty and other stores, which is to be used as the factual basis of the valuation. Takashimaya contends that the valuation should take place on the basis of the existing configuration – in which Takashimaya's department store occupies a sizable portion of about 38,000 sqm out of the total 56,105 sqm of the Demised Premises – while Ngee Ann Development argues that it is for the Valuers to decide how the "prevailing market rental value" should be determined and the configuration of the Demised Premises to be assumed for the purposes of the valuation,[32] including the use of whatever configuration which, in the assessment of the Valuers, would represent the "highest and best use" of the Demised Premises.[33]

37 It is appropriate, before proceeding further, to briefly describe the concept of the "highest and best use" and its relevance, if any, to the dispute. As Associate Professor Yu Shi Ming ("Prof Yu"), Ngee Ann Development's expert witness, explained,[34] the "highest and best use" principle is found in the SISV Guidelines[35] and is defined therein as "[t]he most probable use of an asset

32 Appellant's Case at paras 5, 120 and 128.

33 Statement of Claim at para 14: ROA vol II p18; Judgment at [2]: ROA vol I p8.

34 ROA vol III (Part 4) pp18–19.

35 ROA vol V (Part 1) pp171–189.

which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the asset being valued". The SISV Guidelines also define "market value" as "the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had acted knowledgeably, prudently and without compulsion". The SISV Guidelines explain the relationship between the concepts of "market value" and "highest and best use" as follows: "To estimate Market Value, a Valuer must first estimate the highest and best use, or most probable use for the property in question. … This determination is made from market evidence."

38 We make some observations in relation to the SISV Guidelines. Neither the Lease nor the Joint Appointment Letter contains any reference to the SISV Guidelines, save for the clauses in the Lease on rent review and renewal rent, which merely require Ngee Ann Development to request the President of the SISV to nominate a valuer if the parties fail to agree on the identity of such valuer (see [11] and [14] above). More specifically, nothing in the Lease requires the prevailing market rental value of the Demised Premises to be determined in accordance with or with reference to the SISV Guidelines. Simply put, in the absence of any compelling evidence to the contrary, the SISV Guidelines *do not form part of the parties' agreement* and therefore do not have contractual force. It is equally crucial to bear in mind the well-established principle that the ultimate inquiry in a contractual dispute such as that presently before us concerns the *parties' intentions*, objectively ascertained, as to how they intended the valuation to be carried out. The search is for the parties' common understanding at the time of contracting, when they agreed that in the absence of consensus on the renewal rent, the rent to be paid by Takashimaya

would be the "prevailing market rental value" of the Demised Premises as determined by a process of valuation. It therefore stands to reason that the opinions of the parties' experts on valuation methods, and the principles and procedures set out in the SISV Guidelines, are useful *only insofar as they are able to shed light on this central inquiry*.

39 We think it appropriate to begin, as the Judge did, with the *text* of the parties' agreement as embodied in the Lease and the Joint Appointment Letter. We will then move on to consider the *context* of the parties' agreement which – as emphasised in a series of decisions of this court – is equally crucial and must form part of the interpretive exercise. In our judgment, two aspects of the context are of particular relevance in this case, *ie,* the unique nature of the parties' commercial relationship, and the events that reflect the parties' understanding of how the valuation has been and is to be carried out. We will elaborate in the subsequent analysis.

40 Before embarking on our examination of the text and context of the Lease and the Joint Appointment Letter, there is an important preliminary issue which must first be engaged. This concerns the scope of the court's involvement when parties have decided that particular disputed issues should be determined by an expert. In the present circumstances, the parties have respectively sought the intervention of the court even *before* the Valuers have conducted a fresh valuation. This issue is logically anterior to our determination of the substantive merits of the appeal. It is only if the conditions for the court's intervention are satisfied that it will be appropriate for this court to ascertain the configuration to be adopted for the purposes of the valuation.

The role of the court in relation to expert determinations

41 We begin by observing that there is a distinction between a situation where the court's involvement is sought *before* the expert has made his determination, and a situation where the court is invited to intervene only *after* that determination has been rendered. This is an important distinction for at least two reasons. First, the court's grounds for intervention in the latter situation are wider than in the former: for instance, by his conduct in arriving at his determination, the expert may have acted fraudulently or failed to act impartially in the discharge of his duty: see *Campbell v Edwards* [1976] 1 WLR 403 at 407; *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [29] and [34]; and *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [47]. These are evidently not incidents that could have occurred prior to the making of his determination. Second, in the former situation, the expert has not even had an opportunity to opine on the issues to which the parties disagree, be they issues of jurisdiction or merits. At first blush, there may be some dissonance between the parties' agreement for disputed issues be decided by an expert, and their readiness to seek curial intervention prior to the expert's determination.

42 The present case involves only the former situation, and so it is only that situation that we will consider. With regard to the latter situation, guidance has been provided in the cases that are referred to in the preceding paragraph. In deciding on the propriety of the court's intervention, we will examine what is the permissible scope of curial intervention when the parties have agreed, by way of an expert determination clause, that particular disputes be decided by an expert, and the separate question of whether the court should nonetheless allow

the expert to make his determination first, and resolve any issues that may arise only thereafter. We will take each of these questions in turn.

Permissible scope of curial intervention

43 In the English Court of Appeal's decision in *Mercury Communications Ltd v The Director General of Telecommunications* [1996] CLC 1125 ("*Mercury*"), Hoffmann LJ (as he then was) set out a useful statement of principle in his dissenting opinion. Although Hoffmann LJ was in the minority, the House of Lords eventually agreed with his view and allowed the appeal. Hoffmann LJ's views in *Mercury* have since been cited with approval in a number of cases, including the more recent decision of the English Court of Appeal in *Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826 ("*Barclays*"), and represent the current orthodoxy.

44 The relevant passage from Hoffmann LJ's decision is as follows (*Mercury* at 1139–1140):

> 6. Prematurity
>
> This is a short-hand for saying that *when parties have agreed to appoint someone to determine a question in dispute, they should not pre-empt his decision by asking the court to decide the matter in advance.* It is however important to notice that there are two separate principles involved. One is a matter of substantive law and the other a matter of procedural convenience. I can illustrate the difference in this way. The parties agree that a firm of accountants shall determine the value of a parcel of shares. They do not prescribe any particular principle of valuation, such as allowing a discount for a minority interest. In such a case, the court will not intervene to decide how the valuation should be done. Neither in advance of the valuation nor afterwards. The parties have agreed to accept the accountants' valuation and in the absence of fraud or collusion they are bound by whatever it is. The same is true of other decisions entrusted to experts. This is a rule of substantive law: *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277.

> Assume, however, that the parties have in addition agreed certain of the principles upon which the accountants should value the shares. For example, that the goodwill of the company's business shall be valued at three times the net profits over the past three years. If it can be shown that the accountants have valued the goodwill on a different basis (as to which there may be evidential difficulties which are mentioned by Dillon LJ in *Jones v Sherwood Computer Services plc* at p. 284) the court will set aside the valuation. It is not a valuation to which the parties have agreed.
>
> On the other hand, even in cases in which the parties have agreed principles of valuation, their application may involve questions of judgment which they have left to the decision of the accountants. In the last example, the question of what counts as 'net profits' may be something on which different accountants could hold different views. Here again, as a matter of substantive law, the court will not interfere. As a matter of contract, the parties have agreed that 'net profits' are to be whatever the accountants honestly consider them to be.
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> *So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision.* This is because the court's views about the right answer to the question are irrelevant. On the other hand, *the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.*
>
> One must be careful about what is meant by 'the decision-making authority'. By 'decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. *Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority.* Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion. The distinction is clearly made by Lord Mustill in *R v Monopolies and Mergers*

> *Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p. 32.
>
> [emphasis added]

In our judgment, Hoffmann LJ's views are instructive and we summarise the principles outlined at [49] below.

45 In *Barclays*, a dispute arose regarding whether certain investment profits made by Barclays Bank had to be brought into account and distributed to members under a partnership agreement. There was an expert determination clause for an accountant to resolve disputes regarding profit allocations. A question arose as to whether it was for the court or the expert accountant to determine the scope of the expert's jurisdiction. Thomas LJ (as he then was) referred to several authorities including Hoffmann LJ's opinion in *Mercury,* and held (at [23]) that:

> …in any case where a dispute arises as to the jurisdiction of an expert, a court is the final decision maker as to whether the expert has jurisdiction, even if a clause purports to confer that jurisdiction on the expert in a manner that is final and binding.

46 In a concurring opinion, Lord Neuberger MR (as he then was) similarly expressed his agreement with Hoffmann LJ's opinion, but held more broadly (at [69]) that:

> …where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose agreement on the issue is rejected.

Lord Neuberger MR also suggested at [70], in an opinion that has proven to be somewhat controversial in subsequent cases, that:

> …it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations.

Referring to Lord Neuberger's views in this regard, Thomas LJ remarked at [35] that he saw force in Lord Neuberger's views but the issue required detailed examination when it arose, and so preferred to express no concluded view.

47 In *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994, Moore-Bick LJ observed at [9] that Lord Neuberger's comments in *Barclays* had been made *obiter* and that neither of the other members of the court expressed agreement with them. Moore-Bick LJ considered that if any error of law on the part of the expert rendered his decision invalid, that would in many cases risk undermining the whole purpose of the reference. He preferred the view that whether the expert's decisions on law or of mixed fact and law were intended to bind the parties ultimately depended on the construction of the contract under which the expert was appointed to act.

48 In the absence of full argument on the point, we do not propose to venture an answer to the difficult question of whether it is for the court rather than the expert to reach final and binding decisions on *any and all issues of law*. We also leave for future decision the separate question of whether it is open to the parties to *agree* that questions of construction and of law should be remitted to an expert for his final and binding determination, without the possibility of curial correction. We note that in *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103, Knox J expressed the following view (at 108):

> …if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question

> of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him.

In *Barclays* at [66], however, Lord Neuberger cast doubt on the correctness of Knox J's statement of principle, remarking that he "[did] not consider that this by any means necessarily represents the general rule". We leave these matters and other related issues for future determination when they arise on the facts.

49 For present purposes, we accept the narrower proposition suggested by Hoffmann LJ in *Mercury* that *the scope of the expert's "decision-making authority" is, in the final analysis, a matter for the court*. This includes, where the expert has been tasked to reach his determination in accordance with certain principles, *the correct meaning and understanding of such principles*. As Hoffmann LJ explained, the reason is that when an expert acts upon the wrong application of those principles, he will necessarily go outside the scope of his "decision-making authority" and his determination will not bind the parties, since the parties have only agreed to be bound by a determination that is made in accordance with the correct meaning of those principles. More broadly, it is ultimately for the court to determine, on a final and binding basis, the scope of the expert's jurisdiction. The English Court of Appeal's decision in *National Grid Company Plc v M25 Group Ltd* [1999] 1 EGLR 65 ("*National Grid*") provides a useful illustration of the approach. In that case, the landlord and tenant disagreed on the proper construction of certain aspects of the lease in connection with an ongoing rent review, and the tenant sought declarations from the court on these issues. The first instance judge granted the landlord's application to strike out the originating summons on the ground that those matters should be determined by the expert "on his way to reaching his

determination to the new rent". The English Court of Appeal allowed the appeal. Mummery LJ, delivering the principal judgment of the court, observed that the parties had agreed that when the valuer determines the question referred to him, the valuer should observe certain agreed contractual directions, such as the requirement to ascertain the rent on an open market basis, to have regard to the terms of the lease, and to disregard three particular factors. Mummery LJ then held as follows (at 67):

> … The valuer must ascertain the rent in accordance with these contractual criteria. He can only lawfully do what he was appointed to do under the lease. If he does something which he was not appointed to do, he is acting outside his terms of reference. He does not have a completely free hand in deciding the question what increase ought to be made in the rent payable. *Whether he is acting within the perimeter of his contractual power depends on ascertaining the correct limits of the power conferred on him by the lease. Those limits are ascertained by a process of construction of the lease. The terms of the lease do not confer on the valuer, either expressly or by implication, the sole and exclusive power to construe the lease.*
>
> [emphasis added]

Mummery LJ subsequently expressed his agreement (at 68) with Hoffmann LJ's dicta in *Mercury* and allowed the appeal.

50 Turning to the facts of the present case, the question for determination is whether the meaning of "prevailing market rental value" and the method for determining this are properly to be considered as *principles* in accordance with which the Valuers are to perform the valuation. If they are properly to be considered as such, it follows that it will be open to the court to make a pronouncement on the matter. Indeed, in such a case the Valuers' views on the meaning of the term will not be binding on the parties because the court is the sole proper arbiter on the subject.

51 Is it appropriate to regard the meaning of the term "prevailing market rental value" and the method for its determination as principles governing the valuation? In our judgment, the answer is quite clearly – yes. The central dispute between the parties is whether the "highest and best use" principle should (or should not) be applied in the performance of the valuation, with the consequence that the Valuers may (or may not) adopt a configuration other than the existing configuration for the purposes of the valuation. In this regard, we agree with Takashimaya's expert witness, Mr Tan Keng Chiam, Head of Valuation Advisory Services of Jones Lang Lasalle Property Consultants Pte Ltd that "in order to perform a rental valuation of the Demised Premises under the Joint Appointment Letter, parties must *first agree* on the basis of the valuation" [emphasis added]. After all, the Valuers are only entitled to carry out the valuation in accordance with the relevant principles and if they operate on an incorrect understanding of those principles, their determinations will not bind the parties. These matters go to the jurisdiction or "decision-making authority" of the Valuers and therefore come within the purview of the court. Clearly an agreement on the configuration to be adopted for the purposes of valuation is essential and since the parties have not been able to reach consensus on this fundamental issue, the court's intervention is required to objectively ascertain the parties' intention at the time of contracting.

Order of determination

52 We now move to the second question that we identified at [41] above, which is whether the court should first allow the expert to make his determination before subsequently dealing with any disputed jurisdictional issues that arise, or if the court should speak in advance on the scope of the expert's decision-making authority.

53 Guidance may once again be drawn from Hoffmann LJ's opinion in *Mercury* at 1140–1141, which we agree with:

> These are the principles upon which a court will decline as a matter of substantive law from intervening in a matter which the parties have agreed to submit to the decision of a third party. *It does not follow, however, that because the court will intervene to correct a decision-maker who has gone outside his authority, it will declare in advance what the limits of that authority are. The reason for this reluctance is not one of substantive law but procedural convenience. It is because in advance of the decision, the true meaning of the principles upon which he has to decide is usually a hypothetical question.* It is hypothetical because it will only become a live issue if one of the parties thinks that the decision-maker has got it wrong. It is always possible that he may get it right and therefore wasteful and premature to come to the court until he has made his decision. The practice of the courts is not to decide hypothetical questions: see *Re Barnato* [1949] Ch 258.
>
> There is a further factor which plays a part in the court's reluctance to make a pre-emptive ruling on the construction of the principles according to which the decision-maker is required to decide. A party may be attempting to secure a ruling in advance because he fears that if the decision-maker departs from what he considers to be the correct meaning of those principles, he may have evidential difficulties in proving that he has done so. The terms of the valuation or award may not provide enough material to enable the court to say that the decision-maker has gone outside his authority. But this is not usually a legitimate reason for seeking a pre-emptive ruling. The party has agreed to submit to a particular form of decision-making with whatever evidential difficulties that might entail.
>
> [emphasis added]

54 On appeal, and along similar lines, Lord Slynn of Hadley held as follows (*Mercury Communications Ltd v Director General of Telecommunications and another* [1996] 1 WLR 48 at 59C):

> …The defendants under this head are entitled to say that the court normally will not give a ruling as to the meaning of words to be applied by another decision-maker before he has had a chance to express his own views about it and that the courts will not answer questions which are wholly academic and hypothetical.

55 In *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyd's Rep 106 ("*British Shipbuilders*") at 109, Lightman J referred to the speeches of Hoffmann LJ and Lord Slynn in *Mercury* and sought to summarise the approach to be taken:

> The Court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the conditions which the expert must comply with in making his determination, but (as a rule of procedural convenience) will (save in exceptional circumstances) decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one party considers that the expert got it wrong. To apply to the Court in anticipation of his decision (and before it is clear that he has got it wrong) is likely to prove wasteful of time and costs – the saving of which may be presumed to have been the, or at least one of the, objectives of the parties in agreeing to the determination by the expert.

56 In *Barclays* at [42], Thomas LJ expressed the view that it was unnecessary to go beyond Hoffmann LJ's statement of principle in *Mercury* to describe (as Lightman J did in *British Shipbuilders*) the circumstances in which the court would intervene in advance of the expert's determination as "exceptional". Thomas LJ held as follows:

> …The court has to determine first whether it is faced with a dispute which is real and not hypothetical and then if it is real, whether it is in the interests of justice and convenience to determine the matter in issue itself rather than allowing the expert to determine it first.

57 In our judgment, the court must consider whether the issue brought before the court is a purely hypothetical question given that the expert has not rendered his decision at this point, for the reasons Hoffmann LJ explained. Whether the court decides to intervene ahead of the expert's determination is ultimately a matter for the court's discretion, having regard to whether intervention at an early juncture will prevent unnecessary wastage of costs and

time, for instance where the expert simply has no jurisdiction to determine the dispute such that proceeding with the adjudication would entail an unproductive expenditure of resources. In the final analysis, the court must be satisfied that its intervention in advance of the expert's determination is fair and just in all the circumstances. We agree with Thomas LJ that it is unnecessary to characterise the court's intervention as an "exceptional" course of action. It is merely an aspect of the court's role to ensure that practical justice is done in the case before it.

58 On the facts before us, it is plain that the dispute regarding the configuration to be applied for the purposes of valuation has already crystallised and therefore cannot be considered to be merely hypothetical. The dispute manifested itself in 2013 when the parties' negotiations on the renewal rent failed and Ngee Ann Development sought to include in the draft Joint Appointment Letter instructions to the Valuers that the Lease did not prevent them from adopting a hypothetical configuration for the valuation (see [27] above). The parties' disagreement eventually culminated in a decision to set aside the first valuation that was carried out and to obtain a fresh set of valuation reports (see [30] above). The parties are presently unable to proceed with the determination of the renewal rent unless the dispute over the proper configuration to be adopted is resolved. There is no occasion for the Valuers to make any sort of determination since the parties cannot even agree on the instructions to be given to the Valuers.

59 We do not accept Ngee Ann Development's submission that there is no requirement for the determination of the "prevailing market rental value" to be carried out with reference to *any* configuration. It argues that the Valuers are *entitled* but *not required* to do so. Ngee Ann Development's own conduct

suggests otherwise. It sought unsuccessfully to incorporate a provision in the Joint Appointment Letter that the Valuers are not restricted to apply the existing configuration. Having failed to do so, it sought to make the same point through the 22 April representations. Finally, it is an undeniable fact that the Valuers in reliance on the 22 April representations posited different hypothetical configurations (see [101] below) to arrive at their respective valuations of the renewal rent. It is therefore amply clear to us that both parties were at all material times well alive to the point that the applicable configuration is necessarily sensitive to any valuation exercise. It is therefore plainly wrong for Ngee Ann Development to advance a contrary position. We also have difficulties accepting Ngee Ann Development's argument[36] that it is for the Valuers to decide whether to adopt *any* configuration, if at all, and that if the Valuers decide to use the existing configuration, Ngee Ann Development must accept it and likewise if they choose to apply a hypothetical configuration to derive the "highest and best" use, it is not open to Takashimaya to dispute it. If this is right, it would follow that the "prevailing market rental value" in every rent review or determination of renewal rent would depend on the arbitrary decision of the appointed valuer to adopt whatever configuration he chooses. As subsequent events have borne out (see [101] below), such an approach would only lead to different valuers adopting different configurations giving rise to further disputes. In the circumstances, we are satisfied that it is in the interests of both parties that the dispute as to the proper configuration to be applied for valuation purposes be determined at this juncture by the court.

60 Having dealt with this preliminary issue of law, we now turn to the substantive issues in the appeal, beginning with the text of the parties' agreement.

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[36] Appellant's Case at paras 123 and 128.

The text of the agreement

61 As this court explained in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1187 ("*Y.E.S.*") at [32], the text of the parties' agreement "ought always to be the first port of call" in contractual interpretation. The reason for this approach is that "the primary source of understanding what the parties meant is their language interpreted in accordance with the conventional usage": *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [57] (citing with approval Lord Hoffmann's dicta in *Bank of Credit and Commercial International SA v Ali* [2002] 1 AC 251 at [39]). The language of the parties' agreement, which is embodied in the Lease and the Joint Appointment Letter, accordingly forms the starting point of our analysis.

62 We have set out at [10]–[15] above the relevant provisions in the Lease. We do not find any unequivocal confirmation within the terms of these two documents as to whether the parties intended that the valuation should take place on the basis of the existing configuration or some other configuration. The Lease does not furnish any definition of "prevailing market rental value" or prescribe either explicitly or implicitly how that is to be determined by the Valuers. Clause 12(c) of the Lease only sets out the procedural mechanism by which the renewal rent is to be determined without governing the substance of the inquiry. The language of the Joint Appointment Letter likewise does not provide any useful leads on the parties' intentions. The letter merely appoints the Valuers, instructs them to separately determine the "prevailing market rental value of the Demised Premises" and directs them to have reference to the terms of the Lease and the Variation of Lease. As described at [27] above, the Joint

Appointment Letter merely reproduces cl 11(d) of the Lease, which establishes that the Retained Area can be sublet only to a single sub-lessee or retained for Takashimaya's own use, without elaboration.

63 We find, however, that a close reading of the text of the Lease reveals several striking features of the parties' agreement that shed light on the nature of their intended relationship from the outset. These features are not commonly found in commercial leases and they are therefore particularly instructive as to the contractual expectations of the parties.

64 First, under the terms of the Lease, Takashimaya is given a wide-ranging discretion to determine how the Demised Premises are to be used. Under cl 11 of the Lease, Takashimaya is given sole discretion to decide whether to sublet any part of the Demised Premises, the portion of the Demised Premises to be sub-let, and to whom such sub-letting should occur. This is only subject to the conditions that the sub-lessee be of good reputation and should use the sub-let premises in a manner that is consistent with the prestigious image of Ngee Ann City, as well as the requirement of the Retained Area. Likewise, the identity of the sub-lessee who occupies the Retained Area (*ie,* the anchor tenant) – should Takashimaya choose to sublet the Retained Area – is a matter for Takashimaya to decide, subject to Ngee Ann Development's approval which is not to be unreasonably withheld. The size of the anchor tenant's premises over and above 10,000 sqm is similarly for Takashimaya's sole determination. Critically, nothing in the Lease requires Takashimaya to apply any particular layout or configuration. Other than the requirement of the Retained Area, the proportion of the anchor tenant's premises as against the remaining floor area is left entirely to Takashimaya's discretion. In our judgment, the most prominent feature of the terms of Takashimaya's lease is therefore *the breadth of Takashimaya's*

discretion to use, manage, shape and sublease the Demised Premises. It seems clear to us that the contractual freedom accorded to Takashimaya in this regard is a fundamental tenet of the parties' agreement.

65 Second, the parties envisaged a very lengthy commercial relationship. As we have earlier described, the initial term of the Lease was for a substantial period of 20 years. This initial term is, however, only a fraction of the overall 80-year tenure permitted under the Lease. As Prof Yu, Ngee Ann Development's own expert, accepted, the terms of the parties' agreement indicated that this was "not the usual sort of … run-of-the-mill landlord and tenant [relationship]". In Prof Yu's words, it was "not a direct landlord/tenant relationship" and he was unaware of any similar arrangements in Singapore.[37]

66 Third, we observe that the Lease confers on Takashimaya several atypical privileges that even go beyond the Demised Premises. Under cl 13 of the Lease, Takashimaya has a "first option to lease" any additional areas in the podium block beyond the Demised Premises that become approved for use as commercial shopping space. Before offering these additional areas for lease to other persons, Ngee Ann Development is required to give written notice to Takashimaya and inform Takashimaya of the rent and terms of the proposed lease. If Takashimaya is desirous of leasing the additional commercial space, the parties are then to negotiate for the lease in good faith. Clause 13 also expressly states that these particular rights and obligations are personal to Ngee Ann Development and Takashimaya and will not be binding on any party taking a lease of the additional commercial space nor enure to the benefit of any assignee or sub-lessee of Takashimaya. Going beyond this, cl 14 of the Lease confers on Takashimaya pre-emption rights (meaning a first option to buy) in

[37] NEs (Day 3) p8 line 12 to p9 line 8: ROA vol III (Part 8) pp129–130.

relation to any and all parts of the Demised Premises that Ngee Ann Development desires to sell. Again, these rights and obligations are expressed to be personal to Ngee Ann Development and Takashimaya.

67 These additional unique features of the Lease, when taken together with the other aspects of the agreement that we have observed, serve to highlight the unusual nature of the agreement – it envisions a commercial relationship that accords the tenant a wide discretion in its use and management of a very large and valuable set of premises, which is capable of extension at the tenant's sole discretion for decades to come, and which demonstrates, in the rights and obligations enjoyed by both parties, an exceptional degree of proximity and collaboration between the parties. We consider that our decision on the specific question before us – that is, the parties' intentions regarding the manner in which the valuation of the Demised Premises should take place – should be congruent with these observations on the nature and terms of the parties' agreement. A conclusion that runs against the tide of these observations would not only be anomalous but also would fail to reflect the parties' contractual expectations.

The context of the agreement

68 As we have mentioned at [39] above, two aspects of the factual background are particularly relevant. We will begin by considering the nature of the parties' commercial relationship in the light of the evidence adduced at trial. We will then examine and attribute the necessary significance to the events that reflect the parties' understanding or agreement as to how the valuation should be carried out.

The nature of the intended relationship

The evidence of Mr Teo and Mr Yoshino

69 There were two primary witnesses of fact at the trial. These were Mr Teo and Mr Yoshino, giving evidence on behalf of Ngee Ann Development and Takashimaya respectively. Although their evidence was not always on the same page, we note that there were several key areas of agreement between Mr Teo and Mr Yoshino on the nature and object of the parties' relationship.

70 First, the parties intended that Takashimaya operate a large department store on the Demised Premises as the anchor tenant. In other words, the parties agreed that Takashimaya's department store was to occupy, at the minimum, the Retained Area of 10,000 sqm. Mr Teo explained that before the parties entered into any sort of agreement, Ngee Ann Development had intended to invite Takashimaya Japan to open a department store in Ngee Ann City, which would serve as the anchor tenant of the development.[38] Mr Teo agreed that Ngee Ann Development had hoped that the department store would "serve as the main draw for traffic to the shopping side of [Ngee Ann City]".[39] Initially, Ngee Ann Development had even wanted 30,000 sqm of the Demised Premises to be occupied by Takashimaya's department store.[40]

71 Mr Yoshino's evidence was to like effect. He explained that Ngee Ann Kongsi's representatives approached Takashimaya Japan in 1988 to discuss the possibility of Takashimaya Japan taking up occupancy as an anchor tenant running a large department store in Ngee Ann City. Ngee Ann Kongsi chose

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38 NEs (Day 1) p37 lines 16–17: ROA vol III (Part 8) at p13.

39 NEs (Day 1) p53 lines 2–12: ROA vol III (Part 8) at p17.

40 NEs (Day 1) p96 lines 17–19: ROA vol III (Part 8) at p27.

Takashimaya Japan precisely for its expertise in managing the layout and operations of a large scale department store that would be successful even in the highly competitive Orchard Road shopping belt.[41]

72 We find that the witnesses' explanations of the parties' expectations is entirely consistent with the terms of the Lease. Clause 11(d) of the Lease prescribes a *minimum*, and not a maximum, floor area in respect of the part of the premises to be retained by Takashimaya (*ie,* Takashimaya's department store) or for sub-letting to a single sub-lessee. This indicates a joint intent that Takashimaya's department store should not only be sizable; it should be as large as Takashimaya thinks it appropriate. Ngee Ann Development's primary objective in inviting Takashimaya Japan to take on the Lease was precisely to establish for Ngee Ann City a focal point of attraction, which was to be a prestigious large scale department store. In *Y.E.S.*, this court observed at [35] that the court "is always to pay close attention to both the text and context in every case – noting that both interact with each other". In our view, the present case provides an example of how text and context are to be viewed and understood synchronously to build a complete and accurate account of the parties' agreement.

73 Second, we agree with the Judge's finding that the parties' relationship has, and was intended to have, the nature of a *joint commercial enterprise*. The evidence of the parties' witnesses was clear and unequivocal on this point. Mr Teo testified that because Ngee Ann Kongsi desired Takashimaya Japan's involvement in Ngee Ann City, it was prepared to grant Takashimaya Japan's request to be "partners" in the development.[42] Ngee Ann Kongsi was also

41 ROA vol III (Part 5) pp4–5 at para 6.

42 NEs (Day 1) p53 lines 2 to 23: ROA vol III (Part 8) p17.

willing to grant Takashimaya a very long lease in Ngee Ann City because it saw Takashimaya Japan as "a long-term partner".[43] Mr Teo accepted that Takashimaya was regarded "[n]ot just as a tenant, but almost like a joint venture partner".[44] Along similar lines, Mr Yoshino pointed out that as part of the collaboration between the parties, Takashimaya Japan came to own 26.3% of the shares in Ngee Ann Development and appointed four out of the 13 directors on the board of Ngee Ann Development. Mr Yoshino himself is one of Takashimaya Japan's nominee directors on the board of Ngee Ann Development.[45]

74 It is apparent to us that the parties are therefore closely tied up beyond the immediate terms of the Lease. Ngee Ann Development and Takashimaya share more than a mere *contractual* relationship; what they have are ties of *ownership* – they have a common major shareholder in Takashimaya Japan, which set up Takashimaya and invested in Ngee Ann Development at the invitation of Ngee Ann Development's parent company, Ngee Ann Kongsi. We therefore have little doubt that the parties' relationship cannot be described as that of a landlord and tenant *simpliciter*, and accordingly the agreement between them cannot be construed as such without ignoring the true incidents of the parties' relationship. It is rooted in a deeper and interwoven venture.

75 Third, it is undisputed that Takashimaya's department store has served its intended function of enhancing the image of Ngee Ann City. Both Mr Teo and Mr Yoshino agreed that the success of Takashimaya's department store as the anchor tenant has enhanced the image of Ngee Ann City as a prestigious

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43 NEs (Day 1) p101 at lines 21–24: ROA vol III (Part 8) p29.

44 NEs (Day 1) p101 line 16 to p102 line 2: ROA vol III (Part 8) p29.

45 ROA vol III (Part 5) p5 at para 8.

shopping complex. The department store has served as a major attraction for shoppers, and this has in turn enhanced the rental value of other parts of Ngee Ann City.[46] As a result, Takashimaya has "established its reputation as running the No. 1 department store in Singapore and the ASEAN region".[47]

76 We are also satisfied that since the commencement of the Lease in 1993, the size of Takashimaya's department store on the Demised Premises has been the same, or substantially the same. Mr Yoshino's position on this issue, both in his affidavit of evidence-in-chief[48] as well as his oral evidence,[49] was consistent and unwavering. He explained that Takashimaya has used the same configuration of the Demised Premises for over 20 years and has no intention to alter that configuration. During cross-examination, he accepted (correctly) that Takashimaya was permitted under the terms of the Lease to reduce its department store to 10,000 sqm, but repeatedly emphasised that Takashimaya has no intention to change the current layout and that Takashimaya considers it to be neither in its or Ngee Ann Development's interest to do so. Mr Teo took the view[50] that Takashimaya had altered certain aspects of the layout, and pointed to two changes that Ngee Ann Development had identified in its 22 April representations. These changes were the conversion in 2013 of about 2,100 sqm of space on Level 4 to retail space for high-end branded goods specialty stores and concessionaires, and about 540 sqm of space on Level 1 to retail space for luxury fashion specialty stores and concessionaires. Beyond this, Mr Teo admitted that Ngee Ann Development had not produced evidence of

46 ROA vol III (Part 5) p8 at para 16.

47 NEs (Day 2) p139 lines 7 to 16: ROA vol III (Part 8) at p104.

48 ROA vol III (Part 5) p8 at para 14.

49 NEs (Day 3) p165 lines 15-24; p167 lines 6-7 and 21-22, p168 lines 3-5, p170 lines 16-19, p171 lines 7-8: ROA vol III (Part 8) pp169–170.

50 NEs (Day 2) p140 lines 13-23: ROA vol III (Part 8) p104.

any other changes.[51] In the circumstances, we accept that the configuration applied by Takashimaya to the Demised Premises has remained the same, or substantially the same, since the commencement of the Lease.

77 To sum up, we find it clear from the evidence that the parties' relationship was not a typical landlord-tenant relationship, but rather a collaborative long term commercial enterprise, akin to a joint venture, with Ngee Ann Development providing Takashimaya with prominent and accessible premises at the heart of Orchard Road, and Takashimaya in turn contributing its expertise to operate a large scale prestigious department store which would enhance the reputation of Ngee Ann City as a whole. The context that was painted by the parties' evidence is entirely consistent with the terms of the Lease that we have described above at [10]–[15]. The parties intended that Takashimaya be afforded a wide margin of contractual freedom to manage the Demised Premises as it sees fit, in order to allow Ngee Ann Development to leverage on Takashimaya's expertise in this area.

Findings

78 Given this background to the parties' relationship, we find it improbable that the parties intended that the valuation of the renewal rent should take place with reference to *a hypothetical tenant based on a hypothetical configuration*. We will explain our reasons.

79 First, and most crucially, requiring Takashimaya to pay rent at the highest possible rate will effectively erode Takashimaya's freedom under the terms of the Lease to decide the configuration to be used. The need to pay rent at the highest possible rate will have a highly negative impact on the manner in

[51] NEs (Day 2) p140 line 24 to p141 line 5: ROA vol III (Part 8) pp104-105.

which Takashimaya chooses to configure the Demised Premises. This is inconsistent with the parties' intention in entering into the Lease that Takashimaya should have a wide discretion to decide the configuration of the Demised Premises, since this was a key area of its expertise.

80 Indeed, Ngee Ann Development implicitly recognises in its Appellant's Case that the rental imposed on Takashimaya will have a considerable impact on the configuration that Takashimaya chooses. Ngee Ann Development argues that "[t]he 'prevailing market rental value of the Demised Premises' is simply a notional metric used for the purposes of calculating the renewal rent", and "[o]nce that figure has been derived, *there is nothing to prevent [Takashimaya] from maintaining the existing configuration if it is of the view that it will still be able to make a satisfactory profit after servicing the renewal rent*" [emphasis added].[52] Ngee Ann Development clearly recognises that Takashimaya's profit margin will be directly affected by the rent it has to pay, and that this will in turn affect the configuration it chooses. Put another way, no sensible commercial party will adopt a configuration that does not yield sufficient revenue to cover the rent that it has to pay.

81 This leads to our second point. It is simply not part of the parties' agreement that Takashimaya should configure the Demised Premises or otherwise use it in a way that will maximise the rental yield of the Demised Premises for Ngee Ann Development's benefit. There is no contractual obligation on Takashimaya to exercise its contractual freedom to configure the Demised Premises for this purpose, and correspondingly there is no contractual right for Ngee Ann Development to expect or insist that Takashimaya apply a configuration that would maximise the market rental value of the Demised

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[52] Appellant's Case at para 127.

Premises, or to insist that the valuation be carried out on the basis of a hypothetical configuration that would enable Ngee Ann Development to maximise its rental payout. Rather, as we have explained, the agreed arrangement is more akin to that of a joint venture with both parties as partners, deriving mutual benefits in the process. Ngee Ann Development intended to benefit not merely from the rent for the Demised Premises that Takashimaya would pay Ngee Ann Development, but also – and more significantly – from the prestige that Takashimaya's department store would bring to Ngee Ann City. This would in turn, as Mr Yoshino described, increase footfall to Ngee Ann City and raise the rental value of other parts of Ngee Ann City. The extent of the partnership is exemplified in Takashimaya Japan's ownership of a significant portion of the shares in Ngee Ann Development. In our judgment, it is inconsistent with the nature of the parties' agreement and relationship for Ngee Ann Development to seek to apply a configuration that would extract, at all costs, the highest rental rate from Takashimaya.

82 Indeed, the extent of the inconsistency is starkly reflected in Mr Teo's answers to a series of questions during cross-examination:[53]

> Q. It is correct, Mr Teo, we are not talking about -- I mean, if I can call it -- the typical lease you might have for a particular boutique or shop; this was a lease that, with options, would cover almost 80 years. Correct?
>
> A. Yes.
>
> Q. Thank you. This was a lease of a very large part of NAD's shop units, correct?
>
> A. I would say almost all.
>
> Q. Almost all. This was a lease for a tenant that was supposed to be the anchor tenant and main draw for your development; correct?

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53 NEs (Day 2) p131 line 23 to p133 line 16: ROA vol III (Part 8) p102

> A. Correct.
>
> Q. I know you say that now they are not the main draw, but at the time the lease was negotiated and entered into, they were considered to be the main draw; correct?
>
> A. Correct.
>
> Q. Even when you say now they are not the main draw, you don't mean for Takashimaya to close down their department store; correct?
>
> A. Correct. Yes.
>
> Q. You are just thinking it should be smaller?
>
> A. Correct.
>
> Q. *Actually, you don't care whether it is smaller or not; you just want the rental to be calculated on the basis that the departmental store is smaller.*
>
> A. *Yes, from the landlord point of view.*
>
> Q. That is your concern.
>
> A. Right.
>
> Q. And this was a tenant that was like a joint venture partner, because they also held shares -- 27 per cent -- in Ngee Ann Development; correct?
>
> A. Correct.
>
> Q. They were a tenant that had a first right to lease any additional space you were able to convert, as well as the first right to buy any space you might want to sell, correct?
>
> A. Correct.
>
> Q. Thank you. So, you know, these are unusual circumstances they are a particular type of tenant. This is not the usual tenant you let your shop unit to; correct?
>
> A. Correct.
>
> [emphasis added]

83 Mr Teo's responses are particularly revealing of Ngee Ann Development's present motivations. In truth, it does not really matter to Ngee Ann Development whether Takashimaya in fact reduces the size of its

department store or not, as long as Takashimaya pays rent that is calculated on the basis of a hypothetical smaller department store. As Mr Teo explained, Ngee Ann Development no longer considers Takashimaya's department store to be the main draw of Ngee Ann City, although Mr Teo agreed that at the time of contracting Ngee Ann Development wanted Takashimaya to serve as the main draw and this was the very reason why Ngee Ann Development had initially wanted Takashimaya to operate a department store of at least 30,000 sqm.[54] We find that Ngee Ann Development's demand that Takashimaya should pay rent at the highest possible rate, without regard to the parties' original intentions as to the size and purpose of Takashimaya's department store, is entirely at odds with the parties' intentions at the time of contracting. It is indicative of a present attempt simply to maximise profits as landlord, rather than a genuine desire to have its contractual expectations satisfied.

84 The following point illustrates just how far removed Ngee Ann Development's present position is from the parties' original understanding. In response to Takashimaya's submission that the parties intended Takashimaya to operate a department store of "substantial size" on the Demised Premises,[55] Ngee Ann Development refers to cl 11 of the Lease which, in its submission, "contemplates that (i) [Takashimaya] was free to reconfigure the Demised Premises at any time that it wished (even after commencement of the leased term); (ii) *the anchor tenant of the Demised Premises may not necessarily be Takashimaya*; (iii) *the anchor tenant may not necessarily run a departmental store*; and (iv) the anchor tenant may possibly only occupy 10,000 sqm of the lettable 56,105 sqm" [emphasis added]. Ngee Ann Development submits that Takashimaya may even choose to "assign its leasehold interest to a third party

54 NEs (Day 1) p168 lines 5-25: ROA vol III (Part 8) p45.

55 Respondent's Case at para 22.

(even to a party to whom [Ngee Ann Development] has no prior relationship with)".[56] We find that Ngee Ann Development's submissions are entirely divorced from the parties' intentions at the time of contracting. Indeed, from the perspective of commercial sense, it is simply not realistic to suggest that Ngee Ann Development would even have contemplated the notion of entering into such a lengthy lease conferring broad discretionary rights on its tenant if that tenant was not *specifically* to be Takashimaya, which would use its experience and expertise to operate a successful and prestigious department store as anchor tenant. Given the context of the parties' agreement, the Lease cannot be regarded as a conventional landlord-tenant arrangement and understood in that way.

85 Our final point concerns the argument made at the hearing by Mr Ang Cheng Hock SC, counsel for Ngee Ann Development, that applying the existing configuration would allow Takashimaya to "game" the system by changing the configuration of the Demised Premises just before the valuation in order to depress the renewal rent. Commercial sense repels itself from such an argument. The notion that Takashimaya would be able to sublet parts of the Demised Premises and terminate those subletting arrangements just before a valuation, in order that Takashimaya might benefit from the calculation of a depressed market rental value, is plainly too farfetched. No sensible commercial party would be willing to have the term of its sublease curtailed in such an arbitrary fashion. Nor is there any evidence that Takashimaya has done, or plans to do, anything like this. In fact, as we have accepted (see [76] above), Takashimaya has not changed (at least not to any substantial degree) the existing configuration of the Demised Premises since the commencement of the Lease, and has no intention to do so in the future.

[56] Appellant's Case at paras 142–143.

The parties' conduct in relation to previous rent reviews

86 We now turn to consider certain events that reflect the parties' understanding of how the valuation is to be carried out. An important part of the context to the parties' agreement is the two rent reviews that were conducted in 2003 and 2008 (see [17]–[23] above), because valuations were conducted as part of the rent reviews to determine the prevailing market rental value. The Second and Third Rent Reviews therefore provide a useful and contemporaneous analogue to the present situation, where the parties are once again unable to agree on the renewal rent to be paid. But going beyond that, they provide an insight into the parties' understanding of how the "prevailing market rental value" of the Demised Premises has been and is to be determined moving forward.

Dr Lim's evidence

87 Dr Lim carried out the valuations for the Second and Third Rent Reviews, producing valuation reports dated 3 December 2003[57] and 29 May 2009[58] respectively. Dr Lim's evidence was straightforward – he understood the parties to have *agreed* that the valuation should be conducted on the basis of the existing configuration.[59] Apart from the parties' agreement, Dr Lim identified two other reasons why he had used the existing configuration for the valuation. To start with, if the parties had not reached any agreement on the configuration to be assumed for the purpose of the valuation, it would have been "very difficult, if not impossible, for [Dr Lim] to have done the rental valuation" because the valuation exercise "would likely result in a large variation in the

57 ROA vol III (Part 4) pp112–119.

58 ROA vol III (Part 4) pp124–130.

59 ROA vol III (Part 4) pp75, 76 and 81 at paras 5, 10 and 20.

eventual estimated rental sum and [would] in all likelihood result in further disagreement between the parties".[60] He repeated this multiple times during cross-examination.[61] Indeed, if there had been no agreement, Dr Lim "would not have proceeded with the valuation without clarifying the position with the parties, and asking that they agree on the configuration and basis before [he] proceeded with [his] work".[62] It is only common sense for Dr Lim to have adopted some configuration for the purposes of the rental review. Further, Dr Lim took the view that as a matter of fairness it was more appropriate for the existing configuration to be adopted. He explained that he had carried out independent valuations and therefore his valuations were "not aimed at maximising or minimising the rental valuation for the benefit of the landlord or tenant respectively". Using the existing configuration as the basis of the valuation "would only be proper and fair, and not skewed toward benefitting one side or the other".[63] As a matter of fairness, this must be right since the valuation exercise was carried out with reference to the actual tenant, Takashimaya, and not some hypothetical tenant with a hypothetical configuration.

88 Equally significantly, Dr Lim observed that following each of his reports, Ngee Ann Development *never objected* on the basis that Dr Lim should have used some configuration other than the existing configuration. In fact, "[a]t no point did [Ngee Ann Development] state or instruct [Dr Lim] that [he] should or must value the Demised Premises based on some other configuration, or that

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60 ROA vol III (Part 4) pp77–78 at paras 14–15.

61 NEs (Day 5) p116 lines 8-9; p119 lines 20-22; p127 lines 4-7; p128 lines 11-19: ROA vol III (Part 8) pp249, 250, 252

62 ROA vol III (Part 4) p77 at para 13.

63 ROA vol III (Part 4) p76 at para 10.

Takashimaya was obliged to use only some minimum area for the department store, with the balance area to be reconfigured differently".[64] Dr Lim testified that he had used the same approach when conducting the valuations for both the Second and Third Rent Reviews.[65]

89 Ngee Ann Development argues that Dr Lim had not in fact adopted the existing configuration to carry out the valuations for the Second and Third Rent Reviews. It suggests that it is not apparent from Dr Lim's reports for the Second and Third Rent Reviews that Dr Lim had adopted the existing configuration.[66] Next, in response to Ngee Ann Development's queries regarding the disparity in rental rates paid by Takashimaya and Toshin (see [21]–[23] above), Dr Lim had not explained away the disparity on the basis of a difference in configuration, but had instead relied on some other reason.[67]

Findings

90 In our judgment, neither of the points made by Ngee Ann Development is supported by the evidence. In fact, the evidence runs clearly to the contrary. Ngee Ann Development was well aware that the valuations for the Second and Third Rent Reviews had been carried out on the basis of the existing configuration. For a very significant period of time – from 8 September 1993 (the commencement date of the initial 20 year term under the Lease) to 5 July 2013 (the date that Ngee Ann Development sent Takashimaya a draft Joint Appointment Letter, in which Ngee Ann Development sought to instruct the Valuers that there was nothing in the Lease requiring the valuation to be carried

64 ROA vol III (Part 4) pp76–77 at paras 11–12.

65 NEs (Day 5) p81 lines 21–25: ROA vol III (Part 8) at p241.

66 Appellant's case at para 160.

67 Appellant's case at para 159.

out only with reference to the existing configuration) – Ngee Ann Development never gave any indication that it intended or desired that some hypothetical configuration other than the existing configuration should be used for valuation purposes. We make several points in this regard.

91 To begin with, it appears to us that based on Mr Teo's own evidence, Ngee Ann Development was fully aware that Dr Lim had used the existing configuration as the basis for his valuation. Following from this, Ngee Ann Development considered making submissions to Dr Lim but finally decided against this course of action. The following extract from the Notes of Evidence makes this clear. When asked why Ngee Ann Development had not sought, in the Second Rent Review, to direct Dr Lim to use a configuration that would promote the highest and best use of the premises, rather than the existing configuration, Mr Teo responded as follows:[68]

> Q. … So I am going to ask my question again. If you felt so strongly about the submissions that were made in the 22 April 2014 submission to the two valuers, why did Ngee Ann Development not include this in their instructions to Professor Lim?
>
> A. I think, at the time we did not – *after we received the – Professor Lim's valuation, we thought – as an afterthought, we thought we should have done so* – because, as you say, we just told him clause 204(?), and that is it.
>
> Q. So after you got Professor Lim's valuation, then you thought about it. Is that right?
>
> A. Yes.
>
> [emphasis added]

From the above line of cross-examination, it is clear to us that Ngee Ann Development knew that Dr Lim's valuations were never carried out on the

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68 NEs (Day 1) p79 lines 3–15: ROA vol III (Part 8) p23.

"highest and best use" basis. Had it been otherwise, Mr Teo's response would simply have been that there was no necessity to make any representation to Dr Lim to use a configuration that would promote the highest and best use since Ngee Ann Development had assumed that this was how Dr Lim had done the valuations all along. It was only *after* receiving Dr Lim's report that Ngee Ann Development thought that it should perhaps have directed Dr Lim to value the Demised Premises based on the "highest and best use" of the property. Mr Teo confirmed this account again subsequently during cross-examination.[69]

92 Mr Alvin Yeo SC, counsel for Takashimaya, then pointed out to Mr Teo that Ngee Ann Development had not put in any such submissions to Dr Lim for the Third Rent Review either, some five years later:[70]

> Q. Now, Mr Teo, I don't have any record of Ngee Ann Development putting in submissions like what we saw in April 2014. Can you point me to any such submissions?
>
> A. No.
>
> Q. Isn't it correct, Mr Teo, that even for the last rent review period, 2008 to 2013, before the valuation is done, Ngee Ann Development did not seek to put in any sort of submissions; correct?
>
> A. Correct.
>
> Q. They certainly did not make the submissions that they made in April 2014; correct?
>
> A. Correct.
>
> Q. This was done for the first time in 2014; correct?
>
> A. Correct.
>
> Q. Thank you.

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69 NEs (Day 1) p83 line 19 to p84 line 5: ROA vol III (Part 8) p24.

70 NEs (Day 1) p84 line 19 to p85 line 8: ROA vol III (Part 8) pp24–25.

To similar effect, at a later part of the cross-examination, Mr Teo agreed with Mr Yeo's suggestion that "although you have said that you were not happy with Professor Lim Lan Yuan's second rent review report, even for the third rent review report you didn't make these points to Professor Lim".[71]

93 Whatever the reason Ngee Ann Development may have had for not seeking to instruct or direct Dr Lim to carry out the valuations for the Second and Third Rent Reviews on the basis of a hypothetical configuration, the crucial fact is that Ngee Ann Development was *fully cognisant* that Dr Lim had adopted the existing configuration for the purposes of the valuations. It therefore does not lie in Ngee Ann Development's mouth to say that Dr Lim had not in fact done so. There can be no doubt that the Second and Third Rent Reviews must have been carried out by Dr Lim on the basis of some configuration. As there is simply no basis to suggest that Dr Lim had adopted a hypothetical configuration (which by its nature would require specific instructions and there were none), it is a logical inference that Dr Lim, to the express knowledge of both parties, had adopted Takashimaya's existing configuration for the two rent reviews. This is entirely consistent with Dr Lim's evidence under cross-examination:[72]

> Q: …I took you through your 2003 report, would you agree with me that your 2003 report doesn't say specifically that you are valuing it based on the existing configuration?
>
> A: No. As I said, it is understood, because you are valuing that subject property, you look at *how the subject property is being configured, being used.*
>
> …
>
> The valuation -- not just based on existing use, or whatever use, you know. It is not that. *It is valuing the*

[71] NEs (Day 1) p166 line 21 to p167 line 1: ROA vol III (Part 8) p45.

[72] NEs (Day 5) p131 line 17 to p132 line 3: ROA vol III (Part 8) p253.

> *subject property as it is right now.* Because you are talking about a revision, rental revision.
>
> [emphasis added]

94 There are two other aspects of Ngee Ann Development's conduct that plainly demonstrate its awareness that past valuations had been carried out on the basis of the existing configuration. They are Ngee Ann Development's attempt to instruct the Valuers in the draft Joint Appointment Letter that the Valuers were not required to adopt the existing configuration (see [27] above) and its 22 April representations to the Valuers, seeking to persuade the Valuers that "the prevailing market rental value of the Demised Premises must be determined on valuation principles which are not constrained by the existing or current use of the Demised Premises by Takashimaya".[73] Ngee Ann Development was obviously aware that the past valuations had been carried out using the existing configuration. Otherwise, it would not have made active attempts to specifically direct the Valuers to determine the renewal rent on the basis of a configuration that reflected the "highest and best use" of the Demised Premises. Notably, when Mr Yeo asked Mr Teo about Ngee Ann Development's attempt to instruct the Valuers in the draft Appointment Letter that the Lease did not require the prevailing market rental value to be determined by reference to the existing use of the Demised Premises, Mr Teo answered as follows:[74]

> Q. … Mr Teo, you were trying to put in Ngee Ann Development's own interpretation of the lease; correct?
>
> A. Yes. We were trying to put in a new proposal.
>
> …
>
> Q. This was being done for the first time here; correct?

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73 ROA vol V (Part 4) p111 at para 8.

74 NEs (Day 1) p166 line 17 to p167 line 8: ROA vol III (Part 8) p45.

> A. After Takashimaya said, "Let's do two valuers instead of one".
>
> Q. Yes, and Mr Teo, *like the good businessman you are, so [you] saw the opening to change some of the terms of the lease to Ngee Ann Development's advantage; correct?*
>
> A. *That is what businessmen do. Thank you.*
>
> [emphasis added]

95 This was, for all intents and purposes, a concession that Ngee Ann Development had deliberately tried to move away from the terms of the original agreement as embodied in the Lease in relation to how the "prevailing market rental value" of the Demised Premises was to be ascertained by a licensed valuer. For this reason, we do not see Ngee Ann Development's suit as an attempt to enforce its contractual expectations, but rather as an effort to avoid the financial impact of the terms of the Lease under current market conditions.

96 We also have grave doubts as to whether the Valuers would in fact have used the hypothetical configuration that Ngee Ann Development preferred, had Ngee Ann Development not sent them the 22 April representations. This can be inferred from Knight Frank's reply to Takashimaya's queries following the issuance of the valuation reports (see [29] above). Knight Frank did not justify its choice of the hypothetical best use configuration on the basis of its expertise or general industry practice, but instead cited Ngee Ann Development's 22 April representations to the Valuers to this effect. Knight Frank also noted that those representations were copied to Takashimaya; but in fact no contemporaneous copy had been provided to Takashimaya, and therefore Takashimaya had not made representations of its own in reply. In the circumstances, we also find it more likely than not that Ngee Ann Development knew or at least suspected that the Valuers would have carried out the valuation

based on the existing configuration, in line with the past practice, but for its unilateral representations.

97 We now consider Dr Lim's responses to Ngee Ann Development's queries. Ngee Ann Development relies on those responses to suggest that Dr Lim never purported to explain that the reason for the disparity in rental rates paid by Takashimaya and Toshin was due to the difference in configuration. Takashimaya relies on those same responses of Dr Lim to say that Ngee Ann Development's queries pertained only to the disparity in rental rates and not to Dr Lim's choice of configuration. Thus Ngee Ann Development had implicitly accepted Dr Lim's choice of the existing configuration for the Second and Third Rent Reviews.

98 Ngee Ann Development's position does not make sense. Since Toshin and Takashimaya occupy different spaces and areas, it is only logical that their respective configurations must necessarily be different. So at worst it was an omission to state the obvious. Further, we do not think it was incumbent on Dr Lim to state all the possible reasons for the disparity in the rental rates, such that any omission to state a particular reason would necessarily mean that the omitted reason was not operative, even though it was patently obvious that such a reason must have been the case. He had simply highlighted one of the major reasons for the disparity. To his mind, that was the difference in floor area leased to Takashimaya and Toshin. Dr Lim explained this during cross-examination:

> Q. If you look at page 286, Ngee Ann Development wrote to you to ask for further explanations, and also to register an objection, right?
>
> A. Right.
>
> Q. If you look at the fourth paragraph they say: "... we would like an explanation on the huge difference between the new rental rates for Toshin and for

> Takashimaya Singapore, for the period of June 2008 and September 2008 respectively. The time period was merely three months difference and we believe that rental rates within the same building should not have moved so drastically within such short period of time."
>
> Then they say at the top of 287: "... we would like to object to your rental valuation of $5,300,000 ..." Correct?

A. That's correct.

Q. If you look at your reply at page 288, in the second paragraph you point out that: "An important factor affecting the rental rate is the difference in lettable areas. Toshin's area is 20,993 m^2 whereas Takashimaya's area is 2.67 times that of Toshin at 56,105m^2."

So that was, to you, the main factor that explained the difference between what you had found to be the prevailing market rent and what Toshin was paying; correct?

A. *That's correct.*

Q. You didn't mention here that, "Look, another factor is the fact that the existing configuration of the 56,000 square metres is that 38,000 square metres is being used by Takashimaya as departmental store, and that certainly affects the prevailing market rent". You didn't say that, right?

A. I didn't say that.

Q. Is it because you thought that it was understood they would know?

A. *I mentioned the important factor. There are also other factors. But I thought, when I mentioned this, it will sort of bring across the message that really, we are talking about different sizes, and therefore it will reflected in the rate per metre squared.*

Q. *The main thrust of your letter is, the size of the premises let by Takashimaya Singapore is much bigger than the size of the premises let by Toshin?*

A. *Correct. That's right. Yes.*

[emphasis added]

To Dr Lim, the difference in floor area leased was the primary reason for the difference in rental rates paid by Takashimaya and Toshin. This was consequently the reason that he conveyed to Ngee Ann Development in response to the latter's queries. This did not mean that Dr Lim thought that the difference in floor area was the *only* reason for the disparity in rental rates. As Dr Lim clarified during cross-examination, he considered that this factor was "the important factor" and the "main thrust" of his letter, but at the same time he was fully aware that "[t]here [were] also other factors" which militated in favour of the conclusion he drew. All of this is entirely consistent with Takashimaya's position that Dr Lim did in fact have regard to the existing configuration when he carried out the valuation and, conversely, provides no support for Ngee Ann Development's assertion to the contrary. The glaring gap in Ngee Ann Development's argument is simply this. If Dr Lim had not in fact adopted the existing configuration for the two rent reviews, what was the actual configuration which Ngee Ann Development believed was used by Dr Lim? The conspicuous omission to put forward any positive case as to what configuration was used by Dr Lim betrays Ngee Ann Development's attempt to ignore the undeniable fact that it knew all along that the existing configuration was used for the Second and Third Rent Reviews. This is also in line with our observation in [91] above that Ngee Ann Development knew all along that the Second and Third Rent Reviews had not been carried out on the "highest and best use" basis.

99 In our judgment, what is more noteworthy is the fact that Ngee Ann Development never raised any query to Dr Lim as to whether he had used the existing configuration, and never objected to him doing so. This is evident from the correspondence between Ngee Ann Development and Dr Lim. Ngee Ann Development was obviously not averse to making objections to Dr Lim

regarding his approach in conducting the valuation, having sent both a letter stating its objections and a follow-up letter to Dr Lim. But Ngee Ann Development's demurral pertained only to the comparative difference between the rent payable by Takashimaya and Toshin. It raised no objection regarding the configuration Dr Lim had used. It did not even suggest to Dr Lim that the reason for the disparity was that Dr Lim had incorrectly relied on the existing configuration when carrying out the valuation. Ngee Ann Development had every opportunity to raise any concerns on this matter, but we note that it chose to remain silent on the issue for almost 20 years. In our judgment, Ngee Ann Development had remained silent all these years simply because it knew all along that the rent reviews were carried out with reference to Takashimaya's existing configuration of the Demised Premises.

100 Finally, from a practical perspective, it would seem to make little sense for the parties to have directed valuers such as Dr Lim to unilaterally decide the configuration to be assumed for the purpose of valuation. The valuer could decide to adopt either the existing configuration (as Dr Lim did) or a hypothetical configuration reflecting the "highest and best use" of the Demised Premises. Since there could be a substantial difference in the valuation depending on the choice of configuration, allowing a valuer to make his own unilateral determination on this matter could lead to substantial variations in the valuations for each rent review or for each determination of renewal rent and, invariably, cause further disputes between the parties. Given the nature of the parties' agreement, we do not think that the parties would have agreed that the valuers should make their own decisions on whether the existing configuration or a hypothetical configuration reflecting the "highest and best use" should be adopted, and what that hypothetical configuration should look like. Such an approach would have yielded very different valuation results and,

correspondingly, a tremendous degree of uncertainty for the parties on the rental rate to be paid. Such uncertainty would have persisted throughout a lease with a potential aggregate period of some 80 years and would bear no resemblance to the parties' expectations as at the time of contracting

101 We further observe that such unpredictability had in fact manifested in the range of hypothetical configurations posited by the valuers that have provided valuation reports so far. In the report by Savills[75] that Ngee Ann Development enclosed with its 22 April representations, Savills chose a department store floor area of 10,000 sqm, which it considered to be "a reasonable size for a department store based on [its] observation of current market trends in the reduction of the size of department stores", with the balance 46,105 sqm to be allocated to specialty and other stores.[76] In its report produced pursuant to the Joint Appointment Letter,[77] Knight Frank posited a department store floor area of 19,909.1 sqm, with the balance 36,195.9 sqm to be allocated to specialty shops and the atrium.[78] CBRE allocated 15,200 sqm to the department store and 29,851 sqm for specialty shops[79] in its valuation report.[80] Each of the valuers therefore adopted very different hypothetical configurations which inevitably yielded different results. This simply could not have been contemplated by the parties or within the scope of their intentions when they entered into a lease of the length and nature that we have described.

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75 ROA vol V (Part 2) pp128-150.

76 ROA vol V (Part 2) p138 at para 6.2.

77 ROA vol V (Part 5) pp48-80.

78 ROA vol V (Part 5) p66.

79 ROA vol V (Part 5) p136.

80 ROA vol V (Part 5) pp110-150.

Conclusion on the context

102 Our review of the context to the parties' agreement reveals a contractual backdrop that is vastly different from that which Ngee Ann Development paints. Far from being a typical landlord-tenant relationship where the landlord maintains considerable control over the use of the premises and benefits solely from rental yield, the collaboration between Ngee Ann Development and Takashimaya is a joint commercial enterprise, with each party participating as a partner contributing its assets and expertise for mutual benefit. The terms of the Lease are entirely consistent with the context. A broad margin of discretion was afforded to Takashimaya to manage the Demised Premises. The configuration of the Demised Premises was intended to be a matter entirely within Takashimaya's discretion, and for good reason, as Takashimaya – not Ngee Ann Development – is the party with particular expertise in this area.

103 In our judgment, the application of a hypothetical configuration that would yield the "highest and best use" of the Demised Premises for the purposes of valuation is entirely inconsistent with the parties' contractual expectations as it would seriously denude Takashimaya's contractual freedom to determine the configuration of the Demised Premises. It would also be incongruent for the parties to agree, on the one hand, that Takashimaya should be afforded such a breadth of discretion, and on the other hand, to stymie its exercise of such discretion by effectively compelling it to select a configuration that would maximise the market rental value of the Demised Premises solely from the perspective of the landlord, Ngee Ann Development. Such a conclusion is not only wholly inconsistent with the nature of the parties' agreement but also flies in the face of commercial sense. In addition, Ngee Ann Development's omission to raise any objections to Dr Lim's application of the existing configuration in

the Second and Third Rent Reviews – and indeed to raise any objections of this nature from the commencement of the Lease until the time came to determine the renewal rent, some 20 years after the commencement of the Lease – forms cogent evidence that the application of such a configuration for the purposes of valuation is entirely in line with the parties' agreement. Ngee Ann Development's silence in this regard is not without significance; rather, it is in itself a clear endorsement of Takashimaya's position.

104 As a final matter, we wish to emphasise that the interpretation of terms is an exercise that is inevitably contract-specific and fact-specific. The nature and terms of the Lease between Ngee Ann Development and Takashimaya are atypical, given the nature of the commercial venture that the parties intended. Our conclusion that the parties intended to apply the existing configuration rather than a hypothetical configuration is based on the findings that we have made on the text and context of the case. Such a conclusion will not, of course, be the same in every case.

105 It is largely for this reason that we disagree with Ngee Ann Development's reliance on *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642 ("*Burns*"), a decision of the New South Wales Court of Appeal, to argue that that the meaning of the phrase "prevailing market rental value of the Demised Premise" has "in fact been judicially settled".[81] We note that this argument was raised only in Ngee Ann Development's written submissions and was not pursued in oral argument.

106 In *Burns*, the lease contained a rent review clause allowing the lessor, at a stipulated time, to fix the annual rent at "the then current annual market rent

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[81] Appellant's Case at para 94.

of the premises". The lease also provided that the lessee (who was the appellant) would not, without the lessor's consent, carry on any business upon the land other than that of a hardware department store, or such other business as the lessor might approve. The land was subsequently transferred to the respondent who purported to execute two deeds poll unilaterally, declaring (amongst other things) that it consented to the appellant, its successors and subtenants carrying on *any* lawful business on use upon the premises. The appellant however regarded the relationship as unchanged. The respondent's purpose in executing the deeds poll became clear when it sought thereafter to fix the rent payable by the appellant at a higher rate.

107 The dispute between the parties was essentially whether the "current annual market rent of the premises" was to be determined upon the basis of the use of the premises as a hardware department store. The appellant sought a declaration to that effect and in its aid sought to admit extrinsic evidence involving certain communications in order to show that the true agreement between the lessor and the lessee at the time of the execution of the lease was that the rent should be reviewed on the basis that the premises continued to be used as a hardware store. Ultimately, the issue was decided against the appellant because the pre-contractual negotiations relied upon by the appellant were found to be inadmissible. The court held at 657E–658A that the words "current annual market rent" were "not ambiguous" (ambiguity being a prerequisite for the admission of extrinsic evidence under Australian law unlike the position under Singapore law: *Zurich Insurance* at [114] and [132(c)]) in the sense that they did not have "two or more plausible meanings when the context of the words in the document is taken into account in light of the knowledge any ordinarily intelligent reader of the document would bring to the reading of it". It decided that the disputed phrase ordinarily meant "what the property in

question would fetch in the market under the state of things for the time being in question". In short, it was strictly an interpretation of the rent renewal clause which the court found, on the facts, to be unambiguous.

108 Ngee Ann Development relies on *Burns* to submit that there is "no reason why the phrase 'prevailing market rental value of the Demised Premises' … should be considered ambiguous and should bear any different meaning from the phrase 'current market rental value of the premises'".[82] We reject this submission. Unlike in *Burns*, the dispute before us does not simply concern what the "prevailing market rental value" is *per se*. Neither is the issue whether there is any ambiguity with the phrase "prevailing market rental value" taken in isolation for the purposes of admitting extrinsic evidence. Instead as we have observed at [51] above, the heart of the dispute concerns the "decision-making authority" of the Valuers which cannot be properly carried out without reference to a configuration of the Demised Premises given the terms of the Lease as well as the nature and history of the parties' relationship. As explained at [62] above, we find that neither the terms of the Lease nor the Joint Appointment Letter contain the requisite degree of clarity and certainty to satisfactorily prove that the parties intended either that the valuation should take place on the basis of the existing configuration or some other configuration. In other words, we did not find the language of the Lease or Joint Appointment Letter to be unambiguous on the specific issue in dispute. But the crucial point, as mentioned at [104] above, is that contractual interpretation is necessarily and imperatively contract-specific and fact-specific. Thus there are inherent risks in drawing a conclusion on an issue of contractual interpretation in one case and seeking to transplant that conclusion in another case, where that second case involves an entirely different set of commercial aims and a unique corporate

[82] Appellant's Case at para 102.

relationship. We think it apposite to reiterate the guidance set out by this court in *Y.E.S.* (at [35]):

> … depending on the precise facts of the case, the text and context would often ***interact*** with each other. For example, … what might look like a plain and unambiguous text might not in fact be so if one has regard to the relevant context – at which point the context is also helpful in aiding the court in interpreting the text concerned. Much would, in the final analysis, turn on the ***precise facts*** of the case (which would, holistically speaking, include not only the text but also the context as well). It is important to observe that the process of contractual ***interpretation*** is a *dynamic* one. It is certainly not an unbridled exercise in raw judicial discretion: hence, the *general principles* which constitute the *legal* ***structure*** within which the process of contractual interpretation takes place. However, we also need to acknowledge the *practical reality* to the effect that, in the sphere of ***application*** of these general principles, the ***precise facts*** are (as just noted) of the first importance. There is – and can be – no magic formula or legal silver bullet. Contractual interpretation is (often at least) hard work, centring on a meticulous and nuanced (yet practically-oriented) analysis of the relevant text and context. ***Put simply, the court is always to pay close attention to both the text and context in every case – noting that both interact with each other.***
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> [emphasis in the original]

Implied terms and rectification

109 Given that Ngee Ann Development's appeal fails on its own merits and this is dispositive of its appeal, there is no need for us to reach a decision on Takashimaya's alternative arguments on implied terms and rectification. But if we were to decide those arguments, we would have rejected them. We also note that these arguments did not find favour with the Judge: Judgment at [67]. We will briefly explain our views.

110 Takashimaya seeks to imply a term in fact that "the determination of the prevailing market rental value of the Demised Premises in the Lease and Joint

Appointment Letter should take into account and/or refer to the Existing Configured and Used Demised Premises".[83] As this court held in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101], there is a three-step process to the implication of terms in fact. The court will first ascertain how the gap in the contract arises, and implication will only be considered if the gap arose because the parties did not contemplate the gap. Next, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy. Finally, the court considers the specific term to be implied. Such a term must be one (applying the so-called officious bystander test) which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.

111 Takashimaya argues that "there is a gap in that both [Ngee Ann Development] and [Takashimaya] did not contemplate that the Valuers would apply their own, different, assumed floor areas for department floor space". Both sides "expected that the Valuers would follow a pre-defined configuration", whether this was the existing configuration or a hypothetical one. This argument is inconsistent with Takashimaya's primary submission that the parties had *agreed* that the existing configuration would be used for the purpose of valuation. We have explained our finding that the parties had in fact agreed on the matter, and as a corollary we reject the notion that the parties had not even contemplated it, leading to a "gap" in the contract. Mr Teo admitted as much that Ngee Ann Development was aware that Dr Lim had applied the existing configuration in the Second Rent Review, but simply chose not to take any action, even for the Third Rent Review: see [89]–[92] above. Takashimaya's submission therefore runs into intractable evidentiary

[83] Respondent's Case at para 110.

difficulties. With regard to the requirement that it be necessary to imply such a term, we would likewise have found that the requirement has not been satisfied. The fact that past valuations – in the Second and Third Rent Reviews – have been carried out with some success is a compelling indication that a further term need not be implied in order to give the contract efficacy. Put simply, the contract is workable and has worked.

112 Takashimaya also argues that the Lease ought to be rectified, and relies on the doctrines of mutual and unilateral mistake.[84] Scant details are provided by Takashimaya as to how or why either or both parties made a mistake that led to the parties' failure to include a clause stipulating that the existing configuration be used for purposes of valuation. In the circumstances, we are not satisfied that the reason why the proposed term did not find its way into either the Lease or the Joint Appointment Letter is attributable to either or both the parties mistakenly omitting to include it in those documents.

Conclusion

113 For these reasons, we dismiss the appeal with costs fixed at $65,000 inclusive of disbursements. We make the usual consequential order for payment out of the security.

Sundaresh Menon	Judith Prakash	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

[84] Respondent's Case at paras 114–125.

Ang Cheng Hock SC and Koh Zhen-Xi Benjamin (Allen & Gledhill LLP) for the appellant;
Yeo Khirn Hai Alvin SC, Lim Wei Lee and Chng Zi Zhao Joel (instructed) (WongPartnership LLP) and Rajan Menon (instructing) (RHTLaw Taylor Wessing LLP) for the respondent.
