IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(A) 13

Civil Appeal No 94 of 2022

Between

HSBC Institutional Trust Services (Singapore) Ltd (as trustee of AIMS AMP Capital Industrial REIT)

… *Appellant*

And

DNKH Logistics Pte Ltd

… *Respondent*

EX TEMPORE JUDGMENT

[Contract — Contractual terms — Interpretation — Indemnity clause]

Version No 1: 14 Apr 2023 (15:03 hrs)

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HSBC Institutional Trust Services (Singapore) Ltd (as trustee of AIMS AMP Capital Industrial REIT)
v
DNKH Logistics Pte Ltd

[2023] SGHC(A) 13

Appellate Division of the High Court — Civil Appeal No 94 of 2022
Kannan Ramesh JAD, Valerie Thean J and Andre Maniam J
14 April 2023

14 April 2023

Valerie Thean J (delivering the judgment of the court *ex tempore*):

Introduction

1 As a result of a fire believed to have been caused by the spontaneous combustion of black peppercorns stored by a customer of a tenant at a warehouse, the landlord of the premises suffered losses that were made good by its insurer. The insurer now exercises its right of subrogation to bring a claim against the tenant, in circumstances where no negligence is alleged on the part of the tenant. The insurer relies on an indemnity clause in the lease agreement that allows the landlord to claim an indemnity against the tenant for losses suffered on the premises in certain circumstances. The construction of that clause is the sole issue in the present appeal.

Background

2 The appellant, HSBC Institutional Trust Services (Singapore) Ltd, is trustee of AIMS AMP Capital Industrial REIT (the "Landlord"), in respect of premises at No. 8 Tuas Avenue 20, Singapore 638821 and No. 10 Tuas Avenue 20, Singapore 638822 (the "Premises"). By an agreement dated 31 July 2012 (the "Lease"), it leased the Premises to the respondent, DNKH Logistics Pte. Ltd. (the "Tenant") for a term of four years from 16 July 2012 to 15 July 2016.

3 The Premises comprised warehouse and ancillary office space. On 9 August 2015, a fire broke out on the Premises. The fire originated from an area where McCormick Ingredients Southeast Asia Pte Ltd had engaged the Tenant's warehouse storage services to store large quantities of dried black peppercorns.

4 As a result of the fire, the Premises required repair and reinstatement. Including loss of rental from a rent reduction granted to the Tenant, loss adjuster's fees and consultancy fees, the Landlord suffered losses of $3,441,541.24 in total. Having paid the Landlord, the Landlord's insurer, Great Eastern General Insurance Limited ("GEGI"), exercised its right of subrogation and brought an action for an indemnity pursuant to cl 3.18.1 of the Lease.

5 In the General Division of the High Court, the trial was bifurcated and the issue was limited to liability. In an Agreed Statement of Facts ("ASOF"), the parties agreed that the fire arose without any negligence on the part of either party. In respect of the sole issue of the true construction of cl 3.18.1, the parties agreed to rely only on the terms and conditions of the Lease, without reference to any other evidence.

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The Judge's decision below

6 In his judgment dated 3 October 2022, reported as *HSBC Institutional Trust Services (Singapore) Ltd (as trustee of AIMS AMP Capital Industrial REIT) v DNKH Logistics Pte Ltd* [2022] SGHC 248 (the "Judgment"), the Judge below ("the Judge") held that the indemnity clause, cl 3.18.1, applied only to losses arising from third party claims against the Landlord: Judgment at [115]. Clause 3.18.1 was held to be similar in nature and substance to the indemnity clauses considered in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 and *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 2 SLR(R) 897 ("*Marina Centre Holdings*"), where the Court of Appeal held that the particular indemnity clauses in question applied to third party claims only: Judgment at [116]. The Judge further held that cl 3.18.1 only applied where the losses suffered were attributable to the fault of the Tenant. Clause 3.18.1 was to be understood in the context of the other sub-clauses, cll 3.18.2 and 3.18.3, which concerned losses that were attributable to the fault of the Tenant: Judgment at [118]. The *contra proferentem* rule also operated against the Landlord: Judgment at [119].

Legal context

7 The central question in the present appeal is whether the Landlord may rely on cl 3.18.1 to seek an indemnity from the Tenant. As the insurer's right of subrogation is circumscribed by the rights of the Landlord, the issue properly framed is: whether, on a construction of the Lease, the Landlord is entitled to seek an indemnity from the Tenant under cl 3.18.1 for loss caused by fire, after being fully indemnified by its insurer.

8 The approach to the construction of contracts was summarised by the Court of Appeal in *CIFG Special Assets Capital I Ltd (formerly known as*

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Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal [2018] 1 SLR 170 ("*CIFG* (SGCA)") at [19] (affirmed in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2019] 1 SLR 30 at [120]):

> (a) The starting point is that one looks to the **text** that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant **context** as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029 at [125], [128] and [129]).
>
> (c) The reason the court has regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
>
> (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, *eg, Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).
>
> [emphasis added in bold]

9 As the clause is an indemnity clause, *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1 ("*Kay Lim Construction*") is also relevant. Quentin Loh J (as he then was) held that the principles of construction relevant to exemption clauses are equally relevant to the construction of indemnity clauses. Such clauses are to be construed strictly, and if a party seeks to exclude or limit its liability (or seeks to have its liability indemnified), *it must do so in clear words* (*Kay Lim Construction* at [40]–[41], citing *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [52]). A court cannot, however, reject an exemption (or indemnity) clause if the words are clear and unambiguous and susceptible to one meaning only.

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10 The Judge's starting point in the present case was to compare the scope of cl 3.18.1 with that of precedent cases. As explained in *CIFG* (SGCA) (at [8] above), that is not the appropriate starting point. The correct starting point should be the text of the contractual provision and the relevant context. We turn, therefore, first to the text of the clause, and then its context.

Contractual analysis

Text of cl 3.18.1

11 Clause 3.18 reads as follows:

> 3.18 Indemnity by Tenant
>
> To indemnify the Landlord against (i) all claims, demands, actions, proceedings, judgments, damages, **losses, costs and expenses of any nature** which the Landlord may suffer or incur as a result of or in connection with or caused by, and (ii) all penalties or fines imposed by any relevant authority resulting from:
>
> 3.18.1 **any occurrences in, upon or at the Premises or** the use or occupation of the Premises and/or any part of the Property by the Tenant or by any of the Tenant's employees, independent contractors, agents or any permitted occupier;
>
> 3.18.2 the Tenant or its employees, independent contractors, agents or any permitted occupier to the Premises, the Property or any property in them (including those caused directly or indirectly by the use or misuse, waste or abuse of Utilities or faulty fittings or fixtures); or
>
> 3.18.3 any default by the Tenant, its employees, independent contractors, agents or any permitted occupier in connection with the provisions of this Lease.
>
> [emphasis added in bold]

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12 The width of cl 3.18.1 is extremely broad. On a plain reading of the words in bold and the use of the disjunctive "or" thereafter, all losses, costs and expenses caused by any occurrence at the Premises are covered under the clause. It is necessary, then, to look to the relevant context to ascertain if the parties objectively intended that damage to the Premises by fire caused by no fault of either party would fall within cl 3.18.1. In the present case, only the contractual context is relevant as agreed by the parties in the ASOF.

Contractual context

13 In considering the context of the contract, it is important to understand how the Lease allocates risk for damage to the Premises by a fire. In this regard, it is pertinent that there is a clear allocation of risk specified in the Lease, through the segregation of obligations between the Landlord and Tenant to insure various risks.

Allocation of risk and the obligations to insure

14 We start with the Tenant's obligations to insure. They are extensive. Clause 3.6 mandates the Tenant to take out various insurance policies. Clause 3.6.1(i) relates to the Tenant's goods and stock-in-trade and cl 3.6.1(iii) relates to public liability arising out of the operations of the Tenant or its permitted occupiers. Clause 3.6.1(iv) deals with risks associated with the size and type of business carried out by the Tenant at the Premises. Clause 3.6.1(v) obliges the Tenant to take any other coverage and in such amounts as the Landlord may specify in consultation with the Tenant. Most pertinently, cl 3.6.1(ii) imposes an obligation on the Tenant to insure against all risks and damage to the Premises as well as certain other categories of items enumerated therein. Clause 3.6.1(ii) provides as follows:

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> 3.6 Insurance
>
> 3.6.1 At all times during the Term … the Tenant shall, without demand and at its costs and expense, take out and keep in force the following insurance policies …:
>
> …
>
> (ii) an insurance policy in the joint names of the Landlord and the Tenant (which shall include a **provision for waiver of subrogation against the Landlord) against all risks and damage to the Premises**, all plant, equipment (including the mechanical and electrical equipment) and installations permanently affixed to the Premises, the furniture, plate and tempered glass, **fixtures and fittings in the Premises** and all parts thereof which the Tenant is obliged to keep in repair under the provisions of this Lease in such amounts and covering such risks as may from time to time be specified by the Landlord.
>
> [emphasis added in bold]

All these policies were to be in the joint names of Landlord and Tenant save for the policies specified in cll 3.6.1(iv) and 3.6(v).

15 The risk to be insured under cl 3.6.1(ii), "all risk and damage", is wide enough to cover the risk of fire at the Premises. However, the scope of that obligation must be construed in the context of and with reference to the Landlord's obligation to insure the Premises (excluding fixtures and fittings installed by the Tenant) against damage by fire in cl 4.3.1. Clause 4.3 provides as follows:

> 4.3 Management of the Building
>
> Subject always to the provisions of Clauses 5.1 and 5.2, the Landlord shall:
>
> 4.3.1 keep the structural elements (if any) of the Building in good repair and condition (fair wear and tear excepted);
>
> 4.3.2 insure and keep insured the Property (excluding fittings and fixtures installed by the Tenant) **against damage by fire** and such other risks as the Landlord may deem fit.

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[emphasis added in bold]

16 Properly construed, the Lease allocates the risk of *damage to the Premises* (excluding the Tenant's fixture and fittings) caused by fire to the Landlord by requiring the Landlord to procure insurance to cover the risk. That risk is not part of the Tenant's obligation to insure pursuant to cl 3.6.1(ii). In this regard, it is important that the Landlord is a co-insured under the policy, as mandated by cl 3.6.1(ii). As such, it could not have been the intention of the parties that the Landlord would have insured for fire risk under cl 4.3.2 *as well as* under cl 3.6.1(ii). It makes no sense that the Landlord will insure itself against the same risk (fire) as regards the same insurable interest (the Premises) under two separate policies. We should add that the Tenant's fixtures and fittings have been carved out of cl 4.3.2 as they would be insured under cl 3.6.1(ii), as fixtures and fittings are specifically listed therein. Accordingly, the specific allocation of risk in the Lease points to the conclusion that damage to the Premises (save for Tenant's fixtures and fittings) caused by fire would be met by the insurance procured by the Landlord pursuant to cl 4.3.2. Consequently, the question of an indemnity under cl 3.18.1 does not arise.

17 The Landlord argues that a landlord's bare covenant to insure for fire risk within a lease does not raise a conclusive presumption that the insurance was to inure for the benefit of the tenant as well as the landlord: *Lambert v Keymood* [1999] Lloyd's Rep IR 80 ("*Lambert*") at 72 and *Wisma Development Pte Ltd v Sing – The Disc Shop Pte Ltd* [1994] 1 SLR(R) 749 ("*Wisma Development*") at [32]. In the present case, the issue of any intention to benefit the Tenant is not engaged. Rather, the issue is one of construction of the Lease, and in particular, the manner in which the Lease allocates risk between the parties through the obligation to insure. It is pertinent that under cl 4.3.1, the Landlord has a duty to *maintain the structural aspects of the Building*. The

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Building is part of the Premises which the Landlord was obliged to insure against the risk of fire damage. In the present case, while extensive damage was caused to structures, electrical fittings, air-conditioning systems and air handling units by the fire, the major part of the damage was to the structural components of the Building. This rendered other areas inaccessible or unsafe, requiring rebuilding and construction: see Record of Appeal ("ROA") Vol V Part C at p 101 (First McLarens' Report) and ROA Vol V Part E at pp 170, 172–173 (Seventh McLarens' Report). The related pay-out was covered entirely by the Landlord's insurance under cl 4.3.2. Having been indemnified by an insurance pay-out in respect of the damage caused by the manifestation of the risk that it was obliged to insure against, the objective intention of the parties must be that the Landlord has no recourse to the Tenant for damage caused by the fire.

18 The Landlord points out that there was no exclusion of its insurer's right of subrogation to bring an action against the Tenant in cl 4.3.2. That does not assist in view of the analysis on the segregation of risk above. In any case, any claim by the Landlord must arise out of an obligation, contractual or otherwise, which has been breached by the Tenant. In both *Lambert* and *Wisma Development*, the damage was caused by the *negligence* of the party seeking to rely on the insurance clause. In *Lambert*, the fire was caused by the tenant's negligence, and in *Wisma Development*, the flooding was caused by the landlord's negligence. In those cases, the issue was thus whether the insurance clauses were wide enough to cover instances where negligence was caused by the party seeking to rely on the insurance clause. These cases highlight that where, for instance, a landlord had covenanted with a tenant for their *mutual benefit* to insure against fire risks; neither the tenant nor his insurer can claim against the landlord for damages in event of a fire caused by the landlord's

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negligence. On the contrary, where there is no indication that the parties intended that the insurance was to inure to the benefit of both landlord and tenant, as was the case in *Wisma Development* and *Lambert*, the negligent landlord or tenant, as the case may be, would be and remains responsible for damage caused by their negligence (*Wisma Development* at [34], *Lambert* at 72). In *Lambert* (at 73), it was also expressly acknowledged that a landlord's covenant to insure against risk of fire "may be of value to a tenant in relation to circumstances where fire might occur *other than* due to his own negligence" [emphasis added]. Both cases emphasised that the question ultimately turned on a construction of the lease at hand.

19 For the reasons above, we are of the view that the commercial bargain between the parties envisaged that damage to the Premises (except for fittings and fixtures installed by the Tenant) caused by the fire, in the absence of the fault of either party, was to be recovered by the Landlord under its fire insurance policy procured pursuant to cl 4.3.2. In these circumstances where the provisions are clear, the *contra proferentem* rule is not applicable and we do not deal with the Landlord's arguments on this aspect of the Judge's decision.

Third party claims and the fault of the Tenant

20 This construction of the Lease is consistent with the Judge's reading of cl 3.18.1, in limiting it to third party claims where fault is shown on the part of the Tenant. The Landlord argues that it would be objectively inconceivable for cl 3.18.1 to indemnify only in these limited circumstances. Looking at the Lease as a whole, it would be unnecessary for the Landlord to require an indemnity from the Tenant for losses arising from the Tenant's breach of the Lease suffered *inter se*. A breach by the Tenant of its obligations under the Lease provides the Landlord the basis for a claim against the Tenant for contractual

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damages, obviating the need for an indemnity under cl 3.18.1. This points to the conclusion that cl 3.18.1 should be read as limited to third party claims. Further, absent fault on the part of the Tenant, it is difficult to understand why the Tenant would have to indemnify the Landlord pursuant to cl 3.18.1. A consideration of the broad exemptions granted by cl 5 and the surrounding sub-clauses in cl 3.18 fortifies this conclusion.

Rationalising the exemption clause

21 In this context, the Judge held (at [79]) that construing cl 3.18.1 to only apply to third party claims keeps with the broad exemptions contained in cl 5. We agree. Clause 4.3.2 is subject to cl 5, which limits the Landlord's liability to the Tenant to wilful negligence. Clause 5 states as follows:

> 5 LANDLORD NOT LIABLE
>
> 5.1 Notwithstanding anything contained in this Lease and to the fullest extent permitted by Law, the Landlord is not liable to the Tenant and the Tenant must not claim against the Landlord for any death, injury, loss or damage (including indirect, consequential and special losses) which the Tenant may suffer in respect of any of the following (whether caused by negligence or other causes):
>
> …
>
> unless such death, injury, loss, or damage suffered by the Tenant is caused directly and solely by the wilful negligence of the Landlord.
>
> 5.2 Without prejudice to the provisions of Clause 5.1 and to the fullest extent permitted by Law, the Landlord is not responsible to the Tenant or to its employees, independent contractors, agents or permitted occupiers nor to any other persons for any death, injury, loss or damage sustained at or originating from the Premises and/or any part of the Property directly or indirectly caused by, resulting from or in connection with:
>
> …
>
> 5.2.6 any Force Majeure;

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> Unless such death, injury, loss or damage suffered by the Tenant is caused directly and solely by the wilful negligence of the Landlord.

22 In the absence of any wilful negligence, the Landlord is exempted from paying any compensation to the Tenant for loss originating from the Premises, including losses arising from events of *force majeure*. The Landlord's only liability towards the Tenant where the Tenant is not at fault is to allow for the reduction of rent under cl 7.9.1(i), which was done in the present case. It is apparent that cll 5.1 and 5.2 of the Lease complement cl 3.18.1. The former exempts the Landlord from liability for any claims made *by the Tenant* (apart from the exceptions for negligence liability outlined above), whereas the latter protects the Landlord from claims made by *third parties*. In this regard, the Court of Appeal's decision in *Marina Centre Holdings* is instructive. In *Marina Centre Holdings*, the Court of Appeal gave a similar interpretation to a similar indemnity clause in circumstances where the landlord was negligent. The court further held that a clause exempting the landlord from liability for any damage or loss occasioned to the tenant should be construed in a manner complementary to the indemnity clause which was an indemnification against third party claims (*Marina Centre Holdings* at [35]). As highlighted by the Court of Appeal in *Marina Centre Holdings*, "[t]he one is in essence the correlative of the other" (at [35], citing Buckley LJ in *Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd* [1973] 1 All ER 193, 204).

Rationalising cl 3.18 within its chapeau

23 In our view, the Judge also correctly applied the *noscitur a sociis* canon of interpretation in construing cl 3.18.1 in the context of the surrounding sub-clauses (set out in full at [11] above) to conclude that it only applies where there is fault by the Tenant.

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24 Both cll 3.18.2 and 3.18.3 presuppose fault *on the part of the Tenant* to be operative. Clauses 3.18.2 and 3.18.3 provide that the Tenant shall indemnify the Landlord in circumstances where the Tenant has misused or abused utilities or has defaulted on a provision of the Lease and caused the Landlord to suffer losses, respectively. Significantly, the *latter* part of cl 3.18.1 also appears to assume fault on the part of the Tenant, as it requires the Tenant to indemnify the Landlord for any losses arising from the "use or occupation of the Premises and/or any part of the Property *by the Tenant or by any of the Tenant's employees, independent contractors, agents or any permitted occupier*" [emphasis added]. While this was not considered by the Judge below, we are of the view that applying the *noscitur a sociis* principle *within* cl 3.18.1 would also lead to the conclusion that the words "any occurrences in, upon or at the Premises" cannot be read in isolation. Read together with the latter part of the clause as well as the surrounding sub-clauses, cl 3.18.1 requires fault on the part of the Tenant. As we have explained above, this is consonant with the commercial bargain between parties.

New argument on cl 3.12.1

25 The Landlord raises a new argument on appeal, that under cll 3.12.1(ii) and 3.12.1(vii) of the Lease, the Tenant has a duty to return the Premises in its original condition. We reproduce the clauses here:

> 3.12 Vacation of Premises
>
> 3.12.1 At the end of this Lease or its earlier termination (unless renewed), the Tenant must at its cost and expense:
>
> …
>
> (ii) reinstate to the Original Condition (except for fair wear and tear), repair, clean and decorate the Premises (including the Landlord's installations in it) in accordance with the Tenant's obligations

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> under this Lease, to the satisfaction of the Landlord;
>
> …
>
> (vii) vacate the Premises and give the Premises back to the Landlord together with all keys of the Premises.

26 Noticeably, the obligation to reinstate only crystallises when the Lease has come to an end. In the present case, the Landlord did not elect to terminate the Lease notwithstanding the fire. The Tenant continued leasing the Premises even after the occurrence of the fire. Indeed, *per* the terms of the Lease, the Landlord reduced the rental for the period 9 August 2015 (the date of the fire) to 31 May 2016, to account for the damage (and this was part of the loss reimbursed by the insurer). The restoration work was completed on 31 May 2016, and the Tenant continued leasing the Premises until 15 July 2016, the end of the rental period, by which time the Premises had been reinstated. Thus, there was nothing for the Tenant to reinstate when the Lease ended. In any event, cl 3.12.1(ii) stipulates this duty to be "in accordance with the Tenant's obligations under this Lease". It would be incorrect to read the obligation to reinstate in the manner advanced by the Landlord in view of the construction of the Lease as stated above.

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Conclusion

27 For the reasons above, the appeal is dismissed with costs. Both the Landlord and the Tenant have proposed that the successful party be awarded costs in the region of $30,000 (inclusive of disbursements). The sum proposed is reasonable. We consider that the appeal concerns a narrow issue of the construction of the Lease, and the arguments on appeal were primarily the arguments that were advanced before the Judge. We therefore award the Tenant $30,000 inclusive of disbursements. The usual consequential orders are to apply.

Kannan Ramesh
Judge of the Appellate Division

Valerie Thean
Judge of the High Court

Andre Maniam
Judge of the High Court

S Selvam Satanam and Julia Emma DCruz (Ramdas & Wong) for the appellant;
Aqbal Singh s/o Kuldip Singh and Tan Yee Pin Jeff (Pinnacle Law LLC) for the respondent.

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