IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1997] SGCA 40

CA 6/1997

Between

Marina Centre Holdings Pte Ltd

… *Appellant*

And

Pars Carpet Gallery Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Contractual terms — Exclusion clauses

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Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd

[1997] SGCA 40

CA 6/1997
Karthigesu JA; L P Thean JA; Yong Pung How CJ
28 August 1997

1 (delivering the grounds of judgment of the court):

2 The appellants were the landlords, and the respondents, the tenants of the premises [num]03-134 of Marina Square (`the premises`) under a lease dated 1 March 1991 for a term of three years (`the lease`). The respondents used the premises for the sale and display of their carpets and rugs.

3 On the morning of 17 April 1992, which was a public holiday, water came through the false ceiling above the premises and damaged a substantial portion of the respondents` stock of carpets and rugs. It was subsequently discovered that a chilled air conditioning water pipe within the false ceiling of the neighbouring unit, namely, [num]03-138A, had given way and this resulted in the pressurised water escaping from the air conditioning pipes, seeping through the corridors and into the premises causing damage to the respondents` goods.

4 The respondents had insured their goods, and their claim for the damage had been met by the insurers, who subsequently instituted an action in the district court against the appellants in the name of the respondents in exercise

of their right of subrogation. The respondents claimed that the appellants were in breach of the covenants for quiet enjoyment and repair as contained in the lease, and that they were negligent at common law. The appellants denied the breach and negligence and averred that in any event they were absolved from any liability by the exemption clauses contained in the lease, in particular, cl 36.1(b).

5 **Decisions below**

6 In the district court, the trial judge found that the appellants were negligent at common law and were also in breach of the covenants of quiet enjoyment and repair. However, the trial judge held that cl 36.1(b) exempted the appellants from `all three heads of liability` and dismissed the respondents` claim. The respondents appealed to the High Court. On appeal, there was no challenge against the finding of negligence, and the sole question before the appellate judge was whether cl 36.1(b) exempted the appellants from liability for their negligence. The appellate judge held that the clause did not absolve the appellants from liability for negligence. He therefore allowed the appeal and awarded the respondents the sum of $87,688 as claimed and interest thereon amounting to $9,006 and costs [see [1997] 2 SLR 486]. Against that decision, the appellants appealed.

7 **The appeal**

8 Before us the main contention of the appellants was that cl 36.1 of the lease and, in particular, para (b) thereof, absolved the appellants from their liability in negligence to the respondents. This contention succeeded and we allowed the appeal. We now give our reasons.

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9 It is convenient at this stage to set out the relevant part of cl 36.1 of the lease, which reads as follows:

> *It is hereby agreed between the Landlord and the Tenant that the Landlord and its officers, servants, employees or agents shall not be liable or in any way responsible:*
>
> (a) for any damage to property (whether belonging to the Tenant or to others) entrusted to the Landlord`s officers, servants, employees or agents in the SHOPPING CENTRE or MARINA SQUARE;
>
> (b) for any injury or damage to persons or property or any consequential loss resulting from short circuit of electrical wiring, explosion, falling plaster, steam, gas, electricity, water sprinkler, rain plumbing or other pipe and sewerage system, leaks from any part of the SHOPPING CENTRE or MARINA SQUARE, the roof, street, sub-surface or any other place, dampness, or any appurtenances being out of repair unless caused by the wilful misconduct of the Landlord or its officers, servants, employees or agents;
>
> (c) for any damage caused by other tenants or persons in the SHOPPING CENTRE or MARINA SQUARE or by buildings or other operations in the neighbourhood;
>
> (e) for any loss, damage or injury howsoever caused in the PREMISES, the SHOPPING CENTRE or MARINA SQUARE;
>
> …
>
> (g) to the Tenant or others in respect of any act, omission or negligence of any porter, attendant or other servants or employees of the Landlord in or about the performance or purported performance of any duty relating to the provision of the said services or obligations or any of them;

10 The main arguments advanced on behalf of the respective parties centred on the construction of cl 36.1(b). In construing this clause both the trial judge and the appellate judge applied the guidelines or tests laid down by the Privy Council in **Canadian Steamship Lines Ltd v The King** [1952] AC 192 , which was a decision on an appeal from the Supreme Court of Canada. The facts there were briefly these. The Crown leased a freight shed on a wharf in the harbour

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of Montreal to a lessee, and the relevant provisions of the lease, namely, cll 7, 8 and 17, so far as relevant, provided as follows:

> 7 That the lessee shall not have any claim or demand against the lessor for deteriment, damage or injury of any nature to the said land, the said shed, …
>
> 8 That the lessor will, at all times during the currency of this lease, at his own cost and expense, maintain the said shed, …
>
> …
>
> 17 That the lessee shall at all times indemnify … the lessor from and against all claims … by whomsoever made … in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done … by virtue hereof, or the exercise in any manner of rights arising hereunder.

11 A fire broke out at the shed owing to the negligence of the servants of the Crown and destroyed the shed and the goods stored there. To a claim by the lessee and others for damages the Crown pleaded cll 7 and 17 in defence. The Supreme Court of Canada concurred with the finding of the trial judge that the Crown`s servants were negligent, but held that cll 7 and 17 of the lease barred the claims brought against the Crown and entitled the Crown to an indemnity from the lessee. On appeal, the Privy Council reversed the decision of the Supreme Court. On cl 7 of the lease the Privy Council held that it was wide enough to cover negligence but there were at least three heads of claim not based on negligence which could be covered by that clause. Reading cll 7 and 8 together, it held that it was most unlikely that cl 7 was intended to protect the Crown from claims for damage resulting from negligence of its servants in carrying out the very obligations which were imposed by cl 8. As for cl 17, the intent thereof was to protect the Crown against the claims of third parties but the ambit of that clause was limited by the concluding part: `in any manner based upon, occasioned by or attributable to` any one of the three matters stated

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therein, which were not wide enough to cover negligent acts of the Crown`s servants which caused the damage.

12 Lord Morton of Henryton in delivering the judgment of the Board laid down the following rules on the construction of exemption clauses at p 208:

> *Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:*
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called `the proferens`) from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in ***The Glengoil Steamship Co v Pilkington*** (1897) 28 SCR (Can) 146.
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with ar 1019 of the Civil Code of Lower Canada: `In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.`
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether `the head of damage may be based on some ground other than that of negligence,` to quote again Lord Greene in the ***Alderslade*** case [1945] KB 189, 192. The `other ground` must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene`s words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

13 These rules of construction have been held to be merely guidelines and not principles of law. In **Smith & Anor v South Wales Switchgear Co Ltd** [1978] 1 WLR 165 at p 168, Viscount Dilhorne said:

> *... while the tests formulated by Lord Morton are a useful aid to construing such clauses, they must not be interpreted as if they were provisions in a statute. At the end of the day one must construe the clause in the light, inter alia, of other provisions of the contract.*

14 In ***The Raphael; Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd & Ors*** [1982] 2 Lloyd`s Rep 42 at p 45, Donaldson LJ after referring to the pronouncement of Lord Morton said:

> *Although the Judicial Committee was concerned with the law of Canada, Lord Morton`s remarks are equally applicable to the law of England, and have indeed been applied by this court in* ***Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*** *[1973] 1 Lloyd`s Rep 10; [1973] QB 400, and by the House of Lords in* ***Smith v South Wales Switchgear Co Ltd*** *[1978] 1 WLR 165 . On the other hand, it would be a fatal error to regard them as if they were the words of a codifying and, still worse an amending, statute. They provide a very lucid and useful summary of well settled law, but have to be construed in the light of that law.*

15 In **E Scott (Plant Hire) Ltd v British Waterways Board** (Unreported) Oliver LJ in agreeing that Lord Morton`s tests were merely guidelines as an aid to construction and not rules of law had this to say with reference to such guidelines at p 16 of the transcript:

> *Nevertheless where guidance has been laid down so frequently and so authoritatively, the approach which that guidance suggests cannot simply be ignored.*

16 In the instant case, the trial judge held that cl 36.1(b) contains an express agreement to the effect that the appellants are protected against claims arising from negligence of the appellants or their servants or agents, and that in order to satisfy the first test of Lord Morton it is not necessary to state in express terms that the appellants are not to be liable in negligence. She was of the opinion that the qualifying words at the end: `unless caused by the wilful misconduct of the landlord or its officers, servants, employees or agents` have that clear effect.

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She therefore came to the conclusion that cl 36.1(b) contains words in express terms exempting the appellants from the consequence of their own negligence.

17 The appellate judge, however, took a different view. He found that the clause does not contain any reference to negligence or any synonym for negligence. The appellate judge thus held that the language used in cl 36.1(b) does not expressly exempt the appellants from liability in negligence, and therefore does not satisfy the first test laid down by Lord Morton.

18 We agree entirely with the appellate judge that cl 36.1(b) does not satisfy the first test. The clause does not expressly exempt the appellants from liability in negligence: it contains neither the word `negligence` nor any synonym for it. In the absence of such an express reference to negligence or word synonymous with it, the clause clearly fails the first test.

19 It was held by the House of Lords in ***Smith & Anor v South Wales Switchgear Ltd*** (supra) that to satisfy the first test the exemption clause must have an express reference to negligence or word synonymous with negligence. In that case, the respondents engaged the appellants to carry out an overhaul of the electrical equipment in the former`s factory. One of the terms of their contract was an indemnity clause which, so far as relevant, read:

> *In the event of the order involving the carrying out of work by the [appellants] and its sub-contractors on land and/or premises of the [respondents], the [appellants] will keep the [respondents] indemnified against (a) All loss, claims ... breach of any statute, bye-law or regulation; (b) Any liability, loss, claim or proceedings whatsoever under Statute or Common Law (i) in respect of personal injury to, or death of, any person whomsoever, (ii) in respect of any injury or damage whatsoever to any property, real or personal, arising out of or in the course of or caused by the execution of [the] order.*

20 In carrying out the work at the respondents` premises, one of the workers of the appellants suffered injury in an accident caused by the respondents` negligence and breach of duty. He sued the respondents claiming damages for negligence and breach of duty and the respondents took out third party proceedings against the appellants claiming an indemnity under the indemnity clause. The Court of Session in Scotland held that the accident was wholly caused by the respondents` negligence and breach of duty, but that the respondents were entitled to be indemnified by the appellants under the indemnity clause.

21 On appeal, the House of Lords held that the clause did not expressly provide that the respondents were to be indemnified against the results of their own or their servants` negligence. Nor were the words of the clause wide enough, in their ordinary meaning, to cover their own negligence or that of their servants. The clause was held to apply only to liabilities incurred by the respondents for acts or omissions of the appellants or their servants in connection with carrying out the contractual work, and not to liability incurred by the respondents for their own or their servants` negligence towards the appellants` employees engaged on the contractual work. Lord Fraser of Tullybelton who delivered one of the main speeches of the House said, at pp 172-173:

> *The argument based on the first of Lord Morton`s tests can be disposed of quickly. Mr Cullen argued that para (b) in the present indemnity clause contained language which `expressly` entitled the respondents to indemnity against the consequence of their own negligence and that the first test was satisfied. The argument was that the words `any liability, loss, claim or proceedings whatsoever` amounted to an express reference to such negligence because they covered any liability however caused. The argument was supported by reference to the opinions of Buckley LJ and Orr LJ in* ***Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*** *[1973] QB 400 , 420, 421, where great emphasis was placed on the word `whatsoever` occurring*

> *in an indemnity clause as showing that the indemnity was intended to apply to all claims and demands however caused including claims for negligence. I agree with the decision in that case and with the statement by Buckley LJ, at p 421, that the clause was one `which cannot sensibly be construed as subject to an implied qualification` but I am unable to agree with the learned Lord Justice`s conclusion that the clause contained `an agreement in express terms` to indemnify the proferens.* ***I do not see how a clause can `expressly` exempt or indemnify the proferens against his negligence unless it contains the word `negligence` or some other synonym for it*** *and I think that is what Lord Morton must have intended as appears from the opening words of his second test (`If there is no express reference to negligence`). ... In the present case I am clearly of opinion that there is no express provision that the respondents are to be indemnified against the results of their own negligence and that the Second Division were right in so holding. [Emphasis are ours.]*

22 Viscount Dilhorne concurred with Lord Fraser and said, at pp 168-169:

> *When one considers cl 23(b) by itself in relation to the three tests, I agree with my noble and learned friend, Lord Fraser, that it did not expressly indemnify the respondents from the consequences of their or their servants` negligence, and so did not satisfy the first test. To satisfy that, there must be a clear and unmistakable reference to such negligence; that is shown by the words `If there is no express reference to negligence` with which the second test begins. In* ***Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*** *[1973] QB 400 , Buckley LJ and Orr LJ thought that the first test was satisfied by a clause whereby one party undertook `to save harmless and keep` the other party `indemnified against all claims or demands whatsoever ...` With that conclusion I must express my dissent.*

23 This point was also dealt with by the English Court of Appeal in ***Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd*** (supra) and ***E Scott (Plant Hire) Ltd v British Waterways Board*** (supra), particularly the latter, following the decision of the House of Lords in ***Smith*** `s case. In the first case, the shipowners of the vessel, Raphael, claimed against the defendants for having negligently restowed a derrick on board their vessel, which fell and damaged the vessel. The defendants relied on an exemption clause in the following terms:

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> *Except as stated herein we shall not be liable for any damage ... suffered by you ... and which may arise from or be in any way connected with any act or omission of any person or corporation employed by us or by any sub-contractors or engaged in any capacity herewith ...*

24 One of the questions to be decided by the Court of Appeal was whether that condition was apt to exclude the defendants` liability. The court held that, although there was no express reference to negligence or any synonym for it in the exemption clause, the words there were wide enough to cover negligence, and that there was no head of damage on ground other than negligence which was covered thereby. With reference to the first test of Lord Morton, Donaldson LJ said, at p 45:

> *In the present case there is no express reference to negligence in cl 2, nor are there words which can be regarded as synonymous therewith. On the other hand, the words `any act or omission` are certainly wide enough to comprehend negligence.*

25 May LJ, the other member of the court, said at p 49:

> *... I think that Lord Morton`s first test can only be satisfied if the relevant condition does contain expressly the word `negligent` or `negligence`.*

26 In the same year, in ***E Scott (Plant Hire) Ltd v British Waterways Board*** , the Court of Appeal considered at some length the applicability of the Lord Morton`s tests. There, the plaintiffs hired to the defendants an excavator. While the plaintiffs` servant was driving a low-loader carrying the excavator to certain destination, the top of the excavator struck the underside of an overhead bridge, as a result of which the excavator was damaged. It was conceded that damage was caused by the negligence of the plaintiffs in failing to inform the driver of the height of the excavator. Nonetheless, the plaintiffs relying on an indemnity clause in the hire agreement claimed an indemnity against the

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defendants in respect of the damage caused to the excavator. The relevant clause provided as follows:

> *During the continuance of the hire period the Hirer shall make good to the Owner all loss of or damage to the Plant [the excavator] from whatever cause the same may arise, fair wear and tear excepted and except as provided in clause 9 herein, and shall also fully and completely indemnify the Owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or arising out of the use of the Plant and in respect of all costs and charges in connection therewith whether arising under statute or common law.*

27 They succeeded in the court below, but failed on appeal.

28 The Court of Appeal applied the three tests laid down by Lord Morton. The court held that the indemnity clause failed to satisfy the first test, because it did not contain any words expressly referring to negligence or any synonym for negligence. It, however, satisfied the second test as the words used were wide enough to cover negligence. Applying the third test, the court held that there were liabilities other than negligence covered by that clause. Therefore, it failed the third test. Oliver LJ who delivered the main judgment said, at p 17 of the transcript:

> *In my judgment it is no longer possible, in the light of* ***Smith v South Wales Switchgear*** *[1978] 1 All ER 18 , [1978] 1 WLR 165, to treat the undoubtedly wide words `any damage whatsoever` or `however arising` as a periphrasis of `damage arising from negligence of the proferens` and as either satisfying or by-passing the tests propounded by Lord Morton in relation to exclusion and indemnity clauses, for it has now been made clear by authority which binds this court that unless the clause concerned uses the word `negligence` or some equivalent in unmistakable and unequivocal terms, its effect falls to be tested (subject to the caveat of Lord Dilhorne in* ***Smith****`s case and of Lord Salmon in* ***Hollier v Rambler Motors (AMC) Ltd*** *[1972] 2 QB 71 , [1972] 1 All ER 399), by tests 2 and 3.*

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29 Slade LJ, the other member of the court, concurred with Oliver LJ and in referring to the relevant words in the indemnity clause said, at pp 21-22 of the transcript:

> *Indisputably these quoted words are wide enough in their ordinary meaning to cover negligence on the part of the hirer or his servants. But, since cl 13 does not contain the word `negligence` or any synonym thereof, this is not a case where Lord Morton`s test 1 is satisfied. The proper way to approach the matter is by applying his tests 2 and 3. For the reasons given by my Lord, Lord Justice Oliver, the resulting conclusion can only be that clause 13 on its true construction does not entitle the plaintiffs to the indemnity which they now claim. As he has pointed out, there are a number of possible heads of loss other than negligence on the part of the plaintiffs` servants which cl 13 is entirely apt to cover, and which are by no means fanciful or remote; damage to the plant through the activities of third parties is one obvious example.*

30 Before we proceed further, it should be noted that although Lord Morton`s tests referred to exemption clauses, they are equally applicable to the construction of indemnity clauses. In the ***Smith*** case, Viscount Dilhorne said, at p 167:In that case [***Canadian Steamship*** case] there was both an exemption clause and an indemnity clause. Although the tests themselves referred only to clauses exempting from liability, the reference by Lord Morton of Henryton in the preceding sentence to `such clauses` shows that the tests were meant to apply both to exemption and to indemnity clauses.

31 And Lord Fraser said, at p 172:

> *These rules were stated in relation to clauses of exemption, but they are in my opinion equally applicable to a clause of indemnity which in many cases, including the* ***Candian Steamship Lines Ltd*** *is merely the obverse of the exemption.*

32 Indeed, in that case, the clause in question was an indemnity clause.

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33 Reverting to the case at hand, we turn to Lord Morton`s second test. The trial judge having held, and, in our respectful view, in error, that cl 36.1(b) had satisfied the first test, went on further and said that, if she was wrong in the application of the first test, cl 36.1(b) is certainly wide enough in its ordinary meaning to satisfy the second test. She was of the opinion that the qualifying words at the end, namely: `unless caused by wilful misconduct of the Landlord or its officers ...` show that the landlord will not be liable for any damage from the causes stated therein unless it is due to the wilful misconduct of the landlord or its servant or agent. That conclusion is clearly correct, and we agree with her entirely.

34 Clause 36.1(b) expressly provides that the appellants shall not be liable or in any way responsible for any injury or damage to persons or property or any consequential loss resulting from any of the events specified there, `unless caused by the wilful misconduct of the [appellants] or [their] officers, servants, employees or agents`. Wilful misconduct is far beyond any negligence, and necessarily implies that the person responsible for wilful misconduct knows and appreciates that it is wrong conduct on his part in the circumstances to do or omit to do a particular thing, or acts with reckless carelessness, not caring what the results of his carelessness may be. In **Forder v Great Western Railway Co** [1905] 2 KB 532 at pp 535-536, Lord Alverstone CJ said:

> *I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J in* ***Graham v Belfast and Northern Counties Ry Co*** *[1901] 2 IR 13 , where he says: `Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences.` The addition*

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> *which I would suggest is, `or acts with reckless carelessness, not caring what the results of his carelessness may be.`*

35 The clause thus makes it plain that the degree of culpability for the liability for `any injury or damage to person or property or consequential loss` is one which transcends negligence.

36 We now turn to the third test. The trial judge held that there were two other heads of liability, apart from negligence, namely: liability for breach of the covenant for quiet enjoyment and breach of the covenant for repair but these two liabilities are not absolute but requires fault on the part of the appellants as the landlord, which she equated with negligence. She then concluded that the appellants were protected under cl 36.1(b).

37 The appellate judge, however, took a different approach. He considered the second and third tests together and came to the conclusion that while cl 36.1(b) is capable of being construed as having the effect of exempting the appellants from their liability in negligence ***to the respondents*** , it is also capable of being construed as having the effect of exempting the appellants from their liability in negligence ***to third parties*** . Accordingly, in his opinion, the clause should be construed as only having the ***latter*** effect. The appellate judge said:

> *As to the second and third limbs of the Morton guidelines, my view is that although, on the face of it, the clause is sufficiently wide to have the effect of exempting the landlord from the negligence of its servants and agents, sufficient content can be given to it by confining its operation to claims by and liability to third parties arising from the events set out in the clause.*

38 In coming to this conclusion, the appellate judge adopted the following approach. He bore in mind what Purchas LJ said in **Airline Engineering Ltd v Intercon Cattle Meat Ltd** (Unreported) - a case which he had earlier

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considered in some detail. He held that the injury, damage and consequential loss referred to in cl 36.1(b) are capable of being construed to include not only the injury, damage and consequential loss arising from the negligence of the appellants` servants and agents and suffered by the appellants but also the injury, damage and loss sustained by third parties arising from any of the events therein stipulated. He gave three reasons for this construction. First, reading the provision contra proferentem, he noted that, unlike the preceding para (a), the words `whether belonging to the Tenant or not` are not present in para (b). The absence of these words in para (b) may be an indicator that the damage to property referred to there is intended to refer to damage to property of third parties, rather than that of the appellants. Secondly, he noted that para (b) refers to liability and responsibility for injury to `persons`. That, in his opinion, `must mean ordinarily a natural persons, rather than juridical ones`. This is so particularly in the context of this lease, where the tenant is a corporation. Hence, the reference to injury to `persons` in cl 36.1(b) cannot be to the person of the tenant, but to third parties. The reference to damage to property in para (b) should, in the same breath, be construed to mean damage to third parties` property, rather than that of the tenant. Thirdly, confining the operation of cl 36.1(b) to liability to third parties is consistent with the indemnity provisions of cl 17.2. Under that clause the tenant is obliged to indemnify the landlord against claims, losses and so on arising from personal injury and damage to property occasioned by any occurrence in or at the premises. These two clauses are complementary to each other and by the combination of these two clauses the liability for personal injury and property damage of third parties is shifted to the tenant. Hence, reading cl 36.1(b) as applying to liability to third parties is consistent with this scheme.

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39 The learned appellate judge then came to the following conclusion in [para] 30-31 of his judgment:

> 30 In so far as cl 36.1(b) can be read as extending to or covering third party claims for injury damage and loss, whether or not it can also be read as covering injury damage and loss arising from the negligence of the defendants` servants and agents, it should be confined to such third party claims.
>
> 31 To borrow the words of Purchas LJ, the clause does not necessarily refer, or only refer, to injury damage and loss arising from the negligence of the defendants` servants and agents. It should therefore not be construed as exempting the defendants from liability for the negligence of their servants and agents. To borrow the words of Lord Denning MR in the ***Gillespie*** case, sufficient content can be given to cl 36.1(b) by confining its ambit and operation to third party claims and liabilities to third parties.

40 With great respect, we are unable to agree with the reasoning of the appellate judge. We turn, first, to ***Airline Engineering*** which the learned appellate judge had earlier considered. In that case, under an agreement made between the plaintiffs, AEL and the defendants, ICM, AEL agreed to carry out regular maintenance of a turbo-prop aircraft belonging to ICM. The aircraft crashed while still under maintenance by AEL under the agreement. AEL instituted an action against ICM seeking to recover a sum due under the maintenance contract for services rendered. ICM counterclaimed damages for negligence and breach of contract in carrying out the maintenance and also consequential losses. One of the questions for determination was the effect of the indemnity clause, namely, cl 6, in the maintenance contract, which read as follows:

> *ICM undertakes and agrees to indemnify and hold harmless AEL against all actions, claims, proceedings, costs, losses, charges and expenses which AEL and/or ICM may sustain, incur or pay, arising out of or in connection with any of the services provided by AEL, its servants, agents and sub-contractors, unless such claim results from the wilful misconduct of AEL ...*

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41 The action was heard before McCullough J who found for ICM and entered judgment in their favour. His decision was affirmed on appeal.

42 The Court of Appeal held that the words `losses, charges and expenses` in the indemnity clause did not refer to losses, charges and expenses suffered by ICM as a result of the negligence of the servants and agents of AEL, but were confined to claims made by and/or liabilities incurred to third parties. Purchas LJ said, at p16 of the transcript:

> *Notwithstanding the able argument of Mr Wilmers, I am unable to agree either that the use of the words which provide expressly in cl 6 that `the wilful misconduct of AEL its servants or agents` shall be an exception to the indemnity clause, and that these words necessarily satisfy Morton Guidelines No 1 as being a synonym of the expression `negligence`; or inferring by necessity the word `negligence` in that clause; or that in the overall context of cl 5, dealing with insurance, and c 7 dealing with exemptions from liability, the word `losses` necessarily refers, and only refers, to losses arising from the negligence of AEL and directly suffered by ICM, and cannot extend to claims by third parties. I accept the submissions made by Mr Forbes that cl 6, on its ordinary and natural meaning, is to be confined to liability for claims against either or both AEL and ICM by third parties, and that therefore AEL fail in any event under the second of the guidelines of Lord Morton.*

43 Similarly, Stephenson LJ said, at p18:

> *The words of the clause appear to give a universal indemnity with only one exception, but I am satisfied that they can and should be construed to be restricted to claims by third parties, and the judge was quite right in concluding that words a good deal more direct and clear were needed to exempt AEL from liability for their negligent failure to do the work which was the very subject matter of the contract.*

44 It should be noted that in that case there was an exemption clause, namely, cl 7, and it was accepted that that clause did not extend to cover accidents or failures caused by the negligence of AEL or that of their servants or agents. The clause under dispute was an indemnity clause and not an

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exemption clause. If it was intended to provide for exemption from liability for damage to ICM occasioned by the negligence of AEL or that of their servants or agents, it would have been more appropriate to have provided for it in the exemption clause. That precisely was what Stephenson LJ said, at p 18:

> *... I would read the three clauses as my Lord, Lord Justice Purchas, has done. I should have expected to find the exclusion of AEL`s liability for their own negligence alongside the other exclusions in the clause headed `Exemption`. I should not have expected to find an exclusion or exemption from such liability, or an indemnity against it, in a clause headed `Indemnity`, but dealing first and foremost with actions, claims, proceedings, followed by costs, losses, charges and expenses, which may be sustained or paid by AEL and ICM together, as well as by each separately.*

45 It is clear that the court there in applying the second Lord Morton`s test held that the words, in their ordinary meaning, were not wide enough to extend to liability for damage to ICM caused by the negligence of AEL or that of their servants or agents. It was held by both Purchas LJ and Stephenson LJ that the words `losses, charges and expenses` were confined to claims of third parties, and it was clearly not the opinion of either of them that the words `losses, charges and expenses` in the context of that clause were capable of being construed as referring to claims made by, or liabilities incurred to, ICM occasioned by the negligence of AEL or that of their servants or agents. In other words, the indemnity clause there failed the second test, and the question whether the third test is satisfied never did arise.

46 In our view, ***Airline Engineering*** does not afford any assistance in construing the words, injury, damage and consequential loss referred to in cl 36.1(b) as referring to the injury, damage or loss of a third party. The clause in ***Airline Engineering*** was an indemnity clause and prima facie it was intended to indemnify AEL against `all actions, claims, proceedings, costs, losses, charges and expenses which AEL and/or ICM may sustain, incur or pay`. In the

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context of that clause, as Purchas LJ held, it is plain that the clause referred to and was confined to claims made by, or liabilities incurred to third parties which both of them, AEL and ICM or either of them, had to pay, and could not be liabilities for loss or damage sustained by ICM as a result of the negligence of AEL or that of their servants or agents. McCullough J set this our succinctly in his judgment, at p 25 of the transcript:

> *The words used were apt to lead ICM to think that they dealt with actions, proceedings, claims and so on brought by third parties against either ICM or AEL which resulted in losses to one or other of the contracting parties. Where such claims were made, the parties agreed that if a loss fell on ICM initially they could not seek to be reimbursed by AEL. They would hold AEL harmless. If a loss fell initially on AEL then ICM would be liable to make the loss good. They would be liable to indemnify AEL. In my judgment, that is the effect of cl 6 and it cannot avail the plaintiffs in the circumstances of this case.*

47 In the instant case, there is nothing in cl 36.1(b) which gives an indication that the scope of the injury, damage or consequential loss referred to is to be restricted and confined only to that of third parties. On the contrary, cl 36.1(b), being part of an express agreement made between the appellants as the landlords and the respondents as the tenants, is intended to relieve or absolve the landlords from liability to the tenants for injury, damage and consequential loss resulting from any of the events therein specified, unless caused by wilful misconduct of the landlords or that of their servants or agents. In this clause, the appellants are not concerned with any injury, damage or loss occasioned to third parties, whether or not caused or contributed to by their negligence or that of their servants or agents - assuming that the relevant words there are capable of being construed to include such injury, damage or loss to third parties - for, as between the appellants and third parties, such an exemption clause is not effectual in exempting them (the appellants) from liability to third parties who have sustained any injury, damage or loss by reason of any of the events therein

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specified. The obvious reason is that there is no privity of contract between the appellants and third parties. This clause was essentially intended to exempt the appellants from liability to the appellants for any injury, damage or consequential loss occasioned to the respondents by any of the events specified there. With respect, we are thus unable to accept the appellate judge`s construction of this clause to the effect that the injury, damage or consequential loss is confined to that of third parties.

48 The appellate judge considered significant the absence of the words `whether belonging to the tenant or to others` in cl 36.1(b), which were present in cl 36.1(a). The presence or absence of these words must be read in their proper context. Clause 36.1(a) exempts the appellants from liability for any damage to property `entrusted to the Landlord`s officers, servants or agents in the SHOPPING CENTRE or MARINA SQUARE`, premises of which the appellants are the owners and managers. In these areas, there may be occasions where goods or articles, whether belonging to the tenants or not, are `entrusted` to officers, servants or agents of the landlords and the clause is intended to relieve them from any liability for damage or loss to such goods or articles. Hence, as between the appellants, the landlords, and the respondents, the tenants, where any property is so `entrusted`, the former by this clause disclaim any responsibility for any damage caused to such property. In the context of that clause, clearly the words `whether belonging to the Tenant or to others` serve a real and useful purpose. But, these words are wholly unnecessary in cl 36.1(b); indeed in the context of that clause such words would be completely out of place.

49 Turning to the construction of the word `persons` in cl 36.1(b) we can find nothing there which indicates that the word `persons` must mean ordinarily natural persons, rather than juridical persons. In our respectful view, the word

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`persons` should be read and construed in the context in which it appears. So read and construed the words `damage to persons` mean personal injury as distinguished from damage to property.

50 Lastly, confining the operation of cl 36.1(b) to liability of the appellants to third parties is, with great respect, not consistent with or complementary to the indemnity clause, namely, cl 17.2, which reads as follows:

> *The Tenant shall indemnify and keep indemnified the Landlord from and against:*
>
> (a) all claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, damages, costs, losses and expenses of any nature whatsoever which the Landlord may suffer or incur in connection with loss of life, personal injury, and/or damage to property arising from or out of any occurrence in, upon or at the PREMISES or the use of the PREMISES or any part thereof by the Tenant or by any of the Tenant`s agents, employees or visitors;
>
> (b) all loss and damage to the PREMISES, its adjoining or neighbouring premises, to MARINA SQUARE and to all property therein caused whether directly or indirectly by the Tenant or the Tenant`s agents, employees or visitors and in particular but without limiting the generality of the foregoing caused whether directly or indirectly by the use or misuse, waste or abuse of water, fire or electricity or faulty fittings or fixtures of the Tenant.

51 Clause 36.1(b) would be consistent with and complementary to cl 17.2, if the former is construed as a clause exempting the landlords from liability for any damage or loss occasioned to the tenants by reason of any of the events specified therein arising. Having thus exempted themselves from such liability, the landlords by cl 17.2 seek to protect themselves further by taking an indemnity from the tenants against third parties` claims. In this manner, the two clauses complement each other: `The one is in essence the correlative of the

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other` (per Buckley LJ in **Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd & Anor** [1973] 1 All ER 193 , 204).

52 In determining whether cl 36.1(b) exempts the appellants from liability to the respondents or from liability to third parties, the plain and ordinary meaning of the words in the clause should be given effect to. Clause 36.1(b), on a plain and ordinary reading, is wide enough to exempt the appellants from liability to the respondents in the circumstances therein stated. It should therefore be given that effect.

53 We now turn to Lord Morton`s third test. The only question here is whether there are heads of damage founded on liability other than that for negligence which are covered by cl 36.1(b). This is subject to the caveat that the non-negligent liability must not be so fanciful or remote that the appellants could not have desired protection against it. The underlying reason for this approach is that the court starts with a presumption that parties to a contract do not normally agree to accept the consequences of each other`s negligence, ie by way of an exemption clause, much less to shoulder responsibility for them, ie by way of an indemnity clause, and will not be taken to have intended to do anything so improbable, unless the contract does not admit of any other reasonable construction (per Oliver LJ in ***E Scott (Plant Hire) Ltd v British Waterways Board*** (supra) at p 10).

54 In this case, it was suggested on behalf of the respondents that cl 36.1(b) is capable of exempting the appellants from three other potential liabilities apart from that for negligence, namely: (a) liability for breach of the covenants for quiet enjoyment and for repair, (b) liability for nuisance, and (c) liability under the rule in **Rylands v Fletcher** [1868] 3 LR HL 330 .

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55 We deal first with the liability for breach of the covenant for quiet enjoyment and the covenant for repair. A breach of either of these covenants may or may not involve negligence, depending on the circumstances. But cl 36.1(b), in our opinion, is apt to cover only a breach of such covenants involving negligence. This stems from the fact that a breach as contemplated in this clause takes the form of the events as specified there, such as, short circuit of electrical wiring, explosion, falling plaster, leaks from gas, electricity, water sprinkler, rain plumbing or other pipe and sewerage system, as well as leaks from the roof, street or sub-surface. A breach causing damage in any such events occurring must necessarily involve negligence.

56 In **Anderson v Oppenheimer** [1880] 5 QBD 602 , the defendant was the owner of the house and the plaintiff was the tenant of the groundfloor and basement. The various floors of the house were supplied with water by a cistern at the top floor with pipes connected to the different floors. The defendant paid for the water rates and received from the plaintiff reimbursement in respect of his share of such payments. In consequence of a bursting of a branch service pipe, water flowed into the basement and damaged the plaintiff`s goods. The plaintiff claimed damages for negligence and breach of covenant for quiet enjoyment. It was found that the damage was not caused by any negligence of the defendant. On the breach of the covenant for quiet enjoyment, both the trial judge and the Court of Appeal held that there was no such breach on the part of the landlord.

57 Similarly, in this case, the water escaped from the air conditioning pipe above the unit adjoining the premises of the respondents and seeped into their premises causing damage to their carpets and rugs. In such event, the appellants would only be liable for breach of the covenant for quiet enjoyment and/or breach of the covenant for repair, if there was negligence on their part, which,

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as it was found, there was. In this connection, it bears mentioning that the breaches of these two covenants as pleaded in the respondents` statement of claim were founded on allegations of negligence or want of care.

58 There is another reason why we think that cl 36.1(b) is not apt to cover liability for breach of the covenants for quiet enjoyment and for repair. Such liability is purely contractual, and it could not have been intended by the parties that the appellants should be absolved from their liability to the respondents from the consequence of their breach of the very obligations which they had expressly covenanted to perform. The intention to do so must be made perfectly clear.

59 Next, we turn to the liability for nuisance and that under the rule in ***Rylands v Fletcher*** ; and they may be dealt with together. Clause 36.1(b) contemplates, inter alia, damage or loss resulting from the utilities such as the gas, electricity and water and from defect or fault in any systems, such as the sprinkler, plumbing and sewerage systems, and also from structures such as the roof and ceiling. Such utilities, systems and structures are provided and maintained for the benefit of, among others, the respondents, and the respondents must be taken to have consented to their availability and existence at the commencement of the lease. In these circumstances, the appellants will only be liable in nuisance or under the rule in ***Rylands v Fletcher*** , if they are shown to have been negligent in causing the damage or loss.

60 In **Kiddle v City Business Premises, Ltd** [1942] 2 All ER 216 , the plaintiff leased from the defendants a shop in an arcade. A portion of the arcade roof which sloped towards the demised premises was also the property of the defendants. A gutter fitted with piping received the water accumulated on the roof and carried it to a sewer. One of the pipes became choked and caused an

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overflow of water which ran into the shop and damaged the goods of the plaintiff. The plaintiff claimed damages for negligence and nuisance. It was found that there was no negligence on the part of the defendants. As for nuisance, the Court of Appeal held that a lessee of a portion of the premises must take it as he found it and in the absence of negligence the lessors were not liable. Goddard LJ delivering the judgment of the court said, at pp 217-218:

> *It is now settled law that where the plaintiff and the defendant occupy parts of the same building, whether it be two floors of a warehouse, two sets of offices or two flats, and water which is laid on to the building escapes and does damage, the person from whose part the escape takes place is not liable in the absence of negligence. The reason for the escape is immaterial so long as the exercise of reasonable care would not have prevented it, and it seems to me that the true reason is most clearly stated in the judgment of Martin B, in* ***Carstairs v Taylor*** *[1871] LR 6 Exch 217, at p 222, where he says:*
>
> *`Now, I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently.`*

61 Similarly, in the circumstances there is no liability under the rule in ***Rylands v Fletcher*** . This question was also raised and dealt with in ***Anderson v Oppenheimer*** (supra), where Brett LJ dealt with it in the following terms at pp 607-608:

> *It was further suggested that the plaintiffs have a cause of action, irrespective of the covenant for quiet enjoyment. Reliance has been placed upon* ***Rylands v Fletcher*** *Law Rep 3 HL 330. The principle of that case might have applied, if the supply of water had been for the use of the other tenants without reference to the plaintiffs` portion of the premises. But this apparatus was used for the common benefit of the plaintiffs and the other tenants. There was no storing up of water for the benefit of the defendant alone. I think, therefore, that the plaintiffs cannot succeed upon this ground.*

62 Cotton LJ, the other member of the court, concurred with him and said, at p 608:

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> *It was suggested that the case comes within* ***Rylands v Fletcher*** *Law Rep 3 HL 330; that the defendant, having the water in the cistern at the top of the house for his own purposes, is liable if, without negligence, it escaped and injured the plaintiffs. I agree with Brett LJ, that the water having been stored in the cistern for the benefit of the plaintiffs as well as of the other tenants, the case does not come within* ***Rylands v Fletcher****, although the spot where the water escaped was not on the plaintiffs` premises.*

63 In **Peters v Prince of Wales Theatre (Birmingham) Ltd** [1942] 2 All ER 533 , the plaintiff was a tenant of the premises which formed part of a building belonging to the defendants. At the time of commencement of the lease there was installed in the building a sprinkler system which extended to the premises of the defendant. Owing to an exceptionally severe frost, without any fault on the part of the defendants, the sprinkler heads froze in the defendant`s premises. When they thawed, water poured from six of the sprinkler heads and percolated into his premises and damaged his goods. He sued for damages for negligence and under the rule in ***Rylands v Fletcher*** . The trial judge found that there was no negligence. On appeal the Court of Appeal held that the rule in ***Rylands v Fletcher*** did not apply. The court found that the sprinkler system was installed for the mutual benefit of the tenant and the landlord, and that the tenant must be taken to have consented to the presence of the sprinklers. Since the tenant had consented to the source of danger, the landlord could not be liable under the rule in ***Rylands v Fletcher*** . Goddard LJ delivering the judgment of the court said, at p 539:

> *Applying the principles which we have endeavoured to deduce from the authorities to the present case, the plaintiff took a lease from theatre proprietors of part of the building in which they carried on their theatre. When he took it the sprinkler system was installed and he knew of it. It is not to be supposed that the defendants would have consented to let to him had he stipulated for the removal of that system. He took the place as he found it for better or worse. Indeed, if common benefit be the material consideration, though, in our opinion, it is not, considering that theatres are generally regarded as buildings exposed to more*

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> *than ordinary risk of fire, it may well be for the benefit of tenants in the building that the most effective apparatus should exist for dealing with this danger. It is, however, on the implied consent of the plaintiff to the presence of this installation that we base our decision that the doctrine of* ***Rylands v Fletcher*** *[1868] LR 3 HL 330 does not apply.*

64 Clause 36.1(b) on a true construction is not apt to cover any of these heads of damage or loss. In our judgment, both Lord Morton`s second and third tests are satisfied, and the clause is effective to exclude liability in negligence, and the appellants were entitled to rely on the clause to absolve themselves from such liability to the respondents.

65 Counsel for the respondents sought to rely on **Hong Realty (Pte) Ltd v Chua Keng Mong** [1994] 3 SLR 819 . We are unable to see how this case is relevant. There, the respondent stored his goods in the appellants` warehouse pursuant to a contract of bailment made between the two parties. The appellants then commenced renovation works in the warehouse, which involved, inter alia, the cutting of a section of the overhead water pipe. The cut ends of the pipe were left uncapped without any further precautions having been taken. Water escaped from the pipe and flooded the premises, damaging the respondent`s goods. The respondent sued the appellants, alleging that they had been negligent. The appellants claimed that they were saved from liability by the exemption clauses contained in the contract of bailment. The trial judge found that the appellants were not excused from liability by the exemption clauses. This court affirmed his decision. The warehouse was a fit and proper place to store goods at the time the parties entered into the contract of bailment. The renovation works subsequently, however, rendered it an unfit place to store goods. This court therefore held that the renovation works had altered the circumstances such that they were very different from the circumstances the parties had had in mind when they entered into the contract. The parties could not have intended the

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exemption clauses to apply in the altered circumstances, and therefore the appellants could not rely on them to escape liability. Karthigesu JA, delivering the judgment of the court, said, at pp 825-826:

> *... exemption clauses must be construed strictly and this means that their application must be restricted to the particular circumstances the parties had in mind at the time they entered into the contract. On any view of the matter the respondent and the appellants could not have intended that the exemption clauses in the contract of bailment would apply when some act had intervened to alter the circumstances in which the exemption clauses would ordinarily apply.*

66 That case is clearly distinguishable from the instant case, and the reasoning there has therefore no relevance in the instant case.

67 For the reasons we have given, we allowed the appeal.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Anthony Lee and Amy Lai (Bih Li & Lee) for the appellants
Liew Teck Huat and Ravindra Samuel (Niru & Co) for the respondents

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