IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 187

HC/Originating Summons No 1279 of 2017

In the matter of the Respondent's Fire-Warehousing Risk Insurance Policy No SD15F00369/FFW/R3/E0 issued in favour of the Applicant on 16 January 2015

Between

DNKH Logistics Pte Ltd

… *Applicant*

And

Liberty Insurance Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Courts and Jurisdiction] — [Court judgments] — [Declaratory]

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DNKH Logistics Pte Ltd
v
Liberty Insurance Pte Ltd

[2018] SGHC 187

High Court — Originating Summons No 1279 of 2017
Belinda Ang Saw Ean J
9 July 2018

24 August 2018

Belinda Ang Saw Ean J:

1 By Originating Summons No 1279 of 2017 ("the Application"), the applicant, DNKH Logistics Pte Ltd ("DNKH"), sought a declaration and an order in relation to DNKH's legal position as insured under a fire insurance policy issued by the respondent, Liberty Insurance Pte Ltd ("Liberty Insurance"), to DNKH. I made no order on the Application on 9 July 2018. I was not minded to hear the Application on the basis of legal arguments alone since the real controversies in issue between the parties would require an assessment and determination of relevant facts without which a resolution of the conflict between the parties' views on the scope of coverage would not be satisfactory. Any attempt at this stage to embark on a pure construction of the policy terms and conditions would be undertaken in vacuum and was premature.

2 DNKH has appealed and I now provide full grounds of my decision.

Facts

3 DNKH's principal activities of business are freight forwarding, transport and warehousing, packing, and crating services and providing services as general contractors for non-building construction. For its warehousing business, it leases several warehouses in Singapore, including the warehouse premises at 8 Tuas Avenue 20, Singapore 638821 ("the Warehouse"). In relation to the Warehouse, DNKH purchased the insurance policy in issue, Fire-Warehousing Risk Insurance Policy No SD1500369/FFW/R3/E0 ("the Fire Policy"), which was issued on 16 January 2015, covering the period from 1 January 2015 to 31 December 2015.[1]

4 The Fire Policy set out that the property insured as follows:[2]

> **THE PROPERTY INSURED**
>
> ON THE FOLLOWING PROPERTY BELONGING TO THE INSURED OR HELD BY THEM IN TRUST OR ON COMMISSION OR FOR WHICH THEY HOLD THEMSELVES RESPONSIBLE
>
> RISK NO – 1, 2, 3, 4, 5, 6 & 7
>
> 1 ON ALL REAL AND PERSONAL PROPERTY (EXCLUDING BUILDING) INCLUDING BUT NOT LIMITED TO FIXTURES AND FITTINGS THEREIN AND THEREON, WALLS, GATES, FENCES, PAVING, AWNING, EXTERNAL SIGNS, RENOVATION, ALL IMPROVEMENT OF STRUCTURAL OR TEMPORAL NATURE, SERVICES AND UTILITIES, ELECTRICAL INSTALLATION, FIRE AND SECURITY SYSTEM, FURNITURE, OFFICE EQUIPMENT, PLANT, MACHINERY, CUSTOMERS' MACHINERY, PLANT AND EQUIPMENT WHILST IN THEIR CARE, CUSTODY AND CONTROL FOR REPAIRS, STOCK OF LOSE TOOLS, SPARES AND ACCESSORIES AND ALL OTHER CONTENTS THEREIN

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1 Ng Yeow Chay's affidavit at paras 5–9 and 13.

2 DNKH's bundle of affidavits ("BA") at pp 22 and 23.

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> *2 ON CUSTOMERS' STOCK (OTHER THAN STOCKS ALREADY INSURED BY CUSTOMERS (INCLUDING CONTAINERS OWNED BY INSURED OR LEASED OR HELD BY THEM IN TRUST OR ON COMMISSION).*
>
> …
>
> [Emphasis added]

Risk No 2 was relevant to this Application. The sum insured for Risk No 2 was S$10 million.

5 Sometime in August 2015, there was a fire at the Warehouse ("the Fire") resulting in damage to, *inter alia*, some goods/stocks belonging to DNKH's customers. At the hearing, Counsel for Liberty Insurance, Mr Michael Eu ("Mr Eu"), informed the court that the cause of the fire had yet to be established. Counsel for DNKH, Mr N K Rajarh ("Mr Rajarh"), did not contradict Mr Eu's statement on the matter, and had also stated so in DNKH's submissions.

6 Subsequent to the Fire, DNKH received claims for damages from its customers. DNKH duly filed claims with Liberty Insurance pursuant to the Fire Policy. Liberty Insurance only agreed to indemnify DNKH in respect of a claim made by one of its customers to date.

7 DNKH filed the Application on 10 November 2017, seeking the following:

> (a) A declaration that the containers, goods and/or stocks belonging to DNKH's customers and affected by the Fire are covered by the Fire Policy; and

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(b) An order that Liberty Insurance indemnify DNKH for all costs, expenses and damages incurred and/or to be incurred by DNKH in respect of the claims of DNKH's customers arising out of the Fire.

8 There were no other proceedings filed between the parties arising out of the same limited set of facts.

DNKH's case

9 DNKH's primary position was that the intention of the Fire Policy was to indemnify DNKH for its legal liability resulting from any fire damage, including coverage for *all* its customers' goods/stocks, regardless of any coinsurance taken on the goods/stocks. I will elaborate on DNKH's coinsurance argument at [11] below. Suffice it to say for now, DNKH did not agree with Liberty Insurance's position that the Fire Policy excluded goods already insured. DNKH's reading of the coinsurance clause in the Fire Policy (see [11] below) extended coverage to include its customers' goods and/or stocks in the Warehouse for which the customers had bought separate insurance. Further and/or in the alternative, DNKH took the position that Risk No 2 was ambiguous when read in the context of the Fire Policy and should thus be interpreted in DNKH's favour.

10 DNKH relied on *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") for the proposition that the construction of a contract must be based on an holistic approach and must be informed by the surrounding circumstances or external context (at [131]). In relation to its primary contention, DNKH first highlighted that the following provision in the Fire Policy clearly showed that the Fire Policy was intended to cover DNKH's legal liability for destruction or

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damage of its customers' goods/stocks ("Customer's Goods clause"):[3]

> CUSTOMER'S GOODS
>
> It is hereby declared and agreed notwithstanding anything contained in the within Policy [*sic*] to the contrary but subject to its terms, limitations and conditions that as regards Customer's Goods, this Policy indemnifies the Insured against his legal liability for destruction or damage of such property by fire or any other perils thereby insured against.

11 Second, DNKH pointed out that the provision in the Fire Policy allowing for coinsurance did not differentiate as to whether coinsurance referred to other insurance policies bought by DNKH or insurance policies bought by DNKH's customers. It should therefore be read as allowing for coinsurance on the goods/stocks of DNKH's customers taken out by these customers. Mr Rajarh submitted that the Fire policy should properly respond to the loss of DNKH's customers even if the same loss were covered by more than one insurance contracts, and that it would be for Liberty Insurance to deal with double insurance issues with the customers' insurers. The provision ("the Coinsurance clause") read as follows:[4]

> COINSURANCE
>
> Coinsurance allowed, particulars to be declared in the event of loss or damage or when required.

12 Third, DNKH also pointed out that Condition 7, which was part of the conditions specifically excluding coverage of certain goods and/or certain events, excluded certain goods, but did not exclude customers' goods and/or stocks which had already been insured by the customers. Condition 7 read as follows:[5]

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3 BA at p 24.

4 BA at p 24.

5 BA at p 31.

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> CONDITION 7
>
> Unless otherwise expressly stated in the Policy this insurance does not cover: -
>
> (a) Goods held in trust or on commission.
>
> (b) Bullion or unset precious stones.
>
> (c) Any curiosity or work of art for an amount exceeding $200.00 or its local currency equivalent.
>
> (d) Manuscripts, plans, drawings or designs, patterns, models or moulds.
>
> (e) Securities, obligations, or documents of any kind, stamps coined or paper money, cheques, books of account or other business books, computer systems records.
>
> (f) Explosives.

13 Fourth, DKNH submitted that the Designation of Property clause in the Fire Policy meant that Liberty Insurance had agreed to accept DNKH's recorded designation, including DNKH's customers' goods and/or stocks covered by other insurance policies. The clause read as follows:[6]

> DESIGNATION OF PROPERTY
>
> For the purpose of determining where necessary the column heading under which any property is insured the Company agrees to accept the designation under which such property has been entered in the Insured's books.

14 Fifth, DNKH argued that the very high sum of S$10 million insured for customers' stocks indicated that Liberty Insurance did envision coverage for goods/stocks which were also covered by other insurance contracts. This was especially so when compared to the sum of the claims faced by DNKH: the largest claim brought was S$2,553,941.34, while the rest of the claims were presently less than S$150,000.00 each.[7] Moreover, compared to the sum of

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6 BA at p 25.

7 BA, at pp 8 and 9.

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S$200,000.00 insured under Risk No 1 for items including customers' machinery, plant and equipment, which were potentially high-value items, the much higher value of S$10 million should cover *all* customers' goods/stocks. DNKH submitted that on the basis of a holistic and contextual approach, the Fire Policy was meant to cover DNKH's legal liability for all of its customers' goods/stocks, whether or not insured.

15 In relation to its second argument, DNKH submitted that Risk No 2 was patently ambiguous and should be construed in favour of DNKH, applying the *contra proferentem* rule. DNKH suggested that it was unclear whether the use of the phrase "already insured" in Risk No 2 referred to customers' stocks that were insured as at the date of the issuance of the Fire Policy or after the issuance of the Fire Policy but before the occurrence of the Fire; whether Risk No 2 should cover only customers' insurance that had already been disclosed to DNKH; and whether the extent of the customers' insurance coverage should be same as the coverage under the Fire Policy in order for Risk No 2 to be operative.[8] It was further submitted that the Customer's Goods clause (at [10] *supra*), the Coinsurance clause (at [11] *supra*), the Designation of Property clause (at [13] *supra*) and Condition 7 (at [12] *supra*) appeared to contradict a plain and ordinary reading of Risk No 2.

16 DNKH reiterated that it was not seeking a determination of fact, and its case was not that its customers identified in the Application did not in fact take out their own insurance policies for their goods and stocks. DNKH was simply seeking an interpretation of the relevant clauses under the Fire Policy. Whilst it attached a schedule containing a list of claims it faced from its customers in the Application, DNKH emphasised that the list was not exhaustive.

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8 DNKH's submissions at para 42.

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Liberty Insurance's Case

17 Liberty Insurance disagreed that the clauses relied upon by DNKH were ambiguous and maintained that the Fire Policy covered only customers' uninsured goods and/or stocks. Mr Eu did not embark on a detailed interpretation of the Fire Policy but argued that DNKH failed to prove that the Fire Policy covered *all* its customer's goods/stocks affected by the Fire in light of the lack of sufficient evidence to support its contention. Liberty Insurance pointed out that there was insufficient evidence to show that the companies listed by DNKH as its customers were actually its customers. There was also insufficient evidence to show that its customers' claims fell within the property insured under the Fire Policy, namely customer's stock (other than stocks already insured by customers). Insufficient evidence was produced as to the terms of the contracts between DNKH and its customers including the insurance clause (if any), and if the alleged goods/stocks were already insured by the customers, the ambit and terms of those insurance were not disclosed. Furthermore, there was no evidence to prove that DNKH's legal liability to its customers had been established to trigger the indemnity provision under the Fire Policy (the Customer's Goods clause).[9] On the authority of *Zurich Insurance*, Liberty Insurance submitted that the case was in line with the principles in indemnity insurances, namely that the insurers were only liable to indemnify the insured if the legal liability of the insured had been established. In that case, the legal liability of the insured, B-Gold Interior Design & Construction Pte Ltd, had already been established before it commenced proceedings against its insurers, Zurich Insurance (Singapore) Pte Ltd, based on an insurance policy between them.[10]

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9 Liberty Insurance's submissions at para 6.

10 Liberty Insurance's submissions at para 7.

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Decision

18 Before turning to the law on declaratory relief and the application of the law to the present case, I would first deal with the characterisation of the order under the second Prayer in the Application. Although the second Prayer did not state that DNKH was asking for a declaration, what DNKH was in fact seeking was a declaration that Liberty Insurance was liable to indemnify DNKH for all costs, expenses and damages incurred and/or to be incurred by it in respect of its customers' claims. The true effect of the order, namely to seek a declaration on the extent of Liberty Insurance's liability, was obvious in the circumstances, given that the order was sought in the absence of any allegation of facts. In this respect, I will deal with both Prayers as prayers for declaratory relief.

The law on declaratory relief

19 From the outset, the court has the power to grant declaratory judgments by virtue of s 18 of the Supreme Court Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 14 of the First Schedule to the SCJA and O 15 r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). Section 18 of the SCJA reads:

> **Powers of the High Court**
>
> **18.** – (1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the powers set out in the First Schedule.
>
> …

20 Paragraph 14 of the First Schedule to the SCJA reads:

> **Reliefs and remedies**

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> 14. Power to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.

21 Order 15 rule 16 of the Rules of Court reads:

> **Declaratory judgment (O. 15, r. 16)**
>
> **16.** No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

22 The Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 , in approving of *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR(R) 80 ("*Salijah*"), set out at [14] the following requirements that must be satisfied before the court grants declaratory relief:

> (a) the court must have the jurisdiction and power to award the remedy;
>
> (b) the matter must be justiciable in the court;
>
> (c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;
>
> (d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;
>
> (e) any person whose interests might be affected by the declaration should be before the court; and

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(f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.

23 These principles were further distilled by the Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 to the following three basic propositions (at [72]), which were followed in *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 ("*Vellama*") at [16]:

> (a) the applicant must have a "real interest" in bringing the action (at [19]);
>
> (b) there must be a "real controversy" between the parties to the action for the court to resolve (at [19]); and
>
> (c) the declaration must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation (at [15], [16] and [25]).

Application of the law to the present case

24 Applying the requirements to the present facts, the standings of DNKH and Liberty Insurance were not in issue, because they were the parties to the Fire Policy and interested in the determination of the coverage of the policy. In a proper case, DNKH would have a real interest in bringing the Application, for a declaration as to the first Prayer would simplify the process of claiming from Liberty Insurance for damage to its customers' goods/stocks affected by the Fire given that all of them would be covered by the Fire Policy. Again, in a proper case, DNKH would also have an interest in seeking the second Prayer, for it would be beneficial to DNKH if granted, as it would set out Liberty Insurance's liability in very broad terms. The controversy between DNKH and Liberty Insurance was whether the Prayers sought could be decided on a purely legal basis, without any recourse to the facts of the claims brought by DNKH's

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customers. DNKH took the position that the Prayers could be granted based simply on an interpretation of the Fire Policy, while Liberty Insurance took the opposing view that a decision on the Prayers could only be made after determining the factual matrices of the claims brought by DNKH's customers.

25 Approaching the opposing views as a preliminary point, the grant of any declaratory relief would chiefly concern the exercise of the court's discretion. I alluded in [1] above, in brief, why I decided that the discretion should be exercised in favour of not granting any declaratory relief. Although the parties disagreed on whether the Prayers could be granted purely on a legal construction of the Fire Policy, the real controversies in issue between the parties were whether the customers' goods/stocks affected by the Fire that were separately insured were also covered by the Fire Policy, and Liberty Insurance's extent of liability in relation to these goods/stocks. This was buttressed by the phrasing of the Prayers sought: the declaration was on the coverage of specified goods/stocks, and the order referred to the extent of Liberty Insurance's liability specifically with regard to the claims of DNKH's customers arising out of the Fire. These were fact-specific inquiries, and could not be disposed of without regard to the factual matrices. The Prayers sought were premature because the facts and any disputes as to the facts had yet to crystallise at the point of the hearing.

26 With regard to the construction of clauses put forth by DNKH, I found that the first issue of whether the customers' goods/stocks affected by the Fire were covered under the Fire Policy could only be dealt with having regard to facts, potentially including the existence and extent of any coinsurance taken on the goods/stocks and the contractual agreements between DNKH and its customers. Although coinsurance was permitted under the Coinsurance clause,

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a reading of Risk No 2 suggested that the phrase in brackets – "other than stocks already insured by customers" – was an exclusion to the coverage provided by the Fire Policy. It did not contradict the Coinsurance clause that allowed coinsurance, nor did it contradict the Customer's Goods provision which was subject to the terms, limitations and conditions as regards customer's goods in the Fire Policy. DNKH's reliance on the Designation of Property clause did not advance its case because that clause did not touch on the issue of coverage under the Fire Policy. The absence of express exclusion of goods/stocks already insured under Condition 7 was not conclusive, as the exclusion had been clearly set out in Risk No 2 itself. It could not be said that coinsurance was irrelevant altogether to the question whether the customers' goods/stocks affected by the Fire were covered under the Fire Policy. I disagreed with Mr Rajarh's submissions that the Fire Policy should properly respond to the loss of DNKH's customers even if the same loss was covered by more than one insurance contract, and that it would be for Liberty Insurance to deal with double insurance issues with the customers' insurers. In my view, it was necessary to first determine whether there was double insurance in fact. Since there was insufficient evidence provided by DNKH on any coinsurance of the customers' goods/stocks affected by the Fire, there was no opportunity to consider the ambit of the separate insurance, if any, with reference to the subject matter, risk and interest insured thereunder. I agreed with Liberty Insurance that it was premature for any determinative position to be taken as regard to Prayer 1. The court would have to determine the effect of the other insurance contracts and I accepted Mr Eu's point that the burden of proving that no other subsisting insurance contact covered the same goods and/or stocks in respect of the same risk and interest lie with DNKH. Evidence would have to be presented for the resolution of this matter.

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27 The second Prayer was similarly premature. I note that there was barely any submission made by DNKH to support the second Prayer. This was not surprising because it could hardly be supported. In the first place, it was unclear that the order was supported by the clauses in the Fire Policy. The ambit of the order sought was very broad – that Liberty Insurance indemnify DNKH *for all costs, expenses and damages incurred and/or to be incurred* in respect of its customers' claims arising out of the Fire – and seemed to go beyond the Customer's Good clause stating that the Fire Policy indemnified DNKH against its legal liability for destruction or damage of its customers' property by fire. This broad-ranging order was sought when the facts of relating to Liberty Insurance's liability had not even crystallised. At the point of the hearing, the cause of the Fire was being disputed, so DNKH's legal liability remained unclear. It was impossible to determine the liability of Liberty Insurance with regard to DNKH's costs, expenses and damages in *all* possible factual situations, without being even apprised of the factual situations. This prayer sought was fact-sensitive, rendering general wide-ranging declaration at this juncture inappropriate.

28 In a similar vein, the English High Court refused to grant a declaration in *R (McKenzie) v Waltham Forest London Borough Council* [2009] EWHC 1097 (Admin) ("*McKenzie*"), a case considered by the Court of Appeal in *Vellama* at [22], where the declaration sought was fact-sensitive and there were no facts before the court. In that case, the applicant sought declarations relating to the local authority's refusal to provide her with suitable accommodation when she was due to give birth. In the interim between the grant of leave and the substantive hearing, the applicant was given the accommodation which she had requested for, so the factual substratum for the application fell away. The English High Court refused to grant the declarations sought as they were

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"entirely fact-sensitive, rendering general guidance an unsafe course for any court to attempt" (*McKenzie* at [27]). That case differed from the present in that the former involved the disappearance of a factual substratum while the latter involved factual situations that had yet to crystallise. Nevertheless, the rationale that declarations should not be made in the absence of a factual substratum or in the inadequacy of facts where they are fact-sensitive applied similarly to the very wide order sought by DNKH.

29 The rationale behind the court's reluctance to grant declaratory relief in cases where there is no real controversy was also instructive to the exercise of discretion in the present case. The Court of Appeal in *Salijah* opined at [60] that

> The editors of Zamir and Woolf have identified one rationale for the reluctance of the courts to deal with theoretical issues – that it distracts the courts from deciding real, subsisting problems. A stronger reason is that if there is in fact no real issue subsisting, then *the matter would not be res judicata, nor the issue merged in judgment. In that event, it would be open for the issue to be reopened again and again. The need for the existence of a contested dispute is to ensure that there is finality in the court's judgments as well.*
>
> [emphasis added]

30 The "stronger reason" that the issue would not be merged in judgment and that it would be open for the issue to be reopened again was also a reason in the present case pointing against the exercise of discretion in favour of granting declaratory relief. Where claims against DNKH and DNKH's liability towards its customers crystallised in the future, the issue of the coverage of the customers' goods/stocks and the issue of the extent of Liberty Insurance's liability might very well be reopened, depending on the factual scenarios of the claims that would pan out. I was reluctant to grant any wide-ranging declaratory

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relief at this point where such relief might be overtaken by future events and facts, especially because there were unrelated litigations as to the cause of the fire and there were insufficient facts at the current juncture.

Conclusion

31 For the reasons stated above, I made no order as to Prayers sought in the Application, and ordered costs of $5500 inclusive of disbursements in favour of Liberty Insurance.

Belinda Ang Saw Ean
Judge

NK Rajarh and Daryl Cheong (Straits Law Practice LLC) for the applicant;
Michael Eu (United Legal Alliance LLC) for the respondent.

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