IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 59

Suit 1906/1995

Between

Hakko Products Pte Ltd

… *Plaintiff*

And

Danzas (Singapore) Pte Ltd
Another

… *Defendant*

GROUNDS OF DECISION

Bailment — Bailees; Contract — Contractual terms; Tort

Version No 1: 20 Nov 2026 (01:16 hrs)

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Hakko Products Pte Ltd v Danzas (Singapore) Pte Ltd and Another

[1999] SGHC 59

Suit 1906/1995
Goh Joon Seng J
09 March 1999

1 : The plaintiff`s claim against the defendants is for damages for breach of their duty of care in the delivery of a Stencillaser machine (`the machine`) from the first defendant`s warehouse at the Changi Cargo Complex to the plaintiff`s factory on the third level of the industrial building at 164, Kallang Way, [num]03-24, Singapore. At the close of the hearing, I found for the plaintiff. I awarded it S$218,143.27 being costs of replacement of the damaged parts inclusive of installation, less the salvaged value. This sum is to carry interest at the rate of 6% per annum from the date of service of the Writ. I also awarded costs to the plaintiff. The defendants have appealed to the Court of Appeal [the appeal was withdrawn - Ed]. I now give my reasons.

2 ***The parties***

3 The plaintiff is a company incorporated in Singapore. It is engaged in producing stencils for use as solder paste printing in circuit boards.

4 The first defendant is a freight forwarding company incorporated in Singapore. It is associated with another freight forwarding company, Danzas GmbH, Hanover-Airport, Germany (`Danzas GmbH`).

5 The second defendant undertakes the transportation of cargo for the first defendant within Singapore as its subcontractor providing vehicles, equipment and manpower.

6 ***Events leading to these proceedings***

7 In January 1995, the plaintiff purchased the machine from its manufacturer LPKF CAD/CAM SYSTEME GmbH, Hanover, Germany (`LPKF`) for DM497,000 inclusive of installation and commissioning, FOB Hanover. It was to be used for cutting stainless steel into stencils. The accuracy required is 20 micron. It is therefore a very high precision and sensitive equipment.

8 For airfreighting the machine from Hanover to Singapore, LPKF entrusted the job to Danzas GmbH. Danzas GmbH informed first defendant of this on or about 16 January 1995.

9 On receipt of the information, the first defendant`s Senior Sales Executive, Steven Ong, made an appointment to see Ms Koh Mui Khim (`Ms Koh`), the plaintiff`s Accounts Supervisor.

10 On 17 January 1995, Steven Ong called on Ms Koh, offering the first defendant`s services for airfreighting the machine from Hanover to Singapore and then transporting it to the plaintiff`s factory.

Version No 1: 20 Nov 2026 (01:16 hrs)

11 Subsequent to the meeting with Ms Koh, Steven Ong submitted a quotation for, inter alia, the following:

12 (i) airfreighting the machine from Hanover Airport to Singapore Changi International Airport (`Changi Airport`) at DM 2.50 per kilo.

13 (ii) transporting same from Changi Airport to plaintiff`s factory at S$0.15 per kilo.

14 (iii) charges for the use of a Hiap crane - S$150.

15 (iv) uncrating and disposal of crates - $120.

16 The Hiap crane was required because the weight of the consignment was about three and a half tons. The quotation contained a clause (`the incorporating clause`) at the bottom. It read:

> *All business transacted in accordance with SAAA`S standard trading conditions. Copy available on application.*
>
> *SAAA stands for `Singapore Aircargo Agents Association`.*

17 Clauses 15 and 16 of SAAA`s Standard Trading Conditions read:

> *Clause 15*
>
> *Limitation of liabilities*
>
> (i) The Company shall only be responsible for any loss of or damage to goods or for any non-delivery or mis-delivery if it is proved that the loss, damage, non-delivery or mis-delivery occurred whilst the goods were in the actual custody of the Company and under its actual control and that such loss, damage, non-delivery or mis-delivery was due to the wilful neglect or default of the Company or its own servants. The Company`s liability begins from the time of receipt of the goods in the contracted condition and state and terminates at the time of delivery to other carriers or the consignees.

Version No 1: 20 Nov 2026 (01:16 hrs)

> (ii) The Company shall only be liable for any non-compliance or mis-compliance with instructions given to it if it is proved that the same was caused by the wilful neglect or default of the Company or its own servants.
>
> (iii) Save as aforesaid, the Company shall be under no liability whatsoever however arising, and whether in respect of or in connection with any goods or any instruction, business, advice, information or service or otherwise.
>
> (iv) Further and without prejudice to the generality of the preceding sub-conditions (i) or (ii) or otherwise, be under any liability whatsoever for any consequential loss or loss of market or fire or consequence of fire or delay or deviation however caused.
>
> *Clause 16*
>
> *Rate of limitation*
>
> *In no case whatsoever shall any liability of the Company howsoever arising and notwithstanding any lack of explanation exceed the value of the relevant goods or a sum at the rate of SGD1,000.00 per tonne of 1,000 kilos on the gross weight of the goods whichever is the lesser on a pro-rata basis.*

18 As LPKF had entrusted the airfreighting of the machine from Hanover to Singapore to Danzas GmbH with `freight collect` at Singapore, the plaintiff accepted the first defendant`s quotation.

19 In the meantime, in mid-January 1995, Tony Wong Cheok Ban (`Tony Wong`), a service engineer, and Azman Shah (`Azman`), an engineer, of the plaintiff, were sent to LPKF`s plant in Hanover to familiarise themselves with and be trained in the operation of the machine. While on attachment, they tested the machine and witnessed the packing. They returned to Singapore on 30 January 1995. The machine arrived the next day. The first defendant took delivery of the machine consigned in three crates from the Airfreight Terminal and stored them in its warehouse at the Changi Cargo Complex on 1 February 1995. The crates had markings of an arrow pointing upwards, umbrella and glass. The arrow marking denotes that the crate must face upwards. The

Version No 1: 20 Nov 2026 (01:16 hrs)

umbrella marking means that the cargo should not be allowed to come into contact with water. The glass marking indicates the fragility of the contents.

20 The first defendant engaged as its subcontractor the second defendant to transport the machine from its warehouse to the plaintiff`s factory.

21 On the morning of 4 February 1995 at around 1000 hours, the three crates arrived at 164, Kallang Way on board two trucks. Two smaller crates containing the control unit and the laser board were on board the bigger truck with a fixed canopy cover. It was driven by Yap Peng Huak. The bigger crate containing the marble table and the X-Y positioner (`the X-Y unit`) was on board the smaller truck which did not have a fixed canopy cover. It was driven by Chua Cheng Huat. The crate was covered with a canvas sheet. It was a wet day in the vicinity of Kallang Way, with alternating rain and drizzle.

22 On arrival at 164, Kallang Way, the two trucks were parked at the rear loading bay. The crate containing the control unit was unloaded onto the loading bay where it was unpacked. The control unit, mounted on wheels, was pushed to the plaintiff`s factory and placed in position pointed out by Azman. The second crate was similarly unloaded and moved into position by the second defendant`s workers using a pellet jack.

23 The crate containing the X-Y unit could not be unloaded without the Hiap crane. The Hiap crane had been ordered by the second defendant. But it arrived late.

24 While waiting for the arrival of the Hiap crane, the second defendant`s workers removed the canvas sheet covering the crate. They then removed two

Version No 1: 20 Nov 2026 (01:16 hrs)

side panels of the crate. The X-Y unit wrapped only with a plastic sheet, was thus exposed to the rain.

25 Seeing that the two side panels had been removed, Azman checked and found the X-Y unit wet with rain water. He informed Steven Ong who touched it and confirmed it was wet.

26 When the Hiap crane eventually arrived, it could not operate at the rear loading bay because of an overhead shelter. So the truck with the X-Y unit on board was driven round the building to the front loading bay. This was done without the side panels and without the canvas sheet being put back in place. There was also a thick piece of wood resting on it.

27 After the truck arrived at the front loading bay, the X-Y unit was uncrated. A belt was slung around it. It was then lifted by the Hiap crane from the truck and placed on the loading bay.

28 The second defendant`s workers then discovered that their pellet jack was not of suitable size and could not be used to move the X-Y unit from the loading bay to the plaintiff`s factory. Chua Cheng Huat then went to look for a suitable pellet jack. Pending his return, the X-Y unit was left on the loading bay. All this while, it was still raining/drizzling.

29 When Chua Cheng Huat returned later with a suitable pellet jack, the X-Y unit was transported and placed in position in the plaintiff`s factory as directed by Azman.

30 According to the plaintiff, the whole operation was completed at 1900 hours. The delay was caused by the late arrival of the Hiap crane at 1500 hours

Version No 1: 20 Nov 2026 (01:16 hrs)

and the lack of a suitable pellet jack. The defendants however said that the Hiap crane arrived at 1300 hours and the delivery was completed at 1500 hours. At 1900 hours, Azman spotted rust on the X-Y unit indicating that corrosion, due to contact with water, had taken place. Azman informed Tony Wong who then tried unsuccessfully to remove the rust by wiping it with a piece of cloth.

31 On 5 February 1995, LPKF`s engineers arrived to reassemble, hook up and commission the machine. They installed it on 6 February 1995 and tested it. The cutting was wavy. The machine had lost its required accuracy due to the corrosion of the X-Y unit. On 7 February 1995, they tried unsuccessfully to repair it by fine-tuning. The X-Y unit was eventually replaced, on the advice of LPKF that repairs could not restore the machine to its required accuracy.

32 ***These proceedings***

33 On 25 October 1995, these proceedings were commenced against the first defendant. The writ with the statement of claim was then amended to join the second defendant. The claim against the defendants is for breach of duty of care.

34 The issue before me was whether the corrosion was caused by contact with water when the X-Y unit was exposed to the rain/drizzle during the unloading operation as contended by the plaintiff or was it caused by condensation on the flight from Hanover as contended by the defendants.

35 In support of their case, the defendants relied on the evidence of Dr Daniel John Blackwood, a senior lecturer at the Department of Materials Science, National University of Singapore. In his affidavit of evidence-in-chief, Dr Blackwood gave his opinion as follows:

Version No 1: 20 Nov 2026 (01:16 hrs)

> *In my opinion, even if there was nine hours of exposure to rain, it is insufficient time for steel to corrode to the extent that corrosion products become visible to the human eye.*
>
> *It is my opinion that the corrosion observed on the X-Y positioning unit was due to contact with liquid water for a number of days and that the most likely source of this water was condensation during the flight between Germany to Singapore.*

36 Dr Blackwood`s evidence was discredited by an experiment conducted in court by the plaintiff`s expert witness, Mr David Tay Yew Huat of Matcor Technology & Services Pte Ltd. The experiment began at 1140 hours with samples as follows:

Sample A	-	a machined mild steel plate with oil coating
Sample B	-	a machined mild steel plate with no protection
Sample C	-	three new screw bolts and nuts with washers with oil coating
Sample D	-	old and used bolt provided by Dr Blackwood

37 The samples were exposed to water. Two and a half hours later, all four samples showed visible signs of corrosion in the form of rust formation. Dr Blackwood`s opinion that condensation during the flight from Hanover to Singapore was the most likely cause of the corrosion is also not consistent with the absence of corrosion on the components packed in the other two crates that arrived on the same flight with the crate containing the X-Y unit.

38 I was therefore of the opinion that the corrosion on the X-Y unit was caused by contact with rain water because the X-Y unit was exposed to

Version No 1: 20 Nov 2026 (01:16 hrs)

rain/drizzle from the time it arrived at 1000 hours at 164, Kallang Way until it was delivered to the plaintiff`s factory, be it at 1500 or 1900 hours.

39 Who then was to blame for allowing the X-Y unit to be exposed to the rain/drizzle during the unwarranted delay in the unloading operation due to the lack of proper equipment.

40 The first defendant was awarded the job by the plaintiff because of its expertise in the transportation of sensitive equipment. This was the evidence of Steven Ong:

> Q: What is the nature of your company`s business?
>
> A: Freight forwarding.
>
> Q: How long has your company been established?
>
> A: Since 1987. It`s associated with Danzas of Germany.
>
> Q: Your company has a reputation for delivering all kinds of consignments to customers?
>
> A: Yes.
>
> Q: Have you ever refused any shipment?
>
> A: Yes.
>
> Q: Your company is expert in transporting sensitive machinery, eg high precision equipment.
>
> A: Yes. But we appoint specialist sub-contractors for such high precision equipment.
>
> Q: What about general cargo?
>
> A: We always subcontract out. But we supervised.

41 Paragraph 5 of the first defendant`s amended defence also stated that `its servants or agents exercised due care as regards the concerned cargo`. In its further and better particulars given thereunder, the first defendant stated that it `provided adequate personnel who were properly supervised at the delivery site

Version No 1: 20 Nov 2026 (01:16 hrs)

...`. In line with the first defendant`s defence, Steven Ong in his affidavit of evidence-in-chief stated:

> *I personally went down to oversee the delivery of the consignment and to ensure that everything proceed smoothly.*

42 The first defendant`s pleadings and Steven Ong`s affidavit of evidence-in-chief were consistent with the first defendant having a contractual duty to take reasonable care of the machine. This included the duty to supervise the unloading operation. Notwithstanding this, Steven Ong, tried to distance himself from the unloading operation. This was what he said:

> Q: What did you do when the lorries arrived?
>
> A: I met the contractor, Mr Yap, Mr Chua and two workers.
>
> Q: They took instructions from you?
>
> A: No, from Azman Shah.
>
> Q: At what time did Azman Shah and Tony Wong appear?
>
> A: When the two trucks arrived, two men approached our trucks. They were Azman and Tony.
>
> Q: You did not give any instructions?
>
> A: That`s so. I told them to take instructions from Shah.
>
> Q: Was Azman present at the unloading bay throughout?
>
> A: He was there on and off. But when the bigger crate was being unloaded he was there giving instructions most of the time.
>
> Q: Was Tony Wong there as well?
>
> A: Not throughout the whole operation, at certain time only.
>
> Q: You are the expert and yet you had no part in the unloading leaving things to Azman Shah. Are you saying that?
>
> A: Yes. Because Azman and Tony were in Germany to see how their supplier packed the goods. So they knew how to lift the equipment.
>
> Q: Did you introduce the four workers to Azman and tell them to take instructions from Azman?

Version No 1: 20 Nov 2026 (01:16 hrs)

A: Cannot remember.

43 Under cross-examination, Steven Ong was evasive in his answers. On no less than 30 occasions, his answers were either `cannot recall` or `cannot remember`. When he did give substantive answers, he was not forthcoming with the truth. See for example his evidence, when questioned as to whether he had reconnoitred the vicinity of the plaintiff`s factory to assess the accessibility of the equipment thereto:

> Q: If you have an order for shipment of goods, would you find out if the delivery requires special equipment, familiarise with the area to which the goods are to be delivered?
>
> A: Depends on the nature of the goods, the size of the goods.
>
> Q: See your para 3. You were told of two crates of machinery weighing 3.5 tons?
>
> A: Yes.
>
> Q: Did you see the need to reconnoitre the area?
>
> A: I was informed of the weight without the dimensions. So I did not see any need to do a reconnaissance.
>
> Q: Did you find out the size of the crates?
>
> A: I asked Alice Koh (PW1) about the dimension of the crates. She was not able to advise.

44 The truth came out only after further cross-examination:

> Q: You said before the delivery on 4.2.95 you did not reconnoitre plaintiffs` factory?
>
> A: Now I say I did reconnoitre the factory."

45 Steven Ong was then asked if he took measurements of the lift, this was his evidence:

Version No 1: 20 Nov 2026 (01:16 hrs)

Q: When you saw the lifts did you take measurements?

A: Cannot recall.

Q: Is it your practice to carry a measuring tape with you?

A: No.

Q: When you did the reconnaissance, did you know the dimension of the cargo?

A: Cannot remember.

…

Q: Put you also took measurements of the lift on the day of the reconnaissance?

A: Cannot recall.

46 Under further cross-examination, this was what he said:

Q: Upon collecting the consignment, did Danzas of Germany notify you of the size of the cargo?

A: Yes, the dimension and weight.

Q: So you realised the size of the cargo before its arrival?

A: Yes.

Q: Did you see the need to find out if the crated cargo could fit the lift servicing the plaintiffs?

A: Yes. I knew one crate could not go into the lift. The one measuring 250 cm x 210 cm x 135 cm.

Q: So what did you do?

A: I presumed the width of 210 cm would not fit into the lift.

Q: How did you know that?

A: I presumed so.

Q: Why did you [not] go and measure the lift?

A: I went to measure the lift.

Q: Are you sure?

A: Yes.

Version No 1: 20 Nov 2026 (01:16 hrs)

47 Having said that Ms Koh could not advise him of the dimension of the crates, he went on to say that she told him to uncrate the bigger crate `downstairs`, that is, at the loading bay:

> Q: Did you then go and inspect plaintiffs` factory?
>
> A: Ms Koh of plaintiffs instructed us that the bigger crate had to be uncrated. She advised that the crate be brought up to 3rd floor. We uncrated the big crate on the ground floor and carried the contents to the plaintiffs` factory.
>
> Q: You just said Ms Koh advised you to uncrate the bigger crate downstairs?
>
> A: Yes.
>
> Q: When did she tell you that?
>
> A: Cannot recall.

48 There were so many other instances of such unsatisfactory evidence coming from Steven Ong that I found him not a witness of truth. I will now deal with the evidence of Chua Cheng Huat and Yap Peng Huak.

49 It was quite clear that Steven Ong, Chua Cheng Huat and Yap Peng Huak had agreed to take a common stand that Azman took charge of the whole unloading operation with Steven Ong being a mere bystander. Azman was said to have shown them how to sling the belt around the X-Y unit for it to be lifted by the Hiap crane. See the evidence of Chua Cheng Huat:

> Q: After your lorry moved to the front bay, what happened?
>
> A: The front bay also had a shelter. So the crane could not operate under the shelter. So I parked my lorry with the rear facing the corridor. Azman told us to remove the canvas completely, to remove the four sides of the crate. Then he asked us to use the rope and showed us how to tie the ropes beneath the pellet. Then the Hiap crane lifted the cargo from my lorry onto the corridor. There were also four iron poles on four sides

Version No 1: 20 Nov 2026 (01:16 hrs)

> of the machine. (See BF/102.) Azman asked us to remove the chains which held the machine to the pellet. Azman showed us how to tie the machine in order to remove the machine. When we were removing the chain, the plastic sheet was still covering the machine.
>
> Q: While Azman was giving instructions, what was Steven Ong doing?
>
> A: Watching. He said nothing.

50 This was not consistent with his earlier evidence:

> Q: He [referring to Steven Ong] was supervising you?
>
> A: You can say that.

51 In their joint affidavit of evidence-in-chief, Chua Cheng Huat and Yap Peng Huak affirmed as follows:

> *The second defendant was under a contract with the first defendants to deliver the cargoes in the first defendants` Changi Cargo Complex. The second defendant provides the lorries and manpower for the delivery. The first defendants usually give the delivery orders to the second defendants one day before the delivery date.*
>
> *The second defendant was never engaged by the plaintiffs nor did he receive any orders from the plaintiffs to deliver the goods being the subject matter of the litigation to the plaintiffs` premises in Kallang Way.*
>
> *The order to deliver the goods to the plaintiffs on the 4 February 1995 came from the first defendants in the usual course of business.*

52 But in his eagerness to absolve themselves from blame for exposing the X-Y unit to rain by uncrating in the rain/drizzle, Chua Cheng Huat alleged that they received instructions from the plaintiff three days before delivery to uncrate the cargo. This evidence is all the more incredible when one bears in mind that the second defendant received the delivery order from the first defendant only one day before the delivery. The second defendant never dealt with the plaintiff.

Version No 1: 20 Nov 2026 (01:16 hrs)

The plaintiff was not even aware that the first defendant had subcontracted the job to the second defendant. But this was what Chua Cheng Huat said:

> A: Before we received the DO from first defendants, we received instructions from plaintiffs to uncrate the cargo, otherwise how could the cargo be unloaded from the lorry.
>
> Q: If equipment could be loaded onto the lorry in a crate it could be unloaded in a crate?
>
> A: Cargo was 6 feet x 8 feet. Could not be unloaded onto the corridor.
>
> Q: When did you receive the D.O. from first defendants?
>
> A: One day before delivery date.
>
> Q: When did you receive instructions from plaintiffs to uncrate the cargo?
>
> A: Three days before delivery.
>
> Q: Who from plaintiffs gave you the instructions?
>
> A: I do not know. Somebody from first defendants received a fax from plaintiffs.
>
> Q: What does it say?
>
> A: The plaintiffs requested for Hiap crane, pellet jack and equipment to unload and uncrate the cargo.
>
> Q: The DO must be from first defendants?
>
> A: We were asked to comply with plaintiffs` instructions.
>
> Q: Were you to take instructions from plaintiffs on how to unload and how to transport to the office?
>
> A: Not for transporting to the office but uncrating. Yes.

53 In the case of Yap Peng Huak, when cross-examined on his joint affidavit of evidence-in-chief wherein he stated that Azman directed the unloading operation, this was what he said:

> Q: Throughout the unloading operation was there anyone from plaintiffs` company present?

Version No 1: 20 Nov 2026 (01:16 hrs)

A: No.

54 Steven Ong, Chua Cheng Huat and Yap Peng Huak were all badly discredited. I therefore rejected their evidence that Azman took charge of the unloading operation in the process of which the X-Y unit was exposed to rain/drizzle and thereby sustained damage.

55 I will now deal with the exemption and limitation of liability cll 15 and 16 of the SAAA`s Standard Trading Conditions relied on by the defendants.

56 The transaction giving rise to these proceedings was the first dealing between the plaintiff and the first defendant. The incorporating clause appeared at the bottom of the first defendant`s faxed quotation of 17 January 1995 to the plaintiff following Steven Ong`s meeting with Ms Koh. It had not been brought to the attention of Ms Koh. It was in very small print and was not legible as admitted by Steven Ong:

> Q: See quotation at BF/122. Is that the one you faxed to plaintiffs or 1DB/2?
>
> A: Yes.
>
> Q: Please read the fine print at the bottom.
>
> A: All business transacted in accordance with SAAA`s Standard Trading Conditions, copy available on application`.
>
> Q: Is this an important clause?
>
> A: Yes.
>
> Q: See 1DB/1. Put the print is very small?
>
> A: Yes.
>
> Q: It`s not legible?
>
> A: Yes.

57 As the local sector of the transportation of the machine would be subcontracted to the second defendant, the machine would not be in the `actual custody` of the first defendant. If cl 15 of SAAA`s Standard Trading Conditions was incorporated, the first defendant would not be liable to the plaintiff even for non-delivery by the second defendant. Under cl 16, if there was any liability, it was limited to $3,500 for the entire consignment with a value of DM497,000.

58 The incorporating clause read with the exemption and limitation of liability clauses therefore should have been brought to the attention of Ms Koh.

59 In **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd** [1989] QB 433, the plaintiffs ran a photographic transparency lending library. Following a telephone inquiry by the defendants, the plaintiffs delivered to them 47 transparencies together with a delivery note containing nine printed conditions. Condition 2 stipulated that all the transparencies had to be returned within 14 days of delivery otherwise a holding fee of Â£5 a day and value added tax would be charged for each transparency retained thereafter. The defendants, who had not used the plaintiffs` services before, did not read the conditions and returned the transparencies four weeks later whereupon the plaintiffs invoiced the defendants for Â£3,783.50. The defendants refused to pay and the plaintiffs brought an action and obtained judgment for this sum in the county court. The defendants appealed to the Court of Appeal. In allowing the appeal Dillon LJ stated at p 436:

> *There was never any oral discussion of terms between the parties before the contract was made. In particular there was no discussion whatever of terms in the original telephone conversation when Mr Beeching made his preliminary inquiry. The question is therefore whether condition 2 was sufficiently brought to the defendants` attention to make it a term of the contract which was only concluded after the defendants had received, and must have known that they had received the transparencies* ***and*** *the delivery note.*

Version No 1: 20 Nov 2026 (01:16 hrs)

This sort of question was posed, in relation to printed conditions, in the ticket cases, such as ***Parker v South Eastern Railway Co*** *[1877] 2 CPD 416, in the last century. At that stage the printed conditions were looked at as a whole and the question considered by the courts was whether the printed conditions as a whole had been sufficiently dawn to a customer`s attention to make the whole set of conditions part of the contract; if so the customer was bound by the printed conditions even though he never read them.*

More recently the question has been discussed whether it is enough to look at a set of printed conditions as a whole. When for instance one condition in a set is particularly onerous does something special need to be done to draw customers` attention to that particular condition? In an obiter dictum in J ***Spurling Ltd v Bradshaw*** *[1956] 1 WLR 461, 466 (cited in* ***Chitty on Contracts****, 25th Ed (1983), vol 1, p 408) Denning LJ stated:*

`Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.`

Then in ***Thornton v Shoe Lane Parking Ltd*** *[1971] 2 QB 163 both Lord Denning MR and Megaw LJ held as one of their grounds of decision, as I read their judgments, that where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party. Lord Denning MR, at pp 169H-170D, re-stated and applied what he had said in the* ***Spurling*** *case, and held that the court should not hold any man bound by such a condition unless it was drawn to his attention in the most explicit way. Megaw LJ deals with the point, at pp 172-173, where he said:*

`In the present case what has to be sought in answer to the third question is whether the defendant company did what was reasonable fairly to bring to the notice of the plaintiff, at or before the time when the contract was made, the existence of this particular condition. This condition is that part of the clause - a few words embedded in a lengthy clause - which Lord Denning MR had read, by which, in the midst of provisions as to damage to property, the defendants sought to exempt themselves from liability for any personal injury suffered by the customer while he was on their premises. Be it noted that such a condition is one which involves the abrogation of the right given to a person such as the plaintiff by statute, the Occupiers` Liability Act 1957. True, it is open under that statute for the occupier of property by a contractual term to exclude that liability. In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would

> *lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included. I certainly would not accept that the position has been reached today in which it is to be assumed as a matter of general knowledge, custom, practice, or whatever is the phrase that is chosen to describe it, that when one is invited to go upon the property of another for such purposes as garaging a car, a contractual term is normally included that if one suffers any injury on those premises as a result of negligence on the part of the occupiers of the premises they shall not be liable.`*
>
> *Counsel for the plaintiffs submits that* ***Thornton v Shoe Lane Parking Ltd*** *[1971] 2 QB 613 was a case of an exemption clause and that what their Lordship said must be read as limited to exemption clauses and in particular exemption clauses which would deprive the party on whom they are imposed of statutory rights. But what their Lordships said was said by way of interpretation and application of the general statement of the law by Mellish LJ in* ***Parker v South Eastern Railway Co*** *2 CPD 416, 423-424 and the logic of it is applicable to any particularly onerous clause in a printed set of conditions of the one contracting party which would not be generally known to the other party.*

60 The first defendant having undertaken the assignment might delegate its performance to the second defendant but the first defendant could not delegate the contractual responsibility it owed the plaintiff.

61 In **Metaalhandel JA Magnus BV v Ardfields Transport** [1988] 1 Lloyd`s Rep 197, the plaintiffs were dealers in non-ferrous metals and scrap and were based in Amsterdam. On 12 January 1984, they purchased about 2 tons of thoriated tungsten rods packed in 12 sealed drums from sellers in Brighton. At that time the plaintiffs had no sub-sale in view and they wanted to store the goods in or near London. They sought quotations for the collection and storage of the goods from among others the first defendants (Ardfields) with whom they had done infrequent business in the past. In due course Ardfields` quotation was accepted. There followed an exchange of telexes which resulted in a contract whereby Ardfields undertook to transport the plaintiffs` goods from Brighton

Version No 1: 20 Nov 2026 (01:16 hrs)

and store them at their warehouse in St Albans. On 25 January, Ardfields advised the plaintiffs by telex that as there was no space at the St Albans warehouse the drums would be placed at the warehouse of the second defendants, Jones Transport. Unknown to the plaintiffs and apparently unknown to Ardfields the goods were removed from Jones Transport`s warehouse on 8 August 1984 and could not be traced. The matter came to light only when the plaintiffs having arranged to sell part of the goods telexed Ardfields on 10 October 1984 asking them to quote for transporting them to another destination. In delivering his judgment, Gatehouse J stated at pp 202-203:

> *It seems to me, on the authorities, that Ardfields were therefore never bailees. This affects the onus of proof but in the circumstances of this case that is immaterial. Ardfields` duty was to exercise reasonable care and skill in looking after the goods. They were entitled to delegate performance of the contract - either from the outset or as from the plaintiffs` waiver, when they accepted the breach (if there was one) -whereupon sub-contracting became authorized - but they were not able to delegate responsibility.*
>
> *I was referred to several authorities and to* ***Palmer on Bailment****, where all those authorities are examined. In particular the text of* ***Palmer****, from pp 829-831, deals with the obligations to the bailor of the bailee who enters into an authorised sub-bailment. The better view, says the learned author, is that the bailee is liable for the negligence of the sub-bailee, citing* ***BRS Ltd v Arthur Crutchley Ltd*** *[1968] 1 Lloyd`s Rep 271[1968] 1 All ER 811 and* ***Morris v CW Martin & Sons Ltd*** *[1965] 2 Lloyd`s Rep 63[1966] 1 QB 716.*
>
> ***Palmer*** *then goes on to deal with the case of the `quasi-bailment` where the intermediate party is not a bailee because he never obtains actual possession of the goods. This was in fact the position in* ***Edwards v Newland & Co*** *[1950] 2 KB 534, where the intermediate party was nevertheless treated as a bailee because he had made an unauthorized sub-contract for the storage of the goods. At p 834 of the text,* ***Palmer*** *turns to the position where the quasi-bailee enters into a sub-contract which he is authorized to do. That, it seems to me, is the position in the present case.* ***Palmer*** *concludes that the position of the quasi-bailee is the same as that of a true bailee, namely, that he is answerable for the faults of his sub-contractor because, although*

Version No 1: 20 Nov 2026 (01:16 hrs)

> *he is entitled to delegate performance, he cannot delegate his responsibility.*

62 Turning now to the second defendant, he could not rely on the said exemption and limitation of liability clauses even if they were applicable as between the first defendant and the plaintiff. This is because there was no privity of contract between the plaintiff and the second defendant. The plaintiff was not even aware that the first defendant would subcontract its assignment to the second defendant. The plaintiff`s claim against the second defendant was one based on breach of duty of care of a bailee to take reasonable care of the consignment in its custody.

63 In **Morris v CW Martin & Sons Ltd** [1966] 1 QB 716, the plaintiff sent a mink stole to a furrier to be cleaned. With the plaintiff`s consent, the furrier, who did no cleaning himself, delivered the fur to the defendants, who were well-known cleaners, to be cleaned. The contract between the furrier and the defendants, which was made by the furrier as principal and not as agent for the plaintiff, contained printed conditions of trading with exemption from liability clauses. Whilst the fur was with the defendants, it was stolen by one of their servants whose duty it was to clean the fur. The fur was never recovered. The plaintiff claimed damages against the defendants for breach of their duty to return the fur to her and to exercise reasonable care in its custody and, alternatively, for wrongfully depriving her of the fur. The county court judge found that the defendants had taken proper steps to safeguard the fur and were not negligent in employing the servant; and he held that the defendants were not liable because the act of the servant in stealing the fur was not done `in the scope of his employment`. The plaintiff`s appeal to the Court of Appeal was allowed on the ground that the defendants, being sub-bailees for reward, owed to the plaintiff, the owner of the fur, the duties of a bailee for reward to take reasonable

Version No 1: 20 Nov 2026 (01:16 hrs)

care of the fur and not to convert it. In delivering his judgment, Lord Denning MR stated at p 729:

> *Now comes the question: Can the defendants rely, as against the plaintiff, on the exempting conditions although there was no contract directly between them and her? There is much to be said on each side. On the one hand, it is hard on the plaintiff if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, it is hard on the defendants if they are held liable to a greater responsibility than they agreed to undertake. As long ago as 1601 Lord Coke advised a bailee to stipulate specially that he would not be responsible for theft, see* ***Southcote`s*** *case, 1601 4 Co Rep 83b, a case of theft by a servant. It would be strange if his stipulation was of no avail to him. The answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise.*

64 ***My decision***

65 As the defendants were liable for the damage to the X-Y unit and were not protected by cll 15 and 16 of the SAAA`s Standard Trading Conditions, I entered judgment for the plaintiff for S$218,143.27 being costs of the replacement inclusive of installation less the salvaged value of the damaged X-Y unit. I also awarded the plaintiff interest on the award at the rate of 6% per annum from the date of service of the Writ and costs. I disallowed the claim for $7,671.00 being adjuster`s fees paid by the plaintiff`s insurers on the ground that it was not an item of loss sustained by the plaintiff as a result of the defendants` breach of duty. Therefore, the plaintiff`s insurers who were prosecuting this claim in the name of the plaintiff could not obtain recovery of this item by way of subrogation.

66 **Outcome:**

67 Plaintiff`s claim allowed.

Version No 1: 20 Nov 2026 (01:16 hrs)

Hakko Products Pte Ltd v Danzas (Singapore) Pte Ltd and Another [1999] SGHC 59

Goh Joon Seng J

M Ramasamy and Anparasan K (William Chai & Rama) for the plaintiff
Koh Ching Ian (Drew & Napier) for the first defendant
Tan Boon Leong (Loo & Partners) for the second defendant

Version No 1: 20 Nov 2026 (01:16 hrs)